

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.645 of 2011

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Bibi Mehrun Nissa wife of late Noor Mohammad, resident of Bye Pass Road, Bhadauni at Present, Purani Bazar in Nawada Town, Post Office and Police Station, Nawada, Distt-Nawada.

(Defendant-Respondent).... Appellant/s
Versus

Md. Ehsanul Haque son of Late Noor Mohammad, Carrying of Business under name and style Bihar Metal Shop at Purani Bazar in Nawada Town, Post Office and Police Station, Nawada, Distt-Nawada.

.... Respondent/s

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Appearance :

For the Appellant/s : MR. ABDUL MANNAN KHAN, ADVOCATE

MR. MD. NAJMUL HODDA, ADVOCATE

For the Respondent/s : MR. MRIGENDRA KUMAR, ADVOCATE

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V JUDGMENT

Date: 11-03-2016

Being aggrieved by the judgment and order dated 10.06.2011 passed in Title Appeal No. 07/2009/32/2009 by Additional District Judge-FTC-V, Nawada allowing the appeal after setting aside the judgment dated 15.01.2009 and decree dated 22.01.2009 passed by Civil Judge-(Sr. Division)^{1st}, Nawada in Title Suit No. 111/1999 and remitted the matter to decide afresh as per direction the appellant/defendant preferred instant appeal.

2. Plaintiff/respondent filed Title Suit bearing T.S. No. 111/1999 under banner of Specific Performance of Contract Act, before the learned lower court asking for reliefs directing the defendant (appellant) to execute registered sale deed in his favour with regard to the suit property, defendant be directed to receive the



balance consideration amount appertaining to Rs 1 Lac from the plaintiff or a suitable direction for depositing the aforesaid amount appertaining to Rs. 1 Lac be made, possession of plaintiff over the suit building as an absolute owner be confirmed, any other relief or reliefs which the plaintiff is found entitled for and to substantiate the same, it has been pleaded that Holding No. 627, Ward No.7, Mohalla-Purani Bazar, PS. Nawada, Anchal, Nawada, District- Nawada stood over land bearing CSP No. 4356 corresponding to CS Khata No. 434 having an area 22 Ft. North to South, 18 Ft. from East to West duly identifiable by a boundary, North- Jagdish Tamoli, South-Gali, East-Purani Bazar and West-Bishun Ram Tamoli and Jagdish Tamoli.

3. It has also been stated that this building belongs to Bibi Mehrun Nissa, his mother whereunder plaintiff is running his utensil shop on the ground floor since long. In due course of time, there was negotiation in between the parties which was finalized on a consideration amount of Rs. 1,50,000/- out of which Rs. 50,000/- was paid as an earnest money whereupon upper floor of the building was given under possession of the plaintiff. As per terms of negotiation, 31.03.1999 was the date fixed whereunder plaintiff was expected to pay Rs. 1 Lac and in likewise manner, defendant was expected to execute sale deed. In spite of willingness and readiness at the end of the plaintiff to pay the remaining amount appertaining to Rs. 1 Lac as

well as requesting the defendant to accept the amount and execute the sale deed, repeatedly, the defendant under the influence of Md. Raunak, her youngest son adopted dilly-dallying tactics and on one pretext or other, deferred the matter. It has also been disclosed that at the time of purchase of the aforesaid property by the defendant, plaintiff had also contributed which, during course of negotiation, was taken into account by the defendant.

4. It has also been averred that sale was intended to procure money for propagating religion of Islam as well as another kind of religious activities. It has also been stated that part payment was made in presence of Md. Mukhtar and others, deed of agreement was executed at the end of defendant on 22.07.1997 whereupon she put her signature in Urdu after proper appreciation of recital thereof, whereupon, apart from plaintiff, the witnesses also put their signatures and the document was authenticated before Chaudhary Krishna Ballabh Sahay, Notary Public, Nawada in order to reify the negotiation. It has also been pleaded that defendant of this case had drawn up Title Eviction Suit No. 151/1997 against the plaintiff whereunder plaintiff appeared and had filed his WS on 13.05.1999 incorporating under paragraph-25 which is as follows:-

“That this defendant hereby through this written statement calls upon the plaintiff to execute the registered sale deed with respect to entire suit building and to receive the balance consideration

amount of rupees 1,00,000/- (one Lakh) any time or any day she likes and desires to receive.

