

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No. 259 of 2007

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Most. Mini Sinha, wife of late Krishna Murari Prasad Sinha, resident of Mohalla Koeri Tola, Begumpur, p.s. Chowk, Patnacity, District Patna, at present residing at Radhika Bhawan situated at Mohalla Ranighat, P.O. Mahendru, P.S. Sultanganj, Patnacity, District Patna-800 006.

.... Defendant/Appellant

Versus

Smt. Reena Devi, wife of Sri Hemant Kishore, resident of Village Thika, P.O. kakarahat, P.S. Dehrni Bazar, District Chhapra (Saran), at present Resident at Radhika Bhawan at Mohalla Ranighat, P.S. Sultanganj, P.O. Mahendru, District Patna

.... Plaintiff/Respondent

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Appearance :

For the Appellant : Mr. Shravan Kumar, Sr. Adv.
Mr. Mukund Jee, Adv.

For the Respondent : Mr. J.S. Arora, Sr. Adv.
Mr. Ram Chandra Sahni, Adv.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

CAV JUDGMENT

Date: 18-07-2018

1. This first appeal has been preferred by the defendant-appellant (hereinafter referred to as 'defendant') against the judgment and decree dated 22.09.2007 passed by learned Civil Judge-2nd (Senior Division), Patna City in Title Suit No. 160 of 2006 by which and whereunder he decreed the aforesaid suit on contest and directed the defendant to execute registered sale deed in respect of disputed property within two months after taking remaining consideration amount, failing which the registered sale deed in respect of suit property shall be executed through the process of the court.

2. The plaintiff-respondent (hereinafter referred to as



‘plaintiff’) brought Title Suit No. 160 of 2006 against the defendant on 10.10.2006 for specific performance of the contract in respect of Holding no. 128 (old), Circle no. 46, Ward no. 14(old) /38(new), sheet no. 118 M.S., Plot no. 161 situate at Mohalla-Ranighat, Jaria toli, P.S. Sultanganj, Patna City, District Patna on the ground of agreement for sale dated 07.09.2003.

3. The case of the plaintiff is that her husband was in occupation of a portion of the disputed property as monthly tenant since 1998 on a rental of Rs. 650/- per month. The defendant is owner of the suit property and she was desirous of selling the suit property and with consent of her other family members she made an offer to husband of plaintiff to purchase the disputed property. The negotiation for sale and purchase of the suit property between defendant and plaintiff was finalized for sum of rupees nine lacs only. The plaintiff through her husband paid an advance of rupees fifty thousand by two cheques i.e. one for rupees thirty thousand dated 07.09.2003 and other for rupees twenty thousand dated 07.09.2003 of State Bank of India, Mahendru Branch. The above stated two cheques were duly encashed by the defendant on 09.09.2003 and thereafter, the defendant executed an agreement for sale in respect of the suit property in favour of the plaintiff on 07.09.2003 and original agreement for sale was handed over to the plaintiff. The parties to the



aforesaid agreement for sale agreed that absolute sale deed shall be executed and registered within the period of 24 months commencing from 07.09.2003 on payment of balance consideration amount. The plaintiff and her husband several times requested the defendant within the above stated stipulated period to execute and register the absolute sale deed after taking the balance consideration amount but the defendant on the pretext of marriage of her youngest daughter asked the plaintiff to give balance consideration amount in July 2005 and agreed to execute absolute registered sale deed in favour of the plaintiff. Again at the time of marriage of youngest daughter of defendant which was going to be solemnized in the month of July 2005 plaintiff requested the defendant to take balance consideration amount and execute absolute registered sale deed but she told that she has already arranged money for the purpose of marriage of her daughter and she would like to take the balance consideration amount on the last day of stipulated period and would execute absolute registered sale deed. However, in the first week of September 2005 plaintiff along with her husband approached the defendant with balance consideration amount and requested for acceptance of the balance consideration amount and for execution of absolute registered sale deed but the defendant avoided to take balance consideration amount and to execute absolute registered sale deed on this or that



