

IN THE HIGH COURT OF JUDICATURE AT PATNA

SECOND APPEAL No.300 of 2010

(Against the judgment and decree dated 08-03-2010 passed by Additional District Judge, Fast Track Court No.5, Samastipur, in Title Appeal No. 33 of 1998).

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1. Ram Ekbal Rai
 2. Siya Ram Rai
 3. Rabindra Kumar Rabindra

All sons of Sri Kamal Rai resident of village – Sheopur Maricha, P.S. Tajpur, District- Samastipur

... .. Appellant/s

Versus

1. Rajendra Prasad son of Krishnadeo Rai resident of village Halai, P.O. Tajpur, District- Samastipur
2. Laxuman Roy
3. Nagendra Roy
4. Shatrughana Roy
5. Shiv Chandra Roy,
All sons of late Nandlal Roy, all resident of vill. Sheopur, Maricha, P.O. Maricha, P.S. Tajpur, Dist. Samastipur.
6. Indra Devi, wife of Tilleshwar Roy, daughter of late Nandlal Rai, resident of village Kumaiya, P.S. Tajpur, Dist. Samastipur
7. Bashmati Devi wife of Shiv Kumar Roy, Daughter of late Nand Lal Roy, Resident of village- Pundih, Patna.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Rajendra Narayan, Sr. Advocate
Mr. Manoj Kumar, Advocate
For the Respondent/s : Mr. Ganpati Trivedi, Sr. Advocate
Mr. S.Kr.Thakur, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV JUDGMENT

Date : 05-04-2024

Heard Mr. Rajendra Narayan, learned senior counsel for the appellants and Mr. Ganpati Trivedi, learned senior counsel for the respondents.

2. This Second Appeal has been filed by the defendants/appellants against the judgment of affirmance dated



08.03.2010 passed by the Additional District Judge, F.T.C.-5, Samastipur, in Title Appeal No. 33 of 1998 whereby judgment and decree dated 31.08.1998 passed by the Sub-Judge-Ist, Samastipur in Title Suit No. 32 of 1996 was affirmed.

3. Following substantial questions of law have been formulated for determination:-

(i). Whether the courts below having failed to consider and decide specifically about the readiness and willingness of the plaintiff to perform his part of contract, the impugned judgments are vitiated in law?

(ii). Whether the appellate court judgment is at all a judgment in law against the appellants in as much as only the appeal of defendant no.1 namely T.A. 4 of 1999 has been taken into account and it has not complied with any requirement of XLI Rule 31 C.P.C. and has put a stamp of approval on the trial court judgment?

(iii). Whether the appellate court judgment is vitiated on account of absolute non-consideration of the evidence of appellants except one or two and has not even considered all the documents produced by the appellants?

(iv). Whether the judgments of the courts below are vitiated on account of wrong approach, putting wrong onus of



proof on defendants as well as misreading and misconstruing the documents on record?

(v). Whether the Courts below having failed to consider and decide that the plaintiff has not sought the relief that the admitted Sale Deed dated 10.01.1996 executed by the Defendant no. (1) in favour of the Defendant 2nd set be declared as void and it be cancelled as required under Section 31 of the Specific Relief Act, the suit is barred by limitation and no relief can be granted and thus the judgments and decree of the Courts below are fit to be set aside and the suit is fit to be dismissed?

4. The respondents herein was the plaintiff before the learned trial court. The appellants here in were defendants. The plaintiff/respondents filed Title Suit No. 32 of 1996 for Specific Performance of Contract which was decreed *vide* judgment and decree dated 31.08.1998 passed by the learned Sub Judge-I, Samastipur. Being aggrieved, the defendants/appellants filed Title Appeal No. 33 of 1998 which was affirmed by the Additional District Judge, F.T.C.-V, Samastipur *vide* judgment and decree dated 08.03.2010. Hence, the present Second Appeal has been filed by the defendants/appellants.

5. In order to gauge the matter in its correct perspective, it is necessary to briefly re-state what the suit entails. The



plaintiff/respondents filed Title Suit No. 32 of 1996 for Specific Performance of Contract in respect to the lands appertaining to C.S. Khata No. 704, Plot Nos. 1666 and 1668 areas 3 kattha 10 dhurs and further for a direction to the defendants to execute the sale deed in favour of the plaintiff on receipt of the balance consideration money and in the event of non-execution the same should be executed through the process of the court.

