

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**First Appeal No.413 of 2002**

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1. (a) Kiran Mehta wife of Shri Dhanjay Mehta, R/o Mohalla- Goor Kis Mandi, P.O. & P.S.- Alamganj, District- Patna  
(b) Renu Mehta wife of Sri Binod Kumar, R/o mohalla- Govindpur, Fatuha, P.O. & P.S.- Fatuah, District- Patna  
(c) Sunita Kumari daughter of Late Rajendra Matho

2. Smt. Raj Kumari Devi wife of Late Rajendra Mahto

3. Radhey Shyam Mahto son of Late Rajendra Mahto

4. Ram Singh son of Late Rajendra Mahto

all R/o mohalla- Abdul Rahmanpur, Katra Bazar, P.S.- Malsalami, P.O.- Patna City, District- Patna

.....Defendants .....Appellants.

Versus

1. Lila Devi wife of Ram Lakhan Prasad

2. Sri Ram Lakhan Prasad son of Late Bihari Mahto

both R/o mohalla- Begampur Bhitri, P.S.- Chowk, District- Patna

..... Plaintiffs..... ... Respondents

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**Appearance :**

|                      |   |                                                                                                    |
|----------------------|---|----------------------------------------------------------------------------------------------------|
| For the Appellant/s  | : | Mr. Devendra Kr. Sinha, Sr. Advocate<br>Mr. Madhusudan Prasad, Advocate                            |
| For the Respondent/s | : | Mr. Ganpati Trivedi, Sr. Advocate<br>Mr. R. K. Sinha, Advocate<br>Mr. Bijay Kumar Pandey, Advocate |

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**CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA**  
**C.A.V. JUDGMENT**

**Date : 03-04-2018**

The instant appeal is directed against the judgment dated 11.10.2002 and decree dated 13.11.2002 passed in Title Suit No.189 of 1999 by Sri Binoy Kant Jha the then Subordinate Judge- II, Patna City whereby and whereunder the suit was decreed on contest with cost and the plaintiffs were directed to deposit rest balance consideration amount of Rs. 77,000/- and the defendants were directed to execute the sale deed with respect to the suit property described in schedule A of the plaint after getting rest balance consideration amount of Rs. 77,000/- within two months from the date of judgment, failing which the plaintiffs would be



entitled to get the same executed through the process of the Court. The defendants are the appellants and the plaintiffs are the respondents.

2. The plaintiffs have filed the aforesaid suit for passing decree for specific performance of contract for sale with respect to the suit land detailed at the foot of the plaint against the defendants with cost and also to execute and register the sale deed with respect to the suit land in favour of the plaintiffs after receipt of balance consideration money of Rs. 77,000/- and recovery of possession thereof to the plaintiffs and also if defendants failed to execute the sale deed and deliver the possession then the same be executed through the process of the court. The plaintiffs have also made alternative prayer that in case, if there is any difficulty in granting decree for specific performance of contract then a decree for Rs. 2,75,000/- with interest thereon be passed along with the cost of the suit.

3. Briefly stated, the case of the plaintiffs is that C.S. Plot No. 620 khata No. 102 Tauji No. 172 Thana No. 39 is the ancestral joint family property of the defendant no. 1 Rajendra Mahto who is Karta of the joint family consisting of himself and other defendants and C.S. Plot No. 619 khata no. 116, Tauji No. 333 Thana No. 39 is the self acquired property of Smt. Raj Kumari



Devi, defendant no. 2 wife of Rajendra Mahto. The defendants were in need of money, so they declared their intention to sale the portion of their respective plots. Negotiation for the same with the plaintiffs was made and the same was finalized and agreement to sale was executed on 09.12.1997 by the defendants no. 1 and 2 in favour of the plaintiff no. 1 for sale and purchase of 3 kattha of the parti land with respect to plot no. 620 and 619 at the rate of Rs. 1,10,000/- par kattha. It was agreed that the plaintiffs will get the sale deed executed within six months from the date of execution of agreement to sale after obtaining permission from the authority concerned. It was also agreed that the balance consideration amount will be paid at the time of execution of sale deed after deducting the earnest money within the stipulated period. It was further agreed that if the plaintiffs did not get the sale deed executed from the defendants within the stipulated period after payment of balance consideration money, the plaintiffs shall be held responsible for the same and in case the defendants no. 1 and 2 failed to execute and register the sale deed within stipulated period after receiving the balance consideration money then, the sale deed will be got executed through the process of the court and the defendants no. 1 and 2 shall be liable to bear the cost and damage incurred by the plaintiffs. It was also agreed that the price



