IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.81 of 2018

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1. M/s B. N. & Associates, situated at Mohalla Raghunath Tola, Anisabad, P.S. Gardanibagh, Town and District Patna
2. Baijnath Prasad Yadav, son of Ram Vilas Rai, partner of M/s B. N. & Associates, Resident of Mohalla Raghunath Tola, Anisabad, P.S. Gardanibagh, Town and District Patna
3. Kamlesh Kumar Slingh, son of Bhagwan Singh, partner of M/s B. N. & Associates, Resident of Byepass Road, Gardanibag, Anisabad, District Patna
4. Surendra Prasad, son of Late Rajendra Prasad, partner of M/s B.N. & Associates, resident of Manik Chand Talab, P.S. Gardanibag, Anisabad, District Patna
5. Daya Shankar Tiwary, son of late Hirajee Tiwary, partner of M/s B.N. & Associates, resident of Mohalla Raghunath Tola, Anisabad, P.S. Gardanibagh, Town and District Patna

... ... Appellants

Versus

1. Pramod Kumar
2. Yogendra Prasad, both sons of late Sachidanand Singh
3. Braj Bhushan Prasad Singh
4. Krishna Prasad Singh
5. Surendra Prasad Singh
6. Narendra Prasad Singh

All sons of late Jaglal Singh and all resident of Nathupur Road, P.O. Kurthol, P.S. Parasa Bazar, District Patna

... ... Respondents

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Appearance :

For the Appellant/s : Mr. Bishwa Nath Chaudhary, Adv.
For the Respondent/s : Ms. Nilima Sinha, Adv.
Mr. Ajay Kumar Jain, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date : 07-08-2020

Against the judgment dated 9.4.2018 and decree dated 16.4.2018 passed by the Sub Judge II, Patna in Title Suit No. 274/2010, whereby and whereunder instead of decreeing the suit for specific performance of contract, the defendants/ respondents have been directed to pay the amount which they received as an earnest money without cost has been put under challenge under instant appeal at the instance of the plaintiffs- appellants. In order to properly identify the parties they are being introduced through their original status.

2. The plaintiffs/ appellants filed the suit for specific performance of contract under the garb of an agreement dated 19.7.2008 entered amongst defendants/ respondents no. 1 and 2 in one set, the defendants/ respondents no. 3 to 6 in another set, with regard to an area 1.59½ acre, respectively lying under Khata No. 166, Khesra No. 562 of village Nathupur, P.S. Parsa Bazar, District Patna. In order to properly appreciate the case of the parties, as set up, be briefly stated as-

It has been pleaded at the end of the plaintiffs that Guru Sahay Gope S/o Ganga Gope purchased survey plot no. 562 corresponding to Khata No. 166, area 3 acres 19 decimals lying at village Nathupur, P.S. Parsa Bazar, District Patna (Schedule I property) by auction sale in Case No. 1304/1913 vide registered deed dated 25.6.1914 and came over the same. In due course of time Guru Sahay died leaving behind two sons, namely, Jatadhari Singh and Laldhari Singh. Jatadhari Singh died leaving behind Ramanand Prasad Singh, sole legal heir, who died leaving behind Sachidanand Singh. Sachidanand Singh died leaving behind Pramod Kumar and Yogendra Prasad Singh, defendants no. 1 and

2 as his legal heir. Laldhari had a son Jaglal Singh and he died leaving behind Braj Bhushan Singh, Krishna Prasad Singh, Surendra Prasad Singh and Narendra Prasad Singh (defendants no. 3 to 6) as his legal heir. In this way, branches of Jatadhari and Laldhari have got half share in the land under dispute.

3. Then it has been averred that the defendants, after coming in need of money flashed news of sale of the land in question and coming about the same, the plaintiffs approached and then, it was finally settled at the rate of Rs.65,000/- per katha and in token thereof, two deed of agreement, one by defendants no. 1 and 2 relating to 1.59½ acre of land and another by defendants no. 3 to 6 relating to similar area after receiving 4 lacs by defendants no. 1 and 2 as well as defendants no. 3 to 6, independently, respectively were executed on 19.7.2008. It has further been pleaded that some time after execution of the agreement, the defendants insisted upon the demand and in the aforesaid background defendants no. 1 and 2 got Rs.10,50,000/- (totalling Rs.14,50,000/-) while defendants no. 3 to 6 Rs.3,50,000/- (Rs.7,50,000/-) on different occasion.

4. It has further been pleaded that at the time of negotiation, execution of agreement, the defendants fully assured with regard to the land in question being free from any kind of

infirmity vice save and except mutation could be effected relating to some area in their names whereupon, it was agreed amongst the parties that after having mutation in their name, the defendants will inform the plaintiffs followed with registration of the sale deed which the defendants never obliged. During midst thereof, the plaintiffs got information through other sources to the fact that only 1.59½ acre of land is recorded in the name of the defendants while remaining 1.59½ acre of land still recorded in the name of Nathun Singh, son of Gopi Singh. The aforesaid information was conveyed to the defendants with a request that either the matter be finalized or, sale deed in respect of 1.59½ acre of land be executed after receiving the balance amount and after removal of hurdle, sale deed relating to the remaining 1.59½ acre be executed subsequently.