pretext. Thereafter, the plaintiff gave a registered notice on 25.10.2005 through her advocate to the defendant calling upon her to execute absolute registered sale deed after taking balance consideration amount of Rs. 8,50,000/- but defendant gave a false and elusive reply to the notice through her advocate and did not take the balance consideration amount nor executed absolute registered sale deed and again on 17.11.2005 defendant through her advocate gave another notice stating therein that she was ready to return the advance money of Rs. 50,000/- with simple bank interest, if the plaintiff vacate the portion of the disputed property. The above stated two notices made the intention of defendant clear showing that she was not in a mood to accept the balance consideration amount and to execute absolute registered sale deed in favour of the plaintiff. Further case of the plaintiff is that she has always been ready and willing and is still ready and willing to perform her part of the contract and to purchase the suit property on payment of the balance consideration amount. Further case of the plaintiff is that she filed Complaint Case No. 964 of 2005 for the offence under Sections 420, 406, 427, 500 of the Indian Penal Code against the defendant and her associates for the above stated misdeeds of the defendant. In the aforesaid Complaint Case No. 964 of 2005, cognizance was taken and the case is still pending for disposal. The cause of action for the suit arose on



07.09.2003 when the agreement for sale was executed and also on 06.09.2005 when the period of 24 months expired and also in the first week of September 2005, when the requests were made by the plaintiff and her husband to the defendant to accept the balance consideration amount and to execute absolute registered sale deed and also when the defendant gave notice dated 17.11.2005 for return of advance money of Rs. 50,000/- The plaintiff sought relief for specific performance of contract for sale dated 07.09.2003 and for issuance of direction to defendant to execute and register the sale deed in favour of the plaintiff in respect of the suit property after taking the balance consideration amount of Rs. 8,50,000/- within a reasonable time fixed by the court failing which registered sale deed be executed through the process of the court and possession of the suit property be delivered to the plaintiff. In alternative the plaintiff sought further relief that if for any technical reason there be any difficulty in passing the decree for specific performance of contract for sale in that event a decree for refund of advance of Rs. 50,000/- with interest and without prejudiced be passed. Furthermore, the plaintiff sought relief of cost of suit and interest pendente lite.

4. Defendant appeared and filed her written statement raising ornamental objections such as non maintainability of the suit, suit is barred by law of limitation, suit is barred by principle of



estoppel, waiver and acquiescence, suit is barred by provisions of Specific Relief Act and also questioning the cause of action as well as valuation of the suit. The case of the defendant is that she had entered into an agreement dated 07.09.2003 with the plaintiff to sell the suit property on consideration money of rupees nine lacs and plaintiff paid her Rs. 50,000/- by two cheques of Rs. 30,000/- and Rs. 20,000/- on 07.09.2003 respectively in advance. The time of execution of absolute sale deed as per agreement was only for two years from the date of execution of agreement dated 07.09.2003 and the plaintiff had to pay the balance consideration amount up to 06.09.2005 but the plaintiff failed to pay the balance consideration amount till 06.09.2005 though defendant several times requested to the plaintiff to perform her part of contract but with mala fide and dishonest intention, the plaintiff did not pay the balance consideration amount to the defendant and as per terms of the agreement, the period for paying the balance consideration amount expired and the effect of agreement lapsed after 06.09.2005. She further claimed that after lapse of period of the agreement she cancelled the agreement and requested the plaintiff to receive Rs. 50,000/- along with bank interest but the plaintiff with mala fide intention gave notice with incorrect statement and she responded to the aforesaid notice. She further claimed that suit of the plaintiff is hopelessly time barred as the suit for specific performance



of the contract had to be filed by the plaintiff within three years from the date of execution of agreement dated 07.09.2003 but the present suit was filed in the month of October 2006. She further claimed that time was the essence of the contract and that contract was to be concluded only on payment of the balance consideration money of Rs. 8,50,000/- which was not done and, therefore, there was no concluded contract. She further claimed that plaintiff was neither willing nor ready to perform her part of the contract. She further claimed that she had filed anticipatory bail petition in Complaint Case No. 964 C of 2005 and deposited Rs. 50,000/- in court which was accepted by the plaintiff and, therefore, present suit has got no merit as the plaintiff acceded to her relief no. II and as a matter of fact, the plaintiff had got no cause of action to file the instant suit. She further claimed that neither plaintiff nor her husband had ever tendered the balance consideration amount nor they were ready to give the balance consideration amount and as a matter of fact, the plaintiff sent legal notices to defendant with an object to create evidence for filing the present suit. She further claimed that she was always ready to return Rs. 50,000/- with simple bank interest to the plaintiff and subsequently, she deposited the aforesaid amount in court as per direction of the court given in A.B.P. No. 3585 of 2006. The defendant also claimed that her four daughters have not been made



party to the suit and, therefore, the suit was defective due to non joinder of the parties.

