IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.83 of 2018

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Smt. Sangita Sinha, Wife of Deepak Kumar Sinha, Resident of Flat No. A/164, Peoples Co-operative Colony, P.S.-Kankarbagh, Patna.

... ... Defendant-Appellant/s

Versus

1. Smt. Bhawana Bhardwaj Wife of Dr. Ajay Kumar Bhardwaj, Permanent Resident of Village-Farda, Tola Shivrampur, P.S.-Naya Ram Nagar, District-Munger, presently residing at B-150, Housing Colony, Kankarbagh, P.S. Kankarbagh, Town and District-Patna.

…...Plaintiff-Respondent 1st Set

2. Sri Deepak Kumar Sinha, Son of Late Chandra Deo Prasad, Permanent Resident of Village-Sherpur, P.O.-Chapra, District-Saran, Presently residing at A/164, Peoples Co-operative Colony, P.S.-Kankarbagh, Patna.
3. The Secretary, Peoples Co-operative Housing Construction Society Limited, P.S.-Kankarbagh, Patna.

…...Defendant-Respondent 2nd Set

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Appearance :

For the Appellant/s	:	Mr. Radha Mohan Pandey, Advocate
For the Respondent/s	:	Mr. J.S. Arora, Sr. Advocate
		Mr. Ravi Bhatia, Advocate
		Mr. Manoj Kumar, Advocate
		Mr. Rajiv Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY

C.A.V JUDGMENT

Date : 09-05-2024

1. The instant appeal has been preferred against the judgment dated 27.4.2018 and decree dated 10.5.2018 passed in Title Suit no. 176 of 2008 whereby the suit filed by the plaintiff-respondent no.1 was decreed on contest with a direction to the defendants to execute the sale deed in favour of the plaintiff with respect to the suit property described in Schedule-A of the plaint.

2. The case of the plaintiff in brief is that Kusum Kumari (original defendant no.1) was the owner of plot no. A/164 in P.C. Colony, Kankarbagh, Patna measuring an area of 2800 sq.ft. with a house constructed thereon. The same has been fully described in Schedule-A (herein after referred to as 'the suit property') of the plaint of Title Suit no.176 of 2008. Having come to know the desire of the original defendant no.1 to sell, the plaintiff approached her with the offer to purchase the suit property. In the discussion, her grandson ie the defendant no.1 and his wife, the defendant no.3 also participated and it was agreed that the original defendant no.1 would sell the suit property to the plaintiff for a consideration of Rs.25 lacs. An agreement dated 25.1.2008 was entered into, which was duly signed by Bhawna Bhardwaj (plaintiff) and Kusum Kumari (original defendant no.1) as also the witnesses Deepak Kumar Sinha (defendant no.1) and his wife Sangita Sinha (defendant no.3). As per the agreement, the plaintiff paid Rs.2,51,000/- in cash to the original defendant no.1 and also issued cheques worth Rs.7,50,000/-. The defendant acknowledged receipt of Rs.10 lacs against the sale of property and she agreed to obtain a no objection certificate (NOC) from the Peoples Co-operative Grih Nirman Samiti for transferring the membership of the

Society in the name of the plaintiff. She also agreed to transfer the suit property to the plaintiff by executing a registered sale deed in her favour. She agreed to get the suit property vacated from possession of the tenants prior to registration.

3. It is further case of the plaintiff that in terms of agreement dated 25.1.2008, the original defendant no.1 made an application before the Secretary, Peoples Co-operative Grih Nirman Samiti requesting to issue a form so that the membership of the original defendant no.1 (member no.710, plot no. A/164) may be transferred in the name of the plaintiff. The application contains the written consent of her granddaughter-in-law Sangita Sinha (defendant no.3), in whose favour the original defendant no.1 had executed a registered will in respect of the property. It is further case of the plaintiff that on her visiting the house of the original defendant no.1 on 11.2.2008 at about 4 p.m. with her husband to discuss the matter, the tenants of the original defendant no.1 namely Ajay and wife of Amar interfered, started to scuffle and abuse the plaintiff and her husband and forced them to return. The plaintiff states that she was surprised and shocked to see that the original defendant no.1 supported them and thus the plaintiff having understood that the original defendant no.1 was

intending to avoid carrying out the terms of the agreement dated 25.1.2008 sent a legal notice dated 23.2.2008 through her lawyer. The plaintiff expressed her desire to pay the balance amount of consideration as per the terms and conditions of the agreement and to get the property registered in her favour. The notice was replied to by the original defendant no.1 wherein though she mentions about her age and ill health, however, she does not deny the agreement dated 25.1.2008. The plaintiff got yet another notice sent through registered post with A/D on 23.4.2008 reminding her of the agreement dated 25.1.2008 and asking that a sale deed be executed in her favour. It is stated that the original defendant no.1 has all right to transfer the ownership of the property with prior permission of the Peoples Co-operative Housing Construction Society Limited (herein after referred to as 'the Society') and as per the terms and conditions of the sub-lease agreement only a person enrolled as a member of the Society can own the property. The original defendant no.1 being aware of these facts requested the Society by her letter dated 27.1.2008 to provide suitable form for the purpose of transfer of the property to the plaintiff. It is further stated that the original defendant no.1 entered into the sale agreement dated 25.1.2008 and accepted the advance amount against the consideration agreed upon with the consent of her step-grandson (defendant no.1) and his wife (defendant no.3). A registered will is said to have been executed by the original defendant no.1 in favour of defendant nos.1 and 3. It is the case of the plaintiff that she is very much eager and willing to pay the rest amount of consideration as per the terms and conditions of the agreement. She has already performed her part in the agreement and is further ready to perform the agreement as per the terms and conditions. The cause of action of filing of the suit arose for the first time on 25.1.2008 when the agreement to sale was executed and on various dates including 1.5.2008 when the 7 days notice given by the plaintiff in the reminder notice dated 23.4.2008 expired and the original defendant no.1 failed to perform her part of the agreement. The plaintiff thus filed Title Suit no.176 of 2008 on 5.5.2008 in the Court of learned Sub-Judge I, Patna for the following reliefs :-

> *"(i) The learned court be pleased to pass a decree under Specific Performance of Contract with a direction to defendant no.1 to perform the agreement dated 25.1.2008 and execute a registered Sale Deed in favour of the plaintiff in respect of the land as detailed in the said agreement itself and 'Schedule-A' of this plaint.*

(ii) The learned court be pleased to pass a decree directing the defendant no.1 to handover the peaceful possession of the suit property to the plaintiff.

(iii) Mesne profit.

(iv) Cost of the Suit."

4. A written statement was filed on behalf of Smt. Kusum Kumari (original defendant no.1) and another written statement on behalf of the Secretary, Peoples Co-operative Housing Construction Society Limited, Kankarbagh, Patna (defendant no.2) and issues were framed in the suit on 16.12.2008. Subsequently, the original defendant no.1 having died on 26.1.2009, she was substituted by Deepak Kumar Sinha (defendant no.1). Further, Sangita Sinha and Amar Kumar were also added as defendant nos.3 and 4. Written statements were filed by Deepak Kumar Sinha (defendant no.1) as also separate written statements were filed on behalf of Sangita Sinha (defendant no.3) and Amar Kumar (defendant no.4). In view of the further written statements having been filed, additional issues were settled on 21.1.2013. The issues framed on 16.12.2008 and the additional issues settled on 21.1.2013 are extracted herein below :

"1. Whether the suit as framed maintainable?

2. Whether the plaintiff has valid cause of action *for the present suit?*

3. Whether the suit is barred by the Principle of Limitation, estoppel, waiver and acquiescence?

4. Whether the defendant had entered into an agreement dated 25.1.2008 with the plaintiff for sale of the suit land?

5. Whether the defendant received part consideration amount under the agreement dated 25.1.2008 from the plaintiff?

6. Whether the defendant made an application to the secretary, peoples Co-operative Grih Nirman Samitee intending to transfer her membership in the name of the plaintiff?

7. Whether the defendant is bound to execute a sale deed in respect of the suit land in favour of the plaintiff on payment of rest consideration money as per agreement for sale dated 25.1.2008?

8. Whether the defendant has avoided the times of the agreement for sale dated 25.1.2008?

9. Whether the plaintiff is entitled for the reliefs prayed for or other reliefs to which she would be found entitled?

Additional Issue added/settled vide order dated 21.01.2013

10. Whether Bank draft given by the plaintiff to the defendant no.1 as part consideration amount of agreement and the same were returned back to the plaintiff by the defendant No.1 and the plaintiff has got encashed the same?

11. Whether the alleged agreement dated 25.01.2008 was/is a valid agreement?
12. Whether plaintiff was always ready to fulfill the part performance of the agreement?"