5. It has also been pleaded that the defendants adopted dillydallying tactics on the pretext that they are taking every possible effort for getting their names mutated, on the other hand served an Advocate notice on 24.2.2010 on false and baseless ground including that of the plaintiffs have defaulted in making payment of the remaining consideration amount within the stipulated period which now been expired, so no agreement now subsists. The aforesaid Advocate notice was properly replied on

2.3.2010 wherein the assertion of the plaintiffs was very much controverted, that the plaintiffs are ready and willing to perform their part which has been delayed at the end of the defendants themselves on the ground of having their names mutated and further, requested the defendants to receive the balance amount and execute the sale deed but, the defendants instead of accepting the balance consideration amount and execute the sale deed, replied on 4.3.2010 on same pretext and that being so, the plaintiffs became very much apprehensive, necessitating institution of the suit in order to protect their interest. Then, it has been stated that out of total consideration amount appertaining to Rs.33,17,600/-, Rs.22 lacs have already been received by the defendants (at the rate of 65,000/- per katha) and so, the defendants be directed to receive the remaining consideration amount to the tune of Rs.11,17,600/- and execute the sale deed as, the plaintiffs were never at fault, rather they were/ are ready and willing to perform their part. It has also been peaded that receiving of amount subsequent to execution of agreement by the defendants is indicative of the fact that the plaintiffs were always ready and willing at their part. Then, completing the legal paraphernalia with regard to cause of action, valuation etc., the plaintiffs asked for the relief that a decree for specific performance of contract in pursuance of agreement dated 19.7.2008 be passed in favour of the plaintiffs against the defendants, directing the defendants to execute the sale deed with regard to 1.59½ acre of land, as detailed under Schedule II of the plaint, after receiving the balance consideration amount Rs.11,17,600/-, failing which the same may be done through the process of the court, the defendants be directed to mutate their names relating to remaining 1.59½ acre of land and then, to execute the sale deed after receiving the consideration amount in terms of the agreement relating thereto, the defendants be injuncted from alienating the suit property till final decision of the case, in an alternative, a decree for the amount of Rs.22 lacs which has already been received at the end of the defendants with interest and damages be passed in favour of the plaintiffs against the defendants, cost of the suit, any other relief or reliefs which the plaintiffs is found entitled for. Then, under Schedule I the total area of land has been detailed under Khata No. 166, Khesra No. 562 boundary North- Survey Alang, South- Survey Alang, East- Survey Plot No. 564, West- Survey Plot No. 561, Schedule II, the lands claimed to be sold bearing same khata No., same Survey Khesra No. having boundary North- Survey Alang, South- Survey Alang, East- Survey Plot No. 564, West- Survey Plot No. 562 (part).

6. All the defendants save and except defendant no.2, namely, Yogendra Prasad (ex parte) and defendant no.6 Narendra Prasad Singh (ex parte) appeared and filed their joint written statement whereunder apart from raising ornamental objection, accepted the averments recorded under para-3, para-4 of the plaint, that means to say, acquisition, negotiation, finalization at a rate of Rs.65,000/- per katha, receipt of 4 lacs by both sets of defendants separately, independently relating to 3 acre 19 decimals of land of R.S.P.No. 562 of Khata No.166 followed with agreement dated 19.7.2008 independently, on the other hand, controverted the other details so enumerated under remaining paragraph of the plaint. Further more, it has been pleaded that as the defendants were also eager to purchase another property after removing the land under dispute and for that, they have already advanced Rs.25 lacs. It has further been pleaded that all the papers relating to the title and possession of the land under dispute were shown to the plaintiffs and on being satisfied therewith, negotiation was finalized with regard to the total area of land bearing 3.19 acres at the rate of Rs.65,000/- per katha and in the aforesaid background, on 19.7.2008 after receipt of earnest money to a tune of Rs.4 lacs by each set independently, separately each branch executed deed of agreement in favour of the plaintiff. It has further been pleaded

that the plaintiffs had agreed to pay the remaining consideration amount within eleven months as per terms and got the sale deed executed but, the plaintiff failed to comply with their own promise within the time frame and so, only to cover up their own fault, they have invented a new theme. It has also been pleaded that the time is the essence of contract and so, as the plaintiffs failed to abide with the terms of the agreement within the stipulated period, hence the suit on that very score being deficient one, could be dismissed. It has further been pleaded that whatsoever assertion regarding readiness as well as willingness having at the end of the plaintiffs has been made has got no relevance in the facts and circumstances of the case, more particularly when the period of performance is found duly elapsed, which the defendants had acknowledged the plaintiffs by way of serving Advocate notice. In the aforesaid background, it has been pleaded that on account of non-performance of the terms of contract at the end of the plaintiffs caused agony to the defendants whereupon, they are to be compensated and in the aforesaid background, the suit, as failed, be dismissed.

7. After going through the respective pleadings, the learned lower court had framed the following issues:

I. Is the suit as framed legally maintainable?

II. Have the plaintiffs got valid cause of action for the suit?

III. Is the suit barred by principles of waiver, estoppel and acquiescence?

IV. Is the suit hit under Sec.34 of the Specific Relief Act?

V. Is the court fee paid is sufficient?

VI. Whether the plaintiffs are entitled for the specific performance of agreement dated 19.7.2008 and 19.7.2008 against the defendants?

VII. Whether the plaintiffs are entitled for alternative decree of Rs.22,00,000/- against the defendants?

VIII. Whether the plaintiffs are entitled for interest and damages against the defendants?

IX. To what other relief or reliefs the plaintiffs are entitled to?

and as the learned lower court, instead of decreeing the suit for specific performance of contract granted alternative relief, without interest and damages, hence this appeal.