6. The case of the plaintiff, is that, Bhaju Khirhar was the recorded tenant of Khata No. 704 (Cadastral Survey Khatian) who died leaving behind his two sons, namely, Bhadai Khirhar and Ruplal Khirhar, who inherited the property of his father and came in possession of the said Khata No. 704, Plot Nos. 1666 and 1668. Thereafter, they sold 3 kattha 15 dhurs of Plot No. 1666 and 3 kattha 5 dhurs of Plot No. 1668 to Bhonu Rai and Deo Lal Rai, who after purchase came in possession of the said land. Both Bhonu Rai and Deo Lal Rai purchased half and half area of both the plots. After death of Bhonu Rai, his son Jai Mangal Rai sold 3 katha and 10 dhurs of Plot Nos. 1666 and 1668 to Nand Lal Rai through registered sale deed dated 03.05.1954. Thereafter, remaining lands of the said plots were also purchased by Nand Lal Rai (defendant no. 1). Nand Lal Rai was in need of money therefore he intended to sell the land in



question to plaintiff/respondents for Rs. 41,000/- but the plaintiff was not able to arrange the said amount therefore there was an agreement to pay advance money of Rs. 26,000/- to fulfill the need of defendant no. 1 and in lieu defendant no. 1 would execute Mahadnama (agreement to sale) and after payment of rest of money sale deed shall be executed. As per agreement of the parties, registered Mahadnama deed was executed on 07.07.1994 in favour of plaintiff with respect to suit land. Thereafter, the plaintiff tried several times to give the rest of the consideration money i.e. Rs. 15,000/- so that sale deed may be executed in his favour but the defendants evaded. On the other hand defendant No. 1 executed sale deed on 10.01.1996 in favour of defendant 2nd set for a consideration of Rs. 49,000/-, therefore, the necessity of suit arose as the same is illegal, forged and fabricated.

7. On summons the defendant no. 1 and defendant 2nd set appeared and filed their written statement separately but both have taken common stand and contended that the suit as filed is not maintainable. There is no cause of action to file the suit and the same is barred by law of limitation especially acquiescence and wavier. It was not denied that Bhaju Khirhar was the common ancestral of Bhadai Khirhar and Ruplal Khirhar and



plot no. 1666 area 3 katha 15 dhurs, Plot no. 1668 area 3 katha 5 dhurs belonged to originally Bhaju Khirhar, his sons Bhadai Khirhar and Rup Lal Khirhar, jointly executed sale deed on 05.07.1919 for the entire area of Plot Nos. 1666 (area 3 katha 15 dhurs) and 1668 (area 3 katha 10 dhurs) to Bhonu Rai and Deo Lal Rai i.e., half 3 katha 10 dhurs to Bhonu Rai and half 3 katha 10 dhurs to Deo Lal Rai, half and half share in both the plots. Thereafter, son of Bhonu Rai, namely, Jai Mangal Rai sold half share i.e., 3 katha 10 dhurs of both the plots to defendant no. 1 Nand Lal Rai on 03.05.1954. Jai Mangal Rai was in possession of eastern half portion of both the Plot Nos. 1666 and 1668 and thereafter Nand Lal Rai defendant no. 1 came in possession of eastern half portion of both the plots.

8. The further case of the defendants is that Deo Lal Rai owned and possessed half area 3 katha 10 dhurs of both the plots from western side through said registered deed dated 05-07-1919. Defendant no.1 and Deo Lal Rai were agnates. Deo Lal Rai mortgaged his share of land to Nand Lal Rai through deed of mortgage on 03.05.1954. Consequently, Nand Lal Rai came in possession of 3 katha 10 dhurs of Plot Nos. 1666 and 1668 on western side. It is further case of defendant 2nd set that the said mortgage had already been redeemed and there is no rebuttal on



behalf of defendant no.1. It is further contended that Mahadnama Deed (agreement to sale) dated 07.07.1994 executed by the defendant no. 1 in favour of the plaintiff in respect of western half portion of the two plots is not genuine or legal because he had no right to execute Mahadnama in respect of Schedule-I property of the suit land.

