

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.28 of 2013

Against the Judgment and Decree dated 06.12.2012 passed by Sub Judge-X, Patna in Title Suit No.554 of 2009.

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Shri Shatrughan Sah

.....Plaintiff-Appellant

Versus

M/S ORB Developers Pvt. Ltd. & Ors.

.....Defendants-Respondents

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Appearance :

For the Appellant/s : Mr. T. N. Maitin, Sr. Advocate
Mr. Ramadhar Singh, Advocate with him.
For the Respondent/s : Dr. K.N. Singh, Sr. Advocate
Mr. Mukesh Kumar, Advocate
Mr. Shivaji Singh, Advocate with him

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Dated : 12th day of May, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. The plaintiff has filed this First Appeal against the Judgment and Decree dated 06.12.2012 passed by learned Sub Judge-X, Patna in Title Suit No.554 of 2009 whereby the Court below dismissed the plaintiff appellant's suit for specific performance of contract.

2. The plaintiff filed the aforesaid suit for specific performance of contract, i.e., oral agreement dated 4.8.2009 praying

for directing the defendant to execute and registered the sale deed on receipt of balance consideration amount with respect to Schedule I property.

3. The plaintiff claimed the aforesaid relief alleging that the defendant developer has constructed the multi storied building known as 'Sri Ganesh Shiv Kala Apartment' at Mauza Sadikpur on survey plot no.390. The defendant negotiated to sell flat No.302 of the third floor with the plaintiff and it was finalized for Rs.11,30,950/- besides the price for garage. Thereafter, on demand made by the defendant, plaintiff paid Rs.51,000/- on 05.09.2009, Rs.1,00,000/- on 10.09.2009, Rs.50,000/- on 17.08.2009, Rs.1,00,000/- on 24.08.2009, Rs.65,000/- on 02.09.2009 and Rs.35,000/- on 4.09.2009 total being Rs.4,01,000/- out of the above consideration amount. All the payments were made through the cheques of Indian Overseas Bank.

4. The further case is that since date of finalization, the plaintiff is always willing and ready to pay the balance consideration money and to get the sale deed but the defendant is delaying the matter. The plaintiff gave legal notice dated 10.10.2009 requesting the defendant to execute and registered the sale deed within one month. Reply was given by the defendant to the effect that it was agreed and the consideration was fixed at Rs.26,76,000/- and that the

plaintiff had agreed to pay 25 per cent amount within one month for execution of agreement to sell, i.e., within 05.09.2009. The plaintiff had no money to pay the consideration, therefore, he requested to refund the paid amount. On these grounds, the relief was claimed.

5. The defendant respondent filed contesting written statement. The main defence is that the actual value of the flat in question was Rs.26,70,000/-. The rate was Rs.2200/- per square feet besides Rs.1,00,000/- for parking space, Rs.10,000/- for generator set total comes to Rs.26,76,000/-. The defendant informed the plaintiff that for agreement 25 per cent of the consideration amount is to be paid. The defendant No.1 is private company and the entire work is done in writing. The defendant had received Rs.4,01,000/- from the plaintiff till 04.09.2009 then the plaintiff requested the defendant No.2 to give further two months time to deposit the remaining amount. Time was extended by the defendant but he did not pay and he requested to refund, therefore, Rs.4,00,000/- deposited by the plaintiff in plaintiffs account through cheque dated 02.11.2009 of HDFC Bank, Boring Road, Patna. After receiving the cheque, the plaintiff has filed the suit.

6. On the basis of the aforesaid pleadings of the parties, the Court below framed the following issues :-

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- (I) Whether the suit as framed is maintainable?
 - (II) Whether the plaintiff has got valid cause of action to sue?
 - (III) Whether the suit is barred by law of limitation?
 - (IV) Whether the suit is barred by estoppel, waiver and acquiescence?
 - (V) Whether the plaintiff is entitled to decree for Specific Performance of Contract for sale with respect to the properties as described in Schedule I of the plaint on the basis of oral agreement dated 04.09.2009 in his favour?
 - (VI) Whether the suit is barred under Section 34 of the Specific Relief Act
 - (VII) To what other relief or reliefs, if any, the plaintiff is entitled to?

7. The trial Court on the basis of materials available held that the price was fixed at Rs.11,60,956/- and not Rs.26,76,000/-. The trial Court also recorded a finding that the plaintiff has failed to prove his readiness and accordingly dismissed the plaintiff's suit.