8. In order to substantiate their case the plaintiffs had produced altogether eight P.Ws., namely, P.W.1 Ramji Prasad (formal), P.W.2 Binod Kumar (formal), P.W.3 Manoj Kumar

(formal), P.W4 Shyam Rai, P.W.5 Baijnath Prasad Yadav (plaintiff no.2), P.W.6 Daya Shankar Tiwary (plaintiff no.5), P.W.7 Kamlesh Kumar Slingh (plaintiff no.3), P.W.8 Surendra Prasad (plaintiff no.4). Side by side, also exhibited- Ext.1 reply notice dated 24.2.2010, Ext.2 Deed of Agreement dated 19.7.2008 executed by the defendants Pramod Kumar (defendant no.1) and Yogendra Prasad (defendant no.2), Ext.2/a Deed of Agreement dated 19.7.2008 executed by Braj Bhushan Prasad (defendant no.3), Krishna Prasad Singh (defendant no.4), Surendra Prasad Singh (defendant no.5) and Narendra Prasad Singh (defendant no.6).

9. In likewise manner, seven witnesses have been examined on behalf of the defendants, who are, D.W.1 Pramod Kumar (defendant no.1), D.W.2 Braj Bhushan Prasad Singh (defendant no.3), D.W.3 Shyam Swaroop Singh, D.W.4 Laxman Singh, D.W.5 Manish Kumar Singh, D.W.6 Md. Nasim Akhtar (formal) and D.W.7 Mithlesh Kumar (formal). The defendants have also exhibited- Ext.A rent receipt, Ext.B Land owner certificate, Ext.C rent receipt, Ext.D certificate of assessment rate.

10. Learned counsel for the appellants/ plaintiffs while assailing the judgment and decree has raised many fold arguments. (a) From the pleadings of the respective parties, it is apparent that the origin of land having been purchased by the forefather of the

defendants in an auction sale is not at all denied nor identity of the land bearing Survey Plot No. 562 Khesra No. 166 area 3 acres 19 decimals lying at Mauza Nathupur, P.S. Parsa Bazar, district Patna is under ambiguity; (b) Defendants no. 1 and 2 as well as defendants no. 3 to 6 have their half and half share; (c) flashing of news at their end to sell the aforesaid land, talk, finalization of negotiation in between the plaintiffs and defendants at the rate of Rs.65,000/- per katha and, execution of deed of agreement by defendants no. 1 and 2 independently after receiving Rs.4 lacs as an earnest money as well as by the defendants no. 3 to 6 after receiving Rs.4 lacs independently on 19.7.2008; (d) in due course of time receiving of 10,50,000/- (totalling 14,50,000/-) by defendants no. 1 and 2 while Rs.3,50,000/- (totalling 7.50,000/-) by the defendants no. 3 to 6.

11. From the aforesaid conduct, it is evident that after payment of Rs.4 lacs at the time of execution of deed of agreement to both sets of defendants, independently, they have also succeeded in having the amount from the plaintiffs sumptuously which indicate availability of cash in possession of the plaintiffs, side by side also depict the willingness and readiness. Therefore, there happens to be no occasion left for suspecting over the conduct of the plaintiffs.

12. It has then been pleaded that at the time of negotiation itself it has been disclosed by the defendants themselves with regard to defective title as, till then they could not succeed in getting the mutation of the total area of the land in their favour and so, in order to have the land free from all sorts of vice, they have themselves offered that they will endeavour their best to get themselves mutated and then thereafter, the matter will be informed to the plaintiffs facilitating next steps. As, the defendants kept the whole scenario behind the curtain, did not inform the plaintiffs whether they succeeded in mutation or not up till the whole tenure, on the other hand, sat idle and then, in order to defeat interest of the plaintiffs served Advocate notice, which in the facts and circumstances of the case, has got no legal recognition.

13. In its continuance, it has also been urged at the end of the learned counsel for the appellants that under para 6 of the plaint, there happens to be specific disclosure that 1.59½ acre of land is found in the name of Nathun Singh. Son of Gopi Singh which has not been controverted at the end of the defendants and so, the terms so agreed amongst the parties ought to have been complied with at the end of the defendants by having their names mutated within the stipulated period so agreed upon and as there

was/ is failure at the end of the defendants, in the aforesaid background "time is essence of contract" has no applicability. Apart from this, by the Constitution Bench it has been settled at rest that "time is essence of contract" could not be strictly followed relating to execution of an agreement concerning immovable property.

14. Then, it has been submitted that from the evidence available on record, it is crystal clear that the plaintiffs have succeeded in substantiating their case more particularly relating to willingness and readiness and in the aforesaid background, suit is bound to be decreed by way of directing the defendants to execute the sale deed with respect to 3.19 acre of land after receiving the balance consideration amount.

15. Now, coming to the finding of the learned lower court, much less recorded under para 20 of the judgment, it has been pleaded that the learned lower court has completely failed to identify the germane of litigation. The learned lower court should have considered the crux as there happens to be no controversy with regard to half share each of defendants no. 1 and 2 at the one end, defendant nos. 3 to 6 on the other. Both sets have executed two independent deed of agreement, received the earnest money independently as well as successive thereto, that means to say

defendants no. 1 and 2 received total earnest money 14,50,000/- while defendants no. 3 to 6 have received 7,50,000/-. The suit has been filed against them only to avoid multiplicity of the suit as the parties being co-parceners, the relief sought against them were common. Even then, the learned lower court while scrutinizing the evidence would have bifurcated and decided the issue in consonance with the respective deed of agreement as well as respective defendants, instead thereof proceeded in clumsiness and recorded the finding unworthily. If the finding so recorded under para-20 of the judgment is annulled, the other findings will automatically debilitate. So, submitted that in the facts and circumstances of the case, the finding so recorded by the learned lower court is otherwise illegal and is fit to be set aside. Lastly, it has also been pleaded that since after judgment, not a single farthing has been paid/ deposited by the defendants/ respondents causing severe financial loss to the plaintiffs/ appellants, which justify infliction of interest. Learned counsel also referred AIR 1995 SC 491(**Sardar Singh vs. Smt. Krishna Devi & anr.**), AIR 2011 SC 103 (**Kammana Sambhamvrthy (deceased by Lrs.) vs. Kalipatapu Atchutamma (deceased by Lrs.**), AIR 2019 SC 3013 (**Beemaneni Maha Lakshmi vs. Gangumalla Appa Rao (since dead) by Lrs.)**, (2000) 10 SCC 636 (**A. Abdul Rashid Khan**