9. It is the further case of the defendant 2nd set that defendant no. 1 sold eastern half land area 3 katha 10 dhurs and some other land total of 4 katha 5 dhurs to the defendants 2nd set on 10-01-1996 for valid consideration of Rs. 49,500/-. The plaintiff had knowledge of this sale. Earlier on 30.12.1987 the sons of Deo Lal Rai, namely, Rajeshwar Rai, Yogeshwar Rai and Rameshwar Rai had executed registered sale deed in favour of these defendants/appellants as regards the lands of their share i.e. 3 kathas, 10 dhurs of plot no. 1666 and 1668 which was on the western half of the entire land of plot no. 1666 and 1668. The defendants/appellants built their houses on these lands and are living in it with their family peacefully.

10. The learned Trial Court, on the basis of the pleadings of the parties, framed issues and took up the issue nos. 3 to 5 at first.

11. Issue No. 3 is whether the Mahadnama dated



07.07.1994 is genuine and legal, Issue No. 4 is whether Mahadnama is in respect of western half portion of land of Deo Lal Rai which was under mortgage to defendant no.1 and the Mahadnama Deed was created with ulterior motive and so the same is not an agreement to sale requiring Specific Performance of Contract and issue No. 5 is whether the defendant 2nd set had knowledge of Mahadnama dated 07.07.1994 and even then they got the sale deed dated 10-01-1996 executed in their names from defendant no.1?

12. The learned trial court has referred and recorded about certain admitted facts which are as follows:-

(i) C.S. Plot Nos. 1666 and 1668 stood recorded in the name of Bhaju Khirhar out of which his sons sold land on 05.07.1919 to Bhonu Rai and Devlal Rai half each.

(ii) Plot nos. were wrongly recorded as 1266 and 1268 due to mistake of scribe.

(iii) Defendant no. 1 had purchased half of the land through registered sale deed dated 03.05.1954 from Bhanu's son, namely, Jai Mangal Rai.

(iv) Defendant 2nd set got executed three registered sale deeds Ext.-1 to 1(ii) on 31.12.1987 from the three sons of Devlal Rai in respect of other half land of Devlal Rai's share (western



half).

(v) Defendant 2nd set party got registered sale deed dated 10.01.1996 executed by defendant no. 1.

(vi) Defendant 2nd party got possession over the total land of both halves.

(vii) Mahadnama deed dated 18.01.1991 was executed and the suit bearing Title Suit No. 9 of 1991 got compromised and Title Suit No. 12 of 1994 was dismissed for non payment of court fees.

13. Learned counsel for the appellants submits that while recording admitted facts, the trial court made certain wrong recordings like the one given below, the execution of the registered agreement dated 07.07.1994 (Mahadnama) is admitted and defendant no. 1 made an endorsement of receiving Rs. 26,000/- out of consideration amount of Rs 41,000/-, which has been vehemently denied by the defendants. Similarly, recording about mortgage is also not important because the mortgage was already redeemed. Learned trial court has held that on 07.07.1994 the defendant no. 1 has got an area of 3 kattha 10 dhurs land in two plots and he was competent enough to enter into a contract with the plaintiff. Agreement to sale dated 07.07.1994 is genuine, legal and for consideration and



defendant 2nd set had knowledge about Mahadnama deed in faovur of plaintiff and even after knowledge they got the sale deed executed in their favour in the year 1996 from the defendant no. 1. and accordingly the suit was decreed vide judgment and decree dated 31.08.1998.

14. Aggrieved by the said judgment and decree these defendants/appellants preferred Title Appeal No. 33 of 1998 and Laxman Rai son of Late Nandlal Rai original defendant no. 1 filed Title Appeal No. 04 of 1999. Both the appeals were decided by common judgment and decree dated 08.03.2010 and the judgment and decree of the trial court was affirmed.