5. The case of the original defendant no.1, as per her written statement is that the same being based on an agreement for sale, which is sham/*farzi* and fictitious chit of paper which is *void ab initio*, the suit is fit to be dismissed at its very inception. The original defendant no.1 is a widow aged about 100 years. She never signed any agreement for sale dated 25.1.2008 and considering her age, she has already executed a registered will in favour of defendant nos.1 and 3. It was on 5.2.2008 that she came to know about the basis of the suit and the alleged agreement dated 25.1.2008 has wrongly been described as having been executed by her in favour of the plaintiff. The subject matter of the agreement is her only house where she resides. She neither contacted nor expressed her desire nor at any stage negotiated with the plaintiff with respect to selling the same. It is her case that she receives pension which is sufficient to fulfill her basic needs. It was only on the request of her grandson ie the defendant no.1 that she put her signature on blank papers under the bonafide impression that she was confirming the will which she had executed in favour of

defendant nos.1 and 3. She lodged a *sanha* before the local police station on 6.2.2008 and requested the authority to arrange for return of Rs.2,11,000/- and two post dated cheques to the plaintiff. She further states that she intimated the Secretary of the Society and requested that the NOC regarding transfer of the suit property described in the alleged agreement for sale dated 25.1.2008 must not be issued in favour of any person. To avoid future complications, she took steps for return of the money of cash given by the plaintiff to her grandson through bank drafts so that future litigations may be avoided. Altogether five bank drafts dated 7.2.2008 were issued in the name of the plaintiff Bhawana Bhardwaj for an aggregate sum of Rs.2,11,000/- and further two post dated cheques dated 29.4.2008 and 5.5.2008 of Rs.2,50,000/- each was also prepared and sent by the original defendant no.1 through registered post with an acknowledgment due to the plaintiff on 8.2.2008. However, the same was returned to the original defendant no.1 as undelivered.

6. It is further case of the original defendant no.1 that the plaintiff sent a legal notice dated 23.2.2008 to her to which she replied clearly stating that she had never executed the agreement for sale dated 25.1.2008. The undelivered envelope containing the five bank drafts and two cheques were resent by

her to the plaintiff and which was delivered to the plaintiff prior to filing of the suit.

7. The original defendant no.1 states that the plaintiff making material concealment has instituted the suit without cause of action dragging an old widow lady in litigation. She has encashed the bank drafts received and thus there is no surviving cause of action. The original defendant no.1 proceeded to give paragraph wise reply to the averments made in the plaint and prayed that the plaintiff not having come to the Court with clean hands, the suit be dismissed with cost.

8. The original defendant no.1 having died, Deepak Kumar Sinha was substituted as defendant no.1 and subsequent thereto Sangita Sinha and Amar Kumar were added as defendant nos. 3 and 4 in the suit. All of them filed their written statements and except Deepak Kumar Sinha were also examined as witnesses. Subsequently, the name of Amar Kumar was expunged from the memo of parties in the title suit and so was his deposition as a witness. He was once again examined as a defendant witness on behalf of defendant no.3.

9. The case of Deepak Kumar Sinha (defendant no.1) in his written statement is that he is no blood relation of Kusum Kumari (original defendant no.1), who happens to be the step-

mother of his father. He never lived with Kusum Kumari prior to 2004. Amar Kumar was the tenant of Kusum Kumari. While Kusum Kumari, after the death of her husband used to live alone on the first floor of the house Amar Kumar along with his brother Ajay Kumar Sinha and their wives used to attend to her. Deepak Kumar Sinha who had no source of earning at Patna had to make do with the family pension that original defendant no.1 was getting and used to get some extra money doing some tuitions. However, he used to find it difficult to take care of the needs of his family which consisted of three daughters and a mentally impaired sister besides his wife. The original defendant no.1, who was over 96 years of age was mentally inalert most of the time. Defendant no.3 started negotiating with Amar Kumar that in the event of title of the property coming to her, she would sell it to him alone for an amount of Rs.6 lacs. Amar Kumar paid the amount to his wife (defendant no.3) to tide over the financial crisis and to arrange their daughter's marriage. It is stated that the negotiation with the plaintiff and the plaintiff's husband was being made keeping the original defendant no.1 in dark. The plaintiff's husband was fully aware that the deal was being worked keeping the owner of the property in dark and had agreed to this. Though, the agreement in question was indeed signed by the original defendant no.1 but without understanding the purport of the signature at a time when she was not mentally alert. The defendant no.1 had received part payment of money in lieu of the executed agreement for sale. Subsequently, on the original defendant no.1 becoming suspicious, she started making enquiries. The defendant no.1 had no option but to inform her of the development and to handover the money received from the plaintiff. She became furious, called her tenant Amar Kumar and asked him to throw the defendant no.1 out of the house. Amar Kumar somehow calmed her down. It is further stated that information was given to the Kankarbagh Police Station where a report was entered in the station diary and on the Inspector-In-charge making inquiries, he was convinced that the owner of the property had not entered into any agreement and the instrument had been signed in a state of mental inalertness. The plaintiff's husband was called at the police station and was asked to take back the money and return the original document. Though he agreed, but he did not return back to the police station. Thus, the original defendant no.1 asked Amar Kumar to get the bank drafts prepared from the money in favour of the plaintiff and sent the same to her through registered post. The original defendant no.1 executed a will to the effect that even after her death the house was not to be sold to the plaintiff or her husband and the ground floor of the property including the unconstructed portion was to go to Amar Kumar for the services rendered by him. The first floor of the property by the will would go to the defendant no.3. It is further stated that at the time of his daughter's marriage, on the request of the original defendant no.1, Amar Kumar also paid a sum of Rs.4.5 lacs by way of help. The defendant no.1 is not the successor in interest of the property in question and has no powers to carry out the desire of the plaintiff.

10. A separate written statement was filed by the People's Cooperative Housing Construction Society Limited, Kankarbagh, Patna (defendant no.2) wherein it was stated that the original defendant no.1 by letter dated 27.1.2008 (Exhibit 1/A) had requested for issuing a suitable form for transfer of the suit plot. Then she filed another petition on 14.2.2008 requesting the Honorary Secretary of the Society not to issue any transfer paper as she is not inclined to sell the suit property and has already returned the cheques and drafts to the plaintiff. The petition filed on 27.1.2008 by Kusum Kumari was revoked by her on 14.2.2008.

11. Sangita Sinha (defendant no.3), wife of defendant

no.1 in her written statement states that the plaintiff having encashed the drafts sent by the original defendant no.1 during pendency of the suit, the suit was not maintainable. This defendant came to learn of the agreement for sale only when the plaintiff came and took her away from her residence. The original defendant no.1 became furious after coming to know about the existence of the so called agreement for sale and immediately made attempts to get the defendants and her family thrown out of the house. She never intended to sell her immovable property because of emotional attachment and on account of advanced age, was not in a position to protect her property. She was financially independent and besides getting family pension from the government she was also getting rent from her tenant Amar Kumar. Amar Kumar used to treat her like his grandmother and used to spend considerable money on her besides paying rent regularly. It was because of the financial insecurity of this defendant's husband that he entered into a clandestine deal with the plaintiff's husband taking undue advantage of the mental condition of the original defendant no.1 who used to remain mentally inalert most of the time. It was her lack of reliance on defendant no.1 that she executed a registered will in favour of defendant no.3 instead of her husband. The original defendant no.1 got cheated by defendant no.3. She reduced her inheritance and made Amar Kumar as heir for the property. Amar Kumar is the owner of the ground floor of the property and is in peaceful possession of the same. The defendant no.3 entered into agreement with Amar Kumar that on coming to have the title to the property, she will sell it to Amar Kumar, if he paid Rs.6 lacs. The said Amar Kumar paid a sum of Rs.6 lacs after entering into an agreement including Rs.4 lacs to her husband ie defendant no.1 at the time of their daughter's marriage. The original defendant no.1 took help of Amar Kumar in issuance of the bank drafts and its dispatch. As such, it is prayed that the suit be dismissed with cost and that the plaintiff has not come to the Court with clean hands.