(dead) and ors. vs. P.A.K.A. Shahul Hamid & ors.), AIR 1971 SC 1238 (**Ramesh Chandra Chandiok and Anr. vs. Chuni Lal Sabharwal (dead) by his Lrs.**), 2014(2) PLJR 345 (SC) (**Bishwanath Ghosh (dead) by Lrs. & ors. vs. Gobinda Ghosh @ Gobindha Chandra Ghosh & ors.**) , AIR 1993 SC 1742 (**Smt. Chand Rani (dead) by Lrs. vs. Smt. Kamal Rani (dead) by Lrs.**), AIR 1967 SC 868 (**Gomathinayagam Pillai & ors. vs. Palaniswami Nadar**), AIR 2010 SC 3025 (**Laxman Tatyaba Kankate & Anr. vs. Smt. Taramati Harishchandra Dhatrak**), 2013(1) PLJR 461(**Laddu Gope vs. Manoj Kuer Sharma & ors.**) in order to buttress submissions.

16. Controverting the submission having at the end of the plaintiffs/ appellants, learned counsel representing the defendants/ respondents has strongly defended the finding recorded by the learned lower court. Then, urging that the plaintiffs-appellants are not at all entitled for decree for specific performance of contract, it has been submitted that from the conduct of the plaintiffs which is found exposed from the pleading itself, rightly been perceived by the learned lower court whereupon, instead of decreeing the suit for specific performance of contract directed the defendants to pay back the earnest money which they have received to the tune of Rs.22 lacs which the

plaintiffs intentionally avoiding to receive. It has further been submitted that as there happens to be lapses at the end of the plaintiffs themselves on account of vagueness in the plaint and in likewise manner, failure at the end of the plaintiffs to substantiate their plea, during course of trial. In the plaint, the plaintiffs had asserted that the land appertaining to 1.59½ acres still recorded in the name of Nathun Singh. It was/ is matter of record. The plaintiffs would have taken out the certified copy of the relevant document and would have exhibited the same in order to substantiate with assertion that the defendants had defective title with regard to 1.59½ acre of land.

17. In an alternative, it has also been argued that in para 2 of the plaint, there happens to be specific disclosure that the land under question was purchased by forefather of the defendants in an auction sale in connection with Case No. 1304/1913. There happens to be no intermediary event. Auction purchase is not under challenge. Possession is not under challenge. Then, where is the hindrance. Moreover, rent receipt is not the document of title/ possession so whether it could be a case of defective title. If it is not a case of defective title then, in that circumstance, whether there was any kind of embargo in getting the terms and conditions duly fulfilled within the stipulated period. Even accepting

contention of plaintiffs/ appellants it is crystal clear that no dispute subsists concerning 1.59½ acres of land, then why not an effort was taken with regard thereto. No oral/ documentary evidence has been adduced to justify.

18. Apart from this, it has also been urged that the status of plaintiffs/ appellants as a broker is admitted from one. From the respective deed of agreement, it is crystal clear from incorporation of the fact that as directed by the 1st party (plaintiffs/ appellants) the 2nd party will execute sale deed in favour of third party, with any area duly covered thereunder and transfer the possession. This clause is sufficient to indicate that plaintiffs/ appellants were not in possession of full consideration amount. As, the plaintiffs-appellants failed to perform their own part within the stipulated period on account thereof, the learned lower court rightly dishonoured their plea and directed the defendants/ respondents to return back the amount which they received as an earnest money which the defendants/ respondents are ready to return back the same. Also referred 2008(3) PLJR 263 (SC) (**Shri Rameshwar Prasad (d) by Lrs. vs. Shri Basanti Lal**), 2011(3) PLJR 235 (SC) (**Virnaleshwar Nagappa Shet vs. Noor Ahmad Sheriff & ors.**), 2017(2) PLJR 191 (SC) (**Jayakantham & ors. vs. Abay Kumar**), 2014(4) PLJR 245 (SC) (**Pemmada Prabhakar & ors. vs.**

Youngmen's Vysya Association & ors.), 2016(2) PLJR 246 (SC) (**Satish Kumar vs. Karan Singh & anr.**) in support of the submission.

19. In the peculiar facts and circumstances of the case, what is being considered as the sole ground to adjudicate upon instant appeal, "whether the judgment and decree of the lower court is sustainable"?

20. Before going to express the view on the finding recorded by the learned lower court in consonance of the pleadings, the evidence, submissions raised on behalf of the respective parties, it looks better to discuss the settled proposition of law in this regard and to effectuate the same backdrop is to be properly perceived.