of the land which is scheduled to be sold at the rate of Rs. 1,10,000/- per Kattha will be after making actual measurement and total consideration of 3 kattha of land was fixed Rs. 3,30,000/-. In case, the actual measurement comes more than 3 kattha then total consideration will be fixed at that rate. Amount of Rs. 75,000/- was paid as earnest money at the time of execution of agreement to sale which was to be deducted from the full consideration money. The agreement, incorporating the above terms, was made on 09.12.1997 and the defendants no. 1 and 2 jointly received a sum of Rs. 75,000/- as an advance and executed the agreement to sale which was duly witnessed by Parmod Kumar, Imrit Mahto and Omkar Singh, thereafter, the defendants no. 1 and 2 and plaintiff no. 1 applied for permission for sale on 25.04.1998 before the competent authority. The defendants no. 1 and 2 were in need of money for meeting immediate necessity and they requested the plaintiffs to advance further sum of Rs. 1,00,000/- and on their request, the plaintiffs paid sum of Rs. 1,00,000/- to the defendants no. 1 and 2 jointly on 09.05.1998 and the defendant no. 1 made endorsement of receipt of Rs. 1,00,000/- on the back of agreement to sale in presence of Mehta Kedar Nath. Again defendants no. 1 and 2 needed money to clear certain debt and requested the plaintiffs to advance, again a sum of Rs. 1,00,000/- which was paid



by the plaintiffs to the defendants no. 1 and 2 on 27.08.1998 in presence of Mehta Kedar Nath and the defendant no. 1 made an endorsement of receipt of Rs. 1,00,000/- on 27.08.1998 on the back of the agreement to sale. After expiry of several months when permission for sale by competent authority was not received then all the defendants individually sworn affidavit on 18.12.1998 to the effect that they are ready to execute the sale deed in respect of the land in question. Since it was presumed that permission stands automatically granted by the competent authority, so in the same way the plaintiff no. 1 also sworn affidavit to this effect. The land was actually measured on the spot and it was found that total area of land, according to measurement, is 3 kattha 4 dhur and as such the amount of total consideration comes to Rs. 3,52,000/-. The defendants got prepared a draft of sale deed proposed to be executed and gave to the plaintiff no. 1 for approval. The plaintiff no. 1 approved the draft and the same was given to the defendants for being scribed on the stamp paper and the copy of the sale deed was retained by the plaintiff no. 1. The plaintiff no. 1 has already withdrawn stamp paper from Patna Collectorate for getting the draft and scribing the relevant sale deed on 20.11.1998. Since the defendants after 18.12.1998 went on evading the execution and registration of the relevant sale deed on receipt of balance



consideration amount of Rs. 77,000/-, the stamp purchased by the plaintiffs was returned, resulting, the plaintiffs suffered a loss of 25%. Total price of the land comes to Rs. 3,52,000/- for 3 kattha and 4 Dhur and a sum of Rs. 2,75,000/- has already been paid by the plaintiff no. 1 to the defendants, so only balance amount of Rs. 77,000/- remained due which is being kept ready for payment to the defendants. The defendants after swearing affidavit on 18.12.1998 assured the plaintiffs that execution and registration of the sale deed shall be done possibly on 31<sup>st</sup> December 1998 but the defendants evaded to execute and thereafter, strike of N.G.E.O. commenced from 12.01.1999 and continued for four months, thereafter, plaintiffs again approached to the defendant no. 1 and requested to execute the sale deed but he again evaded. The plaintiff no. 1 through her husband again approached to the defendants in July 1999 but the defendants again evaded to execute the sale deed, thereafter, the plaintiffs requested Sri Mehta Kedar Nath, Pramod Kumar, Subhash Mahto and Vijay Kumar Mahto to intervene into the matter but the defendants evaded and did not attend the meeting even after on several request. Again on 11.09.1999 the defendants were requested to meet at the residence of Sachidanand in order to settle the matter with respect to execution of sale deed in which the defendants came and took time



and stated that the sale deed will be executed after Puja vacation. After Puja vacation again plaintiff no. 1 through her husband approached to the defendants to execute the sale deed after receipt of balance consideration amount of Rs. 77,0000/- which was due, then the defendants replied that he would finalize the matter after Deepawali. Again after Deepawali the plaintiff no. 2 approached the defendants on 06.11.1999 to execute the sale deed in question then, the defendant no. 1 informed that his son is not ready to execute and register the sale deed unless further sum of Rs. 50,000/- per Kattha is paid over and above the balance consideration amount of Rs. 77,000/- . The plaintiffs then sent a registered notice on 25.11.1999 through their Advocate Sri Ranjeet Singh, the plaintiffs also sent notice under U.P.C. and also sent urgent Telegraph. The plaintiffs have all along been ready and willing to perform the part of the contract as per agreement to sale dated 09.12.1997 and are still ready and willing to perform their part of contract by getting the sale deed executed and registered after payment of Rs. 77,0000/- the balance consideration money but the defendants deliberately evaded to execute and register the sale deed in favour of the plaintiffs and deliver the possession thereof and thereby evaded to perform the part of contract, hence, the necessity of the suit.



