

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 166 of 2014

Kishore Kumar Duggad (Since Dead) Through Legal Heirs:

1.1 - Smt. Nirmala Duggad W/o Late Shri Kishore Kumar Duggad, Aged About 65 Years R/o Hospital Ward Kondagaon, Tah.- Kondagaon, District- Kondagaon, Chhattisgarh

1.2 Rajesh Kumar Duggad S/o Late Shri Kishore Kumar Duggad, Aged About 40 Years R/o Hospital Ward Kondagaon, Tah.- Kondagaon, District- Kondagaon, Chhattisgarh

1.3 - Smt. Neelu Golcha W/o Shri Sanjay Golcha, Aged About 42 Years D/o Late Shri Kishore Kumar Duggad, R/o Near Ghadi Chouck Turning, District- Dhamtari, Chhattisgarh

1.4 - Smt. Ruby Parakh W/o Shri Poonam Bhai Parakh Aged About 38 Years D/o Late Shri Kishore Kumar Duggad, R/o Parakh Nivas, Main Road, District- Dhamtari, Chhattisgarh

---- Appellants

Versus

1. Rajmal Jain S/o Guman Mal Jain Aged About 44 Years R/o Main Road, Kondagaon, Tah. Kondagaon, Distt. Kondagaon C.G., Chhattisgarh
2. State Of Chhattisgarh Through - District Collector, Kondagaon C.G., District : Kondagaon, Chhattisgarh

---- Respondents

For Appellants/Defendant	:	Shri Rakesh Kumar Thakur, Advocate with Shri Devershi Thakur, Advocate
For Respondent No.1	:	Shri B.P. Sharma, Advocate with Shri Hari Agrawal and Shri M.L.Saket, Advocates
For State/Res. No.2	:	Shri Aditya Bhardwaj, Panel Lawyer

**D.B. :Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Vimla Singh Kapoor**

CAV Judgment

20/12/2019

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against the impugned judgment and decree dated

21st October 2014 passed by learned Additional District Judge, Kondagaon, District -Kondagaon in Civil Suit No.14-A of 2012 by which the plaintiff's suit for specific performance of contract has been decreed.

2. Respondent- plaintiff- Rajmal Jain filed a suit seeking decree of specific performance of contract on the pleadings, inter alia, that in respect of the property in dispute admeasuring 2.85 acres of land owned by defendant No.1, an agreement of sale was executed by defendant – Kishore Kumar Duggad on 19.5.2010 for a consideration of Rs.63,51,000/- and advance of Rs.5,51,000/- was paid by the plaintiff to the defendant. The balance amount of Rs.58 lakh was agreed to be paid at the time of registration of sale deed. According to the plaintiff, under the agreement, sale deed was to be executed by October 2010. Further case of the plaintiff is that at the time of execution of agreement, the possession was also handed over to the plaintiff. The defendant was required to get the land properly demarcated, diverted and also obtain permission of the Collector. However, for want of one reason or the other, the defendant could not get the land diverted and permission obtained from the Collector till October 2010. Thereafter, the defendant executed another agreement on 24.10.2010 and obtained Rs.5,50,000/- from the plaintiff as further advance. Under the new agreement, sale deed was to be executed by August 2012 upon receipt of balance amount of consideration. Though plaintiff repeatedly requested the defendant to get the sale deed executed by receiving balance amount of consideration, the defendant avoided execution of sale deed. Finally, the plaintiff sent legal notice by registered post on 1.12.2011 to the defendant to remain present for execution of sale deed. When the plaintiff, later on, came to know that the defendant, instead of selling of the property, was proceeding to sell the property to some other person, plaintiff got a notice published in the newspaper on 17.1.2012 which was followed by registered notice dated 19.1.2012. Finally, the plaintiff filed the suit for specific performance of contract. The plaintiff pleaded that he was and is always ready and willing to perform his part of contract by depositing the balance amount of consideration with the defendant and, therefore, prayed that the defendant be directed to execute sale deed in his favour in respect of the disputed property.

3. Denying the plaint allegation, the defendant in his written statement though admitted that he had executed an agreement of sale in respect of the property in dispute on 19.5.2010 by receiving an advance of Rs.5,51,000/-, execution of second agreement dated 24.10.2010 was denied. The defendant pleaded that as per the agreement dated 19.5.2010, the plaintiff was required to pay the balance amount of consideration by October 2010 and get the sale deed executed but the plaintiff did not perform his part of contract by depositing balance amount by October 2010. Therefore, the agreement came to an end and the defendant had no legal obligation to execution of sale deed in favour of plaintiff. Further pleading was that the defendant got this land diverted in July 2010 itself which was duly informed to the plaintiff also and even demarcation of land was also got done but he denied that possession of the land was given to plaintiff. It was further pleaded that in the agreement, there was no condition of getting permission obtained from the Collector. As pleaded by defendant, he requested the plaintiff in August 2010 and October 2010 to pay balance amount of sale consideration and get the sale deed executed. However, at that time, as the plaintiff could not arrange the balance amount of consideration, sale deed could not be executed. As per defendant's pleading, he never entered into any subsequent agreement dated 24.10.2010. He did not even receive any advance. He did not sign the agreement. Second agreement is forged document. As the plaintiff failed to perform his part of contract by depositing balance amount of consideration and get the sale deed executed within the time stipulated in the agreement, plaintiff was not entitled to any relief.