21. It is needless to say that it is the plaintiffs who has to substantiate his case. In likewise manner, it has also been concusively held that he, who comes before the Court, must be with clean hand. As is evident, finalization of negotiation at a rate of Rs.65,000/- is admitted. It is also admitted receipt of 4 lacs by all the defendants/ respondents, separately, independently followed with execution of deed of agreement to specific performance, independently. It is also evident that defendants/ respondents no. 1 and 2 received Rs.10,50,000/- (ten lacs fifty thousand) in different

instalment while remaining defendants/ respondents No. 3 to 6 Rs. 3,50,000/- (three lacs and fifty thousand). However, there happens to be no disclosure in the pleading whether the property was partitioned amongst the defendants no. 1 and 2 at the one end, defendants no. 3 to 6 on the other to the extent of half and half share. In likewise manner, there also happens to be absence whether the property has been, the co-parcenery property (joint Hindu family) and all the co-parceners were joint during negotiation. There also happens to be absence whether negotiation materialized separately identifying the branches or was conjointly. In likewise manner, there also happens to be absence of explanation at the end of the plaintiffs with regard to creation of two deed of agreement dated 19.7.2008. In likewise manner, there also happens to be complete silence why defendants/ respondents no. 1 and 2 were paid 14 lacs 50 thousand, and defendants no. 3 to 6 Rs. 7 lacs and 50 thousand. In likewise manner, plaintiffs/ appellants also kept stillness in whose name mutation was persisting and what steps were taken relating thereto in a way to get execution of sale deed.

22. The law prohibits production of oral evidence in consistent with the documentary evidence having effectuated amongst the parties as is laid down under sections 91, 92 of the

Evidence Act. That means to say, when the terms of any such contract has been reduced to the form of a document, no oral evidence will be entertained inconsistent to the terms of the document. Therefore, whatever been incorporated in the document dated 19.7.2008 identifying the obligation upon the parties as well will be binding over them, and no pleading, evidence incompatible could be allowed.

23. Section 17 of the Evidence Act deals with admission. Its relevance in the present facts and circumstances of the case is, admission at the end of the defendants over finalization of negotiation with the plaintiffs at the rate of Rs.65,000/- per katha, receipt of 4 lacs as an earnest money at the time of execution of the deed of agreement independently by both set followed with execution of deed of specific performance dated 19.7.2008, subsequent conduct of the plaintiffs as admitted by the defendants in having receipt of Rs.10,50,000/- by the defendants no. 1 and 2 while Rs.3,50,000/- by the defendants no. 3 to 6.

24. As per Section 55 of the T.P.Act, certain liability/ responsibility has been put over the seller as well as purchaser. It is not that the purchaser is to accept the disclosure made by the seller with regard to the immovable property in question as gospel truth, rather apart from having obligation on the part of the seller to

divulge all kinds of information relating to immovable property, the purchaser is also under obligation to trace out all necessary information relating to immovable property which he is going to purchase.

25. Apart from this, the readiness as well as willingness of the proposed purchaser (plaintiffs) has also to be seen as required u/s 16(c) and the equity in terms of Section 20 of the Specific Relief Act, as granted by the learned lower court in pursuance of an alternative relief so claimed at the end of the plaintiffs is also bound to be tested.

26. Proceeding ahead, as has been discussed hereinabove, though two separate deed of agreement of specific performance has been prepared, two different kinds of treatment was cared of non-disclosure over nature of property to be partitioned, or joint, made the situation intricate.

27. On the score of jointness two eventualities have been perceived by the Apex Court. The first one that being a co-parcener, the family being joint, the property being classified as joint family property did not identify the co-parcener having absolute title to the property and such question was perceived in **Pemmada Prabhakar & ors. vs. Youngmen's Vysya Association & ors.**, reported in (2015) 5 SCC 355:

"27. With reference to the abovesaid rival contentions, the following points would arise for our consideration:

27.1. (i) Whether the plaintiffs are entitled for the decree for specific performance of the agreement of sale (Ext.A-1) when agreement of sale entered between the plaintiffs and defendants 1 and 2 who do not have absolute title to the property?

xxx xxx xxx

and the Apex Court answered the aforesaid questionnaire in following manner:

"28. It is an undisputed fact that the suit schedule property is self-acquired property by late Pemmada Venkateswara Rao as he had purchased the sai property vide sale deed Document No. 5174 of 1970 dated 24.11.1970 from his vendors. It is also an undisputed fact that the said property is intestate property. He is survived by his wife, three sons and three daughters. The said property devolved upon them in view of Section 8 of Chapter II of the Hindu Succession Act as the defendants are Class I legal heirs in the suit schedule property. Undisputedly, the agreement of sale, Ext. A-1 is executed only by Defendants 1 and 2. The third son, mother and three sisters who have got equal shares in the property have not executed the agreement of sale. In view of the matter, the agreement of sale executed by Defendants 1 and 2 who have no absolute right to property in question cannot confer any right whatsoever upon the plaintiffs for grant of decree of specific performance of agreement of sale in their favour. The said agreement is not enforceable in law in view of Section 17 of the Specific Relief Act in view of the right accured in favour of Defendants 3 to 6 under Section 8 of the Hindu Succession Act.

29. The provisions of Section 17 of the Specific Relief Act in categorical terms expressly state that a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have an absolute title and right upon the property. It is worthwhile to extract Section 17 of the Specific Relief Act, 1963 here:

"**17. Contract to sell or let property by one who has no title, not specifically enforceable.**-(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor

(a) who, knowing not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt."

In view of the aforesaid provisions of the Specific Relief Act, the agreement of sale entered into between the plaintiffs and some of the co-sharers who do not have the absolute title to the suit schedule property is ot enforceable in law. This aspect of the matter has not been properly appreciated and considered by both the first appellate court and the second appellate court. Therefore, the impugned judgment is vitiated in law.