12. Amar Kumar (defendant no.4) filed his written statement stating that the original defendant no.1 having learnt about the defendant no.1 having entered into an agreement with respect to her house was quite disturbed at the treachery of her own step grandson. Initially, Ajay Kumar Sinha as also his elder brother along with their families used to stay and take care of the original defendant no.1. On her asking this defendant to throw defendant no.1 out that it came to light that the defendant no.1 had received Rs. 2,11,000/- and two cheques of Rs.2.5 lacs

each from the plaintiff's husband. On learning this fact the original defendant no.1 wanted to get rid of her step grandson and his family immediately but Amar Kumar somehow managed to calm her down. At this point of time, the original defendant no.1 was financially independent and she was receiving family pension from the government and also rent for her house property. She had no need to sell the property because she had no liabilities. A bare perusal of the letter written by her to the Kankarbagh Police Station would show that she had no need nor any desire to sell her property. The Kankarbagh Police Station was unable to obtain the original agreement document from the plaintiff's husband and thus returned back the amount of Rs. 2,11,000/- and the two cheques to her. She asked Amar Kumar to prepare bank drafts for returning the amount to the plaintiff which was promptly complied on 7.2.2008. The two drafts were sent to the plaintiff on 8.2.2008 but the envelope was returned undelivered and they were once again sent to the plaintiff through speed post on 22.2.2008. This was not received by the plaintiff and came back to the original defendant no.1. Thereafter, a legal notice was received by her sent on 23.2.2008 by advocate for the plaintiff. She promptly replied to the legal notice enclosing with the same the envelope containing the drafts and the cheques. Though, the letter was returned undelivered on 6.3.2008, it shows that the same was received prior to filing of the suit on 5.5.2008. If the plaintiff had any intention of going ahead with the so called agreement, she had the option of not encashing the bank drafts sent by the original defendant no.1 to her. The plaintiff had not come to the Court with clean hands, she did not inform the Court about the age of the original defendant no.1 nor that she had received bank drafts along with reply to the legal notice. She also did not disclose that she intended to encash the same before expiry of its period of validity. The plaintiff also made material concealment with respect to the fact as to how she came to learn about the desire of the original defendant no.1, whom did she negotiate with or the place of negotiation and why she wanted an old widow to be robbed of her roof. The encashment of the drafts during pendency of the suit without obtaining leave of the Court amounted to showing disrespect and thus the suit was liable to be dismissed with cost.

13. A written statement was filed on behalf of the Peoples Co-operative Housing Construction Society Limited (defendant no.2) ('Society' in short) stating therein that the original defendant no.1 filed a letter dated 27.1.2008 (Exhibit-

1/A) and made a request for issuing a suitable form for transfer of the suit plot. The original defendant no.1 filed another petition on 14.2.2008 requesting the Honorary Secretary of the Society not to issue any transfer paper as she is not inclined to sell the suit property and has already returned the cheque and draft to the plaintiff. It is stated that it is correct that the defendant no.1 had filed a petition on 27.1.2008 which she revoked on 14.2.2008.

14. On behalf of the plaintiff, the witnesses examined were Bhawana Bhardwaj (PW-1) ie the plaintiff herself, Dr. Ajay Kumar Bhardwaj (PW-2), husband of the plaintiff and Rakesh Kumar (PW-3).

15. Three witnesses were examined on behalf of defendant no.1 ie Ram Ishwar Sinha (DW-1), Deepak Kumar (DW-2) and Gautam Kumar (DW-3). The witness on behalf of the defendant no.2 was Swaraj Shankar Verma (DW). On behalf of defendant no.3 the witnesses Salim Akhtar (DW-4), Ajay Kumar Sinha (DW-5), Sangita Sinha (DW-6), and Amar Kumar (DW-7) were examined. The witnesses who were examined on behalf of defendant no.4 (subsequently expunged) were Amar Kumar, Ajay Kumar Sinha and Salim Akhtar.

16. Bhawana Bhardwaj (PW-1) has stated in her

deposition that she is the plaintiff in the suit and has filed the suit for enforcement of the agreement dated 25.1.2008. She went with her husband (PW-2) to the house of the original defendant no.1 where Deepak Kumar Sinha (defendant no.1) and his wife Sangita Sinha (defendant no.3) participated in the talks. The consideration amount for the suit property was fixed at Rs.25 lacs and an agreement was entered into on 25.1.2008 on which besides the plaintiff and the original defendant no.1, Deepak Kumar Sinha and his wife Sangita Sinha also signed as witnesses. The plaintiff paid Rs.2,51,000/- in cash and gave three cheques of Rs.2,50,000/- each. The defendant no.1 gave a receipt for the same. The defendant no.1 agreed to take a NOC and also to remove the tenants from the suit property. Accordingly, the defendant no.1 applied for transfer and the defendant no.3 also signed on the said application (Exhibit-2). This witness further states that on 11.2.2008, the wives of the tenants namely Ajay and Amar came and misbehaved with the plaintiff and her husband. Surprisingly, the original defendant no.1 and her grandson (defendant no.1) supported their actions. An advocate's notice (Exhibit-3) was sent through registered post on 23.1.2008 categorically stating therein that the plaintiff was ready and willing to pay the balance amount. A signed reply was received from the original defendant no.1 wherein she expressed her desire to return the advance amount. This witness states that even today the plaintiff is ready to pay the balance consideration as per the agreement. On the death of the original defendant no.1, she was substituted by her grandson defendant no.1. The plaintiff never asked for the advance amount.

17. Dr. Ajay Kumar Bhardwaj (PW-2) happens to be the husband of the plaintiff. He has stated in his deposition that the suit has been filed by the plaintiff for enforcing the agreement dated 25.1.2008 entered into between the parties. He along with his wife had gone to the residence of the original defendant no.1 for talks with respect to the sale of the suit property. The defendant no.1 and his wife (defendant no.3) also participated in the talks. The plaintiff was ready to purchase the suit property for a sum of Rs.25 lacs. An agreement was made on which the plaintiff as also the original defendant no.1 signed. The defendant nos. 1 and 3 also signed as witnesses. As per the terms of the agreement, Rs.2,51,000/- was paid in cash to the original defendant no.1 besides three cheques of Rs.2,50,000/- each. The original defendant no.1 agreed that prior to execution of the sale deed she would obtain a no objection certificate (NOC) from the Society and also agreed that she would get the

tenants to vacate the suit property. As per the terms of the agreement, she filed an application for the transfer of membership before the Society and the said application also had the written consent of the defendant no.3. This witness states that on 11.2.2008 at about 4 p.m. when he along with the plaintiff went to the house of the original defendant no.1, the wives of Ajay and Amar came there and misbehaved with him and their actions were supported by the original defendant no.1 and her grandson which led to this witness being convinced that she does not intend to proceed with implementation of the agreement dated 25.1.2008. A notice was sent to her through registered post to which a signed reply was received wherein she neither denied having entered into an agreement on 25.1.2008 nor denied having received the advance amount. She only expressed her desire to return the advance amount. This witness states that the original defendant no.1 had full right to sell the suit property and the plaintiff has been ready and willing to pay the amount as per the agreement entered into. Certain amounts were sent by the original defendant no.1 at this witness's address and subsequently on the address of the chamber of his lawyer. It is stated that a cheque of Rs.2,50,000/- and Rs.40,000/- in cash still remain with the original defendant no.1. The drafts were deposited in the Bank only for the reason that the time for depositing the same was coming to an end. This witness states that the plaintiff has always been ready and willing to pay the amount as per the agreement dated 25.1.2008 and is ready and willing to pay the amount as per the agreement even today.

18. On behalf of defendant nos.1 and 3, Deepak Kumar was examined. He states that he knows the parties to the suit and being her neighbour, he had a good relationship with the original defendant no.1. He used to meet her with her tenant Amar Kumar with whom he was on good terms. The original defendant no.1 was the stepmother of the father of the defendant no.1. The defendant no.1 used to live in Ranchi while Amar Kumar was posted in the Central Bank of India at Lalganj, Vaishali. It was in the year 2002 that on Amar Kumar calling, that the defendant no.1 and his wife defendant no.3 along with their children came to Patna and started residing on the upper storey of the suit property along with the original defendant no.1. This was her only property which she did not intend to sell. She had asked Amar Kumar to give Rs.4 lacs by way of help at the time of marriage of the daughter of the defendant no.1. Amar Kumar gave the amount of Rs.4 lacs and the cheque

was deposited in the account of the original defendant no.1. In this manner, an advance amount was received out of the total consideration amount of Rs.6 lacs for the suit property. This witness states that for the daily expense as also the expense in medicine of the original defendant no.1, on need arising, the defendant no.3 used to contact and take amounts from Amar Kumar. Ever since her husband (defendant no.1) came from Ranchi to Patna, the only source of his livelihood was his income from giving tuitions. The defendant no.3 had asked this witness to ask Amar Kumar for Rs.6 lacs, which Amar Kumar was ready to pay provided the defendant no.3 executed an agreement. Accordingly, defendant no.3 executed an agreement stating the consideration as Rs.6 lacs of which after deducting the advance of Rs.4 lacs, the balance amount of Rs.2 lacs was received in cash on the condition that soon after obtaining probate of the will of the original defendant no.1, the defendant no.3 would sell the upper storey of the suit property only to Amar Kumar. As soon as the original defendant no.1 learnt about the agreement for sale dated 25.1.2008 she called Amar Kumar and this witness on the upper storey of the suit property and asked them to give information with respect to the same to the Kankarbagh Police Station. Information was given on which the Police Station In-charge called the husband of the plaintiff and told him that a case of fraud would be lodged against him. The plaintiff's husband (PW-2) agreed to return the original agreement but withdrew later on. The plaintiff and her husband taking benefit of the old age of the original defendant no.1 want to forcibly take her flat. This witness further states that the original defendant no.1 in her lifetime itself got the draft made for the amount and got the same returned. The plaintiff received the total amount through cheque and draft. As a result of the services rendered by him, she gave the ground floor of the suit property to Amar Kumar making him the successor in interest. The plaintiff is not a member of the Society. For transfer of flat, it is necessary that the person to whom it is being transferred be a member. The original defendant no.1 was a 90 year old lady and keeping her in dark that the sale agreement was entered into illegally. Defendant no.1 had no right in the flat except that his wife the defendant no.3 was the legatee of the upper storey in the will of the year 2002. The defendant no.1 wanted to take the total flat keeping the old lady in dark.

