

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.42 of 2006

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Against the judgment and decree dated 24.12.2005 passed in
Title Suit No. 43 of 1990 by Sri Nagendra Prasad Tripathi,
Subordinate Judge III, Danapur

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1. Most.Sita Devi wife of Late Rupa Rai
2. Arbind Rai son of Late Rupa Rai
Both R/o mohalla- Daudpur W. No. 16, Bintoli, P.O. and P.S.
Shahpur, District- Patna
3. Smt. Malti Devi D/o Late Rupa Rai and wife of Sri Dharampur
Rai, R/o Moh.- Daudpur, Ward No. 16, Bintoli, P.O. and P.S.-
Shahpur, District- Patna, presently residing at village- Mahinawa,
P.O. and P.S.- Maner, District- Patna
4. Smt. Deomuni Devi D/o Late Rupa Rai and Wife of Late
Bhushan Rai, R/o village- Shahpur, Danapur, P.s.- Sahapur, P.O.
Daudpur, District- Patna
5. Smt. Renu Devi D/o Lat Rupa Rai wife of Sri Ashok Rai, R/o
Mohalla-Daudpur Ward. No. 16, Bintoli, P.O. and P.S. Shahpur,
District- Patna, presently residing at village- Indrapuri, P.s.-
Shastri Nagar,P.O. Keshri Nagar, District- Patna
6. Bimal Kumari unmarried daughter of Late Rupa Rai, R/o
Mohalla- Daudpur W. No. 16, Bintoli, P.O. and P.S. Shahpur,
District- Patna
7. Smt. Dewanti Devi D/o Late Rupa Rai wife of SriMritunjay Rai,
residing at village- Bigrapur, P.S.- Kankarbagh, District- Patna

.... Appellants

Versus

Mahal Sahkari Grih Nirman Samiti Ltd. Patna, through its
Secretary, Panchi Lal Rai, Son of Sri Pran Rai, R/o Naya Tola
Saguna, P.O. and P.S.- Danapur Cantt. District- Patna

.... Respondent

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Appearance :

For the Appellant/s : Mr. Santosh Kumar Sinha-2, Advocate
Mr. Tej Narayan Singh, Advocate

For the Respondent : Mr. Kamla Prasad Roy, Advocate
Mr. Rajednra Kuma Jain, Advocate
Mr. Shiv Shankar Prasad Singh, Advocate

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**CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN
SHARMA**

C.A.V. JUDGMENT

Date: 06-09-2016

The instant appeal has been preferred against the
judgment and decree dated 24.12.2005 passed by Sri Nagendra



Prasad Tripathi, the then Subordinate Judge III, Danapur decree sealed and signed on 06.01.2006 in Title Suit No. 43 of 1990 whereby and whereunder the suit filed by plaintiff/respondent was decreed on contest with costs. The defendants were directed to execute the sale deed in favour of plaintiff on receipt of balance of consideration money from the plaintiff within three months from the date of judgment, failing which the same be executed through the process of the court on depositing the balance consideration money by the plaintiff. The defendants are the appellants here.

2. The plaintiff has filed the suit for a decree of specific performance of contract and in alternative decree for realization of Rs. 65,000/- with interest at the rate of 12 per cent.

3. Briefly stated, the case of the plaintiff is that the original defendants Rupa Rai, Arbind Rai along with one Sanjay Kumar (deceased) being in need of money for business declared for selling the land mentioned in Schedule I of the plaint and ultimately the matter was finalized in between the defendants and plaintiff through its Secretary Panchi Lal Rai at the rate of Rs. 50,000/- per kattha for area of 16 decimal and accordingly, after receipt of advance of Rs. 45,000/- Rupa Rai, Arbind Rai and Sanjay Kumar executed the deed of agreement for sale dated 28.10.1988 with promise to execute necessary sale deed with respect to land mentioned in Schedule I of the plaint in favour of plaintiff within six months till 27.04.1989 on receiving the balance consideration money from the plaintiff, failing which the plaintiff



