

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.583 of 1988

- 1.1. Nawal Kishore Sharma Son of Late Kedar Chaudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 1.2. Subodh Kumar Sharma Son of Late Kedar Chaudhary an imbecile under guardianship of his brother Pramod Kumar Arya, Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 1.3. Pramod Kumar Arya Son of Late Kedar Chaudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 1.4. Binod Kumar Sharma Son of Late Kedar Chaudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 1.5. Kumud Kumar Sharma Son of Late Kedar Chaudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 1.6. Munna Devi D/o Late Kedar Chaudhary and W/o Late Daya Shankar Sharma Resident of Village and P.O. Dumri, P.S. Sarai, District- Vaishali.

... ... Defendant No.1/Appellant/Appellants

Versus

- 1.1. Mostt. Raj Kumari Devi W/o Late Bishwa Nath Rai Resident of Village- Sadapur Mahua, Tola Suknat, Pargana- Bisara, P.O. and P.S. Mahua, District- Vaishali.
- 1.2. Sri Birendra Rai Son of Late Bishwa Nath Rai Resident of Village- Sadapur Mahua, Tola Suknat, Pargana- Bisara, P.O. and P.S. Mahua, District- Vaishali.
- 1.3. Sri Ranjeet Rai Son of Late Bishwa Nath Rai Resident of Village- Sadapur Mahua, Tola Suknat, Pargana- Bisara, P.O. and P.S. Mahua, District- Vaishali.
- 1.4. Mostt. Lal Pari Devi W/o Late Jai Prakash Rai Resident of Village- Anwarpur, P.O. and P.S.- Hajipur, Distt- Vaishali.
- 1.5. Smt. Fulpari Devi W/o Shri Ashok Rai Resident of Village- Ijri Panapur, Desri, P.O. and P.S.- Desri, Distt- Vaishali.
- 1.6. Smt. Sanjeeta Devi W/o Shri Raghvendra Rai Resident of Village- Mathana, P.O.- Mathana, Distt- Vaishali.
- 1.7. Smt. Baby Devi W/o Shri Din Dayal Rai Resident of Village- Sahpur, P.O.- Bhen Borha, P.S.- Mahua, District- Vaishali.

....Plaintiff/Respondents 1st Party/Respondents 1st Set

- 2.1. Ajit Kumar S/o Late Shambhu Choudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 2.2. Ranjeet Kumar S/o Late Shambhu Choudhary Resident of Village- Suratpur, P.O. and P.S.- Mahua, District- Vaishali.
- 2.3. Anju Devi D/o Late Shambhu Choudhary Resident of Village- Suratpur, P.O.



and P.S.- Mahua, District- Vaishali.

... .. Defendant No.2/Respondents 2nd Party/Respondents 2nd Set

Appearance :

For the Appellant/s : Mr. J.K. Verma, Advocate
Mr. Suraj Narain Yadav, Advocate
For the Respondent/s : Mr. Naresh Ch.Verma, Advocate

CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN

ORAL JUDGMENT

Date : 25-10-2024

The present second appeal has been filed against the Judgment and Decree dated 30.05.1988 and 17.06.1988 respectively, passed by Sri S.N. Pathak, 1st Additional District Judge, Vaishali at Hajipur, in Title Appeal No.28 of 1987 affirming the Judgment and Decree dated 02.05.1987 and 15.05.1987 respectively, passed by Sri S.N. Sukla, Sub-Judge, Vaishali at Hajipur, in Title Suit No.48 of 1983. The Defendant No.1 of Title Suit No.48 of 1983 was the appellant of Title Appeal No.28 of 1987 and he is also the appellant in Second Appeal No.583 of 1988. The plaintiff of Title Suit No.48 of 1983 is respondent First Party of Title Appeal No. 28 of 1987 and his heirs and legal representatives 1.1 to 1.7 are the respondent first set in this appeal. Defendant No.2 Shambhu Choudhary of Title Suit No.48 of 1983 is respondent Second Party of Title Appeal No.28 of 1987 and his heirs and legal representatives from 2.1 to 2.3 are the respondent second set in



the present Second Appeal No.583 of 1988.

2. It is a second appeal against the Judgment of affirmance. The Title Suit No.48 of 1983 was filed for grant of relief of specific performance of a contract for sale (*Mahadanama*) dated 15.10.1982 (Ext-1). The said Title Suit was Decreed on contest against Defendant No.1 and *ex-parte* as against Defendant No.2 but without costs. The plaintiff was also directed to deposit Rs.4,000/- (Four thousand only) within one month from the date of Judgment and Defendant was directed to withdraw this money and to execute a sale deed in favour of the plaintiff within two months from the date of deposit of remainder consideration money. It was also ordered in the Judgment that if the plaintiff fails to deposit the remainder consideration money within the above mentioned time limit, the Suit shall *ipso-facto* stand dismissed. It has also been ordered that in case the remainder consideration is deposited and the defendants do not execute a sale deed, as directed above, the plaintiff shall be entitled to get a sale deed executed through the assistance of the Court.

3. In the Title Appeal it has been found by the Appellate Court that the appellant of the Title Appeal has not been able to make out a case for interference with the lower



Courts' Judgment and Decree and, therefore, the Title Appeal is accordingly dismissed on contest with costs at the contested scale. Thereafter, the Judgment and Decree of the Lower Court as passed and prepared on 02.05.1987 and 15.05.1987 respectively, in Title Suit No.48 of 1983, was confirmed.