4. On the basis of pleadings of the parties, learned trial Court framed issues as below:-

“1. क्या प्रतिवादी क्र.1 ने बंधापारा, कोण्डागांव स्थित खसरा क्रमांक 1071/7, 1097, 1098/1 एवं 1098/2 का कुल रकबा 02.85 एकड़ भूमि को रु.63,51,000/- में वादी को विक्रय करने को इकरार कर दिनांक 19/05/2010 एवं तत्पश्चात् दिनांक 24/10/2010 को इकरार नामा निष्पादित किया था ?

2. क्या प्रतिवादी क्र.1 ने वादी के पक्ष में दिनांक 24/10/2010 को विवादित भूमि के विक्रय के संबंध में इकरारनामा निष्पादित नहीं किया था ।

3. क्या वादी, प्रतिवादी क्र.1 किशोर कुमार से विवादित भूमि का संविदा का पालन कराने का अधिकारी है ?
4. सहायता एवं व्यय ? ”

5. Upon appreciation of oral and documentary evidence led by learned counsel for the respective parties, learned trial Court held that the plaintiff had succeeded in proving agreement dated 19.5.2010 as well as subsequent agreement dated 24.10.2010. The defendant's case that he had not executed any subsequent agreement dated 24.10.2010 was not found proved. Recording a finding that the plaintiff had paid the advance and was ready and willing to perform his part of contract by depositing the balance amount and it was the defendant who was avoiding to perform the part of contract, decreed plaintiff's suit for specific performance of contract, that the defendant should execute sale deed in favour of plaintiff by receiving balance amount of consideration of Rs.52,50,000/- towards sale of 2.85 acres of land situated in khasra numbers 1071/7, 1097, 1098/1 and 1096/2 , Bandhapara, Kondagaon P.H. No.12, RI Circle- Tehsil- District- Kondagaon. The decree also stated that defendant shall obtain necessary permission from the Collector and if the defendant does not take steps within 30 days, the plaintiff may seek permission.
6. Assailing legality, validity and correctness of the impugned judgment and decree, learned counsel for the appellant- defendant would argue that the Court below committed illegality in granting decree even though the plaintiff failed to prove the subsequent agreement dated 24.10.2010 in accordance with law. He would argue that the learned trial Court illegally granted permission to lead secondary evidence on 5.10.2012 by incorrectly recording defendant's consent and no objection, whereas, the defendant had specifically denied execution of second agreement dated 24.10.2010 and even in reply to notice, the defendant had denied existence and execution both, therefore, there was no reason for the defendant to consent to lead secondary evidence. Next submission of learned counsel for the appellant-defendant is that the second agreement is highly suspicious and was liable to be rejected. However, learned trial Court, it is argued, ignored material discrepancies and contradiction in plaintiff's

pleading and evidence. It was the burden of the plaintiff to prove signature of the defendant which the plaintiff failed to prove. The plaintiff has not led clear evidence as to how he purchased the stamp document and for what purpose. The agreement is not notarized. The contents of the so called agreement dated 24.10.2010 are contrary to and at variance with plaintiff averments. The agreement did not contain any condition that the defendant would obtain permission from the Collector but according to the plaintiff, the parties had agreed that the defendant would obtain permission from the Collector, which shows that the second agreement is forged one. Further submission is that the two witnesses of agreement who have been examined are all connected with the plaintiff and are interested witnesses. The evidence of the plaintiff's witnesses who claimed to be witness to the execution of agreement, have deposed regarding agreement which is not only inconsistent and at variance with the contents of the so called agreement dated 24.10.2010 but also with the averment of the plaintiff and even contradictory to each other. The agreement is also suspicious because the agreement contains an unusual clause of very long period allowed to plaintiff to get sale deed executed. Further, the evidence of Handwriting Expert also supports the case of defendant and raises serious doubt with regard to genuineness of so called agreement dated 24.10.2010 and the plaintiff also failed to establish as to wherefrom he had arranged huge amount of Rs.5,50,000/-. Lastly it was argued that the plaintiff's admission that diversion of the land was already done within the time as stipulated in first agreement, plaintiff's case that in the second agreement defendant agreed to land get diverted renders document highly suspicious. It is also submitted that the plaintiff has failed to produce any bank statement to prove availability of fund because the agreement was for huge consideration and not small amount and merely because the plaintiff could pay Rs.5,50,000/- as advance, without proper evidence, it could not be assumed in favour of the plaintiff that he was ready with the huge balance amount of consideration to the tune of Rs.58 lakh. In support of his contention learned counsel for the appellant- defendant placed reliance upon decision in the cases of **Kamalrani Rajaram Guru and Ors. Vs. Km. Pinki** 2001 (4) Civil LJ 362 and **Kamal Kumar Vs. Premlata Joshi & Ors.** 2019 (1) CGLJ 337 (SC).