would be entitled to get the sale deed executed from the defendants through the process of the court. It was also agreed by the plaintiff that if the plaintiff fails to get the sale deed executed after paying the balance consideration money within the stipulated period the earnest money would be forfeited. The deed of agreement for sale executed on 28.10.1988 was handed over to the Secretary of the plaintiff. The plaintiff being ready with consideration money always contacted to the defendants and late Sanjay Kumar requesting them to execute the sale deed but they evaded the matter on one ground or the other and in the meantime Arbind Prasad showing urgency demanded Rs. 20,000/- again and the plaintiff through its Secretary paid a sum of Rs. 20,000/- to said Arbind Prasad on 29.11.1988 and in proof of the same Arbind Prasad made endorsement to this effect at the back of first page of deed of agreement for sale and assured to execute the sale deed. The plaintiff contacted to the defendants several times and requested to execute the sale deed on receipt of balance consideration amount but the defendants evaded the matter then finding no alternative the plaintiff sent a legal notice dated 24.04.1989 to the defendants through its Advocate Shri Shiv Nath Sharma which the defendants knowingly and intentionally did not receive and bringing the postal peon in his collusion got the notice returned to the learned Advocate of the plaintiff by making collusive endorsement. The defendants with intention to grab the advance money of Rs. 65,000/- sent a legal



notice dated 27.04.1989 through their Advocate Sri Rajendra Prasad mentioning false and wrong facts to which the plaintiffs sent reply dated 02.05.1989 controverting all the facts of the legal notice of the defendants stating that the plaintiff was or are always ready to perform its part of contract as per agreement and it was the defendants who were and are not ready to perform their part of contract. Thereafter, again the Secretary of the plaintiff met to the defendants in the month of December 1989 with balance consideration amount and requested them to execute the sale deed, then the defendants replied that due to some mishappening in their family they are unable to execute the sale deed and they would execute the sale deed in March,1990. As per assurance the plaintiff through its secretary approached several times to the defendants and requested for executing the sale deed but ultimately on 02.04.1990 the defendants flatly refused to execute the sale deed with respect to the land mentioned in Schedule I of the plaint and then this suit was filed.

4. The defendants by filing their written statement contested the suit, they admitted regarding execution of agreement to sale and receiving payment of Rs. 45,000/- but refused regarding receiving payment of Rs. 20,000/- on 29.11.1988 by Arbind Prasad and that Arbind Prasad never made any endorsement on the back of the deed of the agreement and the same is forged and fabricated. The plaintiff after entering into contract was never ready to perform his part of contract and the



time was the essence of the contract. Therefore, the defendants are not under obligation to perform the terms of the contract. No notice has ever been served upon the defendants by the plaintiff. It is false to say that the defendants brought postal peon in their collusion and got manipulated the service report. The defendants sent legal notice through their Advocate Shri Rajesh Prasad with correct statements of the facts and reply notice of the plaintiff was of no consequence as the same contained false statements. The plaintiff was in fact not ready with money to perform their part of contract within stipulated period and consequently amount paid as advance stood forfeited. The plaintiff was never ready to perform its part of contract as per agreement whereas the defendants were or are always ready to perform their part of contract as per agreement. According to the defendants, on account of unwillingness on the part of the plaintiff its aforesaid earnest money was forfeited and the suit is not maintainable.

5. On the basis of the pleadings of the parties, following issues were settled on re-cast by the learned trial judge:

- (i) Is the suit as framed maintainable ?
- (ii) Has the plaintiff valid cause of action for the suit ?
- (iii) Whether one of the executant of Bai-beyana deed namely Arbind Prasad took Rs. 20,000/- out of total consideration money from the plaintiff on 29.11.1988 and made endorsement at the back of Bai-beyana deed dated 28.10.1988 ?
- (iv) Is the plaintiff entitled for a decree as sought for ?

(v) To what other relief or reliefs the plaintiff is entitled?.

6. Learned Sub-Judge decided all the issues in favour of the plaintiff/respondent holding that the plaintiff was always ready and willing to perform the terms of contract up till now and as such the plaintiff is entitled for the relief as sought for and accordingly, decreed the suit.