4. The present Second Appeal has been instituted before this Hon'ble Court on 28.11.1988. The Substantial Question of Law has been framed vide order No.8 dated 04.01.1990, which is as follows:-

“Whether the Judgment and Decree of the Courts' below are valid when DefendantNo.2 is lunatic and no guardianship was appointed though this fact was brought to the notice of the Court?”

5. During course of final argument, vide order No.26 dated 07.05.2024, Additional Substantial Questions of Law were framed considering the law laid down under Sections 100(4) and 100(5) of the Code of Civil Procedure, 1908 (Act No.5 of 1908) as well as on the basis of Judgment of **Nazir Mohammad Vs. J.K. Kamala & Others** reported in **2020(5) BLJ SC 492- para-37**, which was followed in the case of **P.**



Kishore Kumar Vs. Vittal K. Patkar reported in **2024 (1) BLJ**

SC 37. These Substantial Questions of Law are as follows:-

“I. Whether the Courts below have not acted perversely in Decreeing a suit for specific performance of contract, mechanically, in absence of proof of both aspect of readiness and willingness on the part of the plaintiffs to perform their part of contract which is an essential requirement of law?

II. Whether the Judgment of the Courts below shall be sustainable in view of the discarding of supplementary/ additional written statement dated 04.04.1987 of Defendant No.1/ Appellant/ Appellant which resulted into shifting of burden on the Plaintiff to prove that the alleged agreement of sale was genuine and legally enforceable/not fraudulent, when the purported execution of the alleged agreement was of an old, aged and illiterate person?”

6. As such, with a view to decide the Second



Appeal the parties to the appeal had argued on the respective Substantial Question of Law in the light of principles laid down under Section 100 of the Code of Civil Procedure, 1908 (Act 5 of 1908).

7. Learned Counsel for the appellants submits that with a view to advance the argument on Substantial Questions of Law, it is necessary to explain the brief factual matrix of this appeal. He submits that Title Suit had been filed for Specific Performance of contract for sale, for which a *Mahdanama* was executed on 15.10.1982, marked as Ext-1. He further submits that the said *Mahdanama* was executed by the father of DefendantNos.1 and 2 in favour of the Plaintiff of the suit. The consideration money was Rs.19,000/- (Nineteen thousand only) with the earnest money being Rs.15,000/- (Fifteen thousand only). The amount which had to be paid at the time of execution of sale deed was Rs.4,000/- (Four thousand only). Learned Counsel for the appellants further submits that the name of father of the Defendant Nos.1 and 2 was Maujelal Choudhary, who had executed two deeds on the said date i.e., 15th October, 1982. The first deed that he executed was the deed of agreement to sell (the popular name of the said deed is *Mahdanama*) marked as Ext-1, whereas another



deed that he executed was deed of absolute sale for other property amounting to Rs.3600/-, which is marked as Ext-2. He further submits that as per the case of plaintiff, the said Maujelal Chaudhary died on 25th December, 1982. Thereafter, the plaintiff began consulting defendants for execution of sale-deed as per *Mahdanama*. In this regard, two notices, i.e., notice dated 14th January, 1983 (Ext-3) and notice dated 18th March, 1983 (Ext-3/A) were sent to defendants, but they did not come forward to execute the sale-deed. Thereafter, the suit was filed on 16th of April, 1983 by the plaintiff seeking relief of Specific Performance of Contract.

8. In the Suit, paragraph no.4 of the plaint narrates the statement with regard to readiness and willingness. Paragraph 6 of the plaint narrates the statement with regard to payment of Rs.15,000/- and dues of Rs.4,000/-. Paragraph-7 narrates about statement with regard to payment. Exhibits-3 and 3-A are the notices dated 14th of January, 1983 and 18th of March, 1983 respectively.

9. Learned Counsel for the Appellants submits that in paragraph 12 of the Trial Court Judgment, the issue of readiness and willingness had been decided in favour of the plaintiff on the basis of Exhibits-3 and 3-A read with PW1, PW



10 and PW 12. On the basis of said Judgment passed by Trial Court, Decree has also been prepared. Counsel further submits that being aggrieved and dissatisfied with the said Judgment and Decree, Title Appeal No.28 of 1987 had been preferred by Defendant No.1... Appellant. The said Title Appeal was dismissed on 30th May, 1988 and Decree was prepared on 1st of September, 1988. Counsel further submits that the finding of Appellate Court clearly indicates at paragraph 9/page 14 of the Appellate Court Judgment that it has not described its own findings; rather the Appellate Court completely relied on what Trial Court has observed. Counsel for the appellant further submits that the case has been filed by the plaintiff and the genesis of this case is Section 16(c) of the Specific Relief Act, 1963, which requires that the readiness and willingness have to be proved. According to him, the readiness construes the financial capacity and the willingness construes the conduct.

10. Learned Counsel for the appellants firstly argued on the Second Additional Substantial Question of Law that the proof of both aspects of readiness and willingness is heavily on the part of the plaintiff to perform their part of contract and without absence of such essential requirement, granting Decree of Specific Performance of Contract would be



absolutely illegal and not sustainable in the eye of law.

