

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.91 of 1981

(Against the judgment and decree dated 23.12.1980 passed by 3rd Additional Subordinate Judge, Bettiah in title suit No.284 of 1968/50 of 1974/3 of 1977).

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Smt. Sudama Devi

.... .. Defendant-Appellant

Versus

Birendra Prasad & Ors

.... .. Plaintiffs-Respondents

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Appearance :

For the Appellant/s :

Mr. S.S.Dvivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey
Mrs. Sangeeta Sharma
Mr. Rakesh Chandra
Mr. Satyendra Shukla, Advocates.
Mr. Naresh Chandra Verma
Mr. Milind Kumar Mishra, Advocates.
For the Respondent No.4(c) :
For the Respondent Nos.4(a) and (b): Mr. Shri Prakash Srivastava
Mr. Rajeev Ranjan
Mr. Amit Bhushan, Advocates.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 24-02-2015

1. The defendant has filed this First Appeal against the judgment and decree dated 23.12.1980 passed by the learned 3rd Subordinate Judge, Bettiah in title suit No.284 of 1968/50 of 1974/3 of 1977 whereby the court below decreed the plaintiff's suit for specific performance of contract.

2. The plaintiffs-respondents filed the aforesaid title suit for specific performance of contract dated 07.09.1965 and prayed that the defendant be directed to receive the balance consideration money of Rs.4,600 only and to execute the sale deed.



3. The plaintiffs claimed the aforesaid relief alleging that the suit land belonged to Most. Budha Kunwar who was in need of money and took loan of Rs.3,200. A hand note was executed on 27.02.1965. Subsequently, when again she needed money, there was negotiation for selling the suit property. Consideration was fixed at Rs.13,400. The plaintiffs paid Rs.5,600 as earnest money and Rs.4,600 was agreed to be paid at the time of execution of the sale deed. A contract of sale was executed on 07.09.1965. The period within which the sale deed was to be executed was one month. After few days, Budha Kunwar died and then the plaintiffs requested the defendant i.e. heirs of Budha Kunwar to execute the sale deed but they refused. Therefore, the suit was filed.

4. The defendant-appellant, Sudama Devi, daughter of Budha appeared and filed contesting written statement. She denied the execution of contract for sale by Budha Kunwar. She also denied the payment of consideration money. According to the defendant's written statement, the hand note and the contract for sale are forged documents. The further case is that Budha Kunwar had filed title suit No.30 of 1965/86 of 1967 in the court of Munsif and in that title suit, Birendra Prasad was doing pairvi and during that pairvi period, he used to take L.T.I. of Budha Kunwar on plain paper, therefore, it is possible that the said plain paper might have been converted to a hand



note and contract for sale. Budha Kunwar was never in need of money and there was no occasion for her to obtain loan and to execute either hand note or contract. The further case of the defendant is that the value of the suit property on the date of contract to sale was more than Rs.35,000, as such, there was no question of agreement to sale the property for meager amount of Rs.13,400. Budha Kunwar had already died on 06.09.1965, therefore, she could not have executed the contract for sale on 07.09.1965. The plaintiffs have no means to pay the consideration amount and the plaintiffs never tendered any amount for execution of the sale deed.

5. On the basis of the aforesaid pleadings, the learned trial court framed the following issues:

- I. Is the suit as framed maintainable?
- II. Have the plaintiffs got any valid cause of action?
- III. Is the suit barred by limitation, estoppel, acquiescence and waiver?
- IV. Is the suit land property valued and the court fee paid sufficient?
- V. Whether Mostt. Budha Kunwar died on 06.09.1965 or 16.09.1965?
- VI. Whether the hand note dated 27.02.1965 is valid and for consideration?
- VII. Whether the contract for sale dated 07.09.1965 is valid and for consideration?
- VIII. To what relief (if any) the plaintiffs are entitled to?