4. Briefly stated, the case of the appellants- defendants is that the suit as framed is not maintainable. It is bad due to non-joinder and misjoinder of necessary parties. The suit is barred by law of limitation and hit by principle of estoppel, waiver and acquiescence. The defendants entered into an agreement to sale the land in question for the purpose of business and to remit loan but due to delay in performing the execution of sale deed by the plaintiffs, the defendants suffered a loss and their purpose was not served. The plaintiffs have violated the terms of agreement and committed fraud to get the sale deed executed only on payment of Rs. 1,22,000/- in place of Rs. 3,52,000/-. The plea taken by the plaintiffs regarding payment of further advance of Rs. 1,00,000/- on 09.05.1998 and again Rs. 1,00,000/- on 17.08.1998 is false and the endorsement of payment as alleged on the back of sale agreement dated 09.12.1997 is also a fraudulent act played by the plaintiffs. The plaintiffs were never ready and willing to perform the part of contract as per terms of agreement by paying the balance amount of consideration to get the sale deed executed while the defendants were ready to execute the sale deed as per terms of the agreement. On the back of sale agreement dated 09.12.1997 only the name of Rajendra Mahto has been entered. The defendants have denied regarding the meeting and also denied



further payment of Rs. 2,00,000/-. As a matter of fact the plaintiffs want to get the sale deed executed only after paying Rs. 1,22,000/- in stead of Rs. 3,52,000/- and thus, the plaintiffs have committed breach of sale of agreement and also wanted to cheat the defendants. The plaintiffs were never ready and willing to perform their part of contract and as such the suit is fit to be dismissed.

**5.** On the basis of pleadings of both the parties learned court below framed the following issues on recast :-

- (i) Is the suit framed maintainable ?
- (ii) Have the plaintiffs got any valid cause of action for the suit ?
- (iii) Have the plaintiffs advanced a sum of Rs. 75,000/- ?
- (iv) Whether the plaintiffs have given Rs. 2,00,000/- to the defendants on various dates or the contention regarding payment of Rs. 2,00,000/- also is an act of fraudulent ?
- (v) Is the sale agreement dated 09.12.1997 legal, genuine, valid and binding on the defendants ?
- (vi) Have the defendants any legal and valid rights to resign the contract ?
- (vii) Whether the plaintiffs committed breach of agreement by not getting the sale deed executed as per agreement ?



(viii) Are the plaintiffs entitled to get decree for specific performance of contract against the defendants ?

(ix) To what other relief or reliefs, if any, the plaintiffs are entitled to obtain ?

6. The learned court below took up the issue no. iv at first and decided the same in favour of the plaintiffs holding that a sum of Rs. 1,00,000/- was paid by the plaintiffs to the defendant Rajendra Mahto on 09.05.1998 and again Rs. 1,00,000/- on 27.08.1998. Thereafter, issue no. iii was taken and that issue was also decided in favour of the plaintiffs. Thereafter, issue no. v was taken and that was also decided in favour of the plaintiffs. Issue no. vi and viii were taken together and those issues were also decided in favour of the plaintiffs and against the defendants. Thereafter, issues no. i and ii were taken together and those issues were also decided in favour of the plaintiffs and against the defendants. Issues No. viii and ix were also decided in favour of the plaintiffs holding that the plaintiffs are entitled to get the decree of specific performance of contract for sale and accordingly, the suit was decreed on contest with cost. The plaintiffs were directed to deposit rest balance consideration amount of Rs. 77,000/- and the defendants were directed to execute the sale deed with respect to the suit property described in



Schedule A of the plaint after getting rest balance consideration amount of Rs. 77,000/- within two months, failing which the plaintiffs would be entitled to get the same executed through the process of the court.

7. The defendants being aggrieved and dissatisfied with the judgment and decree preferred this appeal challenging the maintainability of the same. Sri Dvendra Kumar Sinha, learned Senior Counsel for the appellants submitted that the learned court below has not appreciated the case of the parties and the evidences available on the record in the correct manner. The learned court below failed to consider the contention made in paragraph 11 of the plaint and in paragraph 20 of the evidence of PW 11 Ram Lakhan Prasad who has stated that the stamp was purchased and recital of the sale deed was drafted thereon and a copy of the drafted sale deed was retained and that copy of drafted sale deed clearly shows payments of Rs. 2,75,000/- out of Rs. 3,52,000/- but the same has not been produced in the court and as such an adverse inference must be drawn against the plaintiffs-respondents. The learned court below wrongly decided issue no. iv relying on oral evidence of PW 3 that the plaintiff no. 2 paid further earnest money of Rs. 2,00,000/- to the defendant no. 1 Rajendra Mahto. Though the copy of the drafted sale deed was not



filed by the plaintiffs in the court, the learned court below committed serious error of record leaving the documentary evidence on the point of readiness and willingness on the part of the plaintiffs. The learned court below committed error in scrutinizing and comparing properly the case and evidence of the plaintiffs specially paragraph 11 of the plaint and paragraph 20 of the evidence of PW 11. The learned court below has not taken judicial approach and exercised its discretionary power arbitrarily in passing the judgment. The learned court below failed to appreciate Ext. A and Ext. A/1 the drafted sale deed on stamp obtained in the name of Lila Devi wife of Ram Lakhan Prasad. If the same stamp is insufficient for registration for Rs. 3,52,000/-, it cannot be said that the respondents were ready and willing to perform their part of contract. Ext. A and Ext. A/1 falsify the version of the respondents that they were ready and willing to perform their part but the learned court below ignored the Ext. A and Ext. A/1. It is well established and proved that the plaintiffs have varied the terms of contract, played fraud by drafting sale deed for Rs. 1,22,000/- in place of Rs. 3,52,000/- and were not ready and willing to perform their part and also waived the sale agreement dated 09.12.1997 as per recital of Ext. A and Ext. A/1. The judgment and decree passed by the learned court below is