11. With a view to prove the Substantial Questions of Law on the point of readiness and willingness, Counsel for the appellants relied firstly on the case of ***J.P. Builders Vs. A Ramadas and Anr.*** reported in ***2011 (1) SCC 429*** read with Section 16(c) of the Specific Relief Act, 1963 and submits that paragraph 20-27 are very much clear that readiness construes financial capacity and willingness construes conduct, both of which are lacking in the present case. He further submits that the above mentioned Judgment relied on other important judgments, namely, ***N.P. Thirugnanam (D) by LR. Vs. Dr. R Jagan Mohan Rao & Ors.*** reported in ***(1995) 5 SCC 115***, the case of ***P. D'souza Vs. Shondrilo Naidu*** reported in ***(2004) 6 SCC 649***, the case of ***R.C. Chandiok & Anr. Vs. Chuni Lal Sabharwal & Ors.*** reported in ***(1970) 3 SCC 140***. He further submits that the case of ***U.N. Krishnamurthy (since deceased) through LR. Vs. A.M. Krishnamurthy*** reported in [(2023) 11 SCC 775] ***2022 SCC Online SC 840*** are also in his favour. He further relied in case of ***C.S. Venkatesh Vs. A.S.C. (D) by LR. & Ors.*** reported in ***2020 (2) BLJ 156- SC*** and also on Judgment of ***Smt. Sundari Devi Vs. Deo Narayan Prasad*** reported in ***(2012) 3 PLJR 36*** and submits that the finding of readiness and



willingness has not been proved in this case where onus was on the plaintiff to prove, and Appellate Court had to describe its own finding on the point of readiness and willingness, instead of the Appellate Court has heavily relied on the findings of the Trial Court. He further submits that since there is no finding of Appellate Court of his own therefore the Appellate Court's Judgment and Decree is not sustainable in law and thus, fit to be set aside.

12. On the Second Additional Substantial Question of Law the Counsel for the appellants submits that due to the rejection of Supplementary Written Statement dated 4th of April, 1987 of Defendant of the Title Suit (present appellant), the burden to prove the alleged agreement of sale as genuine, legally enforceable and not fraudulent which should have ideally shifted at Plaintiff, particularly when the purported execution of alleged agreement was of an old aged and an illiterate person who died on 15th of December, 1982 merely two months from when agreement was executed on 15th October, 1982, did not shift. Counsel states that additional written statement, which was filed, specifically pleaded that the agreement for sale has been obtained by committing fraud by the executant on plain paper, which was subsequently converted



into *Mahdanama*. Counsel for the appellants further submits that it is true that additional written statement was rejected by the Original Court, but it was not challenged before Higher Court, and, therefore, it is permissible to be challenged in title appeal, particularly in the light of the decision made in case of *Achal Misra Vs. Rama Shanker Singh & Ors.* reported in *(2005) 5 SCC 531* of paragraph 11 and also in case of *Korus (India) Limited Vs. Bank Of Maharashtra & Ors.* reported in *(2009) 17 SCC 674* of paragraph 6 and also in case of *Krishna Mohan Kul & Anr. Vs. Pratima Maity & Ors.* decided in *AIR 2003 SC 4351* of paragraphs 16 and 17. Counsel further submits that since the supplementary written statement was rejected by the Trial Court, against which no further appeal or revision had been preferred, therefore, non-consideration of Supplementary Written Statement has to be considered in accordance with law, which has not been properly decided by the Appellate Court. Hence, on this ground also, the present Title Appeal is fit to be dismissed.

On Substantial Questions of Law i.e., whether the Judgment and Decree of the Courts below are valid when Defendant No.2 is juvenile and no guardianship was appointed though this fact was brought to the notice of the Court? Counsel



further submits that the pleading of Defendant of the Suit is specific that Defendant No.2 is lunatic and this aspect has also not been considered by the Appellate Court and it is due to this reason also, the Judgment and Decree passed in appeal is fit to be set aside.

13. Learned Counsel for the appellants further submits that all the three Substantial Questions of Law *i.e.*, finding of readiness and willingness, non-consideration of Additional Written Statement at the appellate level as well as passing order against lunatic without his proper representation completely make the appellate Judgment and Decree fit to be set aside and he submits that matter be remanded back for fresh consideration at all, and particularly, on the ground of failure of ingredients of readiness and willingness particularly in the light of Section 16(c) of the Specific Relief Act, 1963 read with the Judgment mentioned above, it may be conclusively decided that the plaintiff had failed to prove the basic ingredients of readiness and willingness in this case and it is due to this reason, both the appellate as well as original Judgment and Decree are fit to be set aside.

14. Learned Counsel for the respondents, on the other hand, opposes the argument of the Counsel for the



appellants on all the three Substantial Questions of Law. He argued on the point of readiness and willingness and submits that ingredients of Section 16(c) of the Specific Relief Act, 1963, which is the genesis of this litigation have been present in this litigation by way of pleadings made in paragraph-7 of the plaint, statement of paragraph-5 of notice i.e. Exhibit-3 dated 14.01.1983, paragraphs-3 and 5 of Exhibit-3/A-legal notice dated 18.03.1983 and subsequently, supported by the evidence of PW-10 and PW-12. Counsel submits that the content of readiness and willingness, as mentioned in the statute, is present in the pleadings and proved by oral and documentary evidence both. In support of his argument, Counsel for the respondents heavily relied on a Judgment in the case of ***Biswanath Ghosh (dead) by Legal Representatives & Ors. Vs. Gobinda Ghosh & Ors.*** reported in ***AIR 2014 SC 1582***. Counsel further relied on a Judgment in the case of ***Basavaraj Vs. Padmavathi & Anr.*** reported in ***(2023) 4 SCC 239 (Civil Appeal Nos.8962-8963/2022)***, whose paragraphs-14 and 15 are very much relevant for their case. Counsel further submits that the Judgment of ***J.P. Builders & Anr. Vs. A. Ramadas & Anr.*** (*supra*) is not applicable in the present case due to the reason that price of the property was Rs.4 crores and advance money



was paid only Rs.1 lakh, whereas, in the present case, the price money was Rs.20,000/-, advance money paid was Rs.16,000/- and rest amount has been paid is just Rs.4,000/-. Therefore, the principles laid down in ***J.P. Builders & Anr. Vs. A. Ramadas & Anr. (supra)*** and in the case of ***U.N. Krishnamurthy Vs. A.M. Krishnamurthy (supra)*** or ***C.S. Venkatesh Vs. A.S.C. Murty (D) by L.Rs. & Ors. (supra)*** are not applicable in the present facts and circumstances of the case.