5. On the basis of above stated pleadings of the parties, the learned trial court framed following issues:-

(1) Is the suit of the plaintiff maintainable?

(2) Had the plaintiff possess valid cause of action for filing the suit?

(3) Is the suit barred by law of limitation?

(4) Was the time limit an essential condition in the agreement of sale?

(5) Is the plaintiff willing and ready for the compliance of the specific contract?

(6) Is the plaintiff entitled to get the decree for compliance of specific contract with regard to disputed property?

(7) Is the plaintiff entitled for reliefs other than those sought for?

6. The plaintiff examined, altogether, seven plaintiff-witnesses in the form of oral evidence and apart from this, got exhibited agreement for sale dated 07.09.2003 as Exhibit-1, pleaders notice as Exhibit-2, postal receipt as Exhibit-3, three pass books of S.B.I. as Exhibit-4 series, petition filed in C.A. Case No. 964 C/2005 as Exhibit-5.

7. On contrary defendant examined four defendant witnesses in the form of oral evidence and also got exhibited certified



copy of Complaint Case No. 964C/2005 as Exhibit-A, certified copy of order dated 25.09.2006 passed in Anticipatory Bail Petition No. 3585 of 2006 as Exhibit-B, certified copy of order dated 21.09.2006 passed in C.A. Case No. 964C/2005 as Exhibit-B/1 and certified copy of order passed in C.A. Case No. 964C/2005 as Exhibit-B/2.

8. The learned trial court after scrutinizing the evidences available on the record came to conclusion that plaintiff was always ready with the balance consideration amount to get the sale deed executed and she is still ready to perform her part of contract but it was defendant who adopted elusive measures on one pretext or other and she, unsuccessfully, tried to cancel the contract out of some ill motive and accordingly, the learned trial court decided issue no. 5 in favour of plaintiff. Furthermore, the learned trial court came to conclusion that time limit was not an essential condition of agreement for sale in question and accordingly, issue no. 4 was also decided in favour of the plaintiff. The learned trial court decided issue no. 3 as the aforesaid issue was not contested by the parties. The learned trial court decided the remaining issues in favour of the plaintiff and accordingly, passed the impugned judgment and decree which is under challenge in this appeal.

9. Learned counsel appearing for the defendant assailed the impugned judgment and decree arguing that learned trial court failed



to appreciate the evidences available on the record in its right perspective as learned trial court failed to take notice of this fact that plaintiff was never ready and willing to perform her part of the contract. He further submitted that learned trial court also failed to take notice of this fact that time was essence of the contract but the plaintiff failed to make payment of balance consideration amount within the stipulated period as mentioned in the agreement for sale and after expiry of the stipulated period, the aforesaid agreement for sale had already lost its affect and after expiry of the stipulated period, the plaintiff had no right to file suit to enforce the aforesaid expired agreement for sale. He further submitted that plaintiff failed to bring evidence to show that she was ready and willing to perform her part of the contract and the aforesaid fact is evident from Exhibit-4 series, pass books of S.B.I. because the aforesaid pass books go to show that plaintiff had no sufficient money in her account to make payment of balance consideration amount but the learned trial court failed to take notice of the aforesaid fact and came to wrong conclusion. He further submitted that admittedly, the agreement for sale was executed on 07.09.2003 and the consideration amount was fixed rupees nine lacs but only fifty thousand through two separate cheques were paid on the day of execution of agreement for sale and thereafter, not a single penny was paid to the defendant and when the period of agreement