8. The learned senior counsel, Mr. T. N. Maitin, appearing on behalf of the appellant submitted that the agreement dated 04.09.2009 which is admitted by the defendant and the legal notice was sent to the defendant on 10.10.2009 and then the suit itself was instituted on 14.12.2009 which clearly indicate that the plaintiff was always ready and willing to perform his part of contract. The Court below wrongly held that the plaintiff failed to prove his readiness without considering the fact that the plaintiff is professor and had sufficient means and for showing his readiness, it is not necessary that the money should be



kept in pocket always. As and when the amount were demanded by the defendant, the plaintiff always paid the money. To show his bonafide regarding readiness, the plaintiff had already paid Rs.4,00,000/- and then further he also served legal notice. What more could have been shown by the plaintiff to prove his readiness and willingness. The learned counsel in support of his contention relied upon the decision of the Hon'ble Supreme Court in the case of ***AIR 2000 SC 2408 Motilal Jain Vs. Smt. Ramdasi Devi***. On the basis of this decision, the learned counsel submitted that the averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words.

9. The learned senior counsel, Mr. Maitin, further submitted that it is not believable that the plaintiff got the money of Rs.4,00,000/- deposited by him. The defendant deposited the cheque in the account of the plaintiff without knowledge of the plaintiff with a view to void execution of sale deed in favour of the plaintiff. After service the legal notice on 10.10.2009, there was no question of requesting the defendant to return the money arises. The money was returned on 02.11.2009.

10. The learned senior counsel further submitted that the other flats of the same place were sold for Rs.12 lakhs or 13 lakhs,



therefore, the case of the defendant that the parties agreed for consideration of Rs.26,76,000/- is wrong. The Court below accordingly considering the sale deeds with respect to the other flats has rightly recorded the finding that the defence of the defendant that the consideration amount was fixed at Rs.26,76,000/- is not acceptable and further rightly held that the case of the plaintiff regarding consideration amount is correct. The further submission is that the defendants with malafide intention sold the flat No.302 to third person only to defeat the agreement between the plaintiff and defendant, therefore, the plaintiff filed application under Order 1 Rule 10 CPC in the trial Court for adding the purchaser a party defendant in the suit but the Court below rejected the same. After dismissal of the suit, the plaintiff filed this First Appeal and in this First Appeal also application for adding the purchaser was filed which was rejected by the High Court and then SLP filed before the Supreme Court which was also dismissed. In such circumstances, it is not the fault on the part of the plaintiff. He repeatedly prayed for adding the purchaser as party but the Court refused, therefore, the decree for specific performance be granted in favour of the plaintiff appellant. On these grounds, the learned counsel submitted that the First Appeal be allowed. The impugned Judgment and Decree be set aside and the plaintiff's suit for specific performance be decreed.



11. On the other hand, the learned senior cousin, Dr. K.N. Singh, appearing on behalf of the respondent submitted that the plaintiff did not produce any evidence in support of his case of readiness. In fact he had no money to pay the consideration amount, therefore, he failed to pay 25 per cent and no agreement was executed. When he was unable to pay, he himself requested to return the amount and accordingly the cheque was given to him which he deposited in his account in the State Bank of India Branch. The plaintiff was knowing that the property has already been sold to third person but he intentionally did not make the subsequent purchaser as party defendant in the suit. Subsequently, he filed the application for adding the purchaser as party but the same was rejected by the trial Court. In view of the above fact on the date of the institution of the suit, the defendants were not the owner of the property. The flat No.302 had already been transferred in favour of the purchaser for Rs.20 lakhs prior to institution of the present suit.

12. The learned senior counsel, Dr. Singh, further submitted that the learned Court below without considering the fact that the flat No.302 was sold on 16.11.2009 for Rs.20 lakhs held that the parties agreed on 4.8.2009 fixing the consideration amount at Rs.11 lakhs and odd. Further by ext.3/B, registered sale deed, with respect to another flat of the same builder which was of very smaller area, i.e., 991



square feet was sold by 18 lakhs on 25.02.2010 whereas the area of flat No.302 is 1155 square feet but the Court below held that the agreed consideration was Rs.11 lakhs and odd without applying his judicial mind. The learned counsel further submitted that no doubt the defendants admitted the fact that the defendant agreed to sell flat No.302 to the plaintiff but according to the defendant the consideration amount was fixed at Rs.26,76,000/- total and not 11,60,956/-. The plaintiff in support of this agreement regarding the consideration amount, no chit of paper has been produced. Further if in fact he had paid Rs.25 per cent of the consideration amount why he did not insist for execution of agreement for sale which clearly indicate that he had not paid 25 per cent of the consideration amount. This fact clarifies the matter that the consideration amount was not Rs.11,60,956/-. The Court below fixed the consideration amount on the basis of the sale deed with respect to other flat as if the Court below was fixing the prevalent market value of the property.