15. Learned Counsel for the respondents further submits that the latest Judgment i.e. case of ***Basavaraj Vs. Padmavathi & Anr. (supra)*** shall only apply in the present facts and circumstances of the case by which it becomes crystal clear with the pleadings and evidence that the plaintiff has readiness and willingness both to purchase the property i.e., to say that there is presence of financial capacity as well as conduct.

16. With a view to decide second Additional Substantial Question of Law, learned Counsel for the respondents submits that additional written statement was rejected, no further appeal was preferred and on the ground of non-consideration of additional written statement at the stage of title appeal, the judgment/appeal cannot be dismissed.

17. Learned Counsel for the respondents further



submits that in the present appeal, there is categorical finding in the Title Appeal Judgment mentioned in paragraph-7 of the additional/supplementary written statement and, hence, on this ground, the Appellate Judgment or Decree may not be set aside. So far as the Substantial Question of Law based on the point of lunacy is concerned, Counsel for the respondents submits that this point has been mentioned in paragraph-22 of the written statement filed by the present appellants in the Title Suit. But on the point of lunacy, he has not adduced any evidence and, therefore, he has no locus to raise this point directly at the level of Second Appeal as he himself opted not to pursue this point at any level. Counsel further submits that at the appellate stage, it is the present appellants who filed appeal, he has made Defendantno.2 his brother as respondent no.2. But at the appellate level also, he has neither pleaded this point nor raised this point during title appeal and, hence, in this view of the matter, he has no locus to challenge the point of lunacy at the level of Second Appeal directly. Counsel for the respondents submits that from the record, it transpires that the appellant is brother of the respondent second set and when he himself not opted to raise this point either at the level of Original Court or at the level of Appellate Court then being the own brother, this



point may not be made available to him with a view to set aside the order passed in appeal as it is defendant 1st set-appellant-appellant had represented the original defendant No.2 and at the level of Second Appeal, he may not be granted any benefit to his own fault, if any.

18. With a view to decide those Substantial Questions of Law, it is necessary to quote the relevant provisions of Section 16 of the Specific Relief Act, 1963 as well as relevant paragraphs of those judgments on which the Counsel for the appellants and Counsel for the respondents are heavily relied.

19. Section 16 of the Specific Relief Act, 1963 states as follows:-

“16. Personal bars to relief:-

Specific performance of a contract cannot be enforced in favour of a person-

(a) who has obtained substituted performance of contract under section 20; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed,



or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation;-For the purposes of clause (c),:-

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

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.”

20. Learned Counsel for the Appellants relied on the Judgment of ***J.P. Builders Vs. A Ramadas and Anr.*** (supra),



whose paragraphs 21 to 27 states as follows:-

“21.Among the three clauses, we are more concerned about clause (c). “Readiness and willingness” is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

22. The words “ready” and “willing” imply that the person was prepared to carry out the terms of the contract. The distinction between “readiness” and “willingness” is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In *N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao* [(1995) 5 SCC 115] at SCC para 5, this Court held: (SCC pp. 117-18)

“5. ... Section 16(c) of the Act envisages that the plaintiff must plead



and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer



from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

24. In *P. D'Souza v. Shondrilo Naidu* [(2004) 6 SCC 649] this Court observed: (SCC p. 654, paras 19 and 21)

“19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf. ...

21. ... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale.”

25. Section 16(c) of the Specific Relief Act, 1963 mandates “readiness and willingness” on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific



performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous “readiness and willingness” to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok v. Chuni Lal Sabharwal* [(1970) 3 SCC 140] that “readiness and willingness” cannot be treated as a straitjacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. “Readiness and willingness” to perform the part of the contract has to be determined/ascertained from the conduct of the parties.”



21. Counsel further relied on the Judgment of ***N.P. Thirugnanam (D) by LR. Vs. Dr. R Jagan Mohan Rao & Ors. (supra)*** whose 5 reads as follows:-

“5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short “the Act”). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is



ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.”

22. Counsel further relied on the Judgment of **P.**

D'souza Vs. Shondrilo Naidu (*supra*) whose paragraph 24 states as follows:-

“24. In August 1981 the defendant accepted a sum of Rs 20,000 from the plaintiff. The contention raised on behalf of the appellant to the effect



that the plaintiff has failed to show her readiness and willingness to perform her part of contract by 5-12-1978 is stated to be rejected inasmuch as the defendant himself had revived the contract at a later stage. He, as would appear from the findings recorded by the High Court, even sought for extension of time for registering the sale deed till 31-12-1981. It is, therefore, too late in the day for the defendant now to contend that it was obligatory on the part of the plaintiff to show readiness and willingness as far back as 5-12-1978."