15. Learned counsel for the appellants submits that the learned appellate court has failed to consider and appreciate that defendant no. 1 Nandlal Rai and his descendants have denied execution of such Mahadnama then it was bounden duty of plaintiff to prove beyond all doubts which he has failed to do and the courts below have failed to appreciate it. The difference of the plot number in question and its boundaries especially on the eastern side as mentioned in the plaint and Mahadnama have not been legally taken note of by courts below nor have they tried to appreciate it and its consequences that plaintiff has completely failed to prove his case and the courts have gone



beyond pleadings to make out a third case for him for any how decreeing the frivolous and false suit. Learned senior counsel for the appellants further submits that the appellate court has also failed to consider that western half and eastern half could be directed to be executed by defendant no. 1 when the eastern half had already been purchased by defendant 2nd set in the year 1996 and after purchasing the lands of both eastern and western side they have built their houses and are living with their families in it. It is vehemently submitted that there is no relief sought for cancellation of the sale deed dated 10.01.1996 executed by defendant no. 1 in favour of defendant 2nd set appellants which is stipulated under Section 37 of the Specific Relief Act and without discussing and addressing these important issues, issue nos. 3 to 5 have been rightly decided by the trial court. Learned senior counsel further submits that without even referring to any materials of defendants/appellants Title Appeal No. 33 of 1998 and by referring to only about Title Appeal No. 4 of 1999 the appellate court has concluded saying that it also stand dismissed along with Title Appeal No. 4 of 1999. It is submitted that learned courts below have completely failed to consider and decide the readiness and willingness of the plaintiff to perform his part of contract. Learned senior counsel further submits that



with regard to the deed of agreement to sale dated 07.07.1994 in respect of western half of the Plot Nos. 1666 and 1668, the learned trial court has held that defendant no. 1 was not the owner of the western half. The defendant no. 1 was the owner of the eastern half area which is not the case of the plaintiff. None of these PWs had said that defendant 2nd set had knowledge of Mahadnama dated 07.07.1994. In fact, defendant 2nd set had no knowledge of Mahadnama. Defendant no. 1 had no authority to execute alleged Mahadnama dated 07.07.1994 with regard to western half. It is submitted that two appeals were filed against the judgment of trial court, one by defendant no. 1 and another by defendant 2nd set i.e. appellants. The appeal of defendant no. 1 namely Title Appeal No. 04 of 1999 has been taken into account but with regard to appeal of defendant 2nd set namely Title Appeal No. 33 of 1998, the same has not been considered lawfully by the appellate court and it has completely failed to comply the mandatory provision of Order XLI Rule 31 CPC. The judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons for the said decision. Looking to the plain language of that rule, it cannot be said that failure to comply with these provisions is a bare irregularity. The lower appellate court



cannot run away from its onerous duties of recording the finding of fact and/or discussing the evidence.

16. Learned senior counsel further submits that without cancellation of sale deeds dated 10.01.1996 or 30.12.1987, the relief claimed for is against Section 31 of the Specific Relief Act. Reliance has been placed in case of ***Md. Noorul Hoda vs Bibi Raifunnisa and Ors.*** reported in (1996) 7 SCC 767 paragraph no. 6 where in Hon'ble Supreme Court while discussing about Section 31 of the Specific Relief Act has held that *the plaintiff has to seek relief to get deed or instrument which is standing against him to be cancelled within 3 years and Articles 59 and 113 of the Limitation Act would also be important to be seen in this regard. The plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injuries can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled.*



17. In the present case, the plaintiff never prayed for cancellation of the registered sale deed dated 10.01.1996 or 30.12.1987. The evidence of PW-9, the trial court has recorded that the western boundary has been wrongly scribed in Mahadnama dated 07.07.1994 and plaintiff never intended to get any Mahadnama in respect to that portion of land as it belonged to Devlal Rai and to be inferred that the eastern house was contracted to be sold which was of defendant no. 1 and the eastern boundary of the suit land was wrongly described in Mahadnama. On the basis of such contradictory findings trial court decreed the suit. The learned trial court has also recorded that western half had already been sold to defendant 2nd party in the year 1987. The court has also held that defendant no. 1 has no right to execute any Mahadnama (Ext.-2) in favour of defendant. No decree against defendants can be passed in the suit and the learned appellate court while deciding the issues involved in Title Appeal No. 33 of 1998 and only by referring to the Title Appeal No. 04 of 1999, has concluded that this appeal also stands dismissed along with the Title Appeal No. 04 of 1999 without discussing and addressing points involved in the aforesaid appeals.