30. Even assuming for the sake of argument that the agreement is valid, the names of three sons are mentioned in the agreement of sale, out of whom the agreement is executed by Defendants 1 and 2 and they assured that they would get the signatures of the third brother, namely, Srinivasa Rao and also of the remaining three sisters. At the time of execution of this agreement signatures were not obtained. Therefore, the agreement is not exeucted by all the co-sharers of the property which fact is evident from the recitals of the document itself. Hence, the plaintiffs are not entitled for specific performance decree. This vital factual and legal aspect has been ignored by both the first appellate court and the second appellate court. Therefore, the impugned judgment is vitiated both on facts and law. Accordingly, Point (I) is answered in favour of the defendants."

28. The second event so perceived, being a co-parcener of a joint Hindu family, has got a right to sell the same but the purchaser would not have right to possess the land rather, he is to seek partition and the property so allotted to his share in consonance with the share of the seller would be possessed by him. In **A. Abdul Rashid Khan (dead) & ors. vs. P.A.K.A. Shahul Hamid & ors.**, reported in (2000) 10 SCC 636, it has been held:

"14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, he is bound to execute the sale deed. However, in the absence of the other co-sharer, there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could onloy be to the extent of transferring the share of the appellants in such property to other such contracting party. In the present case, it is not in dispute that the appellants have 5/6th share in the property. So, the plaintiff's suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court's which requires no interference."

29. In **Gajara Vishnu Gosavi vs. Prakash Nanasaheb Kamble & ors.**, reported in (2009) 10 SCC 654, it has been held:

"9. Be that as it may, three courts have recorded the concurrent findings of fact that partition had never been given effect to in respect of the suit property. Therefore, Housabai could transfer her share. But the question does arise as to whether without partition by metes and bounds, she could put her vendee Anjirabai in possession?

10. In Kartar Singh v. Harjinder Singh, AIR 1990 SC 854, this Court held that where the shares are separable and a party enters into an agreement even for the sale of share belonging to the other co-sharer, a

suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed: (SCCp. 531, para 6)

"6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated."

11. In a recent judgment in Ramdas v. Sitabai, (2009) 7 SCC 444, to which one of us (Dr B.S. Chauhan,J.) was a party, placing reliance upon two earlier judgments of this Court in M.V.S. Manikayala Rao v. M. Narsimhaswami, AIR 1966 SC 470, and Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh, AIR 1953 SC 487, this Court came to the conclusion that a purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.

12. There is another aspect of the matter. An agricultural land belonging to the coparceners/ co-sharer may be unlawful/ illegal as various statutes put an embargo on fragmentation of holdings below the prescribed extent.

13. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a

coparcener can be a subject matter of sale/ transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a court in a partition suit, or by settlement among the co-sharers."

30. In **Mayawanti vs. Kaushalya Devi**, reported in (1990) 3 SCC 1, it has been held:

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

31. In **Sardar Singh vs. Krishna Devi**, reported in (1994) 2 SCC 118, it has been held:

> "The Court has to see the totality of the circumstance, conduct of the parties and the respective interest under the contract while granting or refusing such a relief."

32. In **Vijay Kumar and ors. vs. Om Prakash**, reported in AIR 2018 SC 5098, it has been held:

> "7. In order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract and the readiness and willingness has to be shown through out and has to be established by the plaintiff. In the case in hand, though the respondent- plaintiff has filed the suit for specific performance on 29th April, 2008, the respondent- plaintiff has not shown his capacity to pay the balance sale consideration of Rs.22,00,000 (Rupees Twenty Two Lakhs). In his evidence, the respondent- plaintiff has stated that he has borrowed the amount from his friends and kept the money to pay the balance sale consideration. As rightly pointed out by the Trial Court, the respondent- plaintiff could not produce any document to show that he had the amount of Rs.22,00,000 (Rupees Twenty Two Lakhs) with him on the relevant date; nor was he able to name the friends from whom he raised money or was able to raise the money. Further more, as rightly pointed out by the Trial Court, the respondent- plaintiff could have placed on record his Accounts

Book, Pass Book or the Statement of Accounts or any other negotiable instrument to establish that he had the money with him at the relevant point of time to perform his part of the contract. We are, therefore, in agreement with the view taken by the Trial Court that the respondent- plaintiff has not been able to prove his readiness and willingness on his part.

8. The relief for specific performance is purely discretionary. Though the respondent- plaintiff has alleged that he was ready and willing to perform his part of the contract, the First Appellate Court ought to have examined first whether the respondent- plaintiff was able to show his capacity to pay the balance money. In our considered view, the First Appellate Court as well as the High Court has not properly appreciated the evidence and the conduct of the parties. The First Appellate Court as well as the High Court, in our view, was not right in reversing the judgment of the Trial Court and the impugned order cannot be sustained and liable to be set aside."

33. In **Hari Steel and General Industries Ltd and anr. vs. Daljit Singh & ors.**, reported in AIR 2019 SC 4796 it has been held:

"38. … … … In the judgment relied on by Sri P.S. Narsimba, learned senior counsel in the case of Aniglase Yohannan v. Ramlath and ors. (AIR 2005 SC 3503) (supra), this Court has held that the basic principle behind Section 16(c) read with Explanation (ii) of the Specific Relief Act, is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. In the aforesaid judgment this Court has further held that the court is to grant relief on the basis of the conduct of the person seeking relief. Paras 12 and 13 (Paras 11 and 12 of AIR) of the judgment read as under:

"12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

13. Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. On considering almost an identical fact situation it was held by this Court in Surya Narain Upadhyaya v. Ram Roop Pandey 1995 Supp (4) SCC 542: AIR 1994 SC 542) that the plaintiff had substantiated his plea"

The said judgment of this Court also supports the plea of the appellants herein."