23. Counsel further relied on the Judgment of ***U.N. Krishnamurthy (since deceased) through LRs. Vs. A.M. Krishnamurthy (supra)***, whose paragraphs 24, 26, 27, and 28 state as follows:-

"24. To aver and prove readiness and willingness to perform an obligation to pay money, in terms of a contract, the plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in



time. In other words, the plaintiff would have to plead that the plaintiff had sufficient funds or was in a position to raise funds in time to discharge his obligation under the contract. If the plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the plaintiff may aver and prove, by adducing evidence, an arrangement with a financier for disbursement of adequate funds for timely compliance with the terms and conditions of a contract involving payment of money.

26. *In Prem Raj v. DLF Housing Co. Construction (P) Ltd. [Prem Raj v. DLF Housing Co. Construction (P) Ltd., 1968 SCC OnLine SC 151 : AIR 1968 SC 1355] cited by Mr Venugopal, this Court speaking through Ramaswamy, J. held that : (AIR p. 1357, para 5)*

“5. ... It is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract....”

and if the fact is traversed, he is required to prove a continuous readiness and



willingness from the date of the contract to the time of the hearing, to perform the contract on his part. For such conclusion the learned Judge relied upon the opinion of Lord Blanesburgh, in Ardeshir Mama v. Flora Sassoon [Ardeshir Mama v. Flora Sassoon, 1928 SCC OnLine PC 43 : (1927-28) 55 IA 360 at p. 372 : AIR 1928 PC 208] .

27. In DLF Housing Co. Construction (P) Ltd. [Prem Raj v. DLF Housing Co. Construction (P) Ltd., 1968 SCC OnLine SC 151 : AIR 1968 SC 1355] , in the absence of an averment on the part of the plaintiff in the plaint, that he was ready and willing to perform his part of the contract, it was held that the plaintiff had no cause of action so far as the relief for specific performance was concerned. In this case, of course, there is an averment in the plaint that the respondent-plaintiff was all along ready and willing to perform his obligations under the contract. The question is whether the respondent-plaintiff had proved his readiness and willingness to perform his obligations under the contract.

28. In N.P. Thirugnanam v. R. Jagan Mohan Rao [N.P. Thirugnanam v. R. Jagan Mohan Rao, (1995) 5 SCC 115] , this Court reiterated that Section 16(c) of the Specific Relief Act, 1963 envisages that the



plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which were to be performed by him other than those terms, the performance of which has been prevented or waived by the defendant. In N.P. Thirugnanam [N.P. Thirugnanam v. R. Jagan Mohan Rao, (1995) 5 SCC 115] this Court said that the continuous readiness and willingness on the part of the plaintiff was a condition precedent for grant of the relief of specific performance.”

24. Counsel further relied on the Judgment of **C.S. Venkatesh Vs. A.S.C. (D) by LRs. & Ors.** (*supra*), whose paragraphs 15 to 18 and 20:-

“15. The words 'ready and willing' imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the



conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

16. In N.P. Thirugnanam (Dead) by LRs. vs. Dr. R. Jagan Mohan Rao and Others, 1995 (5) SCC 115, it was held that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the



defendant must necessarily be proved to be available.

17. In Pushparani S. Sundaram and Others vs. Pauline Manomani James (deceased) and Others 2002 (9) SCC 582, this Court has held that inference of readiness and willingness could be drawn from the conduct of the plaintiff and the totality of circumstances in a particular case. It was held thus:-

“So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved.”

18. Similar view has been taken by this Court in



Manjunath Anandappa URF Shivappa Hanasi
vs. Tammanasa and Others, 2003 (10) SCC 390
and Pukhraj D. Jain and Others vs. G.
Gopalakrishna, 2004 (7) SCC 251.

20. In the instant case, the plaintiff has alleged that he was ready to pay Rs.35,000/ to the defendants and called upon them to execute the reconveyance deed. However, in para 11 of the plaint it is pleaded that the plaintiff was running contract business wherein he suffered heavy loss and as such he gave up the business. It is also pleaded that at present the plaintiff has no business or profession and has no source of income. He has no property, either movable or immovable. Mere plea that he is ready to pay the consideration, without any material to substantiate this plea, cannot be accepted. It is not necessary for the plaintiff to produce ready money, but it is mandatory on his part to prove that he has the means to generate the consideration amount. Except the statement of PW-1, there is absolutely no evidence to show that the plaintiff has the means to make arrangements for payment of consideration under the reconveyance agreement.”



25. Counsel further relied on the Judgment of ***Smt. Sundari Devi Vs. Deo Narayan Prasad*** (*supra*), whose paragraph 17 states as follows:

“17. Therefore, the basic principal behind Section 16(C) is that any person seeking benefit of the specific performance of contract himself manifest that his conduct has been blamishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleading manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied relief but it is clear that the averment of readiness and willingness in the plaint should not be a mathematical formula which should not be in specific word only. From the averment in the plaint supported by evidence should clearly indicate the readiness and willingness of the plaintiff. The conduct of the plaintiff should be reflected from the subsequent circumstances and conduct of the plaintiff. No doubt readiness and willingness could not be



treated as a straight jacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In the present case, except the mathematical pleading and evidence that the plaintiff was always ready and willing to perform her part of the contract there is no cogent and reliable evidence. It is stated in the evidence in examination in chief by PW 1 that many times he approached the defendant to receive consideration amount and register the sale deed. His wife i.e. the plaintiff has stated that she had asked the defendant through her husband to execute the sale deed. Except this bald statement in the pleading as well as in evidence there is nothing on record to show that the plaintiff was ever ready and willing to perform her part of the contract. The onus was upon the plaintiff to adduce reliable evidence as to when the money was offered to the defendant and what was his reply. Whether the defendant ever refused to execute the sale deed or he refused to accept the plaintiff's consideration amount.