19. Gautam Kumar (DW-3) who was examined on behalf of defendant nos.1 and 3 stated that he along with his family used to visit the original defendant no.1 along with Amar

Kumar. He also used to accompany her with Amar Kumar to the doctor. She was suffering from several ailments and on doctor's advice she used to take sleeping pills. As such, on several occasions she was in a state of mental inalertness. Many a times even after having food she used to ask for food. She had given the upper storey to the defendant no.3 for residing and had expressed her last wish to give the remaining portion and the ground floor to Amar Kumar. She never expressed that she wanted to sell the property. She used to place very less reliance on her step grandson (defendant no.1) and was more reliant on the defendant no.3. She asked Deepak to return the entire amount on which Deepak gave the sum of Rs.2,11,000/- to Amarji. On a *sanha* being lodged, the doctor (husband of plaintiff) was called. He refused that any agreement has been entered into, however later on being told that a case of fraud may be registered against him, he became ready to return the agreement. However, on leaving the police station, he neither returned the document nor came to collect the amount and the same was returned by the In-charge of the police station to him.

20. Defendant no.4, Amar Kumar as also the witnesses Ajay Kumar Sinha and Swaraj Kumar Sinha were examined on behalf of the defendant no.4. However, by order

dated 14.5.2014 the name of defendant no.4 Amar Kumar was struck off.

21. The witness Salim Akhtar in his deposition on behalf of the defendant no.3 states that he knew the original defendant no.1 as they were on good terms and use to visit each other. She used to get pension. The suit property was her only house. He is a member of the Society and it is necessary for one to be a member of the Society to purchase a house there. As per his knowledge, the original defendant no.1 never gave her consent to the Society. He identifies the signature of the original defendant no.1 on the application. In his cross-examination he states that he is a neighbour of the original defendant no.1. He has come to depose at the instance of the defendant no.1. He is not a witness in any of the documents of the original defendant no.1.

22. Ajay Kumar Sinha (DW-5) appearing as a witness on behalf of the defendant no.3 states that he used to visit the house of the original defendant no.1, knew her and was on talking terms. She was never in need of money. He came to learn of the agreement when attempt was made to forcibly evict her from her house. She was quite old, aged about 100 years and was not in a sound state of mind. Taking benefit of her mental

state the plaintiff's husband got a forged deed dated 25.1.2008 made in favour of his wife, the plaintiff. A *sanha* was lodged in the Kankarbagh Police Station which is signed by the original defendant no.1. A legal notice was sent by an advocate to which the original defendant no.1 replied. A *sanha* was lodged at the Kankarbagh Police Station, the same having been written by Deepak Babu and signed by the original defendant no.1. The witness identifies the prescriptions of different doctors who had examined the original defendant no.1. He also identifies the signature of the Secretary of the Society. In his cross-examination he states that the plaintiff's husband tried to forcibly get the suit property vacated with respect to which a *sanha* was lodged. Among the doctors who saw Kusum Kumari, none of them related to the subject of Neuro or Psychiatry. The *sanha* was written by Deepak Kumar and signed by the original defendant no.1. His brother does not pays any rent to the original defendant no.1. He has not produced any document which would show that the original defendant no.1 was not in a sound mental state. She used to operate her bank account and used to withdraw the amounts from the bank herself. No information was given at any place that she was not mentally sound. No document with respect to her having undergone an operation of the eye has been produced.

23. Sangita Sinha (DW-6) is the defendant no.3 in the suit. She happens to be wife of the step-grandson of the original defendant no.1 Kusum Kumari and the appellant in the instant appeal. In her deposition she has stated that the original defendant no.1 was her grandmother-in-law who died during pendency of the suit. It is incorrect to state that she had executed any *bai-beyana* or had signed any document. As a result of having reached the age of 100 years she was mentally weak and on waking up in the morning she did not recognise persons. Slowly her memory used to return. This witness states that she and her husband used to look after all her needs and being happy with her service, she had orally informed that she would give the upper storey of the house to her and the lower storey with the vacant land to Amar Kumar. She had made this witness a nominee by filing an application in the Society in the year 2004. This was her only house and she neither had any need nor intended to sell the same. She had not met the plaintiff and the agreement to sell dated 25.1.2008 was a forged document which had been manufactured by the plaintiff in conspiracy with a staff of the Society. The said staff always used to come to the original defendant no.1 to get her signatures. The signature of this

witness and that of her husband defendant no.1 was obtained forcibly on the document after taking them away from their house and for which a *sanha* had been lodged in the police station. The original defendant no.1 had signed the document at the instance of and in good faith of her step-grandson and the staff of the Society telling her that the application was in connection with the house tax. Information was given to the Kankarbagh Police Station and the Secretary of the Society was informed not to issue any NOC. A total amount of Rs.2,11,000/- was returned by five drafts which was encashed by the plaintiff. This witness further states that the original defendant no.1 had asked Amar Kumar to give the sum of Rs.4 lacs by way of a loan to this witness at the time of her daughter's marriage. She and her husband (defendant no.1) had taken Rs.4 lacs and had told Amar Kumar that as soon as the probate with respect to the will of the original defendant no.1 is obtained, they would sell the property to him. Besides the sum of Rs.4 lacs, her husband had also taken a sum of Rs.2 lacs from Amar Kumar. Treating the amount of Rs.6 lacs as the total consideration, an agreement for sale had been executed between her and Amar Kumar. This witness in her cross-examination states that the original defendant no.1 Kusum Kumari was not mentally weak. She does not know the full name of the staff of the Society who was called ‘Jhaji’. No complaint had been filed against the said staff namely Jhaji. Though a *sanha* had been lodged, no FIR was lodged by the original defendant no.1. The amount which was returned, the cheque for the same was not of the account of the original defendant no.1. The draft also was not prepared from the amount obtained from the account of the original defendant no.1 but was prepared on payment of cash. This witness states that her husband had ill intentions for some time. She states that he resides with her. She does not recall the date on which she and her husband were forcibly lifted from their house and made to sign on the document. She cannot produce the staff Jhaji for his examination as a witness.

24. Amar Kumar (DW-7) who appeared as a witness on behalf of defendant no.3 stated that earlier he was made defendant no.4 in the suit and had also deposed in the said capacity but subsequently his name was expunged and as such his deposition in the said capacity as a witness was also set at naught. He is thus deposing on behalf of defendant no.3. He further states that he knows the parties and resided in the suit property as a tenant till the year 2009. The original defendant no.1 was the step-grandmother-in-law of the defendant no.3.

She died during pendency of the suit. He states that he has paid the total amount to the defendant no.3 and thus has right over the suit house on account of the *bai-beyana* having been executed by the defendant no.3. He was in touch with the original defendant no.1 and her husband since prior to the suit house was constructed and from the time of its construction, he started residing therein as a tenant. Her husband was a government servant who passed away. The original defendant no.1 used to maintain herself with the family pension that she received and the rent received from the house. This was her only house. In the year 2008, she was aged about 100 years and she used to stay on the upper storey. This witness used to stay on the ground floor. Kusum Kumari had never signed the so called *bai-beyana*. She was mentally weak on account of her old age and was forgetful on some occasions. She needed assistance for her daily chores. The agreement is forged with the intent of usurping her property. The husband of the plaintiff is an eye specialist and the original defendant no.1 was not his patient. On account of taking sleeping pills, the original defendant no.1 often used to be in a state of mental inalertness. The plaintiff had forcibly taken away the defendant nos. 1 and 3 and had forced them to be a witness on the deed. A *sanha* was lodged in the Kankarbagh Police Station and the amount returned. Complete information was given to the Secretary of the Society and no NOC was issued for transfer of the property. It is in this state of mental inalertness that her signature was obtained by the defendant no.1 and a forged document prepared. The defendant no.1 by way of greed had taken the amount and on learning this fact, the original defendant no.1 immediately got the amount returned. The drafts had been prepared in the branch of this witness for which the amount had been paid by Deepak. This witness states that the defendant no.3 had executed a *bai-beyana* in his favour on the condition that after the death of the original defendant no.1, when the defendant no.3 is able to get her will probated, she will become the owner of the property and will then sell the property to him. The total consideration amount has been received by the defendant no.3. In his cross-examination this witness states that the original defendant no.1 had no issues. Her husband Jwala Prasad had married twice and the defendant no.1's father was his son from his first wife. He states that he had filed a written statement in the suit and had also been examined as a witness but subsequently on the orders of the Court not treating him to be a necessary party, his name had been expunged from the records.

