

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**First Appeal No.347 of 1978**

**Against the Judgment and Decree dated 08.04.1978 passed  
by 2<sup>nd</sup> Subordinate Judge, Ara in Title Suit No.30 of 1974.**

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Amar Nath Sharma & Ors

.....Defendants - Appellants

Versus

Babli Tiwari & Ors.

.....Plaintiffs-Respondents

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**Appearance :**

For the Appellant/s : Mr. Rajendra Narain, Sr. Advocate  
Mr. Sanjay Kumar Sharma, Advocate with him.

For the Respondent No.1: Mr. Kumar Kaushik, Advocate  
Mr. Anup Kumar Tiwari, Advocate

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**Dated : 19<sup>th</sup> day of June, 2017**

**P R E S E N T**

**CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO**

**CAV J U D G M E N T**

1. The original defendant, Sidhnath Sharma, had filed this First Appeal against the Judgment and Decree dated 8.4.1978 passed by the learned IInd Subordinate Judge, Ara in Title Suit No.30 of 1974 whereby the plaintiff respondent's suit for specific performance



of contract was decreed. During pendency of the appeal, the original defendant appellant died and his legal representatives have been substituted. Likewise the plaintiff respondent No.1, Jagdish Prasad Tiwary also died and his legal representatives have been substituted.

2. The plaintiff respondent filed the suit praying for specific performance of contract with respect to the suit land and in the alternative, prayer was made for a decree for realization of Rs.3000/- which was paid as earnest money to the plaintiff respondent.

3. The plaintiff claimed the aforesaid relief alleging that the defendant No.1 who is respondent No.1 herein negotiated to sell the suit property as he was in need of money. The consideration amount was finalized at Rs.26,000/- and out of that the plaintiff paid Rs.3000/- as earnest money to the defendant No.1 and on 24.05.1972, a registered deed of Mahadnama was executed. It was agreed that the defendant No.1 would take permission from the consolidation officer and then will execute the registered sale deed after receiving balance consideration amount of Rs.23,000/-. The defendant No.1 ultimately obtained the permission in the month of February, 1974 but in spite of several request, the defendant No.1 avoided to execute sale deed. Hence the suit was filed.

4. The further case is that the plaintiff learnt that the defendant No.1 has executed a sale deed dated 7.5.1974 in favour of defendant



No.2 for Rs.24,000/- but as a matter of fact, the sale deed is forged, fabricated and without consideration and is not binding on the plaintiff. The defendant No.2 had full knowledge about the agreement between the plaintiff and defendant No.1 and had also knowledge about the permission obtained by the defendant No.1 to sell the property to the plaintiff but in spite of this fact, the defendant No.2 got a forged and fabricated Mahadnama from defendant No.1 in collusion with him antedating the Mahadnama. Therefore, the same is not binding on the plaintiff.

5. The defendant No.2, the original appellant, appeared and filed contesting written statement. The main defence is that the defendant No.1 never executed any Mahadnama in favour of the plaintiff. The Mahadnama dated 24.05.1972 is forged and fabricated document. The plaintiff never paid earnest money of Rs.3000/-. The defendant No.1 agreed to sell the suit land for a consideration of Rs.24,000/- to this defendant and for that a Mahadnama was executed on 23.05.1971 and this defendant No.2 paid Rs.6000/- as earnest money. The defendant No.1 agreed to execute sale deed within 1.11.1971 after accepting the remaining consideration money. The defendant No.2 several times requested the defendant No.1 to obtain permission from consolidation officer and ultimately permission was obtained in April, 1974 and thereafter on 8.5.1974, he executed



registered sale deed in favour of defendant No.2. At the time of execution and registration of sale deed, it was agreed that Rs.6500/- would remain with defendant No.1 which is to be paid to Rehandar Ram Prasad Mahto and Ram Pravesh Mahto. The remaining consideration amount was to be paid at the time of exchange of the receipt. The plaintiff was knowing this fact from the very beginning. After the execution of the sale deed, the defendant deposited the rehan money in Case No.27 of 1974 and 28 of 1974. The plaintiff got a forged Mahadnama in collusion with defendant No.1. All other allegations had been denied by this defendant.

6. The defendant No.1 vendor of defendant No.2 also filed the written statement supporting the case of the defendant No.2. It is stated in the written statement that after the execution of the Mahadnama in favour of defendant No.2, the plaintiff gave allurement to him and obtained the Mahadnama. According to this defendant, on pressure he executed the Mahadnama. In fact the plaintiff did not pay any amount. The plaintiff was knowing the fact of agreement between the defendant No.1 and defendant No.2. Therefore, the plaintiff is not entitled for grant of decree for specific performance of contract.