7. On the other hand, learned counsel for the respondent-plaintiff submits that the plaintiff not only specifically pleaded with regard to two agreements dated 19.5.2010 and 24.10.2010 but he has succeeded in proving those agreements. Plaintiff led evidence of attesting witnesses of agreement dated 24.10.2010. Further submission is that the defendant's objection to application for grant of permission to lead secondary evidence is an afterthought because the learned trial Court has recorded in the order sheet dated 5.10.2012 that on the basis of consent, application was allowed. The defendant did not move any application that the order sheet was incorrectly recorded and long after, on 22.11.2012, application was filed raising such an objection. It is further argued that the discrepancy pointed to raise suspicion on the second agreement cannot be made basis to reject otherwise reliable testimony of two attesting witnesses who have spoken in favour of plaintiff regarding execution of second agreement dated 24.10.2010. Further submission is that the evidence on record and the admission of the defendant clearly proves that the plaintiff is running a jewelry shop and therefore his paying capacity could not be doubted. The evidence on record proves that the plaintiff, on two occasions, firstly at the time of execution of first agreement and, thereafter, at the time of second agreement had paid huge amount, totaling Rs.11 lakh and, therefore, payment of huge amount as advance itself proves plaintiff's capacity to pay balance amount of consideration, even though, a huge one. Next submission of learned counsel for the respondent is that the plaintiff was not only ready but also willing to perform his part of contract. Oral and documentary evidence proves that the plaintiff repeatedly approached the defendant followed by publication of news in the newspaper as also giving notice to the defendant to get sale deed executed and registered by receiving balance amount of consideration. The suit was also filed promptly by the plaintiff as the plaintiff was apprehending that the defendant may proceed to dispose of the property. These averments in pleadings constitute evidence of willingness on the part of plaintiff. According to learned counsel for the plaintiff, the defendant's denial of not only second but also first agreement, proves that the defendant has been taking dishonest plea. It is also submitted that the agreement itself shows that the

possession of the property in dispute was handed over to the plaintiff, therefore, the defendant's plea is in denial of the contents of the agreement executed between the parties. Further submission is that supplementary evidence under Order 18 Rule 4 CPC have not been controverted in the cross examination, therefore, the plaintiff's evidence has to be treated as un-controverted. He would submit that as far as agreement (Ex.P-14) is concerned, the defendant also did not raise any objection at the time when document was being executed which shows atleast execution of second agreement. He would also argue that appellant -defendant in this appeal is not entitled to challenge correctness of order dated 5.10.2012 by which the plaintiff was permitted to lead secondary evidence because later on, the defendant filed petition under Article 227 of the Constitution of India before the High Court bearing No.WP (227) 324 of 2013 in which an order was passed on 3.5.2013, therefore, now the order rejecting review petition cannot be challenged in the present appeal. Kunal Gupta (PW4), Stamp Vendor has also supported plaintiff's case regarding readiness and willingness. B.S. Thakur (PW5), Tehsildar has deposed that permission of the Collector was necessary for execution of sale deed. In such circumstances also where permission is necessary to execute sale deed, decree for specific performance could be prayed for, as held in the cases of **Manzoor Ahmed Magray Vs. Ghulam Hassan Aram and Ors** (1999) 7 SCC 703 and **Rattan Lal** (since deceased) through His Legal Representatives **Vs. S. N. Bhalla & Ors.** (2012) 8 SCC 659. Lastly, it is contended that defendant is not entitled to have discretion exercised in his favour and on the contrary, there is good reason recorded by the trial Court in para-11, 12 of its judgment as to why it exercised discretion in favour of the plaintiff. Further more, relying upon **K. Praksh Vs. B.R. Sampath Kumar** (2015) 1 SCC 597 and **Zarina Siddiqui Vs. A. Ramalingam alias R. Amarnathan** (2015) 1 SCC 705, it has been submitted that the judgment of trial Court should not be lightly interfered with by the appellate Court unless there are strong grounds to do so.

8. Replying to the submissions of learned counsel for the respondent-plaintiff, learned counsel for the appellant-defendant, relying upon order dated 3.8.2018 passed in FA No.418 of 1997 (*Bhiku Bhai and Anr. Vs. Manilal*

Meerani (died) through Lrs.) argued that even though objection to exhibition of Ex.P-14 (agreement dated 24.10.2010) was not taken before the trial Court, it could be raised in appeal. Further relying upon the case of **Md. Ziaul Hague Vs. Calcutta Vyaper Pratisthan** (AIR 1966 Calcutta 605) it is submitted that once the second agreement is not proved, no decree of specific performance could be granted on the basis of first agreement. In support of his case that time is the essence of contract, reliance has been placed in **I.S. Sikandar (dead) By LRs. VS. K. Subramani & Ors.** (2013) 15 SCC 27.