25. Having considered the oral and documentary evidence led by the parties, the learned Sub Judge-IV, Patna by his judgment dated 27.4.2018 was pleased to decree the suit in favour of the plaintiff and directed the defendants to execute the sale deed in favour of the plaintiff with respect to the suit property described in Schedule-A of the plaint. It is against this judgment dated 27.4.2018 and decree dated 10.5.2018 that the instant appeal has been preferred.

26. Sri Radha Mohan Pandey, learned counsel appearing for the defendant no.3 - appellant (Sangita Sinha) having taken the Court through the facts of the case as also the deposition of witnesses submitted that the so called agreement for sale dated 25.1.2008 was *void ab initio*. Immediately on learning about the same, the original defendant no.1 conducted herself properly and promptly by lodging a *sanha* and returning the entire consideration amount which had been received by defendant no.1, without her consent. The said defendant no.1 had at no point of time been authorised by the original defendant no.1 to sell the suit property. There is no evidence to her participation in the alleged negotiation for sale and her signature had been taken on the forged and fabricated piece of paper without her consent. It was for this reason that she

immediately returned by demand drafts the sum of Rs.2,11,000/- to the plaintiff along with a properly reasoned revocation letter of the alleged agreement to sell. The plaintiff kept the demand drafts for Rs.2,11,000/- and filed the suit concealing the said fact. Even after encashing the demand drafts, no information was given by the plaintiff to the Court. The learned trial Court had erroneously recast the issues framed in the learned Court below. The entire consideration amount having been returned to the plaintiff, the suit could not have succeeded. The readiness and willingness on part of the plaintiff was not proved. In support of his contentions learned counsel for the defendant no.3-appellant relied on the judgments in the case of **Chandrashekar (Dead) by LRs & Ors. vs Land Acquisition Officer & Anr. [(2012) 1 SCC 390], Nanjappan vs. Ramasamy & Anr. [(2015) 14 SCC 341], Ravi Setia vs. Madan Lal & Ors. [(2019) 9 SCC 381], Vijay Kumar & Ors. vs. Om Prakash [(2019) 17 SCC 429], Mehboob-ur-rehman (Dead) through Legal Reprsentatives vs. Ahsanul Ghani [(2019) 19 SCC 415] and C.S. Venkatesh vs. A.S.C. Murthy (Dead) by LRs & Ors. [(2020) 3 SCC 280]**.

27. Sri Rajiv Kumar, learned counsel appearing for the defendant no.1 - respondent no.2 (Deepak Kumar Sinha)

submitted that this defendant is said to be one of the witnesses to the agreement. After the death of the original defendant no.1, he was substituted in her place as the defendant no.1. Learned counsel has taken the Court through the written statement filed on behalf of the substituted defendant no.1 and submitted that the original defendant no.1 was the stepmother of this defendant's father. Further having taken the Court through the deposition of PW-1 (plaintiff), the contents of the plaint, the written statements of the original defendant no.1 as also the substituted defendant no.1 and defendant no.3, it was submitted that on the death of the original defendant no.1 on 26.1.2009, on the plaintiff filing a substitution petition, the same was allowed. Deepak Kumar Sinha followed by Sangita Sinha and Amar Kumar were added as defendants in the suit. It was submitted that this defendant is neither the owner nor the beneficiary instead it is his wife (defendant no.3) who is the legatee. It was submitted that there was no free consent as defined under section 14 of the Contract Act and the document, if any, was got executed when the mental capacity of the original defendant no.1 was affected because of old age. The burden of proving a document lay on the plaintiff and so far as the role of this defendant is concerned, it started after the death of the original defendant no.1. With respect to the agreement dated 25.1.2008 (Exhibit-1) it was submitted that the terms and conditions of payment of consideration amount is missing and the liability part ie the procedure of payment to be made by the plaintiff is also missing in the same. Learned counsel submitted that the document was fabricated and the learned Court below has erred in decreeing the suit.

28. Sri J.S. Arora, learned Senior counsel assisted by Sri Manoj Kumar, learned counsel appearing for the plaintiff - respondent no.1 (Bhawna Bhardwaj) having taken the Court through the case of the parties submitted that the issues important for a suit for specific performance are as to whether there is a legal, valid and enforceable agreement for sale between the parties and whether there had been readiness and willingness on part of the plaintiff to pay the consideration amount payable under the agreement for sale. Initially the suit was filed against two defendants ie the original defendant no.1 Kusum Kumari and the defendant no.2 the Secretary of the Society. On the death of the original defendant no.1, Deepak Kumar Sinha, Sangita Sinha and Amar Kumar were impleaded as defendant nos.1, 3 and 4. It was submitted that there is no format for agreement for sale under any statute and as a stranger

cannot obtain a NOC, pursuant to the agreement for sale dated 25.1.2008, the original defendant no.1 on 27.1.2008 wrote to the Society for granting NOC in favour of the plaintiff for carrying out the agreement. Referring to the contents of the written statement of the original defendant no.1 it was submitted that primarily all allegations levelled are against the (substituted) defendant no.1, however there is no just reason as to why he was not examined as a witness on behalf of the defendants. It was submitted that in the written statement filed by the original defendant no.1, there was no case that she was mentally not in a position to execute the document. Thus, the successor ie the substituted defendant no.1 who came in place of the original defendant no.1 after her death cannot set up a new case of his own. Further non examination of the defendant no.1 as a witness and consequently not giving an opportunity to the plaintiff to cross-examine him leads to one drawing an adverse inference against him. It being admitted that the letter (Exhibit-1/A) was sent by the original defendant no.1 to the Society for grant of permission to transfer the land and her share in favour of the plaintiff and the said letter containing the consent by way of signature of the defendant no.3 shows that the agreement for sale had been entered into consciously by all concerned.

Exhibit-1/A and Exhibit-1/C, the two letters of the original defendant no.1 prove that a valid agreement was there. Learned Senior counsel on the point of readiness and willingness on part of the plaintiff submitted that the capacity of the plaintiff to make payment would be evident from the purchase of the property vide sale deed dated 23.7.2008 (Exhibit-8) for a consideration of Rs.16 lacs and its subsequent sale vide sale deed dated 15.5.2014 (Exhibit-8/a) for a consideration of Rs. 64 lacs. The so called will said to have been executed by the original defendant no.1 in favour of the defendant no.3 was of an earlier date, prior to the agreement for sale dated 25.1.2008. On the medical condition of original defendant no.1 it was submitted that her age on different prescriptions differ and none of the prescriptions relate to or even mentions about any mental related disease being suffered by her. With respect to Amar Kumar it was submitted that the demand drafts were made in Vaishali because Amar was posted there. The amount of Rs.2,51,000/- having been received as per the plaintiff’s case by the original defendant no.1 through the said defendant no.1 who was not examined as a witness on behalf of the defendants, the same would go against the defendants.

29. Learned Senior counsel for respondent no.1

(plaintiff) in support of his contentions placed reliance on the judgments in the case of **Bishundeo Narayan & Anr. vs. Seogeni Rai &Ors. [AIR 1951 SC 280], Subhash Chandra Das Mushib vs. Ganga Prasad Das Mushib & Ors. [AIR 1967 SC 878], Ladli Prashad Jaiswal vs. The Karnal Distillery Co. Ltd. Karnal & Ors. [AIR 1963 SC 1279], Bondar Singh & Ors. vs. Nihal Singh & Ors. [(2003) 4 SCC 161], Nedunuri Kameswaramma vs. Sampati Subba Rao [AIR 1963 SC 884], Sayeda Akhtar vs. Abdul Ahad [(2003) 7 SCC 52], Narbada Devi Gupta vs. Birendra Kumar Jaiswal & Anr. [(2003) 8 SCC 745], Azhar Sultana vs. B. Rajamani & Ors. [AIR 2009 SC 2157], Basavaraj vs. Padmavathi & Anr. [(2023) 4 SCC 239], Iswar Bhai C. Patel alias Bachi Bhai Patel vs. Harihar Bahera & Anr. [AIR 1999 SC 1341] and Iqbal Basith & Ors. vs. N. Subbalakshmi & Ors. [(2021) 2 SCC 718]**. It was submitted that there is no merit in the instant appeal and the same be dismissed.