Whether the plaintiff ever called upon the defendant to the registry office. All these questions are not clear from the pleadings or evidence. Likewise so far issuance of first registered notice is concerned i.e. dated 21.6.1984. Except the pleading and the evidence nothing has been brought on record to show that in fact such registered notice was sent. There must be something on record so that the Court can rely on it. The second notice is dated 7.4.1986 i.e. Ext.2. So far this notice is concerned it is after two years. There is no evidence on record to show the intention, the conduct of the plaintiff about her readiness and willingness during this long period.”

26. Counsel further relied on the Judgment of ***Achal Misra Vs. Rama Shanker Singh & Ors.*** (*supra*), whose paragraph 11 reads as under:

“11. On the scheme of the Act, it is clear that the preliminary step is to declare a vacancy. At this stage, an enquiry has to be made including an enquiry involving at least two respectable neighbours. It is thereafter



that the vacancy has to be notified and objections invited. This is followed by either dropping of the proceedings on the objections being upheld that there was no vacancy, or by allotment to a tenant on finding the vacancy, or in ordering a release of the building, in case a landlord was found entitled to have such a release under the Act. Therefore, the notifying of a vacancy is only a step in the process of making an allotment of the building to a tenant. The Act contemplates that no building should be let out by a landlord except through the process of allotment by the Rent Control Authority. Since the order notifying a vacancy is only a step in passing the final order in a proceeding under the Act regarding allotment, it is clear that the same could be challenged while challenging the final order, unless there is anything in the Act precluding such a challenge or conferring a finality to the order notifying a vacancy. It was held long ago by the Privy Council in



Moheshur Sing v. Bengal Govt. [(1859) 7 Moo IA 283] (Moo IA at p. 302)

“We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting forever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities.””

27. Counsel further relied on the Judgment of

Korus (India) Limited Vs. Bank Of Maharashtra & Ors.



(supra), whose paragraphs 6 reads as follows:-

“6. The order also directed that the Receiver should separately fix and collect royalty in respect of the plant and machinery located in the State of Andhra Pradesh. By a subsequent order, the order was modified by substituting the figure of Rs. 19 lakhs per year as against Rs. 20 lakhs per year as payable by the appellant since Rs. 1 lakh out of Rs. 20 lakhs was to be adjusted out of the sum of Rs. 11 lakhs paid as security.”

28. Counsel further relied on the Judgment of ***Krishna Mohan Kul & Anr. Vs. Pratima Maity & Ors.*** *(supra)*, whose paragraphs 16 and 17 states as follows:

“16. At this juncture, a classic proposition of law by the Privy Council needs to be noted. In Mst. Farid-Un-Nisa v. Munshi Mukhtar Ahmad and another (AIR 1925 PC 204) it was observed as follows:

"It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin



ladies or not."

17. The logic is equally applicable to an old, Illiterate, ailing person who is unable to comprehend the nature of the document or the contents thereof. It should be established that there was not mere physical act of the executant involved, but the mental act. Observations of this Court, though in the context of pardahnashin lady in Mst. Kharbujia Kuer v. Jang Bahadur Rai and others (AIR 1963 SC 1203) are logically applicable to the case of the old, invalid, infirm (physically and mentally) and illiterate persons."

29. Learned Counsel for the respondents relied on the Judgment of ***Biswanath Ghosh (dead) by Legal Representatives & Ors. Vs. Gobinda Ghosh & Ors.*** (*supra*), whose paragraph 28 states as follows:

"28. In the case of Mst. Sugani v. Rameshwar Das and Anr., [AIR 2006 SC 2172], this Court observed that:

"17. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact. It is true that the lower appellate court



should not ordinarily reject witness accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

18. If the question of law



termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in



a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in RBI v. Ramkrishna Govind Morey [(1976) 1 SCC 803 : AIR 1976 SC 830] held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference. ”

30. Learned Counsel for the respondents relied on the Judgment of ***Basavaraj Vs. Padmavathi & Anr.*** (*supra*) whose paragraphs 14, 15, 16 and 17 states as follows:-

“14. The plaintiff also examined two witnesses, PW 2 and PW 3, who were attestors to agreement to sell dated 13-3-2007, who specifically stated that in July 2007, the plaintiff approached the defendants and asked them to accept the balance sale consideration in cash, to that also there is no cross-examination. The receipt of Rs 3 lakhs by way of earnest money, has been held to be proved by both the courts below. Within a period of one month from passing of the decree, the plaintiff deposited the balance sale consideration i.e. Rs 9,74,000 before the learned trial court. Considering the



aforesaid facts and circumstances of the case, it is observed that the High Court has materially erred in reversing the decree by reversing the findings of the trial court on readiness and willingness of the appellant.

15. From the impugned judgment and order [Padmavathi v. Basavaraj, 2020 SCC OnLine Kar 5049], [Basavaraj v. Padmavathi, 2021 SCC OnLine Kar 15772] 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 [Ramrati Kuer v. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] which has been specifically considered by this Court in Indira Kaur [Indira Kaur v. Sheo Lal Kapoor, (1988) 2 SCC 488], it was observed and held as under : (Ramrati Kuer case [Ramrati Kuer v. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] , 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.”

16. In Indira Kaur [Indira Kaur v. Sheo Lal Kapoor, (1988) 2 SCC 488] this Court after considering the observations made by this Court in Ramrati Kuer[Ramrati Kuerv. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] has set aside the findings recorded by three courts below whereby an adverse inference had been drawn against the plaintiff therein for not producing the passbook and thereby holding that the plaintiff was not ready and willing to perform his part of the agreement. It is observed and held that unless the plaintiff was called upon to produce the passbook either by the defendant or, the court orders him to do so, no adverse inference can be



drawn.