7. The defendants being aggrieved and dissatisfied with the judgment and decree have preferred this appeal challenging the maintainability of the same on the ground that the findings of the learned Sub-Judge on the issues are wrong, he has adopted different standards in weighing the evidence of PWs from that of DWs, he has ignored the legal evidence available on the record and has based his findings on conjectures and surmises. There was no occasion to give Rs. 20,000/- again to Arbind Prasad and it is out and out a concocted story. Every thing was finalized by Rupa Rai being the guardian and father of Arbind Prasad and Sanjay Kumar and, accordingly, a deed of agreement to sale was executed. In deed of agreement to sale, which is an important document for consideration, Exhibit 3, it was agreed that during the stipulated period i.e. till 27.04.1989 the plaintiff will ask the defendants to execute the sale deed in different names after paying different amounts and if the defendants will fail in executing the sale deed then, the plaintiff has got right to get the sale deed executed through the process of the court and if the



plaintiff fails to purchase the property after paying the balance consideration amount then, the amount of Rs. 25,000/- will be forfeited as cost and damages. The learned Sub-Judge has wrongly relied upon oral evidence and documentary evidence of plaintiff and wrongly held that one of the executant of Bai-beyana deed namely, Arbind Prasad, took Rs. 20,000/- out of total consideration money from the plaintiff on 29.11.1988 and made endorsement at the back of Bai-beyana deed dated 28.10.1988. The witnesses examined on behalf of plaintiff are not consistent on that point. PW 5 Anup Rai has come to say that amount of Rs. 20,000/- was given later on, but, during cross-examination, in paragraph 11, he has stated that amount of Rs. 20,000/- was given to Rupa Rai and he cannot say the name of the person present at that time. In paragraph 12 this witness has stated that he cannot say the name of the owner of hotel where the amount of Rs.20,000/-was paid. PW 8 Jagdish Prasad Gupta has also come to say that on 29.11.1988 amount of Rs. 20,000/- was taken by Arbind Rai and he made endorsement at the back of the first page of the deed of Bai-beyana. He is the president of Mahal Sahakari Grih Nirman Samiti Limited, Patna and he is an interested person and as such his evidence appears not reliable. During cross-examination in paragraph 24 this witness has stated that amount of Rs. 20,000/- was given in presence of the witnesses of deed of Bai-beyana to Arbind Kumar but they have not signed as a witness on that date. PW 9 is plaintiff no. 2 himself and he has



supported his case. In paragraph 43 he has stated that amount of Rs. 20,000/- was given to Arbind Prasad at his house and at that time his father was also present and further Anup Rai was also present whereas PW 8 in paragraph 14 has stated that he and Panchi Lal Rai have only gone to the house of Rupa Rai and amount of Rs. 20,000/- was given to Arbind Kumar. He cannot say as to whether Rupa Rai was present in the house or not, so the evidence of PWs are inconsistent on that point. PW 11 is a hand writing expert who has examined the disputed signature and the admitted signature of Arbind Prasad and submitted his report unscientifically and his evidence is also not reliable. No notice was ever received by the defendants alleged to be sent by the plaintiff and Ext. 1/A dated 24.04.1989 is a manufactured document. Further in the said notice it is alleged that the defendants are not getting the land measured and demarcated and their gotiya are saying that defendants have got no title and possession over the aforesaid land and as such on this ground also the evidence of PWs is not reliable and is fit to be rejected.

8. On the other hand the evidence of DWs are consistent and reliable. DW 11 Saiyad Md. Jamil Ahmad, hand writing expert has specifically stated that the disputed signature of Arbind Prasad dos not tally with admitted signature of Arbind Prasad and his evidence is also reliable. Ext. C the expert report is scientific. Ext. B is the legal notice which after expiry of time was sent to the plaintiff through learned counsel which they received



and gave reply which is Ext. 1. The evidence of DW 7 Arbind Prasad is consistent with other evidence and is reliable one. Other witnesses have also supported the case of the defendants and as such the reliance placed by learned Subordinate Judge on the evidence of plaintiff is perfunctory and due to wrong assumption of facts and evidence. The learned Subordinate Judge has given wrong findings, resulting, the judgment and decree passed by learned Subordinate Judge is fit to be set aside. Learned counsel for the appellant further argued that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are: (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example: the object of making the contract and for that reliance has been placed upon **(1993) 1 Supreme Court Cases 519 Chand Rani (Smt.) Dead) by Lrs... Appellants versus Kamal Rani (Smt.) (Dead) by Lrs... Respondents.** In the present case also there is express term of the contract that within the stipulated period the sale deed has to be executed after paying the balance consideration amount, failing which the earnest money will be forfeited. The property is agricultural land and was fit for construction of house. The object of making the contract was for doing business and due to non-payment of balance consideration money, as the plaintiff

failed to search different purchasers, the defendants did not start the business and as such the object was frustrated and on this ground the suit of the plaintiff was fit to be dismissed.

9. On the other hand, on behalf of plaintiff-responent, it has been argued that the plaintiff was always ready to pay the balance consideration money and to get the sale deed executed. Amount of Rs. 20,000/- was paid to Arbind Prasad on 29.11.1988 and he has made endorsement and has signed in proof thereof on the back of page one of the deed of Bai-beyana which has been marked as Ext. 3/A. The signature of Arbind Prasad at the time of execution of deed of Bai-beyana and his disputed signature were examined by the expert. PW 11, who is a retired hand writing expert, has found both signatures as same. PW 12 is a photographer who has taken photograph of both the signatures of Arbind Prasad in presence of both the learned counsels and Shirestedar. He has proved the negatives and enlarged photo in the court. The witnesses examined on behalf of plaintiffs are reliable and trust worthy. It is well proved that on 29.11.1988 Arbind Prasad further took Rs. 20,000/-. It is also an admitted fact that Sanjay Kumar died and thereafter, the defendants took some time on that ground but, later on, refused having dishonest intention to execute the sale deed and then, the suit was filed. Ext. 1/A is the legal notice, dated 24.04.1989, sent by Sri Sidhnath Sharma, Advocate Bar Association, Danapur, on behalf of plaintiff to Sri Rupa Rai and others and by the said notice



also it reveals that the plaintiff was ready to get the sale deed executed after measuring the land and demarcating the same but the said notice was returned back vide Ext. 4 by bringing the postal peon in collusion and making false endorsement that by that name no such person is in the locality. Further from Ext. 1, which is a reply notice, also it reveals that the plaintiff was ready with the money and has requested to receive the money and asked the defendants to execute the sale deed and deliver the possession of land to the plaintiff, that reply noticed is dated 02.05.1989. Issue no. iii being most important was decided by the learned Subordinate Judge at first and has rightly held that Arbind Prasad took Rs. 20,000/- on 29.11.1988 after making endorsement and signature at the back of Bai-beyana deed dated 28.10.1988. The defendants having dishonest intention, only with a view to grab the advance money and further to take more money from other persons, failed to perform their part of contract. The learned Subordinate Judge has rightly decided all the issues in favour of the plaintiffs and against the defendants and the suit was rightly decreed. Learned counsel has placed reliance upon a judgment reported in **(1988) 2 Supreme Court Cases page 488 in the case of Smt. Indira Kaur and Others.. Appellants Versus Sheol Lal kapoor.. Respondents.** In the present case, the plaintiff was always ready and willing to perform his part of contract and as such the plaintiff's suit for specific performance has rightly been decreed. It has been argued that the law is well



settled that in transactions or sale of immovable property time is not the essence of the contract. The facts of the case of **Chand Rani** (*Supra*) is quit on different footing. There, the property was house in urban area. In that case the plaintiff was not ready and willing to perform his part of contract whereas in the present case, the plaintiff was always ready to pay the balance consideration amount and to get the sale deed executed. In Ext. 3 rate was fixed Rs. 50,000/- per kattha as per measurement but the defendants never came forward to get the land measured but in spite of that the plaintiffs were always ready with consideration amount to pay the same to the defendants and to get the sale deed executed. According to the learned counsel for the respondents, the judgment and decree passed by the learned Subordinate Judge is quite legal, proper and justified and there is no need of any interference of this Court.

10. On the basis of rival contentions of the parties, the points for consideration before this Court in this appeal are as follows:

- (i) Whether the time was the essence of the contract ?
- (ii) Whether Arbind Prasad one of the executant of agreement to sale took Rs. 20,000/- out of total consideration money from plaintiff on 29.11.1988 after making endorsement and signature at the back of Bai-beyana dated 28.10.1988 ?
- (iii) Whether the plaintiff was ready and willing to perform his part of contract and whether the suit has been rightly

decreed ?

11. Point No. i :- The agreement to sale (Ext. 3) contains the terms which have been agreed upon that the transaction of sale should be completed within six months from the date of execution of the agreement i.e. from 28.10.1988 till 27.04.1989. In last paragraph there is term that if the vendee fails to get the sale deed registered within the time then, amount of only Rs. 25,000/- will be forfeited and that cannot be realized from executant. Further it is mentioned that the land to be sold would be measured and the payment of the price would be finally calculated accordingly. In the case of **Smt. Indira Kaur and others** (*supra*) and also in the case of **Chand Rani** (*Supra*) it has been held that the law is well settled that in transaction of sale of immovable properties time is not the essence of the contract. The Apex Court in the case of **Balasaheb Dayandeo Naik (dead) through LRS & Ors. vs. Appasaheb Dattatraya Pawar** reported in **(2008) 4 SCC Page 464** in paragraph 10, 11, 12 and 14 held that the time was not the essence of the contract. Here also the land going to be sold is immovable property and agricultural land and as such time was not the essence of the contract. There is nothing on the record on behalf of defendants to show that the defendants got measured the land rather the plaintiff after sending the Ext. 1/A (legal notice) requested the defendants to get the land measured and demarcated and to get the sale deed executed. From the oral



evidences adduced on behalf of the parties also it reveals that the time was not the essence of the contract and it was never agreed that the entire earnest money will be forfeited rather by way of cost only Rs. 25,000/- was to be forfeited. No party can be allowed to go beyond the express term contained in the agreement to sale. Accordingly, it is held that the time was not the essence of the contract. In the result, this point is decided against the appellants and in favour of the respondents.

12. Point No. ii:- The case of the plaintiff in this regard is that besides Rs. 45,000/-, he further paid Rs. 20,000/- through its secretary Panchi Lal Rai to the defendant Arbind Prasad on 29.11.1988 and in token of the proof of the same said Arbind Prasad made an endorsement to this effect at the back of first page of the deed of agreement for sale which is Ext. 3. The signature and endorsement of Arbind Prasad on the back of Ext. 3 has been marked as Ext. 3/A.

13. On the other hand the defendants denied the said payment stating that Arbind Prasad never made any signature or endorsement on the back of first page of the agreement to sale and that the same is forged and fabricated one. The plaintiff to prove this fact got examined the signature of Arbind Prasad in Ext. 3A with the signature of Arbind Prasad on Ext. 3 by PW 11 Keshaw Prasad hand writing expert by sending photographs of the same and photos were taken by PW 12 Chunni Lal. Keshaw Prasad PW 11 has submitted his report which is Ext. 5 and further in his



evidence he has stated that signature of Arbind Prasad on Ext. 3 which is an admitted signature and signature of Arbind Prasad on Ext. 3/A which is disputed signature is of same person and similar. Against that the defendant has got examined those signatures by Saiyad Md. Jamil Ahmad DW 11 who has submitted his report Ext. C and has stated in his evidence that the signature of Arbind Prasad on Ext. 3 and disputed signature on Ext. 3/A are not similar and does not tally. PW 5 Anup Rai who is also one of the witness to Ext. 3 has stated in his evidence that after execution of Bai-beyana deed further Rs. 20,000/- was paid by the plaintiff and Arbind Prasad made endorsement at the Bai-beyana deed in his presence. During cross-examination he is unable to give the specific date of payment and further he cannot say the names of the persons present at that time. He has further stated that he cannot give name of the owner of the hotel where the payment was made. PW 8 Jagdish Prasad Gupta, the President of Mahal Co-operative Society has stated in his examination-in-chief that on 29.11.1988 Arbind Prasad received Rs. 20,000/- from Panchi Lal Rai and made an endorsement at the back page of Bai-beyana deed. This witness has been cross-examined but during cross-examination also he has stated that Arbind Prasad received Rs. 20,000/- on 29.11.1988. In paragraph 14 he has further stated that Arbind Kumar received Rs. 20,000/- on 29.11.1988 in presence of the witness of Bai-beyana deed. This evidence of this witness is corroborated by the evidence of PW 5 who is a witness



of the deed of Bai-beyana. PW 9 Panchi Lal Rai has stated that on 29.11.1988 he went to the house of Rupa Rai and met to Arbind Prasad, he requested to the defendants for execution of sale deed but Arbind Prasad shows his inability to execute the sale deed and demanded Rs. 20,000/- from him, then, he paid Rs.20,000/- to Arbind Prasad and thereafter, Arbind Prasad made endorsement regarding the same at the back of the first page of Bai-beyana deed and he has proved the signature and endorsement as Ext. 3/A. During cross-examination nothing has come against the plaintiff rather this fact has been corroborated by the evidence by those two witnesses during cross-examination. On the other hand, on behalf of defendants, DW 5 Premdhar Rai has stated that he along with Arbind Prasad went to Chapra on 29.11.1988 and on 29.11.1988 Arbind Prasad was not present in Danapur but in this regard no document has been produced by the defendants. PW 7 Arbind Prasad has denied in his evidence about receiving of Rs. 20,000/- from Panchi Lal Rai on 29.11.1988 and further denied that he has not made any endorsement on the back of first page of Bai-beyana deed. He has further stated that this endorsement at the back of first page of Bai-beyana deed and signature is forged. Arbind Prasad in his evidence has not stated a single word that on 29.11.1988 he was not present in Danapur and he went to Chapra with Premdhar Rai DW 5 and it goes to show that the evidence of DW 5 is not reliable and has not been corroborated. Arbind Prasad has been cross-examined and during his cross-

examination he has stated that I will not examine his admitted and disputed signature by any expert and this goes to show his suspicious and shaky minds. DW 8 Rupa Rai has also denied about receiving of Rs.20,000/- by Arbind Prasad.

14. After careful consideration of the evidences and pleadings of both the parties in this regard, it is manifest that the plaintiff has succeeded in proving that on 29.11.1988 Arbind Prasad received Rs. 20,000/- from Panchi Lal Rai and made endorsement at the back of first page of deed of agreement to sale dated 28.10.1988. From perusal of expert report Ext. 5 and Ext. C it reveals that both are contradictory to each other. Learned Subordinate Judge in his finding has stated that Ext. 5 is more scientific than Ext. C and I am also of the opinion that Ext. 5 is based on scientific data and is more reasonable and reliable than Ext. C. On the record there are signatures of Arbind Prasad on the written statement and Vakalatnama also and from necked eyes also it reveals that the signature of Arbind Prasad on Ext. 3/A is the similar to those signatures on Ext. 3 and further as on written statement and Vakalatnama. Learned Subordinate Judge after careful consideration and discussion has rightly held that on 29.11.1988 Arbind Prasad took Rs. 20,000/- from Panchi Lal Rai, Secretary of plaintiff no. 1 and made an endorsement at the back of first page of agreement to sale dated 28.10.1988. It is well settled law that where there are two experts, the court is expert of the all experts and the learned Subordinate Judge has rightly

held that Ext.5 is more scientific than Ext. C. In the result, this point is decided in favour of the respondents and against the appellant.

15. Point No. iii:- In support of the case the plaintiff has examined altogether 12 witnesses. PW 1 Uma Nath Prasad is a formal witness, PW 2 Surendra Prasad is also a formal witness and proved Ext. 1, PW 3 Santosh Kumar Jaiswal is also a formal witness and has proved his signature on deed of agreement to sale as Ext. 2. PW 4 Pradeep Kumar is the deed writer of the deed of agreement to sale, he has proved the same as Ext. 3. PW 5 Anup Rai is also one of the witness of agreement to sale and he has stated that at the time of agreement to sale amount of Rs. 45,000/- was paid and later on Rs. 20,000/- was paid. He has further stated that 5 Katthas of land was agreed to be sold at the rate of Rs. 50,000/- per Kattha and after getting the contents read over, Rupa Rai gave thumb impression over the same and he has signed on the deed of agreement to sale as per the dictation of Rupa Rai. PW 6 Devendra Singh is a formal witness and has proved envelop by which legal notice Ext. 1/A was sent and was returned back. PW 7 Gobardhan Rai has come to say that deed of agreement to sale was executed and Panchi Lal Rai paid Rs. 45,000/- to Rupra Rai. PW 8 Jagdish Prasad Gupta is the president of Mahal Co-operative Society. He has fully supported the case of the plaintiff and has further stated that as per the terms of deed of agreement, we were always ready to get



the sale deed executed after paying the balance consideration amount but the defendants always evaded the matter. He has also stated that legal notice was sent and when the defendants did not execute the sale deed then, the suit was brought. In paragraph 15 he has further stated that today also they are ready to pay the balance consideration amount and to get the sale deed executed. From the evidence of this witness, it reveals that the plaintiff was always ready to perform his part of contract and to get the sale deed executed after paying the balance consideration amount. PW 9 is the plaintiff no. 2 himself. He is the Secretary of Mahal Sahkari Grih Nirman Samiti. He has fully supported his case as made out in the plaint. In paragraph 14 of his evidence he has stated that after execution of deed of agreement to sale he was always ready with balance consideration amount and to get the sale deed executed and on 29.11.1988 he went at the house of Rupa Rai where Arbind Kumar met and when he told him to execute the sale deed, he demanded Rs. 20,000/-, which was paid and he made an endorsement accordingly, on the back of page 1 of the deed of agreement to sale. In paragraph 16 he has further stated that he went at the house of Rupa Rai after 29.11.1988 also and requested him to execute the sale deed but he evaded the matter. In paragraph 17 he has stated that he requested him to get the land measured but he did not get the land measured. In paragraph 18 he has stated that in December, 1989 also he went at the house of Rupa Rai and then, he told that his son has



died and as such requested to come in the year 1990. In the month of April, 1990 also he went at the house of Rupa Rai to pay the balance consideration amount and to get the sale deed executed but he refused. Earlier also he has sent legal notice on 24.04.1989 and further he has given reply notice also on 02.05.1989. This witness has been cross-examined at length but nothing has come to discredit his testimony. PW 10 is also a formal witness. He has proved the legal notice as Ext. 1/A. PW 11 is retired hand writing expert and PW 12 is the photographer. Besides oral evidences, documentary evidences are: Ext. 1 is reply of the legal notice, Ext. 1/A is legal notice, Ext. 2 is signature on the deed of agreement to sale, Ext. 3 is deed of agreement to sale, Ext. 4 is endorsement on envelope, Ext. 3/A is the disputed signature of Arbind Prasad on Ext. 3. From Ext. 1/A and Ext. 1 it reveal that the plaintiff was always ready to pay the balance consideration amount to the defendants and to get the sale deed executed. The plaintiff was always willing to perform his part of contract.

16. On the other hand on behalf of defendants DW 1 Krishna Prasad is a formal witness, he has proved the signature of Rupa Rai and Arbind Prasad on written statement as Ext. A and A/1. DW 2 Gyani Rai has come to say that Rupa Rai was trying to start business of fodder cutting machine, flour and oil machine and for that he talked with Panchi Lal Rai to sale the land. Rupa Rai took land from Uma Rai on rent and gave advance of



Rs.10,000/- and further Rupa Rai used to pay rent at the rate of Rs. 600/- per month but due to shortage of money business was not started. During cross-examination this witness has become incompetent. DW 3 Rajeshwar Prasad has also come to say that Rupa Rai gave advance of Rs. 10,000/- to Uma Rai and took land to fix Fodder Cutting Machine etc. but due to shortage of fund the mill was not started and Rupa Rai suffered loss. During cross-examination he has come to say that first of all he is saying this matter in the court and as per advice of Rupa Rai he has deposed. He has become incompetent during cross-examination. DW 4 Mithilesh Kumar Mishra is a formal witness. He has come to say that on 02.05.1989 he has gone to the house of Rupa Rai and on that date no peon has come to deliver a letter at the house of Rupa Rai. During cross-examination he cannot say as to when he has gone to the house of other and he has not noted down the same. He has not stated to anyone that on 02.05.1989 that he has gone to the house of Rupa Rai and there is no other witness. DW 5 Premdhar Rai has come to say that on 29.11.1988 Arbind Prasad was at Chapra with him but Arbind Prasad has not stated like that and as such this witness is not reliable. DW 6 Mirtyunjay Kumar Azad has come to say that he has met with Panchi Lal Rai with Rupa Rai in March, 1988 near Bus-stand, Danapur and both talked regarding execution of sale deed but Panchi Lal Rai took time of one month to pay the balance consideration amount and to get the sale deed executed. Rupa Rai again demanded money



for doing business but Panchi Lal Rai did not speak anything and then, Rupa Rai told him that earnest money will be forfeited. During cross-examination he has stated that Rupa Rai is his uncle, further he has become incompetent. He has stated that earnest money was not paid in his presence and he cannot say the name of witnesses, identifier and deed writer of the deed of agreement to sale. DW 7 is Arbind Prasad himself one of the defendants. He has stated that within six months sale deed was to be executed and time was till 27.04.1989 and as within time sale deed was not executed and as such the earnest money was forfeited. He has accepted the payment of Rs. 45,000/- as an advance but denied regarding payment of Rs. 20,000/-. He has stated that for doing business of fodder cutting machine, the land was going to be sold but due to shortage of fund business was not started. After the deed of agreement to sale was prepared, his father went to Panchi Lal Rai and demanded money but he always evaded. He has also stated to Panchi Lal Rai to pay the balance consideration amount and get the sale deed executed but Panchi Lal Rai evaded the matter. His father has demanded some money for business but Panchi Lal Rai told him that at present he has got no money and then, legal notice was sent to him and in spite of receipt of legal notice Panchi Lal Rai never came to his father. This witness has fully supported the case as made out in the written statement and he has further stated that for drafting written statement he went to an Advocate whose name is some Chaudhary and he did not



identify that Advocate. He cannot say as to what was written in the written statement. Before filing written statement, no notice sent by plaintiff was received and Panchi Lal Rai did not reply to his notice which appears incorrect as vide Ext. 1 reply notice was sent to the concerned Advocate. During cross-examination this witness has become incompetent and failed to testify the testimony. DW 8 is Rupa Rai himself. He has come to support his case. He has stated that it was written in the deed of agreement to sale that if the sale deed was not executed within the time the earnest money will be forfeited. Though in Ext. 3 it is not so mentioned rather it is mentioned that amount of Rs. 25,000/- would be only forfeited by way of cost. From the scrutiny of the evidence of this witness it reveals that this witness is suppressing the truth and is trying to give some false statement. DW 9 Rajeshwar Prasad is the Advocate who has sent legal notice on 27.04.1989. He has proved the same as Ext. B. In paragraph 4 this witness states that he cannot say as to whether reply notice was received by him or not and this goes to show that he being an Advocate having interest has tried to suppress the hard facts. Ext. 1 is the reply notice which was sent to him and was received. In paragraph 8 he states that sometimes reply notice is misplaced. He does not remember as to whether reply of Ext. B had been received or not. Thus, no reliance can be placed on the statement of this witness. DW 10 is also a formal witness. He has gone to give Dasti summon to handwriting expert but he was out of

station, resulting, the same was not received. DW 11 is the handwriting expert and finger print expert. Besides oral evidences by way of documentary evidences are: Ext. A is the signature of Rupa Rai on written statement, Ext. A/A is the signature of Arbind Prasad on written statement, Ext. B is legal notice and Ext. C is the expert report.

17. After careful consideration of the evidences available on the record, it is manifest that Panchi Lal Rai being the Secretary was always ready with balance consideration money and always contacted to the defendants and requested them to execute the sale deed but on some ground or the other they evaded to execute the sale deed and in course of that one of the defendants Arbind Prasad showing his urgency took further advance of Rs. 20,000/- after making endorsement, Ext. 3/A, but the defendants always evaded the execution of the sale deed on some plea or the other and then, the plaintiff sent legal notice dated 24.04.1989 through his lawyer which was not received knowingly and deliberately and was got returned after bringing the postal peon in the collusion. The defendants malafidely sent the legal notice dated 27.04.1989 mentioning false and wrong facts therein and against that also reply, Ext. 1, was sent controverting the facts but the same has also been denied by the defendants which goes to prove the dishonest intention of the defendants. The plaintiff was always willing to perform his part of contract and was always ready with consideration money and

asked the defendants to execute the sale deed but later on, on the plea of death of Sanjay Kumar, they took time and ultimately in April, 1990 they flatly refused to execute the sale deed, resulting the suit was filed.

18. Ext. 1 and 1/A and Ext. 4 go to show the willingness of the plaintiff. The plaintiff was always ready and willing to perform his part of contract but the defendants refused and as such it was the defendants who evaded the matter on one plea or the other and lastly on the plea of mishappening in his family they took time to execute the sale deed in the year 1990 and ultimately refused in April, 1990. Since the plaintiff was always ready and willing to perform his part of contract, the plaintiff is entitled for the reliefs sought for. Accordingly, this point is decided in favour of the respondents and against the appellants.

19. In the result, finding no merit in this appeal the same is hereby dismissed on contest but under the circumstances without cost.

(Jitendra Mohan Sharma, J)

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