30. Having heard learned counsel for the parties and having perused the material on record, in the opinion of the Court, the points for determination arising in the instant appeal are as follows :-

(I) Whether there is a legal, valid and enforceable agreement for sale between the plaintiff and the original defendant no.1 ?

(II) Whether the plaintiff has been able to prove her readiness and willingness to pay the consideration amount payable under the agreement dated 25.1.2008 ?

31. On the point as to whether there is a legal, valid and enforceable agreement for sale between the parties, it may be noted that the agreement dated 25.1.2008 (Exhibit-1) is said to have been signed by Bhawana Bhardwaj (plaintiff) and Kusum Kumari (original defendant no.1). It is further said to have been witnessed by Deepak Kumar Sinha (substituted defendant no.1 or defendant no.1) who happens to be the step-grandson of the original defendant no.1 and Sangita Sinha (defendant no.3), wife of defendant no.1.

32. It is the case of the plaintiff that having come to know about the desire of the original defendant no.1 to sell the suit property, the plaintiff approached her. In the discussion that followed the defendant nos.1 and 3 also participated wherein it was agreed that the suit property would be sold by the original defendant no.1 to the plaintiff for a total consideration of Rs.25 lacs. Accordingly, an agreement was entered into on 25.1.2008 which was signed by the plaintiff and the original defendant

no.1 and witnessed by the defendant no.1 and defendant no.3. As per terms and conditions of the agreement, the plaintiff paid a sum of Rs.2,51,000/- in cash and issued cheques worth Rs.7,50,000/- in favour of the defendants. The original defendant no.1 acknowledged the receipt of Rs.10 lacs and issued a money receipt (Exhibit-5).

33. It may be noted here itself that so far as the presence of persons at the time of execution of the agreement dated 25.1.2008 is concerned, according to the plaintiff (PW-1), she along with her husband (PW-2) were present while the original defendant no.1 was there with her step-grandson (defendant no.1) (not examined) and his wife (defendant no.3) (DW-6).

34. The original defendant no.1 though filed her written statement in the case, however she passed away and was not examined as a witness in the suit. With respect to her signing the agreement for sale on 25.1.2008, her case as narrated in the written statement is that she is a widow aged about 100 years, has already executed a registered Will in favour of her grandson and grand daughter-in-law (defendant nos. 1 and 3) and that she has never signed the agreement. She came to learn about the same for the first time on 5.2.2008 when an

unknown lady came to her house and threatened and pressurized her daughter-in-law (defendant no.3) to accompany her and obtained her signatures on some papers. It is then that she came to know about the agreement for sale. She proceeds to state that some time ago it was on the request of her grandson (defendant no.1) that she put her signature on blank papers under the belief that she is confirming the will which she had executed in favour of defendant nos. 1 and 3. Accordingly, she immediately lodged a *sanha* in the local police station and arranged for the amount to be returned. The original defendant no.1 having died during pendency of the suit, her step-grandson was substituted as defendant no.1 and he filed his written statement on 25.11.2009. He is not only an important witness being the step-grandson of the original defendant no.1 but is also a witness on the agreement for sale dated 25.1.2008 along with his wife defendant no.3. However, he was not examined as a witness in the suit on behalf of the defendants.

35. Subsequently, Sangita Sinha was also added as defendant no.3 in the suit. She had filed an affidavit on earlier occasion which was filed along with the written statement of her husband defendant no.1 and subsequently also supplemented the same with her own written statement. As per her case, the

original defendant no.1 having come to know about the existence of the so called agreement for sale, she had immediately taken steps. The original defendant no.1 was neither in need of any money as she had sufficient funds to cater to her needs nor did she at any time intend to sell the suit property as she was financially independent and was regularly getting family pension. Her (defendant no.3's) husband had entered into a clandestine deal with the plaintiff's husband and had taken advantage of the mental condition of the original defendant no.1, who remains inalert most of the time. In her deposition she states that in the morning hours, on waking up the original defendant no.1 did not recognise persons and her memory used to return slowly. The plaintiffs had never met her and her signature had been obtained by playing fraud upon her through a staff of the Society. At the time of signing she did not know that she was signing on an agreement for sale. With respect to her own signature as a witness, the defendant no.3 states that she and her husband (defendant no.1) were forcibly lifted from the house, taken away and forced to sign on the document for which she also got a *sanha* registered. The original defendant no.1 got the amount of Rs.2,11,000/- which she had received along with cheque for Rs.7,50,000/- returned to the plaintiffs.

36. From the respective stand of the defendants as stated herein above, what is not denied is that the original defendant no.1 indeed signed on the agreement for sale dated 25.1.2008. Though she was not examined as she died during pendency of the suit and the plaintiffs did not have the chance to cross-examine her, nevertheless if her stand is examined this Court finds that the agreement for sale dated 25.1.2008 (Exhibit-1) is an agreement between the plaintiff and the original defendant no.1 with respect to Schedule-A suit property which is a 2800 sq.ft. plot in Kankarbagh Colony in the town of Patna. The agreement provides that the original defendant no.1 will obtain permission for sale from the Society and shall intimate the plaintiff through registered post on which the plaintiff shall pay the requisite fee and become a member of the Society. The responsibility of getting the suit property vacated from the tenants would also be on the original defendant no.1. The plaintiff would get the registration done on payment of the total consideration of Rs.25 lacs and the period of six months for the plaintiff to get registration done would commence from the date the original defendant no.1 gives information to the plaintiff through registered post, after obtaining permission from

the Society.

37. As stated above, the agreement for sale dated 25.1.2008 runs into four pages with both the plaintiff and the original defendant no.1 having put their signatures on each page of the document. Further, both the defendant nos. 1 and 3 have also signed on the last page of the document in the capacity of witness.

38. The stand of the original defendant no.1 as to whether she signed voluntarily and consciously knowing the document to be an agreement for sale or whether she signed it thinking it to be a document confirming the will executed by her in favour of her step-grandson and his wife is best answered by the steps taken by her immediately following the signature on the agreement dated 25.1.2008. As required, as per the terms of the agreement, the original defendant no.1 made an application to the Society praying for providing a form to her to transfer the membership of the Society in favour of the plaintiff. The defendant no.3 also gave her consent and counter signed the said application.

39. It may be mentioned here that the agreement dated 25.1.2008 which is marked as Exhibit-1 and the application written by the original defendant no.1 to the Secretary of the

Society for transfer of membership to the plaintiff which was marked as Exhibit-2 have both been proved by the plaintiff in her examination-in-chief. Here itself it would be relevant to mention that in their written statement the Society (defendant no.2) admitted that the original defendant no.1 had made a request vide letter dated 27.1.2008 for issuing the suitable form for transfer of the suit land, though she subsequently filed another petition on 14.2.2008 stating that she was not inclined to sell the suit property.

40. So far as the stand of defendant no.3 is concerned, she states that the original defendant no.1 who was aged about 100 years did not use to identify people on waking up and her memory used to return slowly. This in the opinion of the Court is a new case which the defendants are trying to introduce of the agreement having been entered into at the time of mental inalertness of the original defendant no.1. No such case was pleaded by the original defendant no.1 in her written statement nor has any material by way of any doctors prescription etc. been brought on record by any of the witnesses to substantiate the fact that the original defendant no.1 was mentally weak or inalert. Instead, the defendant no.3 in her cross-examination categorically states that the original defendant no.1 was not

mentally weak. Thus, in the opinion of this Court, though the original defendant no.1 was a lady of advanced age, there remains no doubt about her mental fitness/alertness, appreciation and ability to carry out her day to day work including her financial/banking transactions as also dealing with her property with the Society etc..

41. The next contention raised by the defendant no.3 is that the signature of the original defendant no.1 was obtained on the agreement dated 25.1.2008 by a staff of the Housing Society who regularly used to come to get the signatures on different documents from the original defendant no.1. Subsequently, the signatures of her husband (defendant no.1) and her signature were obtained forcibly after taking them away for which they got a *sanha* registered. It may be stated here itself that the case of the original defendant no.1 was to the effect that the signature on the so called agreement dated 25.1.2008 was obtained by the defendant no.1 and the original defendant no.1 signed on the same thinking it to be further documents with respect to the Will executed by her. So far as the stand of the defendant no.3 is concerned, not only the same is contrary to the stand of the original defendant no.1 but she has not even been able to give the name of the staff of the

Society and in her cross-examination only states that he is called as ‘Jhaji’. With respect to the *sanha* for the so called occurrence of her and her husband being lifted and being taken away, she states that a *sanha* was lodged in the Kankarbagh Police Station, however no *sanha* has been exhibited in the learned trial Court. Here itself it would be relevant to take note of the fact that with respect to the application (Exhibit-2) of the original defendant no.1 dated 27.1.2008 wherein the defendant no.3 is also a signatory having given her consent for the same for transfer of the membership of the Society to the plaintiff, the defendant no.3 has no explanation.