13. The learned senior counsel, Dr. Singh, further submitted that in fact the plaintiff had no money, therefore, he received the amount of Rs.4 lakhs paid by him which was paid to him through cheque. All the payments were made by the plaintiff to the defendant through cheque issued from the Indian Overseas Bank, whereas the plaintiff deposited the cheque of Rs.4 lakhs in his account in State



Bank of India. It cannot be believed that the defendant deposited the same in the account of the plaintiff in State Bank of India. It is not expected from the defendant that he was knowing the different bank account of the plaintiff. Since the plaintiff was issuing cheque from his account in Indian Overseas Bank, the defendant could have deposited the said 4 lakhs cheque in this account of the plaintiff but in the facts and circumstances, the case of the plaintiff that without his knowledge, the cheque was deposited by the defendant in the account of the plaintiff cannot be relied upon.

14. The learned senior counsel further submitted that in absence of the subsequent purchaser, the plaintiff cannot enforce his right in the suit property only against the defendants because now admittedly, on receiving the entire consideration amount and executing and registering the sale deed in favour of the purchaser third person, the ownership of the property has already been transferred to the purchaser. According to Section 40 of the Transfer of Property Act, the plaintiff could have enforced his right against the defendants and the purchasers jointly but not separately. Therefore, also the suit itself was not maintainable and even if any decree is passed, it cannot be executed. On these grounds, the learned counsel submitted that the First Appeal be dismissed.

15. In view of the above contentions of the learned senior counsel for both the parties, the points arises for consideration in this First Appeal are as follows :-

- (i) As to whether the consideration amount of flat No.302 was Rs.11,60,956/- as claimed by the plaintiff or it was Rs.26,76,000/- as claimed by the defendants.
- (ii) Whether the plaintiff was ready and is still ready and willing to perform his part of the contract and whether the impugned Judgment and Decree are sustainable in the eye of law.
- (iii) Whether in absence of subsequent purchaser, the plaintiff is entitled for decree for specific performance of the oral agreement.

16. **Point No. (i) :-** It is the case of the plaintiff that there was oral agreement on 4.8.2009. The defendants agreed to sell flat No.302. This case of the plaintiff is admitted by the defendant in the written statement. The difference between the parties is that according to the plaintiff in the said oral agreement dated 4.8.2009, the consideration amount for flat No.302 was fixed at Rs.11,60,956/- whereas according to the defendants, the consideration amount was fixed at Rs.26,76,000/-. In the present case, the plaintiff has been examined as P.W.4. In his examination-in-chief, he stated that flat No.101 was sold for Rs.13 lakhs having more area than the area of flat No.302. The plaintiff has also produced ext.4 an agreement for sale dated 29.4.2009 with respect to the said flat No.301. Ext.4/A an agreement for sale dated 22.12.2008 with respect to flat No.202 for



Rs.12 lakhs. Ext.3 is sale deed dated 15.06.2010 with respect to flat No.202 on second floor for Rs.12 lakhs. Ext.4/B is agreement dated 16.03.2009 with respect to flat No.301 for Rs.13 lakhs. These evidence has been produced by the plaintiff in support of his case regarding the price of the flat No.302. It may be mentioned here that the Court is not required to ascertain the market value of the flat in question on the date of agreement between the parties. The flat No.301 was agreed to be sold for Rs.13 lakhs and ext.4/D shows that the agreement was entered into on 16th March, 2009. Ext.3/B is sale deed dated 13.03.2010 with respect to the said flat No.301. Likewise the other agreement, ext.4, is 29.04.2009, ext.4/A is dated 22.12.2008. All these agreements are much prior to the agreement with the plaintiff. Therefore, for selling the flat, the date of agreement is point for consideration. The people may sell one flat of the same floor to one person in less amount, if the agreement between them was earlier but he may not agree to sell other flat on the same price subsequently because of acceleration of the price. Further from these documents produced by the plaintiffs itself, it is now clear that if there is difference of two months or four months between the two agreements, the price is being raised with respect to different flats. There is no fixed price. In such circumstances, the Court cannot ascertain the market value of the flat and then say that in fact the market value of

the property is such and such, therefore, the agreement between the parties was that the flat No.302 was to be sold for that market price.