The defendant is and has always been ready and willing to pay the balance consideration amount of rupees 1,00,000/-. The amount is ready with the defendant. The plaintiff should confirm the possession of defendant as full owner of the building.

If the plaintiff fails to execute the registered sale deed, then the fault lies with the plaintiff. The Bai Beyana deed is dated 22.07.1997. It is binding on the plaintiff. Total amount in deed of Bai Beyana is rupees 1,50,000/- (one Lakh fifty thousand). This defendant has already acquired valid right under Bai Beyana.

5. It has also been incorporated that in above referred eviction suit, defendant had denied as well as controverted the negotiation, acceptance of Rs. 50,000/- as an earnest money, execution of deed of agreement, at the instance of his brother, Raunak. It has also been, by way of amendment, pleaded that Advocate Notices were served upon the defendant at different occasion so detailed therein. Then fulfilling the other statutory obligation disclosing cause of action, payment of court-fee, filed the suit.

6. Defendant/appellant appeared and filed her WS whereunder she controverted the averments whatsoever been incorporated in the plaint. It has further been narrated that the defendant had purchased the property in dispute through registered sale deed no. 15148/69 from her personal fund and came over property exclusively, independently. At the request of plaintiff, who

happens to be her eldest son, she had let out the ground floor on 12.04.1994 in favour of plaintiff. It has also been incorporated that at the extreme northern portion of this house, there happens to be staircase going to first floor. The plaintiff, after hiring the ground floor, was allowed to avail facility of latrine, bathroom and sometimes to accommodate occasional visitors and guests located at the upper floor. During course of life time of her husband, the key of upper floor was being kept by her husband who used to entertain guests at that very place and after death of her husband, plaintiff was allowed to avail the same facility being eldest son of the defendant.

7. Furthermore, it has been pleaded that tenancy of plaintiff over the ground floor was duly acknowledged with a deed of Kirayanama dated 12.04.1994 on a monthly rental of Rs. 1200/- per month which was duly authenticated by the Notary and was witnessed by Md. Islamul Haque (Son-in-law), Raunak (youngest son). As the plaintiff failed to pay the rent in terms of month to month tenancy and became defaulter on account thereof, Title (Eviction) Suit No. 151/1997 was registered at her behest for eviction. Before filing of the aforesaid Eviction Suit, the plaintiff was served with an Advocate Notice which was replied by the plaintiff on 03.07.1997 taking plea that the house was bequeathed by his father simultaneously, had paid Rs. 12,000/- as an advance and further disclosing payment up to the

month of June 1997. However, the 'Will', as shown by the plaintiff discloses relating to Holding No. 330. Furthermore, it has also been pleaded that the story of negotiation in between mother and son happens to be unbelievable, improbable and appears to be beyond imagination.

8. Side by side, it has also been submitted that the relevant document happens to be forged one and has been created with dishonest intention. Furthermore, specific quotation of the Advocate Notice has been quoted whereupon, the defendant pleaded that the plaintiff, a shrewd person took the house on rent with dishonest intention to grab the property whereupon Eviction Suit was drawn up against him. It has also been pleaded that neither there was any sort of occasion nor there was any kind of negotiation in between plaintiff and the defendant with regard to sale of the property in question and in likewise manner, it has also been denied that the negotiation was finalized on a consideration amount of Rs.1,50,000/- out of which part payment was made to her to a tune of Rs.50,000/- and in token thereof, had executed deed of agreement on 22.07.1997 in favour of plaintiff in presence of witnesses and further undertaking, acceptance of remaining amount as well as of execution of sale deed by 31.03.1999. It has also been pleaded that *Hibba* was made much earlier, duly acknowledgeable under Mahomedan Law in favour of



her youngest son, however, to substantiate the same a registered deed of gift was executed on 03.10.2002 to avoid future complication and on the basis thereof, Md Raunak, her youngest son has been impleaded as one of the plaintiffs in Title Suit No.151/1997. It has further been submitted that having custody of key after death of husband of defendant, the plaintiff began to misuse and that happens to be the reason behind making a false assertion that on account of finalization of negotiation as well as acceptance of part payment, key was handed over to him. It has also been pleaded that the persons so shown as witnesses of acceptance of part payment, Md. Mukhtar and Ainul Haque, are the employees of the plaintiff and on account thereof, purposely introduced. Further, it has also been pleaded that the so alleged deed of agreement does not bear either her LTI or her signature and was never drafted at the instance of defendant nor the so alleged witnesses put their signatures at her instance. It has also been controverted that stamp was purchased by the defendant from Stamp Vendor on 21.07.1997.