beyond the evidence on record and as such is fit to be set aside. The principle of law says that the paper which is admissible or inadmissible in evidence which can remove the controversy between the parties must be produced in the court and in this regard learned Senior Counsel relied upon a judgement reported in **AIR 1972 Supreme Court Page 2379** in the case of **Shri M. L. Sethi the appellant versus Sri R. P. Kapur respondent**. The readiness is not only to be shown in the plaint rather the plaintiffs must assert in the court which has not been done in the present case. Learned Senior Counsel further placed reliance upon the judgment reported in **AIR 1970 Orissa page 161 in the case of Mali Bewa and Ors. Versus Dhunda Sonal and anr.** It is the duty of the plaintiff to have gone to witness box but in the present case Smt. Leela Devi has not come in the court for her examination. Where the parties to the suit does not come in the witness box, presumption is there that that the case set up by him is not correct and for that reliance has been placed upon **AIR 1983 Madras page 169 in the case of H. G. Krishna Reddy and Co. Versus M. M.Thimiah and anr.** The learned Senior counsel has further argued that the plaintiff no. 1 is the real beneficiary as agreement to sale stands in her name but she has not been examined nor even affidavit has been filed to be treated as



examination in chief though the parties are required to be examined for the purpose of cross-examination and for that reliance has been placed upon a judgment reported in **(2010) 8 Supreme Court Cases 452 in the case of Kapil Corepacks Pvt. Ltd and ors. versus Harbans Lal**. The story as propounded by the plaintiffs for the payment of further Rs. 2,00,000/- on different dates to the defendant no. 1 has not been proved and the plaintiffs violated the terms of contract by making deed of sale for a price of Rs. 1,22,000/- in place of Rs. 3,52,000/-. There is no attesting witness on the point of further payment on 09.05.1998 and 27.05.1998 and in absence of the attesting witness it cannot be observed that further earnest money was paid to the defendant no. 1. The appellants having legal, genuine and valid grounds to resign the sale agreement dated 09.02.1997. The judgment and decree passed by the learned court below is beyond the evidence on record and as such the same is fit to be set aside.

**8.** Learned Senior Counsel for the appellants further submits that plaintiffs were not ready and willing to perform the part of contract within the time mentioned in the agreement to sale. The purpose for which the defendants have agreed to sale the land in question was defeated due to avoiding tactics of the plaintiffs and as such as within the time fixed in the agreement to sale, the



plaintiffs failed to get the sale deed executed and as such their right under agreement to sale was extinguished and the plaintiffs are not entitled to get a decree for specific performance of contract against the defendants and the suit is fit to be dismissed.

9. On the other hand, Sri Ganpati Trivedi, learned Senior Counsel for the respondents has argued that the time was not the essence of the contract in terms of the agreement for sale dated 09.12.1997 (Ext. 2). The plaintiffs were ready and willing to perform their part of contract for getting the sale deed executed since the date of agreement till the date of filing of the suit. As per the need and desire expressed by the defendants, the plaintiffs paid Rs. 1,00,000/- to the defendant no. 1 on 09.05.1998 and again Rs.1,00,000/- to defendant no. 1 on 27.08.1998 and the defendant no. 1 has given receipt on the back page of the agreement to sale. The payment was made in presence of the witnesses and one of the witness has also singed on the back of the agreement to sale in proof of the said payment. It is wrong to say that the plaintiffs committed fraud upon defendants by not making the payment of Rs. 2,00,000/- on two occasions and attempted to get the sale deed executed showing the lesser amount of consideration money as Rs. 1,22,000/- contrary to the terms of the agreement. The rulings relied upon by the learned Senior Counsel for the appellants are



not applicable in the present case. The time was not the essence of the contract. It is well settled by the Apex Court in the case of **Govind Prasad Chaturvedi Vs. Hari Dutt Shastri reported in 1997 (2) SCC page 539** (paragraphs 5 and 6) that the language used in the agreement is not as such to indicate in unmistakable terms that the time is the essence of the contract. The same case was relied with approval in the case of **Rathnavathi Vs. Kavita Ganashamdas reported in (2015) 5 SCC Page 223** (Paragraphs 38 and 39). From reading of both the paragraphs together it is clear that the time to perform the agreement was not made an essence of the contract. In the said judgment quoting the law laid down in the case of **Chand Rani Vs. Kamal Rani reported in 1993 (1) SCC page 519** it was held in paragraph 36 that in a case of agreement of sale normal presumption is that the time is not the essence of the contract. Learned Senior Counsel for the respondents further submits that non-examination of plaintiff no. 1 is not fatal in this case as plaintiff no. 2 has been examined who is non-else but the husband of the plaintiff no. 1. It was plaintiff no. 2 who was doing every acts, the plaintiff no. 2 has paid further advance of Rs. 2 lakhs to the defendant no. 1 at the Gaddi of Mehta Kedar Nath. The plaintiff no. 2 has been examined in this case, thus, no adverse inference can be drawn against the plaintiffs. The rulings relied