17. Here the plaintiff's specific case is that it was oral agreement. The plaintiff himself is producing the agreement to sell executed by the developer with other persons regarding other flats. There is no explanation as to why no agreement was executed between plaintiff and the developer with respect to flat No.302. If in fact the plaintiff had deposited the 25 per cent why he did not insist for execution of agreement to sell. Neither there any explanation in the pleading nor there is any explanation in the evidence. If the people was executing agreement with respect to other flats, it is expected that agreement should have been entered into with respect to flat No.302. It is the case of the defendant also in the written statement that because the defendant is a private company, every work is being run in writing. Since the suit has been filed by the plaintiff and the plaintiff is seeking the discretionary equitable relief, it is for him to prove that why agreement was not entered into. This clearly shows that the plaintiff did not deposit 25 per cent of the total consideration amount. Since the case of the plaintiff is based on oral agreement, the plaintiff is required to produce reliable evidence in support of his case. In the present case as discussed above, except the bald statement regarding the price, no chit of paper has been produced



with respect to the same. Since the defendant entered into agreement for selling other flats, no reason has been assigned by the plaintiff as to why he did not enter into a written agreement. No such fiduciary relationship between the plaintiff and defendant has been shown. It is not the case of the plaintiff that there was such relationship between the plaintiff and defendant that the plaintiff trusted with the defendant that the defendant will sell and, therefore he did not insist for the execution of agreement to sell.

18. No doubt so far this portion of finding of the trial is concerned, it is in favour of the plaintiff but the defendant challenged this finding and, therefore this question is being decided herein below in view of Order 41 Rule 22 CPC. In my opinion, in view of this provision, the defendant is not required to file cross objection against this finding.

19. The defendant in support of the fact that the price was agreed for Rs.26,76,000/- has also examined witnesses. D.W.4 is the defendant No.2. He has supported his case.

20. In view of my above discussion, I find that the learned Court below has wrongly held that the price for flat No.302 was fixed at Rs.11,60,956/- as claimed by the plaintiff. The approach of the Court below is wrong. Still he ascertained the market value on the

basis of the sale deeds and without their being any reliable evidence has recorded this finding. Therefore, the finding of the Court below is hereby reversed. **The Point No.(i) is answered against the plaintiff appellant and in favour of the defendant respondent.**

21. Point No.(ii) :- The learned senior counsel, Mr. T. N. Maitin on this point heavily relied upon the decision of the Supreme Court in the case of **Motilal Jain (Supra)**. The Hon'ble Supreme Court has held that **'An averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale.'** So far this principle of law laid down by the Supreme Court is concerned, it is the settled law. There can be no dispute regarding it. Here also the plaintiff pleaded that he was ready and willing to perform his part of the contract. The question is merely because if it pleaded in terms of Section 16(C) of the Specific Relief Act or the pleading clearly indicate the readiness and willingness, a finding can be recorded that the plaintiff was ready and willing to perform his part of the contract.



In the present case at our hand, except this pleading and statements in the evidence, nothing has been brought on record by the plaintiff to show that in fact he was ready to perform his part of the contract. The Supreme Court in the aforesaid decision also held that the averment of readiness and willingness is not mathematical formula which should only be in specific words. The plaintiff has to prove this readiness and willingness and this is the condition precedent for the grant of the decree for specific performance of contract for sale.

22. Here the learned counsel for the appellant submitted that legal notice was served. The legal notice has been produced which has been marked as exhibit in the case. It is not the case of the plaintiff that on any particular date, he tendered the balance consideration amount and requested the defendant to execute the sale deed or even requested the defendant to execute a written document. The case is that the defendant avoided then the plaintiff sent legal notice. The law does not require that to show readiness and willingness issuance of legal notice is a condition precedent or that on the basis of issuance of legal notice, only the finding will be recorded that the plaintiff was ready and willing to perform his part of the contract. To prove this facts of readiness and willingness, the plaintiff has to show that he had the capacity or that he had the required money

with him. Here there is no such evidence.

23. In the case of **Gomathinayagam Pillai and others v. Palaniswami Nadar**, reported in **A.I.R. 1967 SC 868** the Hon'ble Supreme Court has held that 'it was for the plaintiff in a suit for specific performance to establish that he was since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so his claim for specific performance must fail.'

24. In the case of **Azhar Sultana v. B. Rajamani and Ors.**, reported in **A.I.R. 2009 SC 2157** the Supreme Court has again followed the decision of **Ram Awadh** (supra) at paragraph 19 and at paragraph 21 laid down that 'if the plaintiff has failed to establish that she had all along been ready and willing to perform her part of the contract, in our opinion, it would not be necessary to enter into the question as to whether the defendant nos.5 and 6 were bonafide subsequent purchasers for value without notice or not.'