expired, the plaintiff gave a legal notice giving threatening to file a criminal case and in that notice, too, the offer to make payment of balance consideration amount was not made. He further submitted that when defendant and her son in law got anticipatory bail by depositing rupees fifty thousand in court, the plaintiff brought the present suit but Exhibit-4 series goes to show that even on the day of filing the present suit, the plaintiff had not sufficient money to make payment to the defendant and, therefore, the aforesaid fact clearly goes to show that the plaintiff was never in readiness. He further submitted that according to plaintiff, for the first time plaintiff offered the balance amount in the month of July 2005 and allegedly, the aforesaid offer was not accepted by the defendant on the pretext of marriage of her daughter but even then the notice was not given to the defendant by the plaintiff. He further submitted that plaintiff has pleaded in her plaint that second offer was made in the first week of September 2005 when the agreement for sale was going to be expired and again her offer was refused but admittedly, the legal notice was given on 25.10.2005 i.e. after much delay of rejection of aforesaid offer. He further submitted that plaintiff has admitted in her evidence that she had not sufficient money to make payment of balance consideration amount and furthermore, neither plaintiff nor her husband nor the PW-3 disclosed the description of land against which



the plaintiff's husband, allegedly, had taken rupees four lacs from PW-3 and moreover, the aforesaid fact has not been pleaded in the plaint. He also submitted that agreement for sale dated 07.09.2003 has been executed by the defendant and admittedly, the defendant had owned part of that property as her daughters were also co-sharers of the property and, therefore, the defendant has not complete title over the suit property and since the agreement for sale in question has not been executed by all the co-sharers, the same cannot be sought to be enforced by the plaintiff.

10. In support of above stated contentions, learned counsel for the defendant relied upon a decision reported in **(2014)11 SCC 605** in which it has been held by the Apex Court of this country that *“absence of exact words of Section 16(c) of Specific Relief Act, 1963 is not fatal to suit for specific performance of agreement if sufficient facts and evidence placed on record show plaintiff's readiness and willingness.”*

11. Learned counsel of the defendant-appellant also relied upon decision reported in **(2015) 5 SCC 355** in which the Hon'ble Apex Court has held that *“agreement for sale executed by the co-sharers of the property without concurrence of remaining co-sharers upon whom also property devolved in equal shares by virtue of Section 8 of Hindu Succession Act, 1956 the vendors not having complete title over suit property and agreement having not been executed by all co-sharers, the same cannot be sought to be enforced by the plaintiff vendee and further in the aforesaid*



decision, it has been held by the Apex Court that “failure of vendee to pay instalments of sale consideration within periods as stipulated in deed of sale agreement amounted to breach of terms of agreement which disentitles vendee to decree of specific performance.” He also relied upon decision reported in **(1995) 5 SCC 115** in which it has been held that *“continuous readiness and willingness on the part of the plaintiff is a condition precedent for grant of the relief which plaintiff must establish on evidence, and to adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances.”*

12. On the other hand, learned counsel appearing for the plaintiff submitted that after passing of impugned judgment and decree, the impugned decree has already been executed and, therefore, the question of willingness and readiness has already lost its force because the aforesaid fact goes to show the willingness and readiness of the plaintiff. He further submitted that the plaintiff has, specifically, pleaded and led evidence regarding her willingness and readiness and the learned trial court having considered the pleadings and evidences passed the impugned judgment and decree. He further submitted that to prove readiness, it is not necessary that money should be ready and, therefore, even if the plaintiff had no sufficient money in her bank accounts, then also, it cannot be said that plaintiff was not ready to perform her part of the agreement though the plaintiff has brought



evidence on record that she had sufficient money to make payment of balance consideration amount as near about four lacs and above was deposited in bank account and rupees four lacs was taken by her husband from PW-3 in advance for selling his certain lands.

