

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.51 of 2012

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KAMESHWAR CHOUDHARY, S/O Late Mahajan Choudhary, Resident of Village- Madhopur, Sipah, P.O- Rana Bigha, Police Station- Deep Nagar, District- Nalanda.

... Defendant ... Appellant/s

Versus

SHRAVAN KUMAR, S/O Angnu Mahto, Resident of Village- Mustafapur, Police Station- Giriak, District- Nalanda, at Present Resident of Mohalla- Devi Sarai, P.S- Deep Nagar, District- Nalanda.

... Plaintiff ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Niraj Kumar, Adv.
For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
C.A.V. JUDGMENT

Date :14-02-2020

Defendant-appellant, against the judgment dated 30.01.2012 and decree dated 09.02.2012, whereby and whereunder the suit has been decreed on contest without cost directing the defendant-appellant to execute sale deed with regard to the disputed land in favour of the plaintiff-respondent within two months after receiving the rest consideration amount otherwise the plaintiff-respondent will be entitled to get the sale deed executed through the process of the court, challenged the same under the present appeal.

2. From the appeal record it is evident that notice has validly been served upon the plaintiff-respondent but, he did not choose to appear. Whereupon, the appeal has been heard ex-parte.

3. The parties are being identified by their original status which they possess before the learned lower court.

4. It has been pleaded at the end of the plaintiff that Survey Plot No.954, area 5 decimals lying under Khata No.146, Thana



No.94, Tauzi No.11313 of village Madhopur, Sipah, P.S. Deep Nagar (Laheer), district- Nalanda belonged to Basudeo Mistry and Sakhi Chand Mistry, son of Sri Ramphal Mistry and accordingly, were over the land. In due course of time coming in need of money they promulgated to sell the land and finally Hari Choudhary and Kameshwar Choudhary succeeded in purchasing the aforesaid land on a due consideration vide sale deed dated 21.07.1980 and, since thereafter they came over the land. Subsequently thereafter, Hari Choudhary and Kameshwar Choudhary partitioned the property and in course thereof, Kameshwar Choudhary got 1.576 decimal of land of plot no.954 which is the subject-matter of dispute. After partition, Kameshwar Choudhary came over the land and, continued with his physical possession. In order to purchase other property as well as to meet out necessary expenses, Kameshwar Choudhary shown his inclination to sell the land and negotiation was finalized with the plaintiff over a consideration amount appertaining to Rs.5,75,000/-. Then it has been asserted that after finalisation of the negotiation, aforesaid Kameshwar Choudhary had disclosed that for the present execution of sale-deed was not possible due to unavoidable circumstances. However, he asked for Rs.55,000/- with an undertaking that the said amount would be earnest money, and in token thereof, he is ready to execute *Baibayana*. Furthermore, it has been assured at his end that by 30.11.2006 he will execute sale deed



after receiving rest consideration amount which the plaintiff accepted. Whereupon *Baibayana* was executed by the plaintiff after receiving Rs.55,000/- on 10.11.2006. The aforesaid document was scribed by Manoj Kumar and Kishori Prasad stood attesting witness while Ravindra Prasad as a witness. The aforesaid document was handed over to the plaintiff.

Then it has been averred that few days thereafter, i.e. on 13.11.2006, Kameshwar Choudhary came to the plaintiff and demanded Rs.1,50,000/- as he was in urgent need of money. He had further stated that Rs.5,20,000/- is still due so, he will endorse the same over the back of *Baibayana* document regarding receipt of Rs.1,50,000/- which will be adjusted out of the total consideration amount. Accordingly, the plaintiff paid Rs.1,50,000/- on 13.11.2006 and in token thereof, aforesaid Kameshwar Choudhary put his L.T.I. at the back of the *Baibayana* document and the receipt was scribed by one Karu Choudhary, friend of Kameshwar Choudhary. It has also been pleaded that on 16.11.2006 aforesaid Kameshwar Choudhary again came and demanded Rs.50,000/- on the pretext that he has to purchase a land wherein there happens to be shortage of certain amount and during course thereof, pleaded in same manner. The plaintiff paid Rs.50,000/- on 16.11.2006 and, Kameshwar Choudhary put his L.T.I. on the back of the *Baibayana* document and the receipt



was scribed by Kishori Prasad. So, by 16.11.2006 Kameshwar Choudhary succeeded in procuring Rs.2,55,000/- from the plaintiff.