9. After hearing learned counsel for the parties, following points arise for determination in this appeal:-

“A. Whether the learned trial Court committed any error of law and fact in holding agreement dated 24.10.2010 proved ?

B. Whether the plaintiff has specifically pleaded and led evidence to prove that he was ready and willing to perform his part of contract towards deposit of balance amount of consideration of Rs.52,50,000/-.”

10. The plaintiff, in his pleadings, has pleaded execution of two agreements, one being agreement dated 19.5.2010 and the other being agreement dated 24.10.2010. In the written statement, the defendant has admitted execution of first agreement dated 19.5.2010 but denied that the plaintiff was ready and willing to perform his part of contract by depositing the balance amount and getting sale deed executed by October 2010. However, the defendant has specifically denied execution of second agreement dated 24.10.2010. The defendant has not only denied execution of second agreement but also denied receipt of Rs.5,50,000/- allegedly given to him at the time of execution of second agreement by the plaintiff. The defendant's case in this regard has been that the second agreement is a forged and bogus document intended only to grab the property of the defendant and he has specifically pleaded in para-17 of the written statement that his forged signatures were prepared in said document which calls for initiation of criminal case against the plaintiff.

11. It has been pleaded by the plaintiff that the defendant entered into an

agreement of sale on 19.5.2010 for sale of disputed property admeasuring 2.85 acres of land for a total consideration of Rs.63,51,000/-. An advance of Rs.5,51,000/- was also paid to the defendant. It has also been pleaded that under this agreement, possession was also handed over to plaintiff by the defendant and that plaintiff continues to be in possession. It has also been pleaded by the plaintiff that as per clause-5 of the said agreement, the defendant was required to get the land duly demarcated, diverted and also permission granted from the Collector. According to plaintiff, due to his own domestic reasons, the defendant could not obtain permission for the same till October 2010. Therefore, he executed second agreement dated 24.10.2010, in the presence of two witnesses by taking Rs.5,50,000/- as advance and this agreement also refers to earlier agreement dated 19.5.2010. According to plaintiff, at the time of execution of second agreement, defendant had assured that he will get the permission obtained from the Collector as early as possible and also get the sale deed executed. Further pleading is that under the second agreement, the balance amount of Rs.52,50,000/- was to be paid by the plaintiff by August 2012 and get sale deed executed. Further pleading is that despite plaintiff having contacted defendant in April, May and July, 2011 defendant kept on avoiding execution of sale . But when no sale deed was executed a registered notice was sent to the defendant on 1.12.2011 requiring the defendant to get sale deed executed. It has also been pleaded that the plaintiff got a newspaper notice prepared on 13.1.2012 regarding agreement between the parties which was published on 17.1.2012. The plaintiff also pleaded that he got non-judicial stamp worth Rs.17,75,000/- purchased through stamp vendor on 19.1.2012 and kept on waiting in the office of Registrar on 19.1.2012 but, later on he came to know that the defendant had not obtained any permission from Collector because of which sale deed could not be executed. Therefore, an application was got submitted by stamp vendor Kunal Gupta on 19.1.2012 itself before Tahsildar to get challan of non-judicial stamp of Rs.17,75,000/- cancelled. The plaintiff has also pleaded that though the defendant was required under the first agreement to get the land demarcated and diverted, it could not get done, therefore, the sale deed in first agreement could not be executed by October 2010. According to plaintiff, original copy of the agreement dated 24.10.2010 is in

possession of the defendant.

12. The defendant in his written statement admitted having received Rs.5,51,000/- at the time of execution of first agreement dated 19.5.2010. The defendant has also pleaded that in the month of July 2010, the defendant already got the land diverted and information in this regard was given to plaintiff and further that the plaintiff should now pay balance amount of Rs.58 lakh but the plaintiff did not pay balance amount on account of inability and in this manner full payment could not be made whereas the defendant was in need of money, it being a festival season. In para-7 of the written statement the pleading of the plaintiff regarding demarcation has been admitted though plea of possession has been denied. Defendant further pleaded that in the agreement dated 19.5.2010, there was no specific condition incorporated that the defendant would get permission obtained from the Collector.
13. Thus, from the pleadings of the parties as far as execution of first agreement dated 19.5.2010 is concerned, receipt of advance of Rs.5,51,000/- and also diversion and demarcation of the disputed land is admitted position. Moreover, the agreement dated 19.5.2010 does not contain any stipulation regarding obtaining permission from the Collector by the defendant. According to plaintiff's, pleading the defendant, at the time of execution of agreement dated 19.5.2010 had agreed that he would get permission from the Collector but this specific pleading has been denied and the perusal of the agreement dated 19.5.2010 also shows that there was no specific condition incorporated in the agreement that the defendant would obtain the permission from the Collector. Evidence of B.S. Thakur, Tahsildar (PW5) proves that as the land was situated in notified area therefore sale and purchase required permission of the Collector under the provision of Land Revenue Code, but no such permission was taken. However, even if it is held that in the present case no permission was obtained from the Collector, in view of law laid down by the Supreme Court in the cases of **Manzoor Ahmed Magray** (supra) and **Rattan Lal** (supra), suit for specific performance would be maintainable and decree could not be avoided on that ground. In the case of **Manzoor Ahmed Magray** (supra), it was held as below :-