13. In support of his above stated contention, he relied upon decision reported in **(2009) 17 SCC 27** in which at para 31 it has been held by the Apex Court that *“it is not necessary that entire amount of consideration should be kept ready and the plaintiff must file proof in respect thereof.”* He further submitted that time was not essence of the contract as there was nothing in agreement for sale that after two years, the agreement shall be terminated. Continuing his submission, he submitted that defendant, herself, cancelled the agreement for sale after expiry of period given in agreement for sale and the aforesaid fact proves that agreement for sale was in existence even after expiry of the period given in agreement for sale and the aforesaid fact also indicates that time was not essence of the contract. He further submitted that defendant in her deposition admitted that before execution of agreement for sale, she had consulted with her daughters and other family members and, therefore, the aforesaid fact goes to show that she entered into an agreement for sale for herself as well as on behalf of her daughters and other family members and, therefore, it cannot be said that other co-sharers of the suit property had not



executed agreement for sale. He further submitted that it is specific case of the plaintiff that she approached the defendant several times and offered the balance amount but she avoided to take balance amount on this or that pretext and lastly, in the first week of September 2005, plaintiff again approached and offered the balance amount to defendant but she flatly refused to accept the balance amount and execute absolute sale deed and, thereafter, immediately, on 25.10.2005 the plaintiff gave legal notice to the defendant. He further submitted that admittedly, the defendant was tenant of the plaintiff and the relation between plaintiff and defendant was cordial but subsequently, relation between plaintiff and defendant became strained when the defendant refused to execute absolute sale deed. He further submitted that no doubt, defendant deposited rupees fifty thousand in court when she got anticipatory bail but the plaintiff refused to receive the aforesaid amount and filed a petition before the learned Sessions Judge, Patna which has been marked as Exhibit-5 and the aforesaid fact goes to show that plaintiff was willing and ready to purchase the suit property. He further submitted that legal notice also contains the fact of willingness and readiness of the plaintiff. He further submitted that admittedly, during pendency of this appeal, the sale deed has already been executed and the plaintiff has deposited the entire balance consideration amount and, therefore,



the aforesaid circumstance also proves the willingness and readiness of the plaintiff as well as capability of the plaintiff to pay the balance consideration amount. He relied upon several decisions such as (2012) 5 SCC 712, (2011) 1 SCC 429, (2017) 4 SCC 654, AIR 1967 SC 868 and also (1996) 10 SCC 51.

14. Certain facts are admitted between the parties. It is an admitted position that agreement for sale was executed between the parties on 07.09.2003 and by executing the agreement for sale the defendant agreed to sell the suit property to plaintiff on consideration amount of rupees nine lacs out of which rupees fifty thousand was paid by the plaintiff to defendant on the date of execution of agreement for sale dated 07.09.2003. It is also an admitted position that plaintiff had to pay balance amount within two years from the date of execution of aforesaid agreement for sale but plaintiff did not pay even a single penny to the defendant within the above stated period of two years. Furthermore, the agreement for sale dated 07.09.2003 contains that defendant agreed to sell the suit property as she was in need of money to purchase certain property and to give some money to her daughters. Furthermore, column 3 of agreement for sale dated 07.09.2003 goes to show that the life of above stated agreement for sale dated 07.09.2003 was only upto two years from the date of its execution. It is also an admitted position that plaintiff gave



legal notice to defendant on 25.10.2005 and the defendant responded to the aforesaid legal notice and subsequently, by sending notice dated 17.11.2005 she cancelled the agreement for sale and thereafter plaintiff filed criminal complaint case against the defendant as well as her son in law. Furthermore, it is an admitted position that defendant got anticipatory bail in the aforesaid complaint case by depositing rupees fifty thousand in court by the order of the learned Sessions Judge, Patna but the aforesaid amount was not received by the plaintiff and she filed a petition before the learned Sessions Judge, Patna informing that she was not ready to receive the aforesaid amount as the suit was pending between the parties.

15. It is also not in dispute that defendant is not sole owner of the suit property rather her daughters are also co-sharers of the suit property but they have not been made party to the suit.

16. It is well settled principle of law that to obtain a decree of specific performance of a contract, the plaintiff has to prove its willingness and readiness. In the present case, the trial court while dealing with issue no. 5 came to conclusion that plaintiff was willing and ready to perform her part of the contract. Learned counsel of the defendant has challenged the aforesaid finding of the court below. Now, it has to be seen in this appeal as to whether finding of the trial court regarding issue no. 5 is in accordance with law or not. It is not in



dispute that even if the pleading regarding willingness and readiness has not been made in the plaint then also, the court can decide the aforesaid point on the basis of evidences adduced by the parties in course of trial. Therefore, in the present case, it has to be seen what evidence has been adduced by the plaintiff to prove his readiness and willingness to perform his part of the contract.