As per the terms and conditions after receiving rest amount Kameshwar Choudhary was under an obligation to execute the sale deed by 30.11.2006 and, by 16.11.2006 Kameshwar Choudhary had already received Rs.2,55,000/- and so, deducting from the total consideration amount of Rs.5,75,000/-, the plaintiff began to request Kameshwar Choudhary to receive the balance amount appertaining to Rs.3,20,000/- and execute the sale deed but, on one pretext or the other Kameshwar Choudhary began to delay the matter. Whereupon, on 22.11.2006 an Advocate notice was served upon the defendant through Shri Laxman Prasad Singh, Advocate requesting to receive the balance consideration amount appertaining to Rs.3,20,000/- and execute the sale deed but, even after receipt of the Advocate notice it was never replied rather, Kameshwar Choudhary personally approached and said that he will execute the sale deed after receiving the balance amount, just trust him. However, made some sort of excuse over non-performance of his part. After having been fully assured at the end of Kameshwar Choudhary, the plaintiff began to wait over proper opportunity. Even after expiry of the statutory period i.e. 30.11.2006, the plaintiff did not perceive any positive response at the end of Kameshwar Choudhary, whereupon, again contacted but Kameshwar Choudhary



in similar fashion responded pushing ahead the issue lastly, seeing no other option, the plaintiff served another Advocate notice on 11.01.2007. Subsequently thereof, Kameshwar Choudhary informed that as he is going outside and will return 1-2 days after *Holi*. Thereafter, he will receive the remaining balance amount and execute the sale deed positively. Just after *Holi*, the plaintiff again approached Kameshwar Choudhary and requested to accept the balance amount and execute the sale deed but, Kameshwar Choudhary in similar fashion again replied that after 10-15 days he, after receiving the due consideration amount, will execute the sale deed. Being apprehensive out of the conduct of Kameshwar Choudhary, seeing no an alternative filed the suit.

It has also been pleaded that the plaintiff was always ready to perform his part that means to say, was ready to make payment of residuary consideration amount appertaining to Rs.3,20,000/-, is ready to pay the residuary consideration amount of Rs.3,20,000/-, will be always ready to pay the residuary consideration amount of Rs.3,20,000/-. Complying other mandatory requirements, suit has been filed with following reliefs:

- (i) The decree for specific performance of contract be passed in favour of the plaintiff against the defendant;
- (ii) the defendant be directed to receive the remaining consideration amount of Rs.3,20,000/- and execute the sale deed



within specific time schedule failing which the court be pleased to execute the sale deed followed with delivery of possession;

(iii) the defendant be permanently restrained to execute any kind of document relating to the land under schedule;

(iv) cost of the suit; and

(v) any other relief or reliefs to which the plaintiff is found entitled for.

Thereafter the details of the property has been shown as Tauzi No.11313, Thana No.94, Municipality- Biharsharif, Ward No.31 having 17' 2"- north to south, 40'- east to west having Khata no.146, Khesra No.954, area 1.576 decimals having boundary north- remaining part of the plot (A/P Jagdish Prasad), south- Santosh Kumar, East- Road, West- Gulab Lal.

5. The defendant Kameshwar Choudhary appeared and filed written statement controverting the allegations whatsoever been levelled in the plaint regarding any kind of negotiation having in between the plaintiff and the defendant with regard to sale of the land and in likewise manner, receipt of the earnest money followed with receipt of amount so disclosed at subsequent two occasions, although, origin of the land and manner of devolvement thereof over the defendant has been admitted. It has further been pleaded that after coming over the land, the defendant



constructed residential house thereupon wherein he is residing along with his family. It has also been pleaded that the defendant has got no other property so, there happens to be no occasion for him to sell. In the aforesaid background, it has been pleaded that the description at the end of the plaintiff with regard to the execution of *Baibayana* is nothing but a forged and fictitious document and in likewise manner, he controverted his L.T.I. over the same after receiving of the earnest money and in likewise manner, also denied to have his L.T.I. at two successive dates after receiving the part consideration amount lateron. It has also been pleaded that Kishori Prasad and Karu Choudhary are henchman of the plaintiff and in the aforesaid background the documents as referred, brought into picture on account of fraudulent, dishonest intention, activity of the plaintiff in conspiracy with Karu Choudhary and Kishori Choudhary in order to grab his property.