25. In the case of **Narinderjit Singh v. North Star Estate Promoters Limited**, reported in **2012 (5) SCC 712**, the Hon'ble Supreme Court has held that 'Section 16(c) of the Act envisages that the plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of

the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant.

26. 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.’



27. The other aspect of the matter is the plaintiff received Rs.4 lakhs on 02.11.2009 through cheque issued by the defendant. In the evidence, plaintiff has admitted that all transactions with the defendant was made by him through the Indian Overseas Bank. In such circumstances, it was not expected that the defendant could have deposited the cheque of Rs.4 lakh in the State Bank of India account of the plaintiff. How the defendant came to know that the plaintiff had his account in State Bank of India also. Why the defendant did not deposit this cheque of Rs.4 lakh in the account of Indian Overseas Bank. There is no explanation at all. To show his bonafide, the plaintiff did not take any action. He did not write the bank for refund of the amount to the person who deposited the same. The plaintiff admitted in his evidence that he had the knowledge that the cheque was in his account of State Bank of India Branch. The argument of the learned counsel for the appellant that plaintiff had no knowledge about the deposit cannot be relied upon because the plaintiff in his evidence has stated that he was income tax payee, therefore, he must be giving the account of all the amount in his bank account. Can it be said that the plaintiff was not knowing this deposit, particularly when he was filing the income tax return. Whether he was not obtaining the bank statement with respect to his account. There is nothing on record. A bald statement has been made that the plaintiff was not

knowing this fact. All these aspects of the matter shows that in fact the plaintiff himself received the amount and deposited the cheque in his account of the State Bank of India.

28. Now, another aspect is that I have already recorded above that the consideration amount for the same flat No.302 was not Rs.11,60,956/- but more than that. The plaintiff was not ready to deposit any amount more than the amount he claimed. We have above seen that he also withdrew the amount of Rs.4 lakhs deposited by him. No evidence has been produced to show that he had raised the balance consideration amount. In view of the above discussion, I find that the plaintiff failed to prove his continuous readiness and willingness to perform his part of the contract. The finding of the trial Court on this question is, therefore, confirmed. **The Point No.(ii) is answered accordingly in favour of the defendant respondent and against the appellant.**

29. Point No. (iii) :- It is admitted fact that prior to institution of the suit, the property was sold by the defendant in favour of third person. The plaintiff did not make the purchaser a party in the suit. Subsequently, application was filed for adding him as party which was rejected but the plaintiff kept mum. In this appeal also, application was filed for adding the purchaser as party which was



rejected by this Court and, thereafter, the appellant filed appeal before the Supreme Court which was also dismissed. Now, therefore, it is admitted fact that the person, i.e., the purchaser is the owner of the property, on the basis of the sale made by the defendant in favour of him. The plaintiff had the right to enforce the agreement against the defendant and the subsequent purchaser. It is settled law that by agreement only the ownership is never transferred. The subsequent transferee with notice of the agreement stands in a fiduciary capacity and holds the property in trust to the prior agreement holder but the prior agreement holder cannot automatically becomes the owner by seeking declaratory relief and has to necessarily filed a suit for specific performance impleading both the vendor and the subsequent transferee in view of Section 40 and 54 of the Transfer of Property Act and Section 91 of the Indian Trust Act. Therefore, now the plaintiff cannot enforce the agreement specifically against the defendant only without impleading the purchasers. The plaintiff has to prove that the defendant, i.e., the subsequent purchaser purchased the property with knowledge of the agreement and this fact can be proved only in presence of the subsequent purchaser. In this connection reference may be made to ***AIR 1999 Andhra Pradesh 170 Kondapalli Satyanarayana Vs. Kondapalli Mayullu***

30. The Hon'ble Supreme Court in the case of ***2013 (3) PLJR***

339 SC has held that **‘if there is no averment in the plaint of the suit filed for specific performance of contract that subsequent purchaser were not bonafide purchaser, no argument can be advanced by the plaintiff regarding bonafide purchased or no bonafide purchases.’** In the present case, no such averment has been made by the plaintiff that the subsequent purchasers are not bonafide purchasers or that fraudulently the defendant sold the property. Now, therefore, even if the decree is passed in favour of the plaintiff then also it will not be executable, therefore, the Court should not pass a decree which is not executable in absence of the subsequent purchasers. Accordingly, I find that the suit itself was defective for non-joinder of the subsequent purchaser. **The Point No.(iii) formulated is thus answered against the appellant.**

31. In view of my above discussions and the findings, I find no merit in this First Appeal and accordingly, this First Appeal is hereby dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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