“ 19. Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for the specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J & K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such Officer as may be authorised by him in this behalf is required to be obtained. Dealing with similar contention, this Court in Bai Dosabai v. Mathuradas Govinddas and Others [(1980) 3 SCR 762] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably.”

14. In subsequent decision in the case of **Rattan Lal** (supra), it was held as under:

“26.2. Secondly, the Trial Court also quite erroneously absolved the Respondents of their obligation under the Agreement to obtain sale permission and Income Tax Clearance Certificate, which were required for completion of the sale. We reiterate that the role of the Appellant was merely that of a facilitator and the

primary responsibility for obtaining permission and clearance from the Income Tax Authorities remained with the Respondents. In fact, there is nothing on record to indicate that by his acts, the Appellant ever agreed to play a role other than that of a supportive role and that too in his own interest, in obtaining the necessary clearances."

15. Learned trial Court, in order to come to conclusion that the plaintiff succeeded in proving second agreement dated 24.10.2010, has relied upon evidence of two attesting witnesses Omprakash Tawri (PW2) and Bhupesh Tiwari (PW3).
16. In present case, the plaintiff came out with the case that original copy of agreement dated 24.10.2010 is in possession of the defendant. The defendant in his pleading denied execution of that document. Further it is also not in dispute and is also clearly reflected from order sheet that in reply to notice to produce document filed by the plaintiff, defendant denied that he was in possession of the agreement and defendant's case has been that no such document is in existence. However on 5.10.2012, learned trial Court allowed plaintiff's application for grant of permission to lead secondary evidence, recording that defendant has no objection. Defendant took serious objection and challenged the same by filing a petition in the High Court which was dismissed vide order dated 2.1.2013 passed in WP(227) 882 of 2012. Thereafter, defendant submitted review petition on 8.2.2013 which review petition was also rejected.
17. A perusal of order sheet dated 5.10.2012 shows that learned trial Court heard the counsel for the parties on application under Order XII Rule 6 CPC and Section 65 A of the Evidence Act. The order further records that the defendant had no objection to grant of permission to the plaintiff to lead secondary evidence and the application was therefore allowed and the plaintiff was permitted to lead secondary evidence in respect of the document referred in application under Order XII Rule 66 CPC. The case was thereafter again listed on 6.10.2012 but on this day, the plaintiff did not press his application for injunction and the application was rejected. On

behalf of defendant No.1 no dispute was raised that no consent was given on 5.10.2012. Thereafter, issues were also framed on 8.10.2012, and then case was listed for recording evidence on 11.10.2012. The plaintiff submitted list of witnesses and defendant No.1 also expressed to lead five defence witnesses. Case was thereafter listed on 22.11.2012. On all these dates, no objection was taken with regard to contents of order dated 5.10.2012. It would thus be seen that though case was listed on several dates after 5.10.2012, defendant did not raise any objection whatsoever but the case proceeded.

18. Contents of the application under Section 65-A of the Evidence Act reveal that the plaintiff sought permission to lead secondary evidence contending that original of both the agreements dated 19.5.2010 and 24.10.2010 are in possession of the defendant which the defendant had obtained on the ground that he has to apply before the Collector for grant of permission and the defendant admitted in his written statement that original agreement dated 19.5.2010 is in his possession and the original agreement dated 19.5.2010 has been filed by the defendant along with his written statement. The application was supported by affidavit. The defendant replied the application by stating that there is no agreement dated 24.10.2010 executed by him in favour of plaintiff and therefore it is not correct to say that original document is in his possession.

19. It would thus be seen that while defendant not only admitted execution of agreement dated 19.5.2010 and produced original of the same from his possession, he denied existence of second agreement dated 24.10.2010 and therefore, in these circumstance the plaintiff moved application for grant of permission to lead secondary evidence which was eventually granted on 5.10.2012.