6. Then, it has been pleaded that the defendant negotiated to purchase a property and for that, he had paid Rs.50,000/- out of his savings as well as after borrowing some amount as an earnest money but as he failed to manage the remaining consideration amount whereupon, could not be able to get the land purchased. In the aforesaid documents, it has been pleaded that in case the plaintiff would try to take benefit with



regard to the aforesaid 50,000/- which the defendant had paid as an advance, would be nothing but out of dishonest malicious intention of the plaintiff. Again emphasizing that neither there was any talk nor negotiation was finalized for sale of the land no amount was received as an earnest money followed with subsequent amount creation of any document. In likewise manner, no Advocate notice has been received at the end of the defendant which indicates the fraudulent activity of the plaintiff and so, raising question over genuineness of the conduct of the plaintiff in question prayed for dismissal of the suit.

7. On the rival pleadings of the parties, the learned lower court had framed the following issues and answered the same in favour of the plaintiff against the defendants resulting decreeing the suit in a manner as indicated hereinabove, hence this appeal:

I S S U E S

1. Is the suit as framed maintainable?
2. Is the cause of action as stated in the plaint correct?
3. Is the suit barred by law of limitation?
4. Whether the defendant had executed deed of *Bai-beyana* dated 10.11.06 in favour of plaintiff or not?
5. Whether the defendant had received Rs.2,55,000/- from the plaintiff or not?
6. Is the claim of the plaintiff correct?
7. Whether the plaintiff is entitled for a decree of specific performance of contract for sale or not?



8. To what any other relief plaintiff is entitled to?

8. On behalf of the plaintiff altogether eight witnesses have been examined, namely, PW-1, Kishori Prasad, PW-2, Ravindra Prasad, P.W.3 Manoj Kumar who are witness on facts, PW-4, Birendra Kumar (formal witness), PW-5, Shrawan Kumar (witness on fact), PW-6 (photographer), PW-7 is the finger print expert and PW-8 is also a photographer as well as seventeen exhibits have been exhibited on his behalf. Exhibit-1 is the signature of witness Kishori Prasad, Exhibit-1/A is the signature of defendant and witness for receiving money on the back page of *Baibayana* deed (Ext.1), Exhibit 1/B is the signature of witness Ravindra Prasad on the first page of *Baibayana* deed dated 10.11.2006, Exhibit-2 is *Baibayana* deed, Exhibit 3 and 3/A are the photo copy of legal notices dated 22.11.2006 and 11.01.2007 respectively, Exhibit 4 is the postal receipts, Exhibits 5 & 5/A are photo and negative of LTI, Exhibits 6 and 6/A are also photo and negative of LTI, Exhibit-7 is the expert report, Exhibits 8 & 8/A are the negative and enlarged copy of LTI for identification by expert, Exhibit-9, 9/A and 9/B are the negative and enlarged copy of LTI for identification.

9. In likewise manner, three witnesses have been examined on behalf of the defendant, namely, DW-1, Kameshwar



Choudhary (defendant), DW-2 is Mantu Kumar who is son of plaintiff and DW-3, Sunil Kumar is a witness on fact. No documentary evidence has been brought up on behalf of the defendant.

10. Learned counsel for the defendant-appellant has submitted that the finding so recorded by the learned lower court is perverse, cryptic, whereupon fit to be set aside. In order to justify his submission, learned counsel for the appellant has submitted that by way of filing written statement, the defendant has controverted the allegation having at the end of the plaintiff-respondent. That means to say, save and except the origin of the land under dispute, the other disclosure i.e. coming in need of money, floating a message to sell the land, negotiation, finalisation, acceptance of the earnest money, execution of *Baibayana*, subsequent acceptance of money and then refusal, all are palpably false, imaginary and further, not at all found legally substantiated. It has also been submitted that two things are necessary while appreciating the prayer under Section 16 of the Specific Relief Act, i.e. readiness and willingness of the party which should not be a mere literal activity and secondly, plea of hardship.



11. So far the readiness and willingness is concerned, from the evidences so adduced it is apparent that the same has been incorporated in the plaint by way of fulfilling the formality as, the plaintiff-respondent never prayed before the learned lower court to allow him to deposit the amount, nor the plaintiff-respondent could be able to substantiate that the amount was readily available with him. Consequent thereupon, the finding so recorded by the learned lower court on that very score happens to be arbitrary as well as beyond the record.