17. In this regard, PW-1, PW-2 and PW-6 have been examined on behalf of the plaintiff. PW-1 at para 8 of her examination in chief stated that she as well as her husband (PW-6) met the defendant and asked her to execute absolute sale deed after taking balance consideration amount but defendant avoided to take balance consideration amount on the pretext that marriage of her youngest daughter was going to be solemnized in July 2005 and she would take balance consideration amount in July 2005. She further stated at para 9 of her examination in chief that in the month of July 2005, when she along with PW-6 offered the balance amount to defendant, she stated that she would take the balance consideration amount on the last day of expiry of the agreement and subsequently, in the first week of September 2005, she again offered the balance consideration amount to the defendant but she refused to take the balance consideration amount. She further stated that she had to pay the balance consideration amount in instalments but whenever she tried to make



payment of balance consideration amount in instalment, the defendant refused to accept the balance consideration amount in instalment. She admitted at para 28 of her cross examination that balance amount of Rs. 8,50,000/- was to be paid in two instalments. She further admitted that when defendant avoided to take balance amount, she did not give any notice. She further admitted that she filed complaint case after expiry of period of agreement for sale. At para 40 of her cross examination, she admitted that during period of agreement for sale, she had not possessed Rs. 8,50,000/- and whatever amount she had, she had deposited in the Bank. PW-2 at para 4 of his examination in chief stated that he along with PW-6 had gone to the house of defendant in the first week of January 2004 and PW-6 offered rupees two lacs to defendant but she refused to take the aforesaid amount on the pretext that she would take entire balance amount in the month of July 2005 at the time of marriage of her daughter. PW-6 who is husband of plaintiff stated that he approached several times to defendant and offered the balance amount but she avoided to take balance amount on this or that pretext and in the month of July 2005 when he tried to give the balance amount to the defendant, she refused to take the balance amount on the pretext that she would take the balance amount on the last day of period of agreement for sale but when on 06th September 2005 the balance amount was offered, she



refused to take the balance amount. This witness further stated that near about Rs. 4,75,000/- was in bank account and he had taken Rs. 4,00,000/- in advance from PW-3. PW-3 has stated that PW-6 agreed to sell his land to him and for that purpose he had taken Rs. 4,00,000/- in advance from him. Admittedly, the aforesaid fact has not been pleaded by the plaintiff in her plaint and in course of trial, the aforesaid fact was brought before the court. The Exhibit-4 series go to show that near about Rs. 4,75,000/- was deposited in the respective accounts of plaintiff and her family members till the expiry of period of agreement for sale and, therefore, it is obvious that during the period of agreement for sale the plaintiff as well as her family members had only Rs. 4,75,000/- in their respective accounts. No doubt, to show the readiness, it is not necessary that plaintiff must have money with him but, at least, the plaintiff has to prove her capacity to make payment of balance consideration amount. Furthermore, the plaintiff has come with this story that her husband had taken Rs. 4,00,000/- in cash from PW-3 for transferring his land in favour of PW-3 but neither any agreement for sale between husband of plaintiff and PW-3 was produced nor it has been shown that aforesaid amount of Rs. 4,00,000/- had been kept in the Bank and it appears improbable that a person can give Rs. 4,00,000/- without any agreement for sale and without obtaining any receipts thereof.



Therefore, the statement of PW-3 and PW-6 in this regard appears to be doubtful and it is established that plaintiff was not capable to make payment of the balance amount till the expiry of agreement for sale and I am of the opinion that plaintiff could not succeed to prove her willingness and readiness to purchase the suit property and furthermore, I am of the opinion that learned trial court committed error in deciding the issue no. 5 in favour of the plaintiff.

18. Exhibit-1 goes to show that plaintiff had to pay balance consideration amount within two years from the date of execution of agreement for sale but she did not pay any amount to the defendant within above stated period of two years and the aforesaid fact goes to show that it was plaintiff who breached the terms of the contract. Moreover, column 3 of agreement for sale (Exhibit-1) clearly says that the life of exhibit-1 was only upto two years from the date of its execution and, admittedly, the balance consideration amount was not paid within the above stated period of two years and, therefore, it is obvious that after expiry of two years, the exhibit-1 had already lost its effect. Furthermore, it is also clear from column 3 of exhibit-1 that the time was essence of the contract.