upon by the learned Senior Counsel for the appellants are not applicable in the present case. Whereas the judgment rendered in the case of **Nathuni Miya Vs. Amir Hussain reported in 1992 (1) PLJR page 292** paragraph 57 is relevant. In the present case PW 11, PW 4 and PW 8 have proved the payment of Rs. 2 lkhass on two dates to the defendant no. 1. Further the signature of defendant no. 1 was tested by hand writing and finger print expert (PW 15) who was appointed by the court and he proved his report (Ext. 12). No objection was raised against the said report in spite of long cross-examination. The plaintiffs discharged the burden of proof that payment of Rs. 2 lakhs was made to defendant no. 1, thus, the onus shifted upon the defendants to disprove the said report but the defendants miserably failed. The learned court below has rightly accepted Ext. 12 as there was no evidence contrary thereto brought on record. The reliance placed by the learned Senior Counsel for the appellants in the case of **Chandreshwar Singh and Ors. vs. Ramchandra Singh and Ors. reported in AIR 1973 Patna 215** is wholly misconceived. There was report of two hand writing experts and then the ratio was laid down as to what would be the role when the court has to consider the opinion of two experts. The plaintiffs were always ready and willing in getting the sale deed executed and the



witnesses have supported this fact. Omkar Singh, one of the important witness who is Sala of the defendant no. 1, has been withheld deliberately in coming in the witness box. It is not the case of the defendants that the plaintiffs were not ready with Rs. 77,000/-, the balance consideration money, rather the case of the defendants is denial of payment of Rs. 2 lakhs on two occasions. The learned court below has rightly given its finding and the judgment and decree passed by the learned court below does not require any interference and this appeal is fit to be dismissed.

**10.** On the basis of rival contentions of the parties, the following points are involved in this appeal for consideration :-

(i) Whether the time was the essence of the contract in terms of the agreement for sale dated 09.12.1997 (Ext. 2)?

(ii) Whether the plaintiffs paid Rs. 2 lakhs at two times i.e. Rs. 1,00,000/- each to the defendant no. 1 on 09.05.1998 and 27.08.1998 ?

(iii) Whether the plaintiffs were ready and willing to perform their part of contract for getting the sale deed executed since the date of agreement till the date of filing of the suit ?

(iv) Whether the plaintiffs committed fraud upon the defendants by not making payment of Rs. 2 lakhs on two occasions and attempted to get the sale deed executed showing the



lesser amount of consideration money as Rs. 1,22,000/- only  
contrary to the terms of the agreement ?

**FINDINGS:-**

**11.** In the present case the following facts are admitted:- (a) That the defendants were in need of money for the purpose of business and remitting the loan, (b) a sale agreement was executed by defendants on 09.12.1997 (Ext. 2) after receiving the part consideration amount amounting to Rs. 75,000/- as earnest money, and (c) the defendants have received notice dated 25.11.1999 vide paragraph 8 of the written statement.

**12. Point No. (i)** :- Ext. 2 is an admitted document wherein purpose of sale was business and other necessary work. The consideration money was fixed at the rate of Rs. 1,10,000/- per kattha. In Ext. 2 it is also mentioned that the defendants proposed to sale the suit land and nobody was ready to give higher price than the plaintiffs. The agreement further recites that there would be delay in execution of the sale deed as permission was needed under the Urban Ceiling Act from the competent authority. Other terms and conditions were that after taking permission from the Urban land Ceiling officer, Patna within six months from that date i.e. the date of agreement for sale dated 09.12.1997 the sale deed will be executed. The period six months expired on 06.05.1998.



Further condition was that the balance consideration money after deducting the earnest money would be received at the time of execution of the sale deed. Further it is mentioned that if on the measurement of the area of the land under agreement exceeds, then the consideration money will be fixed accordingly. At the time of agreement to sale the land was submerged under water. It was also agreed that the executants would not avoid from executing the sale deed and in case of failure the plaintiffs would be entitled to get the sale deed executed through the process of the court. The other condition was that the expenses for execution of the sale deed was met by the plaintiffs, further it was agreed that if after permission was being obtained and the purchaser (plaintiffs) failed to get the sale deed executed then they would be responsible for their own lapse. Thus, from Ext. 2 itself it is apparent that the time was not the essence of the contract. The agreement of sale was executed on 09.12.1997 fixing six months time for getting the sale deed executed which was to be expired on 06.05.1998. The required application for obtaining permission from Urban Ceiling Officer was made on 25.04.1998 vide Ext. 5 and 6. Further awaiting for a long period, affidavits were sworn by the defendants showing their intention to sale the suit land on 18.12.1998 vide Ext. 3, 3/A, 3/B, 3/C and 3/D. Similar affidavit was also sworn by



the plaintiff on the same day vide Ext. 3/E showing intention to purchase the land. After 18.12.1998 the land was measured on 19.12.1998 whereupon it was found that the total area of the suit land exceeded by 4 dhurs enhancing the total consideration money from Rs. 3,30,000/- to Rs. 3,52,000/- Thus, it is apparent that the sale deed could not have been executed earlier than 19.12.1998 i.e. beyond the period of six months. On this score also it cannot be said that the time was the essence of the contract which was lapsed on 06.05.1998 itself. The defendant no. 1 being DW 4 in paragraph 1 of his examination in chief has stated that the land was measured on 19.12.1998. From the evidence of the defendants as well as reading the clauses of the agreement for sale it is clear that the time fixed to perform the contract under agreement was not the essence of the contract. The ruling relied by learned Senior Counsel for the respondents reported in (2015) 5 SCC page 223 (*Supra*) (Paragraphs 38 and 39) is fully applicable in the present case.