18. On the other hand, learned senior counsel for the



plaintiff/respondents submits that the plaintiff entered into an agreement to sale with defendant no. 1 for which a registered Mahadnama was executed on 07.07.1994 for a consideration amount of Rs. 41,000/-, and consideration money of Rs. 26,000/- was paid and balance money was to be paid on 05.07.1997. The application regarding readiness and willingness getting the sale deed executed was averred in paragraph 15 of the plaint which the defendant went on avoiding, hence, it cannot be said that there was no application in compliance of proviso 2 of Section 16 (c) of the Act. Learned counsel for the respondents further submits that it has been repeatedly held by the Apex Court that application of readiness and willingness is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate readiness and willingness of the plaintiff, it will not militate against readiness and willingness of the plaintiff. The fact of the present case is that according to the plaintiff the sale deed was to be executed on 05.07.1997 in favour of plaintiff whereas without awaiting the due date promised by defendant no. 1 for execution of the sale deed, the defendant executed the sale deed in favour of 2nd party on 10.01.1996. Therefore, the question of readiness and willingness to perform the part of the



contract by the plaintiff for execution of the sale deed which was scheduled to be executed on 05.07.1997 doesn't arise at all.

19. From perusal of entire deposition of plaintiff (PW-9), it is evident that defendant has not cross examined PW-9 on the issue of readiness and willingness and thus the requirement as per Section 16(c) of the Specific Relief Act is completed. Learned senior counsel further submits that Bhonu Rai and Devlal Rai both became owner of 3 kattha 10 dhurs each. Bhonu Rai died leaving behind his son Jai Mangal Rai. Jai Mangal Rai sold 3 kattha 10 dhurs of Plot Nos. 1666 and 1668 i.e. eastern part of land in favour of Nandlal Rai on 03.05.1954. Devlal Rai executed registered deed of mortgage with respect to the western half of the two plots bearing Plot Nos. 1666 and 1668 in favour of Nandlal Rai. Therefore, Nandlal Rai with respect to two plots i.e. Plot Nos. 1666 and 1668 became owner with respect to the eastern half of the said plots and with regard to western half of the said plots as mortgagee.

20. As per the case of plaintiff, defendant no. 1 executed Mahadnama dated 07.07.1994 with respect to the land mentioned in Schedule-I of the plaint whereas in paragraph 20 of the written statement it has been specifically admitted that Nandlal Rai had executed two Mahadnama one in favour of his



friend Ram Sagar Rai on 18.01.1991 and another in favour of plaintiff on 07.07.1994 for the purpose of usurping the land of Devlal Rai which had been mortgaged to Nandlal Rai but without there being any consideration. Therefore, the factum of execution of registered agreement for sale on 07.07.1994 stands admitted by defendant no. 1. Title Suit No. 12 of 1994 was filed by Ram Sagar Rai against defendant no. 1 which got dismissed on the ground of non-payment of court fees by Ram Sagar Rai, Mahadnama dated 18.01.1991 in favour of Ram Sagar Rai and Mahadnama dated 07.07.1994 executed in favour of plaintiff by defendant no. 1 was with respect to the land which was mortgaged but Nandlal Rai on the basis of the registered deed of mortgage on 03.05.1954 which was to be redeemed by 38 Vaishakhi 1384 fasli but the same was not redeemed by Devlal Rai meaning thereby the defendant no. 1 admittedly executed Mahadnama which according to him was the land of Devlal Rai. It is further contended that the agreement to sale dated 07.07.1994 is a registered document. The execution thereof has not been denied by defendant no. 1 which categorically proves that defendant has executed the agreement to sale after receipt of the part of consideration money i.e. Rs. 26,000/- , the payment of Rs. 26,000/- as a part of consideration money has been



proved by the scribed PW-2 as well as Ram Uchit Rai PW-3, mere error in the date of payment of part consideration money in the legal notice i.e. 07.07.1994 instead of 05.07.1994 cannot demolish the case of the plaintiff regarding the payment of part consideration money which has been admitted in the registered agreement to sale executed by defendant no. 1. It is well settled law that registered document is presumed to be validly executed, onus is upon the person who pleads evidences to revert the same. The reliance has been placed on the decision of Apex Court in the case of ***Prem Singh and Ors vs. Birbal and Ors.*** reported in **(200)6 5 SCC 353**. It is submitted that in view of Section (1) (D) of the Specific Relief Act, once the property has been purchased subsequent to a contract for sale, the onus lay heavily upon the subsequent purchaser to prove that he had no knowledge of the previous contract. In the present case, as a finding of fact both the courts below on an appreciation of evidence led by the parties have accordingly held that there was agreement to sale with respect to the suit property between the plaintiff and defendant no. 1 for a consideration of Rs. 41,000/-, part thereof amounting to Rs. 26,000/- has been paid to defendant no. 1 on 05.07.1994 and the balance consideration money of Rs. 15,000/- was to be paid up till 05.07.1997 and