19. It is an admitted position that the suit property was ancestral property of the defendant as well as her four daughters but the agreement for sale was executed only by defendant. Although in



her evidence, the defendant admitted that she had taken consent of her daughters for execution of agreement for sale but admittedly, her daughters have neither been made party to the agreement for sale nor to the suit and the admission of the defendant is not binding upon her daughters as her daughters did not get any opportunity to controvert the aforesaid admission of the defendant. Exhibit-1 also establishes this fact that suit property was ancestral property of defendant as well as her daughters and, therefore, the defendant had no right to enter into agreement for sale alone nor she had right to transfer the suit property alone in favour of plaintiff or any other person.

20. Admittedly, the plaintiff filed Execution Case No. 11 of 2007 for execution of impugned decree and in the aforesaid execution case, by the order of court registered sale deed was executed through the process of the court on 03.03.2008. Furthermore, it is an admitted position that this court vide order dated 19.01.2009 passed in Civil Review No. 137 of 2008 allowed I.A. No. 1524 of 2008 staying the further proceeding of Execution Case No. 11 of 2007 till final disposal of the present appeal and, therefore, it is obvious that delivery of possession of the suit property could not be made effective due to order dated 19.01.2009 passed in Civil Review No. 137 of 2008. The defendant has brought the entire order sheets of Execution Case No. 11 of 2007 by filing affidavit dated 20.12.2016 and the order



sheets of Execution Case No. 11 of 2007 goes to show that Order 21 Rule 34 of the C.P.C. was not followed because no opportunity was given to defendant to file objection against the proposed draft of the sale deed dated 01.03.2008. Order 21 Rule 34(2) of the C.P.C. says that proposed draft of sale shall be served upon the judgment-debtor together with a notice requiring his objection to be made within such time as the Court fixes in this behalf but in the present case, it is obvious from the order sheets of Execution Case No. 11 of 2007 that the aforesaid Execution Case No. 11 of 2007 proceeded ex parte against the defendant (judgment debtor) and subsequently, defendant (judgment debtor) appeared in the aforesaid Execution Case No. 11 of 2007 and filed a petition for recall of ex parte order and during pendency of the aforesaid petition, the plaintiff (decree holder) filed draft of sale on 02.02.2008 and the copy of aforesaid draft was given to defendant (judgment debtor) but no notice was served upon him to file objection and, therefore, it is obvious that learned executing court violated the provision of Order 21 Rule 34 of the C.P.C. Moreover, the aforesaid sale deed dated 01.03.2008 cannot be made effective unless the impugned judgment and decree is confirmed but as I have already stated that plaintiff could not succeed to prove his willingness and readiness to purchase the suit property within the stipulated period of agreement for sale dated 07.09.2003 and the time was



essence of contract and, therefore, in my view, the impugned judgment and decree cannot be confirmed as a result whereof, the sale deed dated 01.03.2008 cannot be made effective.

21. The plaintiff-respondent sought alternative relief for refund of money paid to defendant-appellant, if this Court feels difficulty in granting decree for specific performance of contract. Section 22(1)(b) of Specific Relief Act says that a person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused. In the present case, I have already discussed that suit filed by the plaintiff-respondent for specific performance of contract cannot be decreed on the grounds as stated above by me but equity demands that money paid by the plaintiff-respondent to appellant-defendant must be returned to him.

22. On the basis of aforesaid discussions, I am of the opinion that impugned judgment and decree passed by the learned court below is liable to be modified and accordingly, this appeal is allowed and the impugned judgment and decree dated 22.09.2007 stands modified to this extent that decree for specific performance of contract for sale dated 07.09.2003 is set aside and in alternative, it is ordered that appellant-defendant shall return rupees fifty thousand



with 8% simple interest to plaintiff-respondent from the date of execution of agreement for sale till its realization to the plaintiff-respondent within four months from today.

23. No order as to cost of the suit.

(Hemant Kumar Srivastava, J)

SHAHZAD/-

AFR/NAFR	AFR
CAV DATE	22.08.2017
Uploading Date	21.07.2018
Transmission Date	N.A.