9. It has also been submitted that the aforesaid forged document has been created only to avoid Title Suit No. 151/1997. It has further been submitted that when an Advocate Notice on her behalf was served upon defendant on 17.06.1997 through her lawyer, late Ram Lakhan Prasad for eviction of the building, then in that

event, it was unimaginable that defendant will indulge in negotiation of the sale of the said building and execute such kind of document. With regard to amended part of the plaint, relating to service of Advocate Notice as well as presence of registration receipt, it has been submitted that the same has been created by the plaintiff.

10. On the basis of rival pleading, the learned lower court had framed the following issues:-

- I. Is the suit as framed maintainable ?
- II. Has the plaintiff got cause of action for the suit ?
- III. Is the suit barred under provisions of Specific Relief Act?
- IV. Has the defendant executed the deed of Baibeyana in favour of plaintiff with respect to suit holding no. 627 (New-59) situated at Puran Bazar in Nawada Town ?
- V. Whether the defendant ready and willing to perform his part of contract or not ?
- VI. To what relief/reliefs the plaintiff is entitled ?

and decided issue no.4 and 5 against the plaintiff in favour of defendant whereupon the remaining issues have also been decided in the same manner and had dismissed the suit against which, the appeal bearing nos. 07/2009/39/1999 was filed before the learned District and Sessions Judge which was decided by the judgment impugned allowing the appeal after setting aside the judgment and decree passed by the learned lower court remitting the matter with a direction to procure expert opinion relating to so-called agreement and then, a fresh judgment be passed. Hence, this appeal at the behest of

appellant/defendant.

11. While assailing the judgment impugned, it has been submitted on behalf of appellant/defendant that learned appellate court failed to appreciate the basic principle of law whereunder plaintiff is required to prove its case. The aforesaid principle is found more rigorously endowed in case it happens to be a suit under Specific Performance of Contract Act whereunder plaintiff has to substantiate the willingness to sell, negotiation, part payment, deed of agreement, if any, willingness as well as readiness, declining at the end of the vendor and further the cause necessitated for filing of a suit.

12. It has also been pleaded at the end of learned counsel for the appellant that the instant case has a peculiar theme which the learned appellate court failed to perceive and that happens to be with regard to inter se relationship in between the parties to be mother and son and further, admitted fact that the ground floor was taken on rent on monthly basis by the plaintiff since before under Kirainama. In likewise manner, the appellant/defendant had substantiated that before institution of instant case, appellant/defendant had already served Advocate Notice identifying the respondent/plaintiff to be defaulter and further, directing him to clear the arrear and regularize the payment of rent on monthly basis failing which, directing him to vacate the house followed with institution of Title (Eviction) Suit



No.151/1997 really creates a doubt and suspicion over authenticity of the so alleged document said to have been executed by the appellant/defendant on 22.07.1997. Furthermore, from the evidence of the plaintiff/respondent himself, it is apparent that he had indulged himself in drawing up so many kinds of litigations regarding other properties also. Therefore, the strained relationship having surfaced in between is found duly substantiated, admitted whereupon theme of negotiation followed with receipt of earnest money, execution of agreement became suspicious one.

13. Not only this, it has also been submitted that during course of evidence, the witnesses so examined on behalf of plaintiff/respondent had shown their presence improbable and in likewise manner, their conduct also nullified the genuineness of so alleged deed of agreement whereupon, the deed in question would not have been taken into consideration for any purpose.

14. At the present moment, learned counsel for the appellant further submitted that, that happens to be the reason behind that in Title (Eviction) Suit No. 151/1997 the plaintiff/defendant appeared and filed WS only after having preparation of forged and fabricated document keeping away from appearance for long which happens to be another circumstance to suggest that the document in question happens to be a forged one.

15. It has further been submitted that that happens to be reason behind that the respondent/plaintiff neither at the initial stage nor during course of his evidence, prayed before the Court to have comparing of handwriting/LTI having over so called agreement paper as well as examination by a handwriting expert or by Forensic Science Laboratory. In spite of having acknowledgement of denial at the end of appellant/defendant, during course of appellate stage same was purposely argued only to linger the suit with mala fide intention. In likewise manner, the appellate court, instead of recording that burden was upon the respondent/plaintiff to substantiate his plea, and if duly discharged, then in that event, would have diverted to see whether the appellant/defendant, while having shifting of onus, duly explained, illegally taken note of discloser made by the appellant/defendant during course of her evidence that she will get it examined, directed so. The aforesaid direction of the appellate court putting the evidence of appellant/defendant for consideration, contradicted the basic principle of law requiring the respondent/plaintiff to prove, relied upon incidental discloser at respondent/plaintiff, which ought not to have been considered. Hence, the appellate court deflected from basic principle of law while setting aside the judgment and decree of the learned lower court as well as remitting the matter to the learned lower court for having examination

of the document by a handwriting expert and then, pass judgment, afresh.