20. It was only later on that the defendant filed an application seeking review and recall of order dated 5.10.2012 which was rejected by the trial Court. Learned trial Court recorded that application itself was filed after 30 days. Defendant preferred petition under Article 227 of the Constitution of India which was also dismissed vide order dated 3.5.2013 passed in WP (227) No.324 of 2013. This Court taking into consideration that the petitioner (appellant herein) himself signed over the order sheet and even though

case was listed on 6.10.2012, 8.10.2012, 11.10.2012 and 22.11.2012 bearing signature of the defendant along with counsel showing his regular presence but not raising any objection before 2012, dismissed the petition. The Court remarked that the conduct of the petitioner (appellant) shows that the petitioner attempted to impeach the proceedings of the Court which is not permissible without any substantive material.

21. In view of the above, now by way of appeal that ground cannot be allowed to be agitated again as the issue attained finality in view of order passed by this Court earlier on 3.5.2013.

22. The objection of the admissibility of the agreement dated 24.10.2010 (Ex.P-14) has also been taken that the same being a photocopy and as the signature of the defendant are not admitted thereon, the said document is not admissible in evidence. We find that during course of trial, when that document was being admitted in evidence no objection was raised. Learned counsel for the appellant has relied upon order of the Court passed on 3.8.2018 of this Court in FA No.418 of 1997 (*Bhiku Bhai & Anr. Vs. Manilal Meerani (died)*). The legal position is quite well settled as has been laid down in the aforesaid decision. In the aforesaid case, this Court considered the issue as to whether the plaintiff, at the admission stage, could object to admissibility of the sale deed when no objection to it being admitted in evidence was taken during trial when the document was exhibited. Answering this question it was held that decision would essentially depend upon whether it is a case where the document is not at all admissible in evidence or where only the mode, by which, it could be admitted in evidence is under challenge. Relying upon the decision of the Supreme Court in the case of **R.V.E. Venkatachala Gounder Vs. Arulmigu "Viswesaraswami & V.P. Temple and Anr.** (2003) 8 SCC 752, it was held that as the objection to the admissibility of the document was not with regard to mode by which it was to be proved but on the ground that document is inadmissible in evidence due to bar created under the law.

In the present case the objection to the admissibility has been taken not on the ground that the admission of the document itself is barred by law but with regard to mode of proof of the document. Therefore, at this stage the objection to the maintainability is liable to be rejected. It however

has to be borne in mind that grant of permission to lead secondary evidence or no objection to document being exhibited and admitted in evidence does not amount to proof of contents of the document. The burden of the party leading such documentary evidence is to prove the document by leading reliable evidence. As far as contents of the document are concerned, legal position in this regard was declared by the Supreme Court in the case of **H. Siddiqui (dead) Vs. A. Ramalingam** (2011) 4 SCC 240, as below :-

“12. The provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor has any factual foundation been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: *Roman Catholic Mission & Anr. v. The State of Madras & Anr.*, AIR 1966 SC 1457; *State of Rajasthan & Ors. v. Khemraj & Ors.*, AIR 2000 SC 1759; *Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen*, (2010) 4 SCC 491; and *M. Chandra v. M. Thangamuthu & Anr.*, (2010) 9 SCC

712).

15. In *State of Bihar and Ors. v. Radha Krishna Singh & Ors.*, AIR 1983 SC 684, this Court considered the issue in respect of admissibility of documents or contents thereof and held as under:

"40.Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil."

16. In *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.*, AIR 2010 SC 2933, this Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt. Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age."

23. In the aforesaid case (**H. Siddiqui**) even though the execution of the power

of attorney was specifically denied, it was found that the trial Court brushed aside the same by observing that it was not necessary for the plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to respondent therein in his cross-examination and he had admitted his signature. The trial Court had decreed the suit observing that as the party has deposed that original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Their Lordships in the Supreme Court held that the approach of the trial Court was clearly illegal. The factual background and the observation made by the Supreme Court in para-13 was as below:

“13. The Trial Court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the Trial Court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother, R. Viswanathan to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant/plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (R. Viswanathan, second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property.

14. In our humble opinion, the Trial Court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value."

24. In view of the above, even if the order allowing plaintiff to lead secondary evidence of the second agreement dated 24.10.2010 and that it was allowed to be exhibited during trial, nevertheless, in order to succeed in the suit, the plaintiff is required to prove its contents that such an agreement was executed between the parties which give the plaintiff, right to sue for specific performance of contract.

25. Defendant has specifically denied execution of second agreement dated 24.10.2010 and has taken stand in the written statement that he never executed any such document and the document is a fictitious and bogus document, only to get relief. Therefore, the plaintiff was required to prove that the parties had entered into second agreement of sale of the disputed property on 24.10.2010 including proof of contents of the said agreement and further that plaintiff was ready and willing to perform his part of contract. In order to prove contents of the agreement, the plaintiff has examined himself as PW1 and also examined Omprakash (PW2) and Bhupesh Tiwari (PW3) as attesting witnesses of the agreement (Ex.P-14).