defendant 2nd party in spite of knowledge of agreement had purchased the suit land on 10.01.1996, with knowledge of the previous contract for sale dated 07.07.1994 (Exhibit-2). Both the trial courts as well as the appellate court have accordingly held that the defendant 2nd set had the knowledge of the previous agreement to sale between the plaintiff and defendant no. 1. The benefit of Section 9 (B) is not available to defendant 2nd set as he had knowledge of previous contract. Both the courts have rightly decreed the suit in favour of plaintiff/respondents.

21. On analyzing the materials on record, as well as the impugned judgments, it is apparent that the vendor Nand Lal Rai purchased the land through registered sale deed dated 03-05-1954, bearing Khata No. 704, Plot Nos. 1666 and 1668, 3 Katha and 10 dhurs from Jai Mangal Rai, son of Bhonu Rai, from eastern side of the said two plots, and 3 Katha and 15 dhurs of Plot Nos. 1666 and 1668 from the western side, remained in ownership of Deo Lal Rai, who purchased the said land with the said Bhonu Rai on 05-07-1919. The said Deo Lal Rai mortgaged his share of purchased land from the western side to Nand Lal Rai through deed of mortgage on 03-05-1954. Therefore, he came in possession of half eastern side on the basis of purchase of plot Nos. 1666 and 1668 as purchaser and



half of the same plots from western side as mortgagee. The sons of Deo Lal Rai, namely, Rajeshwar Rai, Yogeshwar Rai and Rameshwar Rai had executed a registered sale deeds on 30-12-1987 in favour of defendants/appellants as regards the lands of their share which was on the western half of Khata No. 704, Plot Nos. 1666 and 1668. However, boundary of Mahadnama i.e., agreement to sale (Exhibit 2) of Khata No. 704, Plot Nos. 1666 and 1668, area 3 Katha, 10 Dhurs.

Boundary

North	- Road,
South	- House of Ram Sagar Rai,
East	- Nij Man Mokir, (Nand Lal Rai Defendant No. 1)
West	- Sujinder Rai (full brother of Defendant Nos.2, 3, 4)

22. It is apparent from the boundaries of the suit land, that from the eastern side of the suit land, Nand Lal Rai have remaining land. From the said eastern land, the said Nand Lal Rai executed sale deed on 10.01.1996 in favour of Ram Iqbal, Rai, Siya Ram Rai and Sri Ravindra Kumar @ Ravindra (Defendant 2nd Set), appertaining to Khata No. 704, Plots No. 1666 and 1668, area 4 katha, 10 dhurs, which was bounded as follows.



North - Road
South - Ram Ji Rai and others
East - Srimati Sunaina Devi
West - Ram Ekbal Rai & Ors (recent purchaser)

(Through sale deed dated 30-12-1987 with regard to western half of the said land and through sale deed dated 10-01-1996 with respect to eastern half of the said land).

23. The agreement to sale dated 07-07-1994 with respect to 3 kattha 10 dhurs half of Plot Nos. 1666 and 1668 as per boundary western half of the said plots is the subject matter of the suit/appeal. It is apparent from the deed of 30-12-1987, the said western half of the Plot Nos. 1666 and 1668 had already transferred to the defendant 2nd set by the sons of Dev Lal Rai, who was one of the original title holders of the western portion of Plot Nos. 1666 and 1668. This fact has not been denied by the plaintiff/ respondents. This Court is of the opinion that the suit land, as per the boundaries, was purchased by defendant 2nd set on 30-12-1987, which was never challenged by the plaintiff.

24. The Hon'ble Supreme Court in the case of ***Md. Noorul Hoda*** (supra) has held that “*when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an*



insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the Court may in its discretion so adjudge it and order it to be delivered or cancelled..”