16. On the other hand, learned counsel for the respondent submitted that being a suit under Specific Performance Of Contract Act, no other incidental event is to be taken into consideration which, the learned lower court had considered while dismissing the suit. However, the same has been taken into consideration in its right perspective by the learned appellate court.

17. It has also been submitted that broadly the pleading of respondent/plaintiff has been admitted at the end of appellant/defendant, having ground floor given on the rent to the respondent/plaintiff, giving the key of the upper floor of the building and for that, though some sort of explanation has been made, is found unbelievable as, respondent/plaintiff was separate in mess and business from appellant/defendant, his mother. The explanation furnished by the appellant/defendant with regard to possession given relating to upper floor of the building in question is found particularly unrealistic, then in that event, the event of giving the upper floor under the possession of the respondent/plaintiff is indicative of the fact that the same was effected in pursuance of negotiation having arrived at in between appellant and defendant for sale of the house in question as well as acceptance of earnest money.



18. Furthermore, it has also been argued that there happens to be consistent evidence in support of the pleading that negotiation amongst the parties was finalized over consideration money of Rs 1,50,000/- out of which, at the time of execution of the agreement, appellant/defendant received Rs 50,000/- as an earnest money and further, the witnesses so examined on behalf of respondent/plaintiff had substantiated execution of the agreement deed after receipt of Rs.50,000/-. Not only this, from the income tax return, it is found that payment to a tune of Rs. 50,000/- for purchase of the house has also been shown. Therefore, the cumulative effect of the evidence adduced on behalf of respondent/plaintiff is found sufficient to substantiate the negotiation, receipt of earnest money out of the agreed amount, part performance by way of execution of agreement as well as delivering possession of the upper floor and so, the burden is found duly discharged.

19. Much stress has also been laid over the readiness and willingness at the end of the respondent/plaintiff in order to perform his part as he is always ready with the remaining amount appertaining to Rs. 1,00000/-, consequent thereupon, the instant appeal is fit to be dismissed.

20. It has further been submitted that as the respondent/plaintiff has proved its case relating to negotiation,



execution of agreement, receipt of earnest money, readiness as well as willingness, therefore, the learned appellate court had rightly directed the learned lower court to have the signature of the appellant/defendant verified that the document in the background of her own admission that she is ready to get her signature having over agreement deed, properly examined by a handwriting expert which, is found in accordance with law to verify whether the agreement in question does bear the signature of appellant/defendant.

21. It has also been submitted that presence of Eviction Suit at the end of appellant/defendant is not going to axe his interest because of the fact that both have got two independent arena of adjudication. Moreso, the respondent/plaintiff, who happens to be defendant in the aforesaid Eviction Suit had filed WS whereunder apart from controverting the pleading of the appellant/defendant, had also asserted that appellant/defendant had negotiated with the respondent/plaintiff over sale of the building under dispute which was finalized over consideration money of Rs. 1,50,000/- out of which she had accepted Rs. 50,000/- as an earnest money and executed deed of agreement in token thereof, followed with handing over delivery of possession of the upper floor and so in the aforesaid background was neither a landlord nor Respondent/plaintiff happens to be tenant since thereafter, as such the controversy goes out of purview of Eviction

Suit.

22. In the aforesaid background, it has been pleaded that the instant appeal happens to be non maintainable and is, accordingly, fit to be dismissed.

23. Before coming to the factual aspect, the principle so governing during course of adjudication of a suit guided by Specific Performance of Contract Act is to be taken note of.

24. In *K. Nanjappa (Dead) by LRs v. R.A. Hameed @ Ameersab (Dead) by LRs and Anr.* reported in *AIR 2015 SC 3389*, it has been held:-

19. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. Lord Du Parc in a case (AIR 1946 Privy Council) observed, while deciding a suit for specific performance, that an oral contract is valid, binding and enforceable. A decree for specific performance could be passed on the basis of oral agreement. This view of a Privy Council was followed by this Court in the case of Koillipara Sriramulu vs. T. Aswatha Narayana, AIR 1968 SC 1028, and held that an oral agreement with a reference to a future formal contract will not prevent a binding bargain between the parties.

20. However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immoveable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immoveable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immoveable property were concluded between the parties.

21. In a suit for specific performance of a contract, the Court has to keep in mind Section 20 of the Specific Reliefs Act. This Section preserves judicial discretion to grant decree for Specific performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

22. In the case of *Surya Narain Upadhyaya vs. Ram Roop Pandey and others*, 1995 Supp (4) SCC 542, this Court while considering Section 20 of the Specific Relief Act held as under:-

“4. Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a relief merely because it is lawful to do so; but the discretion of the court is not arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. This case demonstrates that the High Court took irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellant court, namely the appellant has always been ready and willing to perform his part of the contract.”

23. It is equally well settled that relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonably judicial principles. The cases providing for a guide to courts to exercise discretion one way or other are only illustrative, they are not intended to be exhaustive, In England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions.

24. In the case of *Mayawanti vs. Kaushalya Devi*, (1990) 3 SCC 1, this Court observed as under:-

“8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of



Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.”

25. In the case of *K. Prakash vs. B.R. Sampath Kumar*, (2015) 1 SCC 597, this Court held:

“13. Indisputably, remedy for specific performance is an equitable remedy. The court while granting relief for specific performance exercises discretionary jurisdiction. Section 20 of the Act specifically provides that the court’s jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

14. The King’s Bench in *Rooke’s* case said:

“Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others, allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with.”

15. The Court of Chancery in *Attorney General v. Wheate* followed *Rooke’s* case and observed: (ER p. 666)

“... the law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and



confusion would ensue. And though proceedings in equity are said to be *secundum discretionem boni viri*, yet, when it is asked, *vir bonus est quis?* The answer is, *qui consulta patrum, qui leges juraque servat*. And as it is said in *Rooke's case*, that discretion is a science not to act arbitrarily according to men's wills and private affections; so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every Judge."

16. The principle which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree for specific performance: that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance."

26. Reference may also be made by this Court in the case of *Zarina Siddiqui vs. A. Ramalingam*, 2015 (1) SCC 705, this Court observed as under:-

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance.”

25. In the light of principle laid down by the Hon’ble Apex Court as referred above, now facts of the case it to be taken note of.

26. The instant suit has been filed in the year 1999. The suit is based upon an agreement dated 22.07.1997 allegedly entered in between the defendant/appellant as well as respondent/plaintiff relating to sale of house which materialized on a consideration amount of Rs. 1,50,000/- out of which Rs. 50,000/- was paid by the respondent/plaintiff in lieu of part performance and in token thereof, deed of agreement (Bai-Beyana) was executed by the appellant/defendant. Aforesaid agreement (Bai-Beyana) was executed and the same happens to be authenticated by Chaudhary Krishna Ballabh Sahay, Notary, Nawada. It has also been incorporated that the respondent/plaintiff who happens to be tenant on the ground floor of the aforesaid building became owner of the building on account of



transfer of possession of the upper floor. Furthermore, it has been incorporated that defendant had undertaken to execute sale deed by 13.05.1999 and as the defendant failed to execute the sale deed within the aforesaid period, then thereafter, filed suit for Specific Performance for Contract Act. It is also apparent from the pleadings that in the year 1997 Eviction Suit was drawn up against the respondent/plaintiff itself. The appellant/defendant denied any kind of negotiation having in between plaintiff and defendant, materialization of the same over Rs. 1,50,000/- as consideration money, having put her signature over deed in question after receiving Rs.50,000/- though admitted handing over of key of upper floor with certain explanation. Furthermore, it is evident that Respondent/plaintiff appeared and filed WS in connection with Eviction Suit in the year 1999, though suit was filed in the year 1997. In likewise manner, it is also evident that both the parties are on litigation since 1997.

27. Because of the fact that respondent/plaintiff is under statutory obligation to prove its case, that means to say, the incident of negotiation, finalization of the deal, receipt of Rs. 50,000/- as an earnest money, execution of deed of agreement, transfer of possession, however, from the judgment of the learned appellate court, it is apparent that the aforesaid theme were left over and instead thereof, the discloser coming out from the evidence of



appellant/defendant that she will get her signature examined by a handwriting expert, has been seriously perceived and further, remitting the case to the learned lower court, directed the signature to be examined by a handwriting expert. As stated above, it was incumbent upon the plaintiff to have substantiated his case by cogent and reliable evidence, as he was under obligation to prove. Onus would shift on defendant only after having the burden properly discharged by the plaintiff.