42. Thus from the facts stated herein above, the respective case of the parties and both the oral and documentary evidence brought on record, this Court comes to the conclusion that an agreement for sale dated 25.1.2008 was entered into between the plaintiff and the original defendant no.1 and the original defendant no.1 had signed the same being conscious of the fact that it was an agreement for sale. Thus, the agreement for sale dated 25.1.2008 entered into between the plaintiff and the original defendant no.1 was legal, valid and enforceable.

43. So far as the second point for determination as to whether the plaintiff has been able to prove her readiness and

willingness to pay the consideration amount payable under the agreement for sale dated 25.1.2008 is concerned, it may be noted that as per the case of the plaintiff, pursuant to the agreement they had paid to the original defendant no.1 Rs.2,51,000/- in cash and Rs.7,50,000/- by cheque to which the defendant acknowledged the same by giving a receipt. Out of the said amount, as per the original defendant no.1's case a sum of Rs.2,11,000/- by five drafts and Rs.5 lacs through two post dated cheques were returned to the plaintiff. It is the case of the plaintiffs in paragraph nos.7 and 13 of the plaint that she expressed her desire and willingness to pay the rest amount of consideration as agreed by the agreement dated 25.1.2008. She categorically states that she is very much eager and willing to pay the balance consideration amount as per the terms of the agreement, has already performed the agreement in part at the time of agreement and is ready to perform the remaining part of the agreement as per the terms and conditions therein. In course of their examination the plaintiff (PW-1) in her deposition has stated that she is ready even today to pay the amount of consideration as per the terms of the agreement. She further states that she has always been ready to comply with the terms of the agreement and pay the balance amount. The husband of the plaintiff (PW-2) also in his deposition has categorically stated that the plaintiff has always been ready and even today is ready and willing to pay the balance consideration amount as per the agreement dated 25.1.2008.

44. It may further be noted here that the plaintiff (PW-1) has not been cross-examined with respect to her capacity to pay or even on her readiness and willingness to pay the balance consideration amount as per the agreement. However the plaintiff has brought on record a sale deed dated 23.7.2008 (Exhibit-8) through which the husband of the plaintiff purchased a residential flat situated on the Kankarbagh Main Road in the town of Patna by a registered sale deed for a total consideration of Rs.16 lacs. The plaintiffs have also brought on record another registered sale deed dated 15.5.2014 (Exhibit-8/a) whereby the residential flat purchased on 23.7.2008 was sold by the husband of the plaintiff for a total consideration of Rs.48 lacs. PW-2, the husband of the plaintiff in his deposition, besides supporting the plaintiff has in paragraph nos. 17 and 22 of his deposition stated that the plaintiff has always been ready and willing to pay the balance consideration amount as per the agreement dated 25.1.2008.

45. Learned counsel for the appellant (defendant no.3)

in support of his contentions has relied on the judgments in the case of **Ravi Setia vs. Madan Lal & Ors. [(2019) 9 SCC 381], Vijay Kumar & Ors. vs. Om Prakash [(2019) 17 SCC 429], Mehboob-ur-rehman (Dead) through Legal Reprsentatives vs. Ahsanul Ghani [(2019) 19 SCC 415] and C.S. Venkatesh vs. A.S.C. Murthy (Dead) by LRs & Ors. [(2020) 3 SCC 280]** on the point of readiness and willingness of a party to pay the balance consideration amount. Referring to the judgments it is submitted that only averment in plaint or statement in examination-in-chief would not suffice. The plaintiff has to prove his readiness and willingness which has to be shown to be throughout the case. If he fails to aver or prove, he must fail. In this context it would be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of **Umabai & Anr. vs. Nilkanth Dhondiba Chavan (Dead) by LRs &Anr. [(2005) 6 SCC 243]** wherein the Hon'ble Supreme Court has held as follows :-

> *"**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"

46. Further in the case of **Basavaraj vs. Padmavathi & Anr. [(2023) 4 SCC 239]** the Hon'ble Supreme Court held that an adverse inference with respect to readiness and willingness could only have been drawn against the plaintiffs if the defendants had asked the Court to order them to produce accounts and they had failed to produce the same. No such prayer having been made in the Court, no adverse inference can be drawn from non production of the accounts. It may only be stated here that in the instant case also at no stage did the defendants asked the Court to direct the plaintiff to produce her accounts to show her capacity to pay. The relevant paragraph no.15 of the case of **Basavaraj (*supra*)** is reproduced herein below for ready reference :-

*"**15**. From the impugned judgment and order passed by the High Court, it appears that the reasoning given by the High Court is that the plaintiff has not proved that he had the cash and/or amount and/or sufficient funds/means to pay the balance sale consideration, as no passbook and/or bank accounts were produced. In Ramrati Kuer which has been specifically*

considered by this Court in Indira Kaur, it was observed and held as under: (Ramrati Kuer case, AIR pp. 1136-37, para 9)

> *"9. Fourthly, it is urged that the respondents did not produce any accounts even though their case was that accounts were maintained and that Basekhi Singh used to give maintenance allowance to the widows who were messing separately. It is urged that adverse inference should be drawn from the fact accounts were not produced by the respondents and that if they had been produced that would have shown payment not of maintenance allowance but of half-share of the income to the widows by virtue of their right to the property. It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs- respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts. But it is urged that even so the accounts would have been the best evidence*

to show that maintenance was being given to the widows and the best evidence was withheld by the plaintiffs and only oral evidence was produced to the effect that the widows were being given maintenance by Basekhi Singh. Even if it be that accounts would be the best evidence of payment of maintenance and they had been withheld, all that one can say is that the oral evidence that maintenance was being given to widows may not be acceptable; but no adverse inference can be drawn (in the absence of any prayer by the appellant that accounts be produced) that if they had been produced they would have shown that income was divided half and half in accordance with the title claimed by the appellant."

47. In view of the law laid down by the Hon'ble Supreme Court as stated herein above and taking into consideration the entire facts and circumstances of the case including not only the averments in the plaint, the deposition of the witnesses examined on behalf of the plaintiff but also the sale deeds brought on record showing the financial capacity of the plaintiff and her husband who has throughout supported the case of the plaintiff, there remains no doubt in the opinion of the Court that the plaintiff has been able to prove that she was

always ready and willing to pay the balance consideration amount payable under the agreement dated 25.1.2008.

48. Both the points for determination having been decided in favour of the plaintiff (respondent no.1 herein), in the opinion of this Court it would be important to refer to the other points raised by the defendant no.3 (appellant).

49. It was contended by learned counsel for the defendant no.3 (appellant) that though issues were framed on 16.12.2008 and additional issued added/settled on 21.1.2013, however the learned Sub-Judge at the time of delivering his judgment recast the issues to the following effect:-

> *"1. Is the suit as framed legally maintainable ?*
>
> *2. Has the plaintiff got valid cause of action to file this suit?*
>
> *3. Is the suit barred by law of limitation.*
>
> *4. Is the suit barred by the principles of estoppel, waiver and acquiescence?*
>
> *5. Whether the defendants had entered into an agreement dated 25.01.2008 to the plaintiff for the sell of suit land and in continuation of transaction defendants have received part consideration amount as pleaded by the plaintiff through the said agreement?*
>
> *6. Whether the sale deed dated 25.01.2008 was the valid agreement & plaintiff*

was always ready to pay the rest consideration money to fulfill part performance of the agreement?

7. Whether the plaintiff is entitled to relief as prayed for with cost or not?"

50. The dictionary meaning of 'issue' is a point in question, an important subject of debate, disagreement, discussion, argument or litigation. Order 41 Rule 1(1) of the Civil Procedure Code provides that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. So far as the facts of the instant case are concerned, it is not in dispute that both the sides were fully aware with the case of the other side. Taking into consideration the case of the parties on both the sides, issues and additional issues had been settled on 16.12.2008 and 21.1.2013 respectively. Evidence at length were led by both the parties and both the sides got opportunity to cross-examine the witnesses of the other side. However, it was on the date of the judgment that the issues were recast by the learned trial Court and the judgment delivered. Comparing the issues and additional issues settled on 16.12.2008 and 21.1.2013 respectively with the issues recast on 27.4.2018 it would transpire that all the issues framed earlier by the learned trial Court has been included in the recast issues except, at most, the following :-

(i) Whether the defendant made an application to the Secretary, Peoples Co-operative Grih Nirman Samiti intending to transfer her membership in the name of the plaintiff ?

(ii) Whether the defendant has avoided the time of the agreement for sale date 25.1.2008 ?