34. In **Madhukar Nivrutti Jagtap & ors. vs. Smt. Pramilabai Chandulal Parandekar & ors**., reported in 2019(4) PLJR 134 (SC) it has been held:

> "13(2) The question as to whether the plaintiff seeking specific performance has been ready and willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case. The requirement is not that plaintiff should continuously approach the defendant with payment or make incessant requests for performance. For the relief of specific performance, which is essentially a species of equity but has got statutory recognition in terms of the Specific Relief Act, 1963, the plaintiff must be found standing with the contract and the plaintiff's conduct should not be carrying any such blameworthiness so as to be considered inequitable. The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the plaintiff in particular. In view of the contentions urged, we have scanned through the record to examine if the finding of the High Court in this regard calls for any interference."

35. Now, in the background of the aforesaid legal proposition, the facts of the case is to be seen. As stated above, the

parties have not controverted the existence of deed of contract dated 19.7.2008. Needless to say, both the documents are an exhibit of the case. From Column No.5 of both the documents, it is apparent that the share has been intended to be purchased. In order to proper appreciate the nature of the deed the relevant portion is to be quoted below:

> "हमगी वो तमामी मवाजी 1.59½ डीसमील मीनजुमला (एक एकड़ साढे उनसठ डीसमील) मीनजुमला 3 एकड़ 19 डीसमल के आधा भाग लेख्यकारीगण का है जिसका बयब्याना हो रहा है, एराजी कास्त रैयती कायमी नकदी परती जमीन, वाके मौजा नथुपुर, सर्वे थाना फुलवारी हाल थाना परसा बाजार, सव वो सदर रजिस्ट्री ऑफिस वो जिला पटना जिसका थाना नं0 109 (एक सौ नौ)] तौजी नं0 5544 खाता नं0 166 (एक सौ छियासठ), खेसरा सर्वे प्लौट नं0 562 (पॉच सौ बासठ) का अंश, वजमिन्दारी बिहार सरकार अंचल अधिकारी फुलवारीशरीफ लगान सलाना मो0 15 रूपये अलावे शेष वो अन्य कर वजरीये जमाबंदी नं0 295 वो 1393 है। सैय वैयव्याना पटना क्षेत्रीय विकास प्राधिकार विघटित के अन्दर है। चौहदी निम्नांकित है।
>
> <u>चौहदी</u>
>
> उतर – सर्वे अलंग
> दक्षिण – सर्वे अलंग
> पूरब – सर्वे प्लौट नं0 564
> पश्चिम – सर्वे प्लौट नं0 561
>
> उपरोक्त चौहदी मीनजुमला रकवा 3 एकड़ 19 डीसमील का लिखा गया है। जिसका आधा भाग लेख्यकारीगण का है।"

36. The aforesaid theme gives an impression that the family was joint and the property was in jointness. However, the plaintiffs, as is evident from the pleading as well as evidence,

appears to be very much confused. From Schedule II of the plaint wherein description of the land has been shown for immediate relief by way of allowing transfer has been specified with boundary which is neither supported by the respective deed of agreement, nor from the evidence. The aforesaid area with boundary is an imagination of the plaintiffs which cannot be acknowledged. This issue is found further supported with own admission of the plaintiffs/ appellants, who has stated that 1.59½ acres of land out of 3.19 acre is properly mutated in the name of defendants which ought to have been disclosed because of deficiency at the end of the plaintiffs/ appellants whether land was joint or separate.

37. The second aspect, which nullify the assertion is evident from the document itself, which is very much explicit regarding mutation having in the name of defendants/ respondents. No evidence contrary thereto is permissible in accordance with Section 92 of the Evidence Act. The relevant portion of the document is quoted below:

> " अपने अपने पिता स्वर्गवास कर जाने बाद श्री रामानन्द प्रसाद सिंह एवं श्री जगलाल सिंह अन्य जायदाद के साथ प्लौट नं0 562 के मीनजुमला रकवा 3 एकड़ 19 डीसमील पर निर्विवाद काविज वो दाखिल मालिक मुस्तकील होते वो रहते वो भी व अदाय मालगुजारी रसीद बनाम रामानन्द प्रसाद सिंह के कटाते चले आये। जिसका जमाबंदी नं0 295 है।"

So many persons came forward to be plaintiff on the basis of to be partner but no document has been made an exhibit. From the deed of agreement, it is evident that M/s Associates was represented by its Managing Director Baijnath Prasad Yadav. However, during course of examination-in-chief, as is evident from P.W.5 Para-3 of the affidavit, he had not stated whether the family was separate or joint. On the other hand, from para-4 of the examination-in-chief it is evident that defendants no. 1 and 2 were paid Rs.14,50,000/- while defendants no. 3 to 6 Rs.7,50,000/- which inspires that the family was separate. The aforesaid theme is further evident from para-5 wherein he has stated that with regard to 1.59½ acre, mutation was already effected in favour of the defendants while with regard to the remaining, Jamabandi was continuing in the name of Nathun Singh, son of Govind Singh. It is further evident from the aforesaid para that para-5 of the pleading has been given a twist in a manner that the defendants were requested to execute the sale deed relating to 1.59½ acre of land and with regard to remaining, the same be executed after correction of the Jamabandi. During cross-examination at para-14 he has stated that he got agreement from both Gotias independently. He had seen the documents relating to the land in question. There was partition affected amongst both the Gotias but he is unable to say in whose name mutation was effected.That also happens to be the evidence of another member of the plaintiffs examined as P.W.6 at para-16 whereunder he admitted that both the Gotias are separate. The same happens to be also evidence of another plaintiff P.W.7 at para-18.