6. The learned trial court, after trial, on the basis of the evidences and materials available on record, came to the conclusion that Budha Kunwar died on 16.09.1965 and not on

06.09.1965 as alleged by the defendant. The hand note and the contract for sale bear the L.T.I. of Budha Kunwar. The consideration is adequate. The plaintiffs have complied the terms and conditions as provided under Section 16(c) of the Specific Relief Act. On these findings, the court below decreed the plaintiff's suit.

7. The learned senior counsel, Mr. S.S.Dvivedi raised only three points. Firstly, the learned counsel submitted that the court below wrongly recorded the finding that Budha Kunwar died on 16.09.1965 although, sufficient evidence was produced on behalf of the appellant in support of the fact that she died on 06.09.1965. Secondly, the learned counsel submitted that the plaintiff himself in his evidence admitted that the value of the suit property at the time of contract for sale was not less than Rs.3 lacs. Therefore, it is not believable that the said property could have been agreed to sell for sum of Rs.13,400 only. Thirdly, the learned counsel submitted that the plaintiff failed to show his continuous readiness and willingness to perform his part of the contract and that there is no evidence at all regarding tendering of the balance consideration amount to the appellant and moreover, the suit has been filed after three years from the date of agreement dated 07.09.1965. The learned counsel further submitted that the appellant has been able to show that in title suit filed by Budha Kunwar for declaration with respect to an adoption



deed, the plaintiff, Birendra Kumar was doing pairvi, as such, he had the occasion to obtain L.T.I. of Budha Kunwar on plain papers. These L.T.Is. obtained on plain papers might have been converted to hand note and the contract for sale which would be evident from the trend of use of the said papers. The learned trial court without considering the settled principles of law that the plaintiff has to approach the court with clean hand showing continuous readiness and willingness from the date of agreement till the institution of the suit recorded the finding that the plaintiff has complied the requirement of law and wrongly decreed the plaintiff's suit. It has come in the evidence that the suit property is the only residential house of the plaintiff wherein her son-in-law and daughters were residing and it will be great hardship if the property will be sold. Moreover, when there were many other properties, there is no explanation as to why the residential house was agreed to be sold and not the agricultural property particularly when it has come in the evidence that Budha Kunwar had about 19 bighas of land. On these grounds, the learned counsel submitted that the appeal be allowed and the impugned judgment and decree be set aside and the plaintiff-respondent's suit for specific performance of contract be dismissed.

8. On the other hand, the learned counsels for the respondents submitted that the court below appreciated the evidences



oral and documentary with respect to date of death of Budha Kunwar. Expert was examined and thereafter considering all aspects, the court below recorded the finding that in fact, Budha Kunwar died on 16.09.1965. The plaintiffs-respondents have produced the death register and also the application for substitution filed in the suit by Budha Kunwar. The original application was called for wherein the digit “1” just before digit “6” was erased, therefore, the expert was appointed who gave the report to that effect. In such circumstances, the finding of the court below cannot be interfered with. So far adequacy of consideration is concerned, the learned counsel submitted that in the written statement, the defendant’s case is that the said suit land was valued more than Rs.35,000 whereas the plaintiffs have produced different sale deeds which were executed and registered with respect to some of the property nearer to the suit land and on the basis of the said evidence, the court below recorded the finding that the consideration for which the parties agreed to sell is adequate consideration and moreover, on the ground of adequacy or inadequacy of the consideration amount, the suit for specific performance of contract cannot be dismissed. It is the agreement between the parties.

9. The learned counsels further submitted that in the plaint, the specific pleadings of the plaintiffs is that the plaintiff was ready and is still ready to perform his part of the contract and in the



evidence also, the plaintiff stated that he was ready and is still ready to pay the balance consideration amount, therefore, the learned court below has rightly held that the requirement of law has been complied with by the plaintiff. In such circumstances, the finding of the court below on this question also cannot be interfered with. The learned counsel further submitted that to show that Budha Kunwar was in need of money, the plaintiffs have produced various mortgage deeds which were being executed by Budha Kunwar for raising money. All these evidences clearly prove that she was in need of money and obtained loan from the plaintiffs and executed the hand note and then agreed to sell the suit land. The L.T.I. on these documents has been proved by the plaintiffs to be of Budha Kunwar. Therefore, the finding of the trial court on this question also cannot be interfered with.