12. Now coming to second aspect, it has been submitted that right from the written statement, it has been raised at the end of the defendant-appellant that he has got only piece of land, the disputed one, whereupon his residential house stands, wherein he resides along with his family members and so, he will have a hardship in case the plaintiff's main relief is allowed. As it happens to be equitable right hence the court below would have properly considered the same in the background of the fact that the money was taken for purchase of the land, which never materialized.

13. Because of the fact that even after receiving notice, the plaintiff-respondent failed to appear and so, this appeal has been heard ex-parte against him.



14. After hearing the defendant-appellant as well as going through the lower court record, the following points are formulated for just decision of the case:

(1) Whether the plaintiff has got cause of action as well as right to sue?

(2) Whether the plaintiff is entitled for a decree under the Specific Performance of Contract?

(3) Whether the plaintiff is entitled for equitable right by way of alternative relief so prayed for?

(4) Any other relief or reliefs to which the plaintiff is found entitled to?

15. Before coming to the points so enumerated hereinabove, it looks apposite to refer the principles so laid down by the Apex Court how and in what manner the suits being filed under Specific Relief Act is to be seen and, what are the obligations which the parties have to discharge.

16. In **Mehboob-Ur-Rehman vs. Ahsanul Ghani** reported in **AIR 2019 SC 1178** it has been held :

13. It remains trite that the relief of specific performance is not that of common law remedy but is essentially an exercise in equity. Therefore, in the Specific Relief Act, 1963, even while providing for various factors and parameters for specific performance of contract, the provisions are made regarding the contracts which are not specifically enforceable as also the persons for or against whom the contract may be specifically enforced. In this scheme of the Act, Section 16 thereof provides for personal bars to the relief of specific performance. Clause



(c) of Section 16 with the explanation thereto, as applicable to the suit in question, had been as follows:-

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) *** **

(b)*** **

(c) [who fails to aver and prove] [By Act No.18 of 2018, the expression "who fails to aver and prove" is substituted by the expression "who fails to prove"] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation:--For the purpose of clause (c),---

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff [must aver] (By the same Act No.18 of 2018, the expression "must aver" is substituted by the expression "must prove.") performance of, or readiness and willingness to perform, the contract according to its true construction."

14. Though, with the amendment of the Specific Relief Act, 1963 by Act No. 18 of 2018, the expression "who fails to aver and prove" is substituted by the expression "who fails to prove" and the expression "must aver" stands substituted by the expression "must prove" but then, the position on all the material aspects remains the same that, specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms of which, the performance has been prevented or waived by the other party. As per the law applicable at the relevant time, it was incumbent for the plaintiff to take the specific averment to that effect in the plaint. Of course, it was made clear by this Court in several decisions (vide Syed Dastagir v. T.R. Gopalakrishna Setty: (1999) 6 SCC 337: (AIR 1999 SC 3029): and Aniglase Yohannan v. Ramalatha and Ors.: (2005) 7 SCC 534: (AIR 2005 SC 3503), that such requirement of taking the necessary averment was not a matter of form and no specific phraseology or language was required to take such a plea. However, and even when mechanical reproduction of the words of statute was



not insisted upon, the requirement of such pleading being available in the plaint was neither waived nor even whittled down. In the case of A. Kanthamani v. Nasreen Ahmed: (2017) 4 SCC 654: (AIR 2017 SC 1236), even while approving the decree for specific performance of the agreement on facts, this Court pointed out that the requirement analogous to that contained in Section 16(c) of the Specific Relief Act, 1963 was read in its forerunner i.e., the Specific Relief Act, 1877 even without specific provision to that effect. Having examined the scheme of the Act and the requirements of CPC, this Court said,-

“22. Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16 (c) read with requirements contained in Forms 47 and 48 of Appendix ‘A’ CPC”

15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in the case of Umabai (supra) as under:-

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in- chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

45. It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question..."



17. In **Beemaneni Maha Lakshmi v. Gangumalla**

Appa Rao reported in **AIR 2019 SC 3013** it has been held as under:

“11. Now so far as the submission on behalf of the appellant that if the decree for specific performance of the contract is passed after number of years, it would cause undue hardship to the defendant – vendor and the reliance placed upon the decision of this Court in the case of P.R.Deb (AIR 1996 SC 1504) (supra) is concerned, it is required to be noted that in the written statement the defendant has not pleaded any hardship to be caused if the decree of specific performance of the contract is passed against the defendant – vendor. At this stage, the decision of this Court in the case of A. Maria Angelena v. A.G. Balkis Bee, reported in AIR 2002 SC 2385 is required to be referred to. In the aforesaid case, the vendor sought to raise the plea of hardship for the first time before this Court and this Court did not permit the vendor to raise such a plea of hardship by observing that as no plea as to hardship if relief for specific performance is granted was raised by the defendant – vendor in written statement nor any issue was framed that the plaintiff – purchaser could be compensated in terms of the money in lieu of decree for specific performance, such plea cannot be entertained for the first time in appeal by way of SLP, more so, when there are concurrent findings that the plaintiff was ready and willing to perform his part of the contract has been recorded by the lower courts. Therefore, the plea raised on behalf of the vendor on hardship cannot be permitted to be raised now, more particularly when no such plea was raised/taken in the written statement.”

18. In **Hari Steel and General Industries Ltd. and**

another vs. Daljit Singh and others reported in **AIR 2019 SC 4796** it has been held as under:

“38. In the judgment relied on by Sri P.S. Narsimha, learned senior counsel in the case of Aniglase Yohannan vs. Ramlatha 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.”

19. In **Vijay Kumar and others vs. Om Prakash**

reported in **AIR 2018 SC 5098**:

“(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 29 th 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.”

20. In the background of principles so laid down by the Apex Court as referred hereinabove, now point nos. 2, 3 and 4 have to be seen in consonance with the materials having adduced on behalf of the respective parties. It has been pleaded at the end of the plaintiff that negotiation was finalized on a total consideration amount of Rs.5,75,000/-. The date of negotiation has not been disclosed. Simply it has been incorporated that *Baibayana* was scribed on 10.11.2006 after receiving the earnest money of Rs.55,000/- and the sale deed was to be executed by 30.11.2006 as, in the opinion of the defendant execution of sale deed was not possible in usual way. It has also been incorporated that on 13.11.2006 the defendant took Rs.1,50,000/- and endorsed the same by putting his LTI identified by Karu Choudhary and on 16.11.2006 Rs.50,000/- which was endorsed by Kishori Prasad concerning his LTI over the back of the document and then there



happens to be story with regard to subsequent conduct of the defendant. In the plaint apart from others at paragraph 13 it has specifically been incorporated that plaintiff was ready to pay the remaining consideration amount, is ready and will be ready.

21. On the other hand, the defendant completely disowned the statement of the plaintiff with regard to negotiation to sell, finalisation of the negotiation, execution of *Baibayana* after receiving Rs.50,000/- as an earnest money, receipt of Rs.1,50,000/- as well as 55,000/- at two different occasions, as per negotiations, in terms of *Baibayana* rest amount was to be received by 30.11.2006 followed with execution as well as registration of the document but from paragraph 13 of his written statement it is evident after going through page 9 of that paragraph which speaks as: “the defendant has talk to purchase a land and, he paid Rs.50,000/- out of his savings as well as after collecting money but, as the total consideration amount was not paid so, defendant could not succeed to purchase the land. If, the plaintiff intends to take the benefit of advance paid by the defendant to the tune of Rs.50,000/-, will be illegal.”

Though defendant flatly refused to acknowledge claim of the plaintiff but aforesaid disclosure hints otherwise and if the same taken together with the evidence of L.T.I. expert, coupled



with conduct of the appellant who never raised any grievance to get the L.T.I. examined, is another circumstance which prosecute the appellant.

Be that as it may, now coming ahead to next stage, evidence has to be seen. It is needless to say that if the plaintiff who has to prove his readiness and willingness hence, his evidence has to be seen at first instance.

22. PW-5 is the plaintiff. During his examination-in-chief, paragraphs 1 to 4 relate with origin of the land. At para 5 he has disclosed that as Kameshwar Choudhary came in need of money, whereupon he flashed the news to sell his land. After coming to know about the same he became one of the contender, talk was finalized over consideration amount of Rs.5,75,000/-. It has also been averred that during course of negotiation, Kameshwar Choudhary disclosed that for the present he is not in a position to execute sale deed so, after paying Rs.55,000/- a document of *Baibayana* be executed. In the same sheet it was also finalised that by 30.11.2006 after paying the remaining consideration amount, sale deed be procured at his end. He accepted the same and then, after paying Rs.55,000/- he got *Baibayana* which was scribed by Manoj Kumar, having LTI of Kameshwar Choudhary, identified by Kishori Prasad and