17. Applying the law laid down by this Court in the aforesaid two cases to the facts of the case on hand, no adverse inference could have been drawn by the High Court. The High Court seriously erred in reversing the findings recorded by the learned trial Court on the readiness and willingness of the appellant.”

31. Learned Counsel for the respondents further relied on the Judgment of **Swarnam Ramachandran & Anr. Vs. Aravacode Chakungal Jayapalan** reported in **(2004) 8 SCC 689**, whose paragraphs 17 and 18 states as follows:-

“17. We do not find any merit in the above arguments. The courts below have examined the evidence on record and have recorded a finding of fact that the respondent was in a position to raise the wherewithal for implementing the contract. However, on facts, it is clear that time to complete the sale was extended up to 31-12-1981. That notice terminating the contract was given by the appellants on 3-10-1981 and the respondent had instituted the suit on 2-12-1981 which indicates that the respondent was eager to fulfil his part of the contract. That it is nobody's case that the post-dated cheque had bounced. That there



was no unreasonable delay in payment of consideration and, therefore, it cannot be said that the respondent was not ready and willing to perform his part of the contract.

18. *In the case of Nannapaneni Subayya Chowdary v. Garikapati Veeraya [AIR 1957 AP 307 : 1955 An LT 713] it has been held, after examining various authorities, that in a suit for specific performance, all that is necessary for the purchaser to show is that he was ready and willing to fulfil the terms of the agreement; that he had not abandoned the contract; that he had kept the contract subsisting. Applying the above tests to the facts of the present case, we are of the view that the courts below were right in their conclusion that the respondent was always ready and willing to comply with his obligations under the contract. In the circumstances, the courts below were right in decreeing the suit for specific performance.”*

32. After going through the different judgements on which reliance has been made by the Counsel for the appellants, it transpires to this Court that the following principles come out for the purpose of grant of relief for the specific performance of a contract.



33. Under Section 16(c) of the Specific Relief Act, the ingredients of readiness and willingness to perform the essential terms of the contract are one of the essential elements. The Court has to enter into the facts and circumstance of cases for finding that whether the plaintiff was ready and was always ready and willing to perform his part of contract or not ? It has also established that in a suit for specific performance of a contract, the plaintiff must establish his readiness and willingness to perform his part of the contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case, no *straitjacket formula* can be laid down in this behalf. The question of readiness and willingness to perform the part of the contract has to be determined /ascertained from the conduct of the parties. The plaintiff would have to plead that he had sufficient funds or was in a position to raise funds in terms of discharging obligation under the contract. If the plaintiff does not have enough funds with him to discharge his obligation in terms of a contract that requires payment of money, the plaintiff would have specifically pleaded how the fund would be available to him. It also transpires to this Court from those judgements that averment of readiness and willingness in the



pliant should not be a mathematical formula rather it should be in specific words only. Every averment in the plaint supported by evidence should clearly indicate the readiness and willingness of the plaintiff. It transpires to this Court that in the case of **J. P. Builders (supra)** extremely huge amount for the performance of the contract has been involved which is at the tune of Crores and Crores. In the case of **U. N. Krishnamurthy (supra)**, the consideration price was Rs.15,10,000/- (Rupees Fifteen Lac Ten Thousand Only) out of which Rs.10,001/- (Rupees Ten Thousand One) was paid. In the case of **Achal Mishra(supra)**, the question of tenancy is involved whereas in the present case, the total consideration amount is Rs.19,000/- (Rupees Nineteen Thousand Only) out of which Rs. 15,000/- (Rupees Fifteen Thousand Only) has already been paid and only Rs.4000/- (Rupees Four Thousand Only) was yet to be paid. In this regard, the statement has come in paragraph no.4 of the plaint followed by paragraph nos. 6 and 7 of the plaint and subsequently, the pleading has been supported in a legal notice dated 14.01.1983 and 18.03.1983 (Exhibit 3 and 3A), evidence of PW-1, PW-10, and PW-12 have rightly been discussed by the Trial Court in its judgment being issue No. 6 and 7 and decided the suit in favour of the plaintiff.



34. It further transpires to this Court that the Appellate Court has not given its own finding but relied on the finding of the Trial Court. Here, this Court has reached on the conclusion on the basis of paragraph No.7 of the plaint, from the contents of Exhibit -3 and Exhibit-3A and from evidences of PW -1, PW-10 and PW-12, which clearly states about the readiness and willingness as about 3/4th amount i.e. Rs.15,000/- had already been paid and only 1/4th amount i.e. Rs.4,000/- was yet to be paid. So the facts of the present case cannot be compared with the facts of the case of **J. P. Builders (supra)** on which the appellant relied in which payment of crores and crores rupees are in question.

35. The respondent relied on the judgement rendered in the case of **Basavaraj Vs. Padmavathi (supra)** relevant paragraph 15 and 16 whereof indicates as under :-

15. From the impugned judgment and order [Padmavathi v. Basavaraj, 2020 SCC OnLine Kar 5049] · [Basavaraj v. Padmavathi, 2021 SCC OnLine Kar 15772] 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 [Ramrati Kuer v. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] which has been specifically considered by this Court in Indira Kaur [Indira Kaur v. Sheo Lal Kapoor, (1988) 2 SCC 488] , it was observed and held as under : (Ramrati Kuer case [Ramrati Kuer v. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] , 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.”

16. *In Indira Kaur [Indira Kaur v. Sheo Lal Kapoor, (1988) 2 SCC 488] this Court after considering the observations made by this Court in Ramrati Kuer [Ramrati Kuer v. Dwarika Prasad Singh, (1967) 1 SCR 153 : AIR 1967 SC 1134] has set aside the findings recorded by three courts below whereby an adverse inference had been drawn against the plaintiff therein for not producing the passbook and thereby holding that the plaintiff was not ready and willing to perform his part of the agreement. It is observed and held that unless the plaintiff was called upon to produce*



the passbook either by the defendant or, the court orders him to do so, no adverse inference can be drawn.

36. Hence, the substantial question on the point of readiness and willingness has been decided in favour of the plaintiffs-respondents-respondents and not in favour of the appellants.

37. On the point of the second substantial question of law '*that the appellant has the opportunity to challenge discarding of supplementary/ additional written statement dated 04.04.1987 of Defendant No.1/ Appellant/ Appellant which resulted into shifting of burden on the Plaintiff to prove that the alleged agreement of sale was genuine and legally enforceable/not fraudulent, when the purported execution of the alleged agreement was of an old, aged and illiterate person*', the appellant submits that the rejection of additional Written Statement can be considered at the level of Second Appeal particularly when it has not been challenged before any higher Court.

38. In that case, it is true that the question of additional Written Statement raised in the Title Suit can be challenged at the stage of Title Appeal and Second Appeal, but here in the present case, the said pleadings have not been raised



at the level of Title Appeal by the appellant but its finding has come in paragraph no.7 of the judgement passed in Title Appeal but no evidence has been adduced on the said point at the mouth of any of the independent witness. Therefore, this Court is of the view that the question of non-consideration of additional Written Statement has rightly been decided by the Original Court and the Appellate Court and there is no need of any interference in the said finding.

39. The point of 3rd substantial question of law ***"whether the Judgment and Decree of the Courts' below are valid when Defendant No.2 is lunatic and no guardianship was appointed though this fact was brought to the notice of the Court"*** has already been discussed earlier i.e. the question of lunacy has been raised in the Written Statement by the present appellants, in suit but no evidence has been adduced nor this plea has been raised by the appellant at the level of Title Appeal and this Court is of the view that once the point on which the defendant-appellant-appellant has not raised the plea and chosen not to contest on this point at original level or appellate level, then at the level of Second Appeal, it shall be proper for this Court to look into the point that has come in the pleading of Written Statement but no evidence has been



adduced, as the suit cannot be considered at the Second Appeal. Hence, this Court is of the view that the appellants of Second Appeal themselves left this point at original and first appellate level.

40. In result, the present Second Appeal is dismissed. The judgment and decree dated 30.05.1988 and 17.06.1988 respectively, passed by Sri S.N. Pathak, 1st Additional District Judge, Vaishali at Hajipur, in Title Appeal No.28 of 1987 and judgment and decree 02.05.1987 and 15.05.1987 respectively, passed by S.N. Sukla, Sub-Judge, Vaishali at Hajipur in Title Suit No.48 of 1983 are hereby affirmed.

41. Upon perusal of operative part of judgment/decreed passed in Title Suit No.48 of 1983 which is as follows:

“That the suit is decreed on contest against defendant No.1 and ex-parte as against defendant No.2 but without costs. The plaintiff is directed to deposit Rs.4,000/- (Four thousand) within one month from today. The defendant is directed to withdraw this money and to execute a sale deed in favour of the plaintiff within two months of the date of deposit of remainder consideration money. If the plaintiff fails to deposit the remainder consideration money within the above mentioned time limit the



suit shall ipso facto stand dismissed. In case the remainder consideration is deposited and the defendants do not execute a sale deed as directed above the plaintiff shall be entitled to get a sale deed executed through the assistance of the Court. In the circumstances of the case, I do not award any costs to the plaintiff.”

42. Upon reading the said decree it transpires to this Court that it has been held that specific time has been mentioned that if plaintiff fails to deposit the remainder consideration money within one month from the date of judgment then the suit shall *ipso facto* stand dismissed. It transpires to this Court that practically it is not possible after a long litigation of about 41 years the parties became aware within such a short span of time. It is due to this reason this Court, in the interest of justice, is modifying the said time limit. After the said modification, the modified part of the judgment/decreed, which has to be executed, shall be as follows:

“The second appeal is decreed on contest against defendant No.1/appellant/appellants and ex-parte against defendant No.2/ respondents 2nd Party/respondents 2nd Set but without cost. The plaintiff/respondents 1st Party/respondents 1st Set are directed to deposit Rs.4,000/- (Four thousand) within six



months from today. The defendant No.1/appellant/appellants is/are directed to withdraw this money and to execute a sale deed in favour of the plaintiff/respondents 1st Party/respondents 1st Set within two months from the date of deposit of remainder consideration money. In case remainder consideration money is deposited and the defendants (defendant No.1 and defendant No.2 of suit/appellant and respondent 2nd party of Title Appeal and appellants and respondents 2nd set of second appeal) do not execute a sale deed, as directed above, the plaintiff/respondents 1st Party/respondents 1st Set shall be entitled to get a sale deed executed through the assistance of the Court. In the circumstances of the case, this Court do not award cost to the plaintiff/respondents 1st Party/respondents 1st Set.”

43. Registry is directed to prepare the decree in the present second appeal and remit back the Lower Court Records to the Original Court for its execution.

(Dr. Anshuman, J)

Mkr./Ashwini/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	26.10.2024
Transmission Date	NA