10. The learned counsel further submitted that the daughter and son-in-law of Budha Kunwar were residing elsewhere and they were coming to suit house occasionally. There was none to look after Budha Kunwar. Therefore, she agreed to sell the property in question. Her L.T.I. on the hand note as well as on agreement to sale is genuine one, therefore, on the ground that why the other property was not agreed to be sold, the present agreement to sale cannot be disbelieved. On these grounds, the learned counsel

submitted that the First Appeal be dismissed with cost.

11. In view of the above submissions of the learned counsels appearing on behalf of the parties, the points arise for consideration in this First Appeal are as follows:

- I. Whether Budha Kunwar died on 06.09.1965 as alleged by the appellant or 16.09.1965 as alleged by the plaintiffs-respondents?
- II. Whether the agreement for sale is executed by Budha Kunwar in favour of the plaintiffs?
- III. Whether the plaintiffs were always ready and willing and still ready and willing to perform his part of the contract and whether he is entitled for the relief for the specific performance of contract?

Point No.I.

12. According to the appellant, Budha Kunwar died on 06.09.1965, therefore, there is no question of execution of the agreement to sale by her on 07.09.1965 arises. On the contrary, according to the plaintiffs-respondents, Budha Kunwar died on 16.09.1965. So far this controversy is concerned, both the parties have adduced oral evidences. However, the oral evidences were adduced much after the execution of the so called agreement. Therefore, on the basis of the oral evidences only which are nothing but oath against oath, conclusive finding cannot be recorded as to when Budha Kunwar died. However, in the present case, the death

Register has been produced by the plaintiffs which has been marked as Exhibit 3. The relevant entry in the register has been marked as Exhibit 3/A which clearly proves the fact that Budha Kunwar died on 16.09.1965.

13. The learned senior counsel, Mr. S.S.Dvivedi appearing on behalf of the appellant submitted that the four pages of the Register has been pasted separately and in this pasted pages, the entry of date of death of Budha Kunwar has been mentioned which has been marked Exhibit 3/A. Therefore, it creates a doubt regarding the genuineness of the entry. So far this submission is concerned, it may be mentioned here that the original substitution application filed by the appellant in title suit No.30 of 1965 was called for and the said application has been marked Exhibit D in the present suit. When the dispute arose between the parties that digit "1" has been erased which was there just prior to digit "6". Expert was appointed for giving a report. Expert after examining this substitution application, Exhibit D gave the report Exhibit 10 to the effect that just before figure "6", the figure "1" has been erased but still a portion of ink is there. From perusal of the substitution application, I also find that there is mark of eraser prior to figure "6". Now, therefore, in view of this fact coupled with the report of expert, Exhibit 10 and the death register, there can only be a conclusion that Budha Kunwar died on 16.09.1965 and not

on 06.09.1965. The finding of the learned trial court on this point is, therefore, confirmed.

Point no.II

14. We have seen above that the defence of the defendant-appellant to the effect that Budha Kunwar died on 06.09.1965 has been negated. The other defence is that Birendra Kumar was doing pairvi in title suit filed by Budha Kunwar on behalf of the said Budha Kunwar. In support of this case, the defendant has produced the documents to show that Birendra Kumar was doing pairvi on behalf of the Budha Kunwar. The plaint of title suit No.30 of 1965 has been marked as Exhibit B in the present suit. It appears that Budha Kunwar has put her L.T.I. in the last page of the plaint and her L.T.I. has been identified by Birendra Prasad. One affidavit dated 02.03.1965 was filed in that suit which has been marked as Exhibit C in the present suit wherein Birendra Prasad has admitted that he is nephew of Budha Kunwar and the affidavit has been signed by Birendra Prasad. The vakalatnama filed in the said suit has been marked as Exhibit E in the present suit. The L.T.I. of Budha Kunwar has been identified by Birendra Kumar, one of the plaintiffs. These documentary evidences clearly prove that Birendra Kumar @ Birendra Prasad, the plaintiff-respondent was doing pairvi on behalf of Budha Kunwar in that title suit No.30 of 1965. Admittedly, Budha

Kunwar was illiterate lady and was putting L.T.I on each and every document and was being identified by Birendra Kumar.