7. In view of the above pleadings of the parties, the learned trial Court framed the following issues :-



- (i) Whether the suit as framed is maintainable?
- (ii) Whether the plaintiff has got any cause of action or right to sue?
- (iii) Whether the suit is barred by limitation?
- (iv) Whether the Mahadnama dated 24.05.1972 executed by defendant No.1 in favour of the plaintiff is genuine and valid or whether the Mahadnama executed in favour of defendant No.2 is genuine and or prior date?
- (v) Whether the plaintiff is entitled to get a decree for specific performance of contract for sale with respect to the suit and on the basis of the Mahadnama dated 24.05.1972?
- (vi) Whether the suit has abated under the provisions of Section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act?
- (vii) Whether the plaintiff is entitled to get any decree or any other relief as claimed for?

**8.** The learned trial Court heard the parties and on the basis of evidences oral and documentary recorded finding that the Mahadnama of defendant No.2 is suspicious and not a genuine document. The learned trial Court also came to the conclusion that the Mahadanam of the plaintiff dated 24.05.1972 is a genuine document. Plaintiff has



been able to prove that he has always been ready to perform his part of the contract. Accordingly, the suit was decreed.

9. The learned senior counsel, Mr. Rajendra Narain, appearing on behalf of the appellant submitted that the plaintiffs claimed the relief for specific performance of contract which is very weak right. But the learned Court below held that exhibit 'A' the agreement of the defendant No.2 is not a genuine document although the plaintiff never sought for any relief with respect to this Mahadnama and it is also not the case of the plaintiff that no permission was obtained from consolidation officer to sell the suit property in favour of the defendant No.2 but the learned trial Court held that the order granting permission has not been produced as such the entire case of the defendant appellant has been discarded. According to the learned senior counsel, the findings of the trial Court are based on presumption and assumption and also on surmises and conjectures as such the findings are liable to be set aside. The learned senior counsel further submitted that the trial Court has wrongly drawn adverse inference against the defendant appellant for non-examination of defendant No.1 which vitiated the judgment. The defendant No.2 being the purchaser stepped into the shoes of the vendor defendant No.1 as such he has the same right as that of the vendor to defend the suit. In such circumstances, the learned trial Court could not have



drawn adverse inference.

**10.** The learned senior counsel further submitted that the learned trial Court has mis-appreciated the evidences as a result of which the judgment and decree is vitiated and thus is liable to be set aside. No evidence has been produced by the plaintiff which can be relied upon to show that the defendant No.2 appellant had any knowledge about the agreement of the plaintiff with defendant No.1 and moreover the agreement of this defendant No.2 with defendant No.1 is the earlier agreement and as soon as the registered sale deed executed it related back to the date of the agreement, and therefore, also the plaintiff is not entitled to any decree. The learned senior counsel further submitted that in fact no reliable evidence has been produced by the plaintiff to show that he was ready and willing and still ready and willing to perform his part of the contract and the learned trial Court in one line has held that the plaintiff has proved readiness and willingness without considering the evidences. The learned senior counsel further submitted that the trial Court gave much emphasis that the agreement in favour of the appellant is unregistered whereas the agreement of the plaintiff is registered. According to the learned senior counsel, the agreement is not required to be registered, and therefore because it is unregistered it cannot be discarded and / or the registered document cannot be given preference



to. On these grounds, the learned counsel submitted that impugned judgment and decree be set aside after allowing the appeal and the plaintiff respondent's suit for specific performance be dismissed with cost.

**11.** On the other hand, the learned counsel for the plaintiff respondent submitted that the initial burden is on the subsequent purchaser to prove that he had no knowledge about the agreement between the vendor and the plaintiff and in the present case, the plaintiff had clearly pleaded that the defendant No.2 who is the subsequent purchaser had knowledge about the agreement between defendant No.1 and the plaintiff and the Court below found is to be correct. In support of his contention, the learned counsel relied on the decision of the Hon'ble Supreme Court reported in *(1998)5 SCC and 2001 (2) PLJR 25 SC*. According to the learned counsel at paragraph 11 of the plaint, it is specifically pleaded that the defendant No.2 had the knowledge about the agreement between the plaintiff and defendant No.1. The learned trial Court considered each and every evidence and thereafter recorded the finding. In support of his contention, the learned counsel placed the evidences of plaintiff witnesses P.W.9, 10, 11 and 14 and submitted that plaintiff has been examined as P.W.14 who was power of attorney holder of original plaintiff. The learned counsel further submitted that in fact the



defendant No.2 obtained the agreement in collusion with defendant No.1 antedating the agreement with a view to defeat the agreement of the plaintiff and the Court below on the basis of the material recorded correct finding as such the finding of the trial Court needs no interference. On these grounds the learned counsel submitted that the First Appeal be dismissed with cost.