51. Though the issues and the additional issues were a total of twelve in number, in the issues recast at the time of judgment, a number of them were joined together. Even these two issues which may not be specifically stated to have been included in the issues recast. Nevertheless, it has to be remembered that evidence was led by both the parties with respect to them also and as per the oral and documentary evidence led by the parties and discussed herein above, this Court comes to the conclusion that indeed the original defendant no.1 had made an application to the Society intending to transfer her membership in the name of the plaintiff, which she recalled subsequently. Further in the facts and circumstances of the case, this Court has no hesitation to hold that the original defendant no.1 did avoid the time of the agreement for sale dated 25.1.2008. However, the defendant no.3-appellant has not been able to show as to how recasting of the issues on the date of judgment caused prejudice to her.

52. It has next been contended on behalf of the defendant no.3 that the total consideration amount having been returned by the original defendant no.1 and the same having been received by the plaintiff, the plaintiff has no cause of action to file the instant suit. It may be stated here that the consistent case of the plaintiff from the very beginning in the plaint has been to the effect that she paid a total sum of Rs.2,51,000/- in cash and Rs.7,50,000/- by cheques to the original defendant no.1. The same was the stand of the plaintiff (PW-1) in paragraph no.8 of her deposition as also the stand of the plaintiff's husband (PW-2) in paragraph no.8 of his deposition. In response it has been the stand of the original defendant no.1 as also the other defendants that soon after coming to know about the agreement for sale the original defendant no.1 returned the sum of Rs.2,11,000/- by five drafts and the two post dated cheques totaling Rs.5 lacs. Even as per the case of the defendants, an amount of Rs.40,000/- paid in cash by the plaintiff to the original defendant no.1 still remains unreturned and with the defendants, in addition to the cheque of Rs.2,50,000/-. Thus, in no manner can it be said that the total amount paid by the plaintiff which as per the plaintiff's case was paid pursuant to the agreement for sale dated 25.1.2008 was

returned in full to the defendants. So far as deposit of the drafts received by the plaintiffs in the bank are concerned, it is the explanation furnished by the plaintiff that the same were deposited for the reason that they were about to expire. The balance amount of at least Rs.40,000/- paid by the plaintiff in cash remaining with the defendants and not having been returned back, the deposit of the drafts subsequent to filing of the suit is not of much value.

53. It may be noted here that though other witnesses were examined on behalf of the defendants, however it is no one's contention that any of the them were present at the time when the agreement for sale was signed by the original defendant no.1.

54. One of the points raised on behalf of the defendant no.3 (appellant) was that the agreement for sale dated 25.1.2008 executed between the plaintiff and the original defendant no.1 being unregistered, no right, title or interest would pass with respect to the immovable property as a result of the same. Learned counsel for the appellant in support of his contentions relies on the judgment in the case of **Suraj Lamp and Industries Private vs. State of Haryana & Anr. [(2012) 1 SCC 656**] and more particularly paragraph nos. 18 and 19

thereof. For ready reference paragraph nos.16 to 19 which deals with the scope of an agreement for sale in the said judgment is quoted herein below :-

> *"**Scope of an agreement of sale***
>
> ***16**. Section 54 of the TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam observed: (SCC pp. 254-55, paras 32-33 sale & 37)*
>
> > *"32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Ram Baran Prasad v. Ram Mohit Hazra.) The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.*
> >
> > *33. In India, the word 'transfer' is defined with reference to the word 'convey'..... The word 'conveys' in Section 5 of the Transfer of Property Act is used in*

the wider sense of conveying ownership.

* * *

37. ...that only on execution of conveyance, ownership passes from one party to another..."

***17**. In Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra this Court held: (SCC p.619, para 10)*

"10. Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed into service against a third party."

***18**. It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.*

***19**. Any contract of sale (agreement to sell) which is not a registered deed of* *conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter."*

55. Section 54 of the Transfer of Property Act, 1882 defines sale as transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. It also defines contract for sale. Section 54 is quoted herein below for ready reference:-

*"**54. "Sale" defined.**-"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.*

***Sale how made.**--- Such transfer, in the case of tangible immoveable property the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered *instrument or by delivery of the property.*

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.--- *A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.*

It does not, of itself, create any interest in or charge on such property."

56. From reading of the definition of sale and contract for sale as provided under section 54 of the Transfer of Property Act together with the relevant portion of the judgment in the case of **Suraj Lamp and Industries (*supra*)** it would transpire that a contract of sale is merely an agreement of sale and the same itself does not create any interest in or charge on the property. A contract for sale or an agreement to sell does not confer any title nor transfers any interest in an immovable property, the same not being a deed of sale. It is not in dispute that an agreement of sale may be unregistered also, however in case any benefit of right granted under section 53A of the Transfer of Property Act is sought, only in that case will the agreement for sale be required to be registered in view of section 17(1A) of the Registration Act, 1908. For ready

reference section 17(1A) of the Registration Act and Section 53A of the Transfer of Property Act is quoted herein below :-

*"[**17(1A)**. The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 (48 of 2001) and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]"*

*"[**53A**. **Part performance**. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that where there is an instrument of transfer, that the transfer has *not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.]"

57. So far as the facts of the instant case is concerned the plaintiff contend that they have made part payment of the total consideration and even after return of the amount by the defendants, some amount of the plaintiff still remains with the defendants. Neither the plaintiffs prayed for grant of benefit as provided under section 53A of the Transfer of Property Act, they have not contended that they ever came in possession over any part of the suit property at any stage and thus in the opinion of the Court, the agreement to sell dated 25.1.2008 being merely an agreement that a sale will take place at a future date does not require that the same be mandatorily registered.

58. As to what will the effect of the registered will executed by the original defendant no.1, it may be stated here

that the case of the original defendant no.1 in her written statement was that she had executed a registered will in favour of her grandson (defendant no.1) and granddaughter-in-law (defendant no.3). The case of the defendant no.3 was that the original defendant no.1 having been cheated by the defendant no.1, she (original defendant no.1) had made her tenant namely Amar Kumar as the heir of the ground floor of her property and had made the defendant no.3 as the legatee of the first floor of the suit property. So far as the scope of a Will or even a registered Will is concerned, it would be relevant to take note of paragraph no.22 of the judgment of the Hon'ble Supreme Court in the case of the **Suraj Lamp (*supra*)** which is quoted herein below for ready reference :-

> ***"Scope of will***
>
> ***22***. *A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the lifetime of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the*

> *will, by operation of law, the will stands revoked. (See Sections 69 and 70 of the Succession Act, 1925.) Registration of a will does not make it any more effective."*

59. That a Will comes into effect only after the death of the testator not being in dispute, the existence of a Will or even a registered Will, during the lifetime of the testator would be of no value and to use the terms as laid in the judgment in the case of **Suraj Lamp (*supra*)** quoted herein above, 'a will is not worth the paper on which it is written, as the testator can at any time revoke it'. Thus, the existence of a Will executed by the original defendant no.1 would have absolutely no effect on her capacity to enter into an agreement for sale or even to execute a registered sale deed with respect to the suit property which is the subject matter of the Will.

60. At this stage, this Court would like to mention that in the case of Sangita Sinha (defendant no.3) in her affidavit, written statement and deposition, reference has come of one Amar Kumar, a tenant on the ground floor of the suit premises who is said to be very helpful to the original defendant no.1 as a result of which it is said that on discovering that she has been cheated by the defendant no.1, the original defendant no.1 executed a Will or expressed her desire that on her death the

ground floor would go to Amar Kumar and the first floor to Sangita Sinha. No will, registered or otherwise, of the original defendant no.1 has been produced by the defendants in the suit. On perusal of the evidence of the parties it transpires that it is the case of the defendant no.3 that on the request of the original defendant no.1, Amar Kumar had given by way of loan Rs.4 lacs to the defendant no.1 for their daughter's marriage. The defendant no.3 further states that Amar Kumar had been helping her monetarily giving loans and a total amount of Rs.2 lacs had been given. The defendant no.3 entered into an agreement for sale with the said Amar Kumar (tenant on the ground floor of the suit property) that on death of the original defendant no.1, after obtaining probate of the registered Will executed by her in favour of the defendant no.3, the defendant no.3 would execute a sale deed with respect to the upper storey of suit property in favour of the tenant Amar Kumar for a total consideration of Rs.6 lacs which she and her husband ie the defendant no.1 had already received. As to why a property for which an agreement for sale dated 25.1.2008 was entered into for a consideration of Rs.25 lacs and was being contested by the defendant no.3 up to this Court on one hand and on the other as to why with respect to the upper storey of the same property the defendant no.3

entered into an agreement for sale with the tenant Amar Kumar for a total consideration of Rs.6 lacs, no evidence having been led thereon, nor any explanation having been furnished by the defendant no.3 at any stage, this Court does not state anything further.

61. In the facts and circumstances of the case, both the points for determination as also the other points raised by the appellants having been decided in favour of the plaintiff-respondent no.1, this Court finds no merit in the instant appeal and the same is dismissed.

(Partha Sarthy, J)

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