witnessed by Ravindra Prasad. Then thereafter there happens to be disclosure with regard to receipt of Rs.1,50,000/- on 13.11.2006, 50,000/- on 16.11.2006 and in token thereof, Kameshwar Choudhary put his LTI and the same was endorsed by Karu Choudhary as well as Kishori Prasad successively. It has also been stated that since after 16.11.2006 he repeatedly requested Kmeshwar Choudhary to receive the remaining consideration amount and execute the sale-deed but, on one pretext or the other Kameshwar Choudhary deferred the same. Whereupon, he served Advocate notice on 22.11.2006. Even thereafter Kameshwar Choudhary assured him that after expiry of the period he will execute the sale deed. Thereafter again notice was served on 11.01.2007 and at that very moment also he assured the same. Then has denied the suggestion having at the end of the defendant. During cross-examination from para 19 to 21 has been made with regard to his financial capability. In para 22 he has stated that he had purchased 10 kathas of land at his village out of savings of agriculture as well as compoundary. He had also purchased 3¹/₄ decimals of land about 12 years ago. In para 23 he has stated that he had seen the land having house thereupon. Some portion was Khaprposh, as also roof. At para 28 he has stated that he has got no information whether Kameshwar Choudhary has got any other



land save and except the present one. In para 29 he has stated that Kameshwar Choudhary had disclosed that he has to purchase another house after sale of the house. He has also to set off the persisting loan. He has also stated that Kameshwar Choudhary has also got *Baibayana* with regard to a house but he is unable to say from whom. At para 30 he has admitted that in the document the land has been shown as cultivable. In para 31 he has stated that at the time of *Baibayana* Kameshwar Choudhary was residing in that building. In para 33 he has stated that when negotiation with Kameshwar Choudhary was finalized he was in possession with Rs.5,75,000/-. This amount was from sale of his land. He had not deposited the same in the Bank. Cash was preserved by him. In para 34 he has stated that at the time of *Baibayana* he had divulged Kameshwar Choudhary that he is in possession of full consideration amount so, accept it and got the sale deed executed but, Kameshwar Choudhary insisted that for the present, he has got no time so *Baibayana* document be executed. In para 37 he has stated that Karu Choudhary is the witness of acceptance of Rs.1,50,000/- on 13.11.2006 by Kameshwar Choudhary. Kameshwar Choudhary has also disclosed that he has to purchase a house but he is unable to say whether the building has been purchased or not. At para 41 he has stated that he has not filed any



receipt concerning of Advocate notice. So, from his evidence it is apparent that the source of money having in his possession happens to be on account of sale of land. From the record it is evident that the plaintiff has not filed any sale deed nor description has been specified in order to substantiate that during the course of negotiation and subsequently thereof, up to 30.11.2006 he was in possession of Rs.5,75,000/- after sale of the land.

23. PW-1 is Kishori Prasad. He has not deposed that he had seen Rs.5,75,000/- with the plaintiff. He has not stated that in his presence the plaintiff had ever stated that kindly accept the remaining amount and execute the sale deed, and in similar way PW2, Ravindra Prasad, PW-3, Manoj kumar stated. P.W.4, Birendra Kumar is a formal witness in nature who had simply exhibited Advocate notice dated 22.11.2006 as well as 21.01.2007 but, so far the postal receipt is concerned the same had only been with regard to dated 10.01.2007. PW6, Ashish Pal is a photographer. PW-7 is LTI expert and PW-8 is also a photographer.

24. As per the principles laid down by the Apex Court as discussed hereinabove, it is crystal clear that the plaintiff is under obligation to substantiate his case. So, the plaintiff would have been in a position to substantiate that he was in possession of Rs.5,75,000/- on the date of execution of *Baibayana*. He was in



possession of money on subsequent dates till the conclusion of the trial. Definitely on that very score rules out readiness, willingness of the plaintiff much less having the remaining consideration amount. At the present moment, another lacuna is found persisting having absence of alternative relief, whereupon, it could not be granted. After having analytical scrutiny of the materials available on record, it has become crystal clear that the judgment, decree impugned did not find favour. Hence is set aside. Consequent thereupon the appeal is allowed. However, in the facts and circumstances of the case parties will bear their own costs.

(Aditya Kumar Trivedi, J)

skpathak/-

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