25. The Hon’ble Supreme Court, while discussing about Section 31 of the Specific Relief Act, 1963 has held that plaintiff has to seek relief to get deed or an instrument, which is standing against him to be cancelled within three years, and Articles 59 and 113 of the Limitation Act would also be important to be seen in this regard. In the present case, plaintiff has not sought relief as such, as stated above.

26. It is apparent from the record that the western part of the land purchased through registered sale deed dated 05-07-1919 from the entire area of plot Nos. 1666 and 1668 belonged to Deo Lal Rai. Later on, three sons of Deo Lal Rai



had executed registered sale deeds of western half of plot Nos. 1666 and 1668 to defendant 2nd set- appellants on 30-12-1987. Therefore, the plaintiff/respondents have no right to claim or maintain the suit of the western side of the said two plots without cancellation of deed dated 10-01-1996 and 30-12-1987, while sale deed dated 10.01.1996 pertains to Plot Nos. 1666 and 1668 from eastern side of the entire of the said plots.

27. So far question of readiness and willingness to perform part of the contract by adducing cogent evidence, acceptable evidence has not been placed on record to prove plaintiff's readiness and willingness. It is a settled law that for relief of specific performance, the plaintiff has to prove that all along and till the final decision of the suit, they were ready and willing to perform their part of the contract. It is the bounden duty of the plaintiff to prove his readiness and willingness by adducing evidence. This crucial facet has to be determined by considering all circumstances, including availability of funds and mere statement or averment in plaint of readiness and willingness would not suffice.

28. Reliance can be placed upon judgment, reported in **A.I.R. 1995 SC 945** in the case of ***Jugraj Singh and another versus Labh Singh and others***. In the present case, the plaintiff



has not been able to prove that they were ready with the money all along, and as such, the plaintiff has failed to prove that they were ready and willing to perform their part of contract.

29. So far requirement of Order 41, Rule 31 C.P.C., which is mandatory in nature, the bounden duty of the appellate authority is to comply with the aforesaid provisions. The learned Lower Appellate Court, by the common judgment, decided two appeals, one preferred by defendants/appellants bearing Title Appeal No. 33 of 1998 and second one filed by Lakshman Rai (son of original defendant No. 1) bearing Title Appeal No. 04 of 1999. The learned Lower Appellate Court below has only considered and discussed the Title Appeal No. 04 of 1999 of the original defendant No. 1 and finally affirmed the judgment and decree dated 31-08-1998 and rejected both the appeals bearing Title Appeal No. 33 of 1998 and 04 of 1999, without formulating any points with regard to Title Appeal No. 33 of 1998. The learned Lower Appellate Court has not considered the material evidence, both oral and documentary, of the appellants. There is no finding of the learned Lower Appellate Court with regard to Title Appeal No. 33 of 1998. The learned Lower Appellate Court did not determine the real issue i.e. identification of suit land involved in the aforesaid appeal. The



specific case of the plaintiff is that the agreement to sale dated 07-07-1994 was for the western portion of the Plot Nos. 1666 and 1668 as per boundary of the suit land, despite that, the learned Lower Appellate Court has assumed that agreement to sale is for eastern portion of the Plot Nos. 1666 and 1668. The learned Courts below already held that western half portion of the Plot Numbers 1666 and 1668 belonged to original land owner, namely, Deo Lal Rai. However, defendant 2nd set/appellants are successor in interest of Deo Lal Rai.

30. In view of the above discussion, made above, in my opinion, the suit for specific performance of contract, on the basis of agreement to sale 3 kattha, 10 dhurs, with definite boundaries, without seeking relief for cancellation of sale deeds of the appellants with respect to the suit land, is not maintainable. The findings of both the learned Courts below are not based on correct and proper discussion of evidence and law involved in the instant case. The judgment of the learned Lower Appellate Court is also not in correct perspective.

31. In view of the above discussion, it is established that the discretion has been exercised perversely, arbitrarily and against the judicial principle. Therefore, the judgment of the learned Courts below are set aside, and suit of the plaintiff/



respondents is hereby dismissed.

32. In the facts and circumstances of the case, the substantial questions of law formulated is, therefore, answered in favour of the appellants.

33. This second appeal has got merit and, accordingly, it is allowed.

(Khatim Reza, J)

Prabhat/
shyambihari-

AFR/NAFR	NAFR
CAV DATE	24.11.2023
Uploading Date	09.04.2024
Transmission Date	N/A