26. In his affidavit under Order 18 Rule 4 CPC, the plaintiff has stated that initially on 19.5.2010, an agreement of sale of 2.85 acres of land was executed by the defendant No.1- Kishore with plaintiff -Rajmal for a total consideration of Rs.63,51,000/-, out of which Rs.5,51,000/- were paid as advance and it was agreed between the parties that balance amount would be paid at the time of registration of sale deed. This part has not been disputed and defendant has admitted that on 19.5.2010 an agreement was

executed between the parties wherein he had received advance of Rs.5,51,000/- and balance amount was also to be paid at the time of registration of sale deed, subject to the caveat that despite repeated prayer of the defendant, plaintiff failed to pay balance amount by October 2010 and therefore, the agreement of sale loses its efficacy.

27.The dispute is mainly with regard to execution of second agreement dated 24.10.2010. In this regard, the plaintiff has stated in his affidavit that in October 2010, defendant, in need of money, obtained Rs.5,50,000/- from the plaintiff and prepared an agreement in the presence of the plaintiff, two witnesses and by this agreement, time for execution of sale deed, as stated in the agreement dated 19.5.2010 was extended. It was also stated in the affidavit that in the proceedings it was agreed to between the parties that balance amount would be paid by August or before that and sale deed would be executed .In cross-examination he admits that at the time when original agreement (Ex.P14) was executed that was the time of Dussera, Diwali festivals. He has further deposed that stamp paper relating to agreement executed on 24.10.2010 was purchased by his assistant Narpati Patel who is his employee. He further admits that signature of Narpati are not there in Ex.P-12 and further admits that there is no mention of the parties for which stamp in Ex.P-14 was purchased. He also admits that 24.10.2010 was Sunday and stamp paper (Ex.P-14) was purchased prior to that. He also admitted that agreement (Ex.P-14) was not notarized by the Notary. He admits that even during the period of currency of first agreement, diversion of the land was already done. He also admits that there was no recital with regard to seeking permission for sale from Collector in agreement dated 19.5.2010. Another suggestion given to him which has been denied is that he asked defendant No.1 to remain present in the office of the Registrar on 19.1.2012 and clarified by saying that it was he who had asked the defendant to remain present in the office of Registrar on that date and that he was present on that very date.

28.The other witness of the plaintiff Omprakash (PW2) has also stated regarding execution of subsequent agreement dated 24.10.2010 and receipt of Rs.5,50,000/- by defendant. He has stated that son of defendant got the agreement typed in the stamp paper on which defendant No.1

signed and thereafter plaintiff Rajmal signed and thereafter he along with Bhupesh signed the agreement. He has also stated that it was agreed to between the parties that after necessary diversion and preparation of necessary document, Kishore Duggad would inform the plaintiff by 2012 for execution of sale deed. In his cross-examination, he admits that before expiry of the period under first agreement, second agreement dated 24.10.2010 was prepared. He has further stated that he was called by the plaintiff to sign the document in his shop. He has denied suggestion that no agreement was executed on 24.10.2010.

29. The third witnesses of plaintiff Bhupesh (PW3) has also supported the case of the plaintiff by stating that on 24.10.2010, an agreement was executed between Kishore and Rajmal and Rs.5,50,000/- was given as advance. He further stated that on the stamp paper, agreement was got typed by Rajesh, S/o Kishore and thereafter he, the other witness Omprakash, Kishore and Rajmal had signed document. He also stated that the parties had also discussed that necessary permission from the Collector would be obtained by Kishore and after getting all necessary diversion, permission obtained, sale deed would be executed. In the cross-examination of this witness, this witness has stated that the agreement was entered into in the shop of the plaintiff. He has denied the suggestion of non-execution of agreement dated 24.10.2010.

30. Though, on behalf of the appellant, doubt is sought to be raised on the said agreement between the parties by submitting that the plaintiff failed to prove signature of the defendant and that the report of Handwriting Expert renders doubtful that the agreement was ever signed by defendant -Kishore and also that there is some discrepancy with regard to evidence and the contents of the agreement and various terms and conditions, in our considered opinion, in view of specific evidence of the attesting witnesses namely Omprakash (PW2) and Bhupesh Tiwari (PW3) who have clearly deposed in the Court regarding execution of agreement dated 24.10.2010 between the parties, those minor discrepancy do not render improbable execution of agreement dated 24.10.2010. This is so because present is a case where the execution of agreement of sale on 24.10.2010 has been supported by two witnesses. Therefore, minor discrepancy here

and there with regard to exact terms and condition of agreement would not render the entire case of the plaintiff doubtful.

31. Another argument has been raised by defendant-appellant that plaintiff was required to pay huge amount of more than Rs.58,00,000/- towards payment of balance amount of consideration but the plaintiff has failed to prove that he was possessed of fund. Once it is proved that the plaintiff had already paid Rs.11,00,000/- to the defendant by way of advance at the time of execution of two agreements and there being evidence on record to prove that the plaintiff is a Goldsmith and running a shop in the prime area of the city, his capacity to pay balance amount could not be doubted and therefore it cannot be said that the plaintiff failed to lead evidence of readiness and willingness.