**12.** In view of the above contentions of the learned counsels for both the parties, the following points arises for consideration :-

- (i) Whether the plaintiff respondent is entitled for a decree for specific performance of contract on the basis of Mahadnama dated 24.05.1972?
- (ii) Whether the agreement of the defendant No.2 appellant is forged, fabricated or whether the plaintiff's agreement is forged and fabricated?
- (iii) Whether the plaintiff has been able to prove his readiness and wiling continuously as such he is entitled for the decree for specific performance ?

**Point No.(i) and Point No.(ii)**

**13.** Since both these points are inter-related and are important for the determination of the real controversy between the parities, both are taken together. The plaintiff has filed the suit for specific



performance of contract. His simple case is that agreement was entered into between plaintiff and defendant No.1 and agreement was executed and registered on 24.05.1972. This agreement have been produced by the plaintiff which is ext. '1'. On the contrary, according to the defendant No.2, this agreement is forged and fabricated. The plaintiff at paragraph 10 clearly pleaded that the plaintiff learnt that a registered sale deed dt.7.5.1974 has been executed by defendant No.1 in favour of defendant No.2. This sale deed is created document and is not binding on the plaintiff and at paragraph 11, it is pleaded that if any antedating agreement is created then it is not binding on the plaintiff nor the defendant No.2 has any right to get any benefit of this agreement.

**14.** In view of this pleading of the plaintiff, now it becomes admitted by the plaintiff that there was an agreement in favour of defendant No.2 and according to the plaintiff, this agreement is antedated. No doubt in paragraph 11, it is skill fully drafted to the effect that if any agreement is there which is antedated it is not binding on the plaintiff. It is sufficient enough to hold that the plaintiff admitted the existence of the agreement. However, the plaintiff never claimed any relief with respect to this agreement in favour of the defendant No.2 executed in between defendant No.1 and 2. This agreement had been produced by the defendant No.2 which



has been marked as ext. 'A'.

**15.** Now, assuming the case of the plaintiff that there was agreement between the plaintiff and defendant No.1 which is registered agreement ext. '1' and it is a genuine agreement but then also if the agreement of the defendant No.1 with defendant No.2 is prior to the ext. '1', '10', the sale deed which has been executed and registered by the defendant No.1 in favour of defendant No.2 will relate back to the agreement of defendant No.2 as such it will prevail.

**16.** Now, let us see the evidences produced by the parties. P.W.1 has stated that he knows Sidhnath Sharma and also Sidhnath @ Hemant Prasad. Both are in good term. This is the evidence of P.W.2, 3 also. P.W.4 has proved the agreement to sell ext. '1'. P.W.5 is witness of ext. '1'.

**17.** P.W.6 has stated that Jagdish Tiwary had executed a power of attorney in favour of Ram Brikchh Tiwary which was scribed by this witnesses and this power of attorney has been marked as ext. '2'.

**18.** It may be mentioned here that the plaintiff Jagdish Prasad Tiwary has filed the suit but he has not been examined as witness in the present case. There is no pleading in the plaint to the effect that he executed any power of attorney in favour of Ram Brikchh Tiwary. The learned senior counsel, Mr. Rejendra Narain submitted that the



plaintiff who filed suit for specific performance of contract has not been examined as witnesses, therefore, there is no evidence in support of this case that the agreement of the defendant No.2 and defendant No.1 is antedated. All the witnesses examined on behalf of the plaintiffs are not competent to say so because they are not party to the agreement either entered into between the plaintiff and defendant No.1 or between the defendant No.1 and defendant No.2. The learned Court below instead of drawing adverse inference against the plaintiff, adverse inference had been drawn against the defendant No.2 wrongly.

**19.** So far the submission of the learned senior counsel is concerned, it is admitted fact that the plaintiff Jagdish Prasad Tiwary has not been examined as witness. There is no pleading that he executed any power of attorney. Therefore, the power of attorney produced by this P.W.6 is without any pleading, i.e., without any basis, and therefore, just liable to be ignored. Moreover, in the plaint also it is not described that plaintiff is represented or is filing the suit through power of attorney holder.

**20.** P.W.7 is on the point of agreement between plaintiff and defendant No.1 and filing of application for permission before consolidation officer which is not relevant for deciding the controversy. P.W.8 has stated that he had heard that defendant No.1



had executed an agreement in favour of plaintiff, therefore, he is heresay witness. P.W.9 has stated that in 1974, defendant No.1 and defendant No.2 went to him for preparing a document and they were talking that agreement was there in favour of Jagdish Tiwary but now the defendant No.1 does not want to sell to Tiwary and this witness refused to prepare any such document. P.W.10 has stated about execution of agreement by defendant No.1 in favor of Jagdish Tiwary,. He has also stated that Ram Brikchh is famous person. P.W.11 is also on the point of execution of agreement in favour of plaintiff. P.W.14 is Ram Brikchh Tiwary. He stated that plaintiff is his nephew. A power of attorney has been executed in his favour for looking after this case which he has already filed. Thereafter, he has deposed in support of the pleading in the plaint regarding agreement to sell in favour of plaintiff. At paragraph 4 of his deposition, he stated that this witness learnt that defendant No.1 had executed sale deed in favour of defendant No.2 then he obtained the certified copy. He denied the suggestion that defendant No.1 had executed any agreement in favour of defendant No.2 in the year 1971. The agreement dt.23.05.1971 is a forged document and is antedated. Therefore, according to the evidence of this witness, the knowledge is of this witness and not the knowledge of the plaintiff. Whatever he stated is with respect to his knowledge only. The knowledge of this



witnesses cannot be said to be the knowledge of the plaintiff, Jagdish Prasad Tiwary. Therefore, it can very safely be said that this witness P.W.14 is playing a vital role in the case and in fact this witnesses is fighting the case and this fact that he is fighting the case would be evident from other paragraph of his evidence such as paragraph 6 also. There is no evidence adduced by this witness regarding the knowledge of the subsequent purchaser defendant No.2 about ext. '1'.

**21.** The other witnesses examined on behalf of the plaintiffs appears to be very formal in nature.

**22.** The defendants have also examined many witnesses. D.W.3 has stated that Ram Brikchh Tiwary was saying Dhemon to execute an agreement in his favour in presence of this witness. Dhemon told Ram Brikchh that agreement had already been executed in favour of Sidhnath Sharma. This evidence of this witness also proved that in fact Ram Brikchh Tiwary was interested in purchasing the suit property and was asking for execution of the agreement and this is the evidence of Ram Brikchh Tiwary himself as P.W.14. It will not be out of place to mention here that P.W.14 is not the plaintiff and he is not claiming for a decree for specific performance of contract. D.W.4 has also stated that Ram Brikchh Tiwary had asked Dhemon to execute agreement in favour of Ram Brikchh Tiwary and Dhemon told him that he had already executed agreement in favour of the



present appellant. D.W.5 is the scribe of the agreement executed by defendant No.1 in favour of defendant No.2 and this witness had proved the agreement which has been marked as exhibit 'A'. D.W.7 also stated about the agreement ext. 'A'. D.W.8 has also stated that Ram Brikchh Tiwary was asking Dhemon to execute agreement in his favour.

**23.** It will not be out of place to mention here that no cross-examination have been made nor the evidence of the witness who said that Ram Brikchh Tiwary was asking for execution of the agreement to defendant No.1 is denied by the plaintiff. D.W.11 has also stated the agreement ext. 'A' and D.W.12 is the defendant No.2 appellant who has fully supported the case. D.W.13 also stated that ext. 'A' was executed in his presence by defendant No.1 in favour of defendant No.2.

**24.** In view of the above discussion of the evidences of the parties, it becomes clear that there is no evidence in support of the pleadings in the plaint. In the plaint, it is pleaded that the defendant No.1 executed registered sale deed which is forged sale deed. There is no evidence to that effect. The settled law is that a registered sale deed is presumed to be valid in all respect unless it is proved otherwise by the person who asserts that the sale deed is forged and fabricated. No evidence to this effect had been adduced by the



plaintiff. It is pleaded in the plaint that if any Mahadnama is there in favour of defendant No.2 then it is forged and antedated. The plaintiff never came to the witness box in support of his pleading in the plaint. Therefore, whatever is pleaded with respect to ext. 'A' is unrebutted. As stated above, existence of ext. 'A' is not denied by the plaintiff. It is only stated that it is antedated but no reliable evidence has been produced. Moreover the plaintiff has not been examined.. P.W.14 himself claimed to be the power of attorney holder of the plaintiff. But there is no such pleading in the plaint nor the plaintiff filed the suit through power of attorney holder. Further P.W.14 claimed that he was asking for execution of the agreement. P.W.14 claimed that he came to know about the sale deed by defendant No.1 in favour of defendant No.2 and he denies that defendant No.1 executed the agreement in favour of defendant No.2 in the year 1971, i.e., 23.5.1971.

**25.** This is a suit for specific performance of contract and therefore, the plaintiff is required to prove his case strictly but as stated above, the plaintiff has not come to depose in support of the pleading. P.W.14 said that he paid the consideration amount of Rs.3000/- whereas in the plaint, it is pleaded that the plaintiff paid the amount. P.W.14 is not the plaintiff and he is not seeking for a decree for specific performance of contract. It is also clear that the plaintiff



nowhere challenged the agreement of the defendant No.2 ext. 'A'. No relief has been claimed for by the plaintiff with respect to this ext. 'A'. From perusal of the impugned judgment, it appears that the trial Court without going to the fact stated above investigated about this ext. 'A' and held that it is invalid document and cannot be relied and it is suspicious document. The approach of the Court below is not correct. The Court is required to see the case pleaded by the plaintiff in one side and the case pleaded by the defendant in the other side. The Court cannot make a third piece. Here although no relief has been claimed by the plaintiff nor any declaration has been sought for with respect to ext. 'A' but the trial Court made a declaration making a third case with respect to this ext. 'A'.

**26.** The Hon'ble Supreme Court in the case of *Md. Noorul Hoda Vs. Bibi Raifunissa 1996 (7) SCC 767* has held that 'when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a



reasonable apprehension that such instrument, if left outstanding, may cause him serious injury can sue to have it adjudged void or avoidable and the Court may in its discretion so adjudge it and order it to be delivered or cancelled..”

**27.** In the present case, the plaintiff adduced evidence regarding validity of the agreement in favour of plaintiff, i.e., ext.‘1’ and obtaining permission from consolidation officer. As stated above, even if the plaintiff’s case regarding this ext.‘1’ and permission granted by consolidation officer is valid and correct then also unless the plaintiff get a declaration with respect to ext. ‘A’, he is not entitled to grant of a decree for specific performance because the sale deed of defendant No.2 will relate back to the date of agreement ext. ‘A’. The learned Court below has not at all considered in this light.

**28.** It may be mentioned here that when the sale deed of the defendant No.2 related back to the date of agreement, the defendant No.2 became owner from the date of the agreement. In such circumstances, the plaintiff has entered into agreement subsequently. Now, therefore, the defendant No.2 is not the subsequent purchaser. Thus, the plaintiff is required to pray for a declaration with respect to the registered sale deed of defendant No.2 also. But nowhere the plaintiff sought any such declaration. By filing this suit, the plaintiff only tried to ignore ext. ‘A’ and pleaded that defendant No.2 is the



subsequent purchaser, and therefore, he sought relief for decree.

**29.** From perusal of the trial Court judgment, it appears that the trial Court has given much emphasis on the ground that the agreement of the defendant No.2 is unregistered whereas the plaintiff agreement is registered. So far this observation of the trial Court is concerned, it is reiterated here that it is not the case of the plaintiff that the agreement of the defendant No.2 is unregistered, therefore, it is not reliable. In fact no relief has been claimed regarding ext. 'A'.

**30.** Further, the trial Court gave much emphasis that the plaintiff has been able to prove the genuineness of ext.'1' and payment of Rs.3000/- as earnest money. As stated above, so far this fact is concerned, even if it is admitted to be correct and the finding of the trial Court is upheld then also the previous agreement, ext. 'A' cannot be ignored.

**31.** It further appears that the trial Court gave much emphasis to the fact that the defendant No.1 obtained prior permission from consolidation officer to sell the property in favour of plaintiff. So far this fact is concerned, again there will be no difference because the sale deed of the defendant No.2 will relate back to ext. 'A', therefore, it is immaterial whether permission was granted prior to the plaintiff's permission or thereafter. Now, it is admitted fact that after permission, the defendant No.1 has sold the land to the defendant



No.2. In the written statement, this fact is admitted by the defendant No.1.

**32.** From perusal of the impugned judgment, it further appears that the trial Court gave much emphasis on the fact that when permission was granted to the defendant No.1 to sell to defendant No.2. But from ext.'9', it appears that permission was granted in April, 1974 whereas permission to sell in favour of plaintiff was granted on 20.02.1974. Further the trial Court also gave much emphasis that application for permission was filed to sell land to the plaintiff earlier. So far these facts are concerned, in my opinion, will not invalidate ext. 'A' and this ext. 'A' is undisputed by the vendor defendant No.1 and also not challenged by the plaintiff. Moreover, except the pleading, no evidence had been adduced but the trial Court on presumption and assumption as discussed above held that ext. 'A' is invalid document without their being any claim made by the plaintiff that the document ext. 'A' is either invalid or suspicious document or it is not existent. Only statement made in the plaint is the agreement must have been antedated and created but there is no such reliable evidence and no such finding recorded by the trial Court.

**33.** The learned counsel for the respondent relied upon the decision of the Hon'ble Supreme Court reported in **2001 (2) PLJR 25 S.C. R. K. Mohamad Ubaidullah Vs. Haji C. Abdul Waheb, AIR**



*2005 SC 1420 Sargunam Vs. Chadambaram and 1998 (5) SCC 537 Jagannath Vs. Jagdish Rai* and submitted that ‘the initial burden is on the subsequent purchaser to prove that he is a bona fide purchaser for value without knowledge.’ So far this settled principle of law is concerned, there is no dispute but in the present case, these decisions are not applicable because the defendant No.2 is not the subsequent purchaser rather his agreement ext.‘A’ pursuant to which registered sale deed was executed in his favour is prior to the agreement of the plaintiff. Therefore, in fact the plaintiff entered into agreement subsequent to the agreement of the defendant No.2.

**34.** In view of my above discussion, I find that the agreement of the defendant No.2 ext. ‘A’ is prior to the agreement to the plaintiff and this ext.‘A’ is not disputed. Therefore, the plaintiff is not entitled to a decree for specific performance of contract on the basis of ext. ‘1’ which is the subsequent agreement to ext. ‘A’. The finding of the trial Court on this point is thus hereby reversed.

**Point No.(iii)**

**35.** No doubt, in the plaint, it is pleaded by the plaintiff that he was ready and willing to perform his part of the contract but in support of this pleading, the plaintiff had not been examined. Whether he was ready and willing to perform his part of the contract,



he is the best person to say and none else. Moreover, the only evidence regarding readiness is of P.W.14 Ram Brikhh Singh. This witness said that he asked the defendant No.1 to execute the sale deed and when defendant No.1 denied notice was sent by this P.W.14 to defendant No.1 and this witness has proved the notice. Again it is reiterated that this P.W.14 is not the plaintiff. There is no evidence at all that the plaintiff Jagdish Prasad Tiwary ever asked defendant No.1 to sell the land to him or ever issued any notice demanding defendant No.1 to execute the sale deed. There is no evidence that Jagdish Prasad Tiwary the plaintiff was ready and willing to perform his part of the contract. The P.W.14 at paragraph 5 has stated that the defendant No.1 sold the property to defendant No.2 to defeat the right of P.W.14 to purchase the land. Therefore, the evidence of P.W.14 speaks about his claim and not the claim of the plaintiff. Except this, there is no evidence in support of the readiness and willingness. Thus, I find that the plaintiff Jagdish Pd. Tiwary was never ready and willing to perform his part of the contract. The trial Court only observed that the plaintiff had pleaded about readiness and willing and P.W.14 has proved this without examining the evidence and pleading. Thus the finding of the trial Court is hereby reversed. The Point No.(iii) answered against the plaintiff respondent and in favour of the defendant appellant.



**36.** In view of my above discussion, I find that the plaintiff is not entitled for the grant of a decree for specific performance of contract pursuant to ext. ‘1’. So far the alternative relief is concerned, the plaintiff has not come to the witness box to say that he paid earnest money of Rs.3000/-. The defendant No.1 in his written statement clearly denied to have received the amount. Thus, there is no proof of the fact that Rs.3000/- was paid to defendant No.1 by the plaintiff.

**37. In the result, this First Appeal is allowed. The impugned judgment and Decree are set aside and the plaintiff’s suit for specific performance is dismissed. The parties shall bear their own cost.**

**(Mungeshwar Sahoo, J)**

Sanjeev/-

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