15. Exhibit 1 is the hand note. From perusal of this Exhibit 1-hand note, it appears that the L.T.I. is on the top corner of the document. There is nothing written in the main body of the document. However, all the endorsement regarding receipt of Rs.3,200 has been mentioned in the right hand column of the document. Now, let us examine in other way. If this Exhibit 1 is now turned and the L.T.I. occurring therein is kept in the right hand lower corner then also, the upper portion of the plain paper is blank and the writing will be just four or five lines in the lower part of the document. Normally, this type of document is never seen. For the first time, I am seeing this type of document wherein the main portion of the paper is blank whereas only in the margin or in the lower portion, the endorsement is there regarding payment of loan of Rs.3200. There is no explanation at all as to why this type of document was created. In other words, why in the main part of the paper, nothing has been written and it is written only on the portion which is expected to be left as margin.

16. Now, let us see the so called agreement to sale i.e. Exhibit-2. It appears that in this document also, the L.T.I. is on the top of the paper. It further appears that the paper was not sufficient to



include the writings in one page only but anyhow the writing has been made congested and it was concluded in one page only. If there was no place normally it is expected it would have continued to the next page but in the present case, it is not the fact. I may mention here that what I am observing are not the ground for disbelieving the writings nor on that ground, a document can be rejected. No doubt, no specific place has been assigned for putting L.T.I. but in the present case, the facts are peculiar. This peculiar fact is that plaintiff was doing pairvi in the case filed by Budha Kunwar. Therefore, it cannot be ruled out that he was obtaining L.T.I. on blank papers. The agreement to sale is dated 07.09.1965 whereas Budha Kunwar died just after one week. The place of L.T.I. or writings of the documents as stated above, create the doubt in the mind of the Court because of the fact that those do not appear to be usual document. No doubt, the witnesses have stated that Budha Kunwar put her L.T.I. in presence of the witnesses. From perusal of the evidence of the witnesses examined on behalf of the plaintiffs, P.W. 7, 8, 10 and 14, I find that the witnesses appear to be chance witnesses. They were called by Budha Kunwar according to their evidences and ask to put their initial as witness. Plaintiff has been examined as P.W.14. Almost all these witnesses have admitted the fact that at the time of execution of the agreement to sale, the son-in-law i.e. husband of the appellant was present there. There is no



explanation why he was not asked to put his L.T.I. or signature. Why he did not play any role in the execution of the document. The witnesses further have stated that she was ailing then it was normally expected that her son-in-law who was the only male member would have taken care of her but no role has been assigned. These are the peculiar circumstances which creates doubt. No doubt the expert gave report that the L.T.I. on hand note and the contract to sale is of Budha Kunwar but as stated above, because of these special features, no conclusive finding can be recorded that after understanding the contents of the document and implication thereof, Budha Kunwar put her L.T.I. There is no explanation as to why she would have sold the only residential house where her daughter and son-in-law were residing with children.

17. In view of the above discussion, it appears that the appellant has been able to prove that plaintiff was doing pairvi on behalf of Budha Kunwar in title suit No.30 of 1965 filed by Budha Kunwar. During the said period, it cannot be ruled out that plaintiff might have obtained L.T.I. on blank paper that is why the peculiar nature of documents appear to have been created. Therefore, merely because L.T.I. is of Budha Kunwar, it cannot be said that the document is not created document. In the present case, there is an unambiguous circumstance which creates doubt in the mind of the

Court. Moreover, this is a suit for specific performance of contract. Accordingly, I find that the plaintiffs failed to prove that in fact, the agreement to sale, Exhibit-2 was scribed at the instance of Budha Kunwar and then she put her L.T.I. after understanding the contents and implication thereof.