**13.** In view of the law laid down as well as the facts and circumstances of the present case it is apparent that the time was not the essence of the contract as the execution of the sale deed was depending upon certain factors which itself could be fulfilled after expiry of the period of six months fixed in the agreement to



sale dated 09.12.1997 (Ext. 2). Thus, the point no. i is decided against the appellants and in favour of the respondents.

**14. Point No. ii :-** As per the plaintiffs, amount of Rs. 1,00,000/- was paid to defendant no. 1 namely, Rajendra Mahto on 09.05.1998 and again Rs. 1,00,000/- on 27.08.1998 at the Gaddi of Mehta Kedar Nath (PW 8) and defendant no. 1 made an endorsement on the back of the agreement for sale dated 09.12.1997 (Ext. 2) in his own hand writing in presence of Mehta Kedar Nath vide paragraph 7 and 8 of the plaint. The payment of Rs. 1,00,000/- on two occasions had been denied by the defendants. The plaintiff no. 2 has been examined as PW 11 who in paragraph 3 of his examination-in-chief has supported the factum of payment to the defendant no. 1. Nothing adverse could be elicited during his cross-examination. PW 8 Mehta Kedar Nath in paragraph 1 of his deposition has supported the payment made to Rajendra Mahto on 09.05.1998 and 27.08.1998 at his Gaddi, he has also stood the test of cross-examination in paragraph 2 of his cross-examination, he has also asserted that he is the witness to the said endorsement. PW 13 is the Branch Manager who has proved the withdrawal of money amounting to Rs. 1,00,000/- on 09.05.1998 as well as Rs. 1,00,000/- on 27.08.1998. One cheque was issued in the name of Mehta Kedar Nath (PW 8) and another



cheque was issued in the name of Ramlakhan the husband of plaintiff no. 1. PW 8 in his deposition has categorically stated that at the time of agreement to sale amount of Rs. 75,000/- was given and thereafter, amount of Rs. 2,00,000/- on two occasions was given to Rajendra Mahto and on 09.05.1998 in his presence amount of Rs. 1,00,000/- was given and he has given the amount from his own hand to Rajendra Mahto. He has further stated that on 27.08.1998 again Rs. 1,00,000/- was given and he has signed as witness on 27.08.1998 also. PW 11, the plaintiff no. 2, has stated that at the time of payment Pramod Kumar (PW 4), Mehta Kedar Nath (PW 8), Omkar Singh (not examined) and Radhey Shyam (DW 2) were present. In paragraph 22 of his cross-examination PW 11 has supported his case regarding payment of Rs. 1,00,000/- each on 09.05.1998 and 27.08.1998 at the Gaddi of PW 8 and also witnessed by PW 8. The endorsement of Rajendra Mahto on the back of agreement for sale (Ext. 2) has been marked as Ext. 7 duly proved by Mehta Kedar Nath in whose presence the said endorsement was made. PW 4 has also supported the said payment on 09.05.1998 at the Gaddi of Mehta Kedar Nath vide paragraph 1 of his deposition. He has also stated that Mehta Kedar Nath has also put his signature. He stood in the cross-examination on the issue but nothing adverse could have come. The two cheques



issued were honoured by the Bank which is apparent from deposition of PW 13 who has stated that in his Bank there is saving account no. 11141 in the name of Smt. Leela Devi (plaintiff no.1). Leela Devi has issued cheque of Rs. 1,00,000/- in the name of Mehta Kedar Nath bearing no. 596841 and at that cheque the amount was withdrawn on 09.05.1998. Leela Devi has also issued cheque in the name of Ramlakhan Prasad and amount was withdrawn on 27.08.1998. From the aforesaid statement it is also apparent that Leela Devi had sufficient money in her account for making payment of balance consideration money at least since 09.05.1998 onwards. Since the defendants have denied the endorsement made by Rajendra Mahto on the back of the agreement for sale though proved by PW 4 and PW 8 without objection yet at the prayer of the plaintiffs hand writing expert was appointed so that the signature of Rajendra Mahto @ Rajendra Prasad Mahto (Ext. 7) on the back of the agreement for sale (Ext. 2) can be compared with his admitted signature. Hand writing expert Set Hassan Raja was appointed and he submitted his report (Ext. 12) which was admitted into evidence without there being any objection. Ext. 10 to 10/F are negative photos of the signatures of Rajendra Mahto, Ext. 12/A is Juxtaposition chart prepared by hand writing and finger print expert who has been examined as