32. As far as proof with regard to readiness and willingness is concerned, in the plaint, plaintiff has pleaded in categorical terms that after execution of agreement dated 24.10.2010, the plaintiff contacted the defendant and his son Rajesh in April 2011, May 2011 and July 2011 but the defendant avoided execution of sale deed. It has been further pleaded that in November 2011 defendant had agreed that the sale deed would be executed and registered on 19.1.2012. It has also been pleaded that as the defendant was avoiding execution of sale deed and time was being extended and again, plaintiff had given a notice to the defendant for execution of sale deed by remaining present with all preparedness on 19.1.2012. This notice was given by the plaintiff to the defendant on 1.12.2011. The plaintiff further stated that the plaintiff had deposited Rs.17,75,000/- in the treasury office for purchase of non-judicial stamp to be used for preparation of sale deed but the defendant did not come and then plaintiff came to know that defendant had not obtained permission from the Collector.

33. In his evidence, plaintiff has clearly stated in his affidavit under Order 18 Rule 4 CPC that on 24.10.2010 at the time of execution of agreement he had paid Rs.5,50,000/- to the defendant and thereafter since April 2011 he was continuously approaching the defendant and his son for execution of sale deed and finally the defendant agreed to execute registered sale deed on 19.1.2012. He has also deposed that he had sent a notice to defendant

for execution of sale deed by remaining present on 19.1.2012 in the office of Registrar and he also got a notice published in the newspaper dated 17.1.2012. He has also deposed that he had deposited challan of Rs.17,75,000/- on 19.1.2012 through stamp vendor for purchase of non-Judaical stamp to be used for preparation of sale deed but the defendant did not appear and then he came to know that defendant had not obtained permission from the Collector due to which sale deed could not be executed therefore challan was got cancelled.

34. Aforesaid evidence proves plaintiff's readiness and willingness to perform his part of contract.

35. Defendant- Kishore Duggad in his affidavit under Order 18 Rule 4 CPC has deposed that he never entered into agreement of sale dated 24.10.2010. In his cross-examination he admits that he knows Omprakash who was one of the witnesses of agreement dated 19.5.2010 and admits that there is no enmity with that witness. Having admitted that he entered agreement in May 2010 for sale of property to plaintiff, he admits that the first agreement was valid up to 31.10.2010 and also admits that he had received Rs.5,51,0000/- at the time of execution of first agreement. He further admits that by 31.10.2010, he did not get his land demarcated and further deposed that he did not get demarcation done as per Ex.P-1, the first agreement. He further admits that the condition of demarcation as contained in para-5 of the first agreement was not fulfilled. He further admits that he did not obtain any permission from the Collector. He admits receipt of notice dated 1.12.2011 of the plaintiff.

The conduct of the defendant shows that even though he had obtained huge amount of Rs.5,51,000/- under first agreement, he did not fulfill the condition of first agreement and admitted by him and further that he did not take any steps towards obtaining permission from Collector.

36. Narpati (DW3) has stated that in his evidence that he was an employee of the plaintiff and he had purchased stamp paper as directed by the plaintiff. He deposed that he was asked to purchase stamp during conversation between the plaintiff and defendant relating to certain land. In his cross-examination he admitted that when he was asked to go for purchasing

stamp at that time plaintiff -Rajmal and defendant – Kishore Duggad both were sitting in the shop, He further admits that he had informed stamp vendor that he is purchasing stamp for agreement and has also informed the name of the parties. He also states that when he brought stamp paper both plaintiff and defendant were present. He admits that they were talking with regard to property.

37.B.S. Thakur (DW4), Tehsildar has deposed that Kondagaon being notified scheduled tribal area, even in the matter of sale and purchase of property between non-tribals, permission of the Collector is necessary . He has also deposed that as the land has been diverted, permission of the Collector would also be necessary.

38.The defendant has led the evidence of Dr. Sunanda Dege (DW2) Handwriting Expert to establish his case that agreement dated 24.10.2010 does not bear his signature. In para-6 of her cross- examination, however, this Handwriting Expert has admitted that at the time she obtained signature of Kishore nobody was present. She further admits that the defendant had not put his signature on the copy of Pan card, Income Tax Return and Sales Tax Return. She also admits that Kishore did not put any signature in her presence and also admits that no such report was obtained by the Court. Therefore, much credence cannot be given to said evidence when authenticity of collection of specimen signature has not been proved because present is not a case where the Handwriting Expert's opinion was obtained by the order of the Court. Though even in such cases, Handwriting Expert opinion is admissible in evidence, in view of what has been elicited in the cross-examination of the Handwriting Expert (DW2) much credence cannot be given to such evidence.

39.In the result, we do not find any good ground to interfere with the impugned judgment and decree passed by the Court below.

40.Appeal is therefore dismissed. Let appellate decree be drawn accordingly.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge