

## Janak Dulari Devi & Anr vs Kapildeo Rai & Anr on 15 April, 2011

**Equivalent citations:** AIR 2011 SUPREME COURT 2521, 2011 (6) SCC 555, 2011 AIR SCW 3185, 2011 (3) AIR JHAR R 152, AIR 2011 SC (CIVIL) 1452, (2012) 1 LANDLR 462, (2013) 1 ORISSA LR 848, (2011) 114 REVDEC 27, (2011) 4 RECCIVR 708, (2011) 2 ICC 694, (2012) 2 JCR 54 (SC), (2011) 104 ALLINDCAS 140 (SC), (2011) 1 CLR 1076 (SC), (2011) 5 ALL WC 4475, (2011) 4 CIVLJ 847, (2011) 6 MAD LJ 782, (2011) 5 SCALE 1, (2011) 2 WLC(SC)CVL 283, (2011) 87 ALL LR 486, (2011) 5 CAL HN 109, (2012) 113 CUT LT 282, 2011 (2) KLT SN 92 (SC), 2011 (3) KCCR SN 207 (SC)

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**Bench:** Markandey Katju, R V Raveendran

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Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4422 OF 2002

Janak Dulari Devi & Anr.

... Appellants

Vs.

Kapildeo Rai & Anr.

... Respondents

J U D G M E N T

R. V. RAVEENDRAN, J.

Plaintiffs in a suit for specific performance, aggrieved by the judgment and decree of the Patna High Court dated 3.1.2002 dismissing his second appeal against the decision of the first appellate court dated 16.12.1997 dismissing their suit (in reversal of the judgment and decree of the trial court dated 27.8.1990 decreeing the suit) have filed this appeal by special leave.

2. The case of the appellants in brief is as under : The second respondent was the owner of the suit property. The second respondent executed a sale deed dated 22.2.1988 (registered on 7.3.1988) in respect of the suit property in favour of the appellants, for a consideration of Rs.22000/-; that Rs.17,000 was paid by the appellants to the second respondent, at the time of execution and registration of sale deed; that the balance of Rs.5000 was to be paid subsequently, when the vendor requested for the said payment; that the second respondent retained the registration receipt in regard to the sale deed, agreeing to deliver it to the appellants against payment of the balance sale consideration; that on execution of the sale deed, by the second respondent, his right, title and interest in the suit property passed to the appellants and possession of the land sold was also delivered to them; that subsequently the second respondent avoided receiving the balance of Rs.5000 and failed to deliver the registration receipt; that the appellants issued a legal notice calling upon the second respondent to deliver the registration receipt so that they could collect the original registered sale deed, but the second respondent send a reply denying the receipt of Rs.17000 and stating that the entire consideration was due; and that therefore, it became necessary