38. From the aforesaid piece of evidence, it is crystal clear that the oral evidence having adduced by Pws. 5, 6, 7 and 8 the plaintiffs are completely inconsistent with the documentary evidence, however they are consistent over partition having effected in the family. Then, in that circumstance, the disputed land as detailed under Schedule I would have been with more clarity by way of properly identified under both deed of agreement, and in likewise manner, Schedule II would have been properly identified in consonance with deed of agreement. There should have also been positive steps to trace out and mark the owner of Schedule II property who could be compelled to perform his part with proper relief against them. However, the pleading and the examination-in-chief are quite inconsistent thereto. The aforesaid disclosure makes the suit as framed non-maintainable as the deed of agreement suggests jointness, purchase of share, contrary to it the evidence suggests purchase of particular portion.

39. And this point neither been controverted nor accepted, rather suggested halfheartedly. Had there been genuine conduct of the plaintiffs, then in that circumstance, would have specifically disclosed in the pleading as well as also during course of evidence that the mutation was effected either in favour of defendants no. 1 and 2 or in favour of defendants no. 3 to 6 and in the aforesaid background would have also suggested that either defendants no. 1 and 2 or defendants no. 3 to 6, as the case may be, be directed to execute the sale deed at an earliest and with regard to remaining, the concerned defendants be compelled in terms thereof. Keeping silence on that very score is indicative of the fact that the plaintiffs have not come with clean hand.

40. Section 16 of the Specific Relief Act casts some sort of obligation and more particularly sub-clause (c) mandates that not only there should be specific averments in the plaint regarding willingness, readiness of the plaintiffs, rather the conduct of the plaintiffs should also be found to be out of blame worthiness, so that the plaintiffs should not be found at fault. From the respective deed of agreement, it is evident that the plaintiffs are not an individual, rather it happens to be a firm named and style as B.N. & Associates. P.Ws. 5, 6, 7, 8 have claimed to be partner thereof but no document has been made an exhibit. The firm is not a

registered one. No document has been to suggest existence of the said firm. It is also admitted that the aforesaid agreement was operative only for eleven months, that means to say, the document got its natural death on 18.6.2009. There happens to be no pleading nor during course of evidence any of the P.Ws. has disclosed that there was extension of the period. It is also an admitted fact that the first notice was served on 24.2.2010. It is further evident, P.W.5 (para-15) that he had instructed the defendants to execute the sale deed but he is not remembering the exact date. He had not demanded execution of the sale deed within the stipulated period in writing. On 24.2.2010 the seller informed through Advocate notice that the period of agreement has already expired. P.W.6 at para-17, P.W.7 at para-19 and P.W.8 at para-17 have reiterated the same. Although, P.W.5 has not stated during cross-examination on that very score but, P.W.7 at para-16 has stated that they have filed return up to the financial year 2007-08 and thereafter, the firm has been closed. At para-17 he has stated that he is unable to file return of 2007-08. The formation of firm was through a document but no document was prepared with regard to closure. That means to say, whether on the date of filing of the suit Baijnath Prasad (P.W.5) was really/ actually representing the firm which was in existence has become doubtful and in likewise manner, creates doubt over having such huge amount in possession of the firm on account of its non-entity. The most surprising feature is that irrespective of the fact that the agreement was entered at the end of B.N. Associates through Managing Partner Baijnath Prasad Yadav, the Advocate notice was served on B.N.Associates through Managing Partner Baijnath Prasad Yadav but, none of the P.Ws. have stated that the aforesaid firm was in possession of the fund, the aforesaid firm was in willingness as well as readiness to perform its part in terms of the agreement. The reply having at the end of the plaintiffs has not been brought up on record which would have enlightened the issue more clearly though, it has been incorported under para-7 of the pleading that the reply was made on 2.3.1920 which was responded by the defendants on 4.3.1920.

41. In **Shankar Singh vs. Narinder Slingh & ors.**, reported in 2014(16) SCC 662, it has been observed:

> “26. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is considered to be a substantial remedy, whereas the later is of course a specific remedy. It is true that Explanation (i) to Section 10 of the Act provides that unless and until the contrary is proved, the court shall presume that breach of contract to transfer immovable property cannot be

adequately relieved by compensation in money. However, this presumption is not an irrebuttable one. That apart, for a specific performance of a contract of sale of immovable property, there must be certainty with respect to the property to be sold.

27. As held by this Court in para 18 of Mayawanti v. Kaushalya Devi, (1990)3 SCC 1 (p.12)

"18. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all."

42. In **Madhukar Nivrutti Jagtap & ors.** (supra), it has been laid down:

"16.2 In our view, after it was found that granting the decree for specific performance in the very terms of the agreement/s in question may not be appropriate because of myriad factors, the matter ought to have been examined with reference to the stand of the parties and the provisions of Sections 21 and 22 of the Act of 1963. For ready reference, we may extract the said provisions as were existing at the time of filing of the suit in question as under:-

"21. *Power to award compensation in certain cases.*- (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, in addition to such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation- The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

22. *Power to grant relief for possession, partition, refund of earnest money, etc.*-(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint,the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."

43. After analyzing, crystallizing the evidence on record in consonance with the pleading, legal principle it is apparent that

the finding so recorded by the learned lower court needs no interference. Consequent thereupon, this appeal sans merit and is accordingly dismissed.

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

(Aditya Kumar Trivedi, J)

Surendra/-

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