28. From the recital of the plaint, it is evident that no date or sitting has been disclosed whereunder negotiation was finalized. Respondent/plaintiff has been examined as PW-1, who, during course of his evidence too failed to depose on that very score. In para-3 of his examination-in-chief, he had stated that on the basis of agreement, the negotiation was finalized relating to land and building in presence of witnesses over Rs.1,50,000/- . In para-6, he had stated that the land was purchased in the name of his mother(defendant) and during course thereof, he had also contributed. It has further been deposed that, that happens to be reason behind that his mother intended that he should be the owner of the land. To justify the same, he had further deposed that he is earning since the age of 15 years having active involvement with his father in business. In para-9, he had stated further that agreement was scribed as per direction of his mother who

got it read over and finding it correct, put her signature as well as also gave LTI. In her presence, Mukhtar, Ainul had signed and then thereafter, the aforesaid document was handed over to him by her mother which he had deposited in court.

29. It is evident that two agreements are available on the record. The first one is typed copy which is of dated 22.07.1997 allegedly executed by Bibi Mehrun Nissa, appellant/defendant containing signature of so many persons as a witness, scribe and the other document happens to be executed by the same Bibi Mehrun Nissa, appellant/defendant in favour of respondent/plaintiff for the same piece of land whereupon also so many persons stood as witnesses including that of Jagdish Prasad as well as Md. Shafique Alam, Md. Afroz Khan. This document happens to be dated 2.2.1998 and duly notarized. With regard to document dated 22.07.1997, page no.1 does not contain signature of any of the witness save and except respondent/plaintiff himself. Page No.2 contains signature of one witness, Ainul Haque and page no.3 contains the signature of Md. Mukhtar. That means to say, presence of witnesses namely, Md. Mukhtar (para-8) of the plaint is found while at para-9 of the deposition, the same has been substituted by Ainul Haque.

30. Now coming to his cross-examination, it is evident that the parties are on litigating terms since the year 1997 and so many



cases cropped up since thereafter including probate case no.09/1997 which was subsequently deserted by him. He had further admitted at page no.10 of his cross-examination with regard to presence of agreement dated 02.02.1998 as referred above and he had further stated that the aforesaid document was also filed at his behest, however, neither the same has been incorporated in plaint nor in his examination-in-chief. He had further been elaborately cross-examined with regard to the document dated 02.02.1998 under page 11 also. However, he failed to explain under what circumstances, deed dated 02.02.1998 was scribe and further, which, either of two happens to be operative.

31. For the first time, during cross-examination at page no.12, he had stated that negotiation in between him along with his mother took place on 14/15 July 1997 at his residence. He had not paid cash on the said date rather he paid on 22.07.1997 at his house at about 4/5:00 P.M.. He had further stated that at the time of payment, he with his wife, mother, children, Kishori Prasad, Mukhtar Alam, Ainul Haque along with others were present but he is not remembering their names. He is also not remembering whether his brother, wife of brother, sisters, husband of sisters were present or not. He had further stated that payment was made in cash. He had further stated that he had not withdrawn the aforesaid amount from bank



rather from his shop. At page no.15, he had stated that he had purchased the document on 15th July 1997. Draft was prepared on 22nd July 1997. He had further stated that the aforesaid draft was prepared after payment of Rs. 50,000/- by Shiv Ratan Prasad, an Advocate. He had further stated that Kishori Babu, a Munshi had typed the same. He had further stated that Bai-Beyana was prepared after 2-3 days of payment. Again, he corrected as it was prepared on the same date. Then his cross-examination has been confined with regard to document dated 22.07.1997. At page 19 again, cross-examination has been made over the document dated 02.02.1998.

32. PW-3 is Ainul Haque, one of the alleged attesting witnesses over document dated 22.07.1997. From his evidence, more particularly, paragraph-3 thereof, it is evident that he had deposed that in his presence Bibi Mehrun Nissa had put her signature as well as put her LTI whereupon, he had also signed. Md. Mukhtar had also signed. Another three persons had also signed. Ehsanul Haque had also signed. The document was a typed one which was read over to Mehrun Nissa. In his presence Rs. 50,000/- was give to Mehrun Nissa and in pursuance thereof, had handed over key of upper floor of the house. From his cross-examination, apart from, admitting that he had not noted down that the payment was made in his presence. LTI was given by Mehrun Nissa in his presence. He attested LTI of Mehrun



Nissa. At page no.3 of his cross-examination had been stated that one boy had come to call him that *Maalkin* is calling him. He reached at 4:30-4:45 P.M. The document was typed since before, signature, LTI was put in his presence. He had further admitted that since before 22.07.1997, Mehrun Nissa never called him to stand as a witness over any document.

33. PW-4 is Md. Mokhtar who had stated that on 22.07.1997, Mehrun Nissa had signed as well as put her LTI in his presence over which he had put his signature. He had further stated that in his presence, Ehsanul Haque had paid Rs. 50,000/- whereupon his mother handed over key of upper floor of the building. During cross-examination, at page-3, he had admitted that he had not noted down that Rs. 50,000/- was paid in his presence. He had further stated that on 1st and 2nd page of the document he did not put his signature.

34. From the evidence of PW-3, Md. Mukhtar, it is evident that he had not stated with regard to presence of PW-2, Ainul Haque and in likewise manner also failed to depose that Ainul Haque had signed in his presence nor he had stated that Ainul Haque was present since before. Furthermore, there happens to be vital inconsistency amongst the evidence of PW-1, PW-2, PW-3 over preparation of the document in question as well as conduct of the parties.

35. The other remaining witnesses which goes up to serial

22 are irrelevant because of the fact that they are not over the document dated 22.07.1997, although, PW-6, Kishori Lal had tried unsuccessfully to support the case of the respondent/plaintiff.

36. Apart from this, save and except PW-1, none happens to be over the negotiation and in likewise manner, PWs 3 and 4 failed to depose on that score. PW-3 and 4 have also ruled out the possibility of presence of other PWs, more particularly, PW-6 and in likewise manner other events.

37. From the judgment of learned appellate court, it is apparent that much emphasis has been drawn over the statement of the income tax. The aforesaid event as well as filing of WS in Eviction Suit No.151/1997 is to be taken note of. All those documents have been filed in the year 1999, after institution of the instant suit and on account thereof, became doubtful. More particularly, having presence of document dated 02.02.1998 which, though has been on the record but surreptitiously duly covered by way of having its absence in the plaint as well as during course of examination-in-chief by PW-1, Respondent/plaintiff himself. The presence of aforesaid document of the year 1998 having allegedly executed by appellant/defendant in the background of series of litigation launched in between the parties since year 1997, was really possible and further institution of the suit before filing of the Eviction Suit is another circumstance to be taken

note of which, cast doubt over genuineness of document dated 22.07.1997.

38. Apart from this, after having parallel scrutiny of evidence of PW-1, P.W.3 and PW-4, it is evident that the same happens to be inconsistent with each other. As, plaintiff under Section 101 of the Evidence Act, is under obligation to substantiate its case by cogent and reliable evidence, is found completely deaden, on account thereof, is found deciduous one. Apart from, improbability visualizing from the evidence of respondent/plaintiff (PW-1) that dispute arose since the year 1997 is found admitted one, cast doubt over negotiation as alleged in the year 1997, that too in the background of another document (deed of agreement) for the same land, in between same party dated 02.02.1998. The aforesaid evidence had given complete goby by the learned appellate court.

39. Furthermore, it is evident that right from WS, appellant/defendant had denied her presence over alleged deed of agreement, on account thereof, it was known to the respondent/plaintiff over aforesaid event. Then in that circumstance, the respondent/plaintiff should have taken proper step to have signature properly verified/compared by a handwriting expert. Having failed on that score, cannot be allowed to revisit that too during appellate stage, as by such action, it would be deemed that lacuna

persisting in the case of plaintiff is going to be filled up, which cannot be allowed, that too by way of exonerating him from his responsibility, at the other end, picking the evidence of defendant.

40. As such, the inconsistency amongst the evidences of the PWs inconsonance with the deficiency persisting on the record do not justify acceptability of the judgment passed by the learned appellate court. Hence, the judgment of the learned appellate court is set aside. Appeal is allowed.

41. However, in the facts and circumstances of the case, parties will bear their own costs.

Patna High Court
March 11th 2016
perwez/AFR

(Aditya Kumar Trivedi, J)

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