PW 15 and he has proved his report and stated in paragraph 1 of his chief that the signature made on the back of the agreement for sale on 09.05.1998 and 27.08.1998 marked as D, D/1 and D/2 and the signatures made on the agreement for sale on 09.12.1997 marked as D as well as specimen signature and hand writing of Rajendra Mahto marked as x/1 to X/5 are of the same person. During cross-examination nothing has come to disbelieve his report (Ext. 12). The defendants did not take any step for producing another evidence contradicting the report of hand writing expert. The plaintiffs have succeeded in proving his case that payment of Rs. 1,00,000/- was made to Rajendra Mahto defendant no. 1 on 09.05.1998 and again Rs. 1,00,000/- on 27.08.1998 and the receipt was acknowledged by making an endorsement on the back of the agreement for sale (Ext. 2). The burden of proof that the plaintiffs made payment to defendant no. 1 on 09.05.1998 and 27.08.1998 Rs. 1,00,000/- on each of the dates as required under Section 101 of the Evidence Act was discharged by the plaintiffs and thus, the onus shifted upon the defendants to disbelieve the said report either through cross-examination or through the another hand writing and finger print expert which the defendants miserably failed. The learned trial court has rightly accepted Ext. 12 report of hand writing and finger



print expert (PW 15). In the present case there is only one report of hand writing expert. The learned trial court in paragraphs 13 and 14 of its judgment has arrived at its conclusion on the basis of evidence of PW 8, PW 11, PW 4 and PW 15, Ext. 7 and Ext. 12 and rightly concluded in paragraph 15 of its judgment that a sum of Rs. 1,00,000/- was paid by the plaintiff to Rajendra Mahto on 09.05.1998 and further Rs. 1,00,000/- was also paid by the plaintiff to Rajendra Mahto on 27.08.1998. Thus, the learned trial court has rightly found vide paragraph 16 and 17 of its judgment that the plaintiffs have paid a sum of Rs. 75,000/- and again Rs. 1,00,000/- and again Rs. 1,00,000/- i.e. total Rs. 2,75,000/- out of total consideration money of Rs. 3,52,000/- and thus, only a sum of Rs. 77,000/- remained due to the plaintiff for getting the sale deed executed. The argument advanced by the learned Senior Counsel for the appellants in this behalf is not convincing. Thus, point no. ii is also decided in favour of the respondents and against the appellants.

**15. Point No. iii & iv :-** The defendants case is that on 20.12.1998 the defendants were called by the plaintiffs to arrive at the scribe namely, Ved Prakash for getting the sale deed executed where the draft sale deed was shown to them and on perusal of photo copy thereof it was detected that the plaintiffs wanted to get



the sale deed executed with respect to the suit land measuring 3 Kattha 4 Dhurs for total consideration of Rs. 1,22,000/- only and thus, they committed a fraud upon the defendants whereon the defendants left the campus of registration office and thereafter no step was taken by the plaintiff since December 1998. On the other hand, the case of the plaintiffs is that the draft sale deed proposed to be executed was given by the defendants to the plaintiffs for its approval which was returned by the plaintiffs after approval to the defendants for being scribed at the proper stamp. PW 11 (plaintiff no. 2) in paragraph 12 has categorically stated that Omkar Singh asked Ved Prakash to show the stamp whereupon Ved Prakash showed the plain stamp worth Rs. 26,500/- and stated that he had withdrawn on 20.11.1998 from Patna Collectorate whereupon I asked him that stamp was to be purchased from Bombay for Rs. 3,52,000/- and he had given Rs. 35,000/- to him for purchasing the stamp from Bombay then Omkar Singh told him that his brother-in-law (defendant no. 1) does not want to go to Bombay so get the sale deed executed at Patna, here the Government rate is Rs. 38,125/- per kattha, thus, the total value of 3 Kattha and 4 Dhur comes to Rs. 1,22,000/- and for that stamp of Rs. 26,500/- is required. Omkar Singh told him that there is advantage to get the sale deed executed at Patna as easily mutation will be done then I



told Ved Prakash to scribe. DW 2 Radhey Shyam during cross-examination, in paragraph 4, has stated that Omkar Singh is his maternal uncle and there is no dispute between the maternal uncle and his father. In paragraph 6 he has stated that he cannot examine Omkar Singh. Suggestion has been given to him that Omkar Singh called him to get the sale deed executed and then they did not go, resulting, Omkar Singh is not coming to depose. DW 4 Rajendra Mahto in his cross-examination has stated that he has stated that on 20.12.1998 the document will be prepared, thus, it is apparent that it was the defendants who get the sale deed prepared on the stamp (Ext.A/1). He has been suggested in paragraph 10 that in August, 1999 in Ist week there was meeting at the Gaddi of Mehta Kedar Nath where Omkar Singh was also present and Omkar Singh sent his man to call him but even after 1 and ½ hour he did not go then, Omkar Singh told that when there was need of money, the defendant no. 1 was moving behind him and when the need was fulfilled he is not ready as per his wishes. Then Omkar Singh told that he will not come in the picture and he will not depose in the court. Further DW 4 in paragraph 15 of his cross-examination has stated that he will not get examined his endorsement made on 09.05.1998 and 27.08.1998 by another hand writing expert. Then, he was suggested that as those endorsement are his writing,