Point no.III

18. From perusal of the plaint, paragraph 9 and 10, it appears that the plaintiff has pleaded that the plaintiff was always ready and willing to perform his part of the contract i.e. he was ready to pay balance consideration of Rs.4,600. On the contrary, according to the defendant, the plaintiff never tendered the amount and that Budha Kunwar never executed the agreement.

19. It may be mentioned here that in support of this case of readiness and willingness, the plaintiff has been examined as P.W.14. He has stated in his evidence that after death of Budha Kunwar, she requested her legal heirs to execute the sale deed but they avoided and lastly they refused to execute the sale deed on 05.09.1968. Except this evidence, there is nothing on record. It is admitted fact that the plaintiff was knowing that Budha Kunwar died on 16.09.1965. The period for execution of the sale deed was one month. The plaintiff has not stated as to when he approached the appellant for execution of the sale deed. There is no evidence that



whether he offered the balance consideration amount of Rs.4,600 on any particular date. There is no evidence as to when he arranged Rs.4,600. It will not be out of place to state here that plaintiff in his evidence admitted that on the date of execution of the so called hand note, he has only Rs.1,600. The balance Rs.1,600 was given by another to Budha Kunwar and hand note was written. There is no reason as to why only Rs.5,600 was paid on the date of agreement. There is no pleading in the plaint that why sale deed was not executed directly if plaintiff had money on that day because it is not the case of the plaintiff that because he had no full consideration amount, time was fixed for one month. Therefore, now, the question is if he had full amount then why it was not paid and why directly sale deed was not executed. Secondly, if he had no balance consideration amount on 07.09.1965 then when he arranged the same amount and how and when he tendered the said amount, there is nothing at all in the pleading or evidence. So far the provision as contained in Section 16(c) of the Specific Relief Act is concerned, it is not a formulae only that it should be pleaded in the plaint and should be stated in the same line in the evidence. The further glaring fact is that the suit has been instituted after three years. No doubt, it is within time as provided under Article 54 of the Limitation Act but then the plaintiff has not only to aver but also to prove his readiness and willingness from the

date of execution of the agreement till the institution of the suit.

20. The Supreme Court in the case of **J.P. Builders and another v. A. Ramadas Rao and another**, reported in (2011) 1 Supreme Court Cases 429 has held that the words “ready” and “willing” in the Specific Relief Act, Section 16 imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness. Section 16 (c) mandates “readiness and willingness” on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also held that it is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16 (c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and it is also clear that readiness to perform must be established throughout the relevant points of time. In view of the aforesaid settled principles of law, the plaintiff has neither pleaded nor adduced any evidence.

21. A three Judges Bench of the Supreme Court in the



case of **Ram Awadh and others. v. Achhaibar Dubey and another.,** reported in 2000 (2) Supreme Court Cases 428 held that the obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirement of clauses (a), (b) and (c) thereof. A court may not, therefore, grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement, the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit.

22. In the case of **N. P. Thirugnanam v. Dr. R. Jagan Mohan Rao and others,** reported in 1995 (5) SCC 115 the Hon'ble Supreme court has held that **the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance.** Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. This



circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.

23. In the present case, plaintiffs have not even given any notice to the appellant. As stated above, when he arranged the balance consideration, is also not explained. Although, limitation prescribed for three years but there is no explanation as to why he waited for three years.

24. From perusal of the judgment of the court below, it appears that learned trial court has not at all considered these settled principles of law. The court below recorded the finding regarding readiness and willingness on the basis of pleading and statement in evidence in terms of Section 16(c). The court below has not considered the conduct of the plaintiffs and the law laid down by the

Hon’ble Supreme Court.

25. In view of my above discussion, I find that the plaintiff has failed to prove that he was all along ready and willing and is still ready and willing to perform his part of the contract. The finding of the trial court on this point is, therefore, reversed.

26. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside. The plaintiff’s suit for specific performance is dismissed. No order as to costs.

(Mungeshwar Sahoo, J)

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