resulting he is not ready for that. From the statement of PW 11 as also of DW 2 and DW 4 it is apparent that stamp was purchased from Patna Treasury by the Scriber Ved Prakash at the instance of Omkar Singh who admittedly is sala of defendant no. 1 Rajendra Mahto and brother of defendant no. 2 Smt. Raj Kumari Devi. Admittedly, Omkar Singh was a person who is a witness on Ext. 2 Omkar Singh was instrumental in purchasing the stamp. Still the defendants withheld him from being examined as a witness in this case. The plaintiffs to secure the presence of Omkar Singh filed an application in the trial court for issuance of summon to Omkar Singh and by order dated 15.09.2000 on payment of cost, the application of the plaintiffs was allowed and summons were issued to Omkar Singh. But in spite of service of summons through process server (PW 9) Omkar Singh did not turn up for examination as witness and process server (PW 9) has submitted his report mentioning therein "declined to accept the summon". PW 9 has proved his report as Ext. 5. PW 9 has stated that Omkar Singh told that he will not depose in this case. Thus, from the deposition of PW 2 and DW 4 during cross-examination coupled with the deposition of PW 9 who submitted his report (Ext. 5), it is apparent that the defendants deliberately withheld Omkar Singh in coming in the witness box from whom it could have been



elicited as to the circumstances under which a stamp of Rs. 26,500/- for a total consideration money of Rs. 1,22,000/- was purchased and who was instrumental for getting the sale deed scribed on such stamp. The land to be transferred was 3 Kattha 4 Dhurs and circle rate of that locality in Patna during the relevant time was Rs. 38,125/- per kattha. It is not the case of the defendants that the plaintiffs were not ready with Rs. 77,000/- rather the case of the defendants is denial of payment of Rs. 2,00,000/- on two occasions and further that a fraud was committed upon them by writing the consideration money in the sale deed as Rs. 1,22,000/-. Ext. 1 is the legal notice which the plaintiffs have given to the defendants for execution of the sale deed and in that notice it is mentioned balance consideration money of Rs. 77,000/-. It is admitted fact that amount of Rs. 75,000/- had already been paid as earnest money as mentioned in Ext. 2, when earnest money i.e. Rs. 75,000/- is added to the balance consideration money of Rs. 77,000/-, it comes to Rs. 1,52,000/- but on Ext. A/1 consideration money is mentioned as only Rs. 1,22,000/-. Thus, it can safely concluded that consideration money was calculated at the rate of Rs. 38,125/- per kattha which was the circle rate at Patna during relevant period. Hence, the question of committing fraud upon defendants does not



arise at all as it has already been held above that Rs. 2,00,000/- on two occasions had already been paid to the defendant no. 1 on 09.05.1998 and 27.08.1998 besides earnest money of Rs. 75,000/-. It appears that to avoid further stamp duty consideration money was shown as Rs. 1,22,000/- but it cannot be said that the defendants were defrauded in the transaction by the plaintiffs. Non-examination of Omkar Singh, the sala of defendant no. 1, who was instrumental in getting the sale deed scribed at the circle rate of the land of the locality, the plaintiffs have been greatly prejudiced and as such adverse inference under Section 114 of the Evidence Act is drawn against the defendants who declined to get Omkar Singh examined as per DW 2. Due to non-examination of plaintiff no. 1 no adverse inference can be drawn against the plaintiffs as there are other cogent evidence on record and plaintiff no. 2 has already been examined. The ruling relied on 1992 (1) PLJR page 292 (*Supra*) (paragraph 53) is fully applicable in the present case. In the present case there is no dispute that agreement for sale (Ext. 2) has been executed, there is no dispute that Rs. 75,000/- had been paid as earnest money by plaintiff no. 1. PW 13 the Branch Manager has stated that plaintiffs on two occasions on 09.05.1998 and 27.08.1998 had withdrawn Rs. 1,00,000/- which goes to show that the plaintiff no. 1 had sufficient money for



getting the sale deed executed. The legal notice was given by the plaintiff no. 1 to the defendants which was received by the defendants. The plaintiffs have shown the readiness and willingness for making payment of balance consideration money of Rs. 77,000/- and to get the sale deed executed, thus, it is held that the plaintiffs were ready and willing to perform their part of contract for getting the sale deed executed since the date of agreement till the date of filing of the suit and further the plaintiffs have not committed fraud upon the defendants by not making payment of Rs. 2,00,000/- on two occasions and attempted to get the sale deed executed showing the lesser amount of consideration money of Rs. 1,22,000/- only contrary to the terms of agreement and accordingly, both the points no. iii and iv are decided in favour of the respondents and against the appellants.

16. The judgment and decree passed by the learned court below does not require any interference by this Court and the suit has been rightly decreed. In the result, finding no merit in this appeal, the same is hereby dismissed but under the circumstances without cost.

avin/-

(Jitendra Mohan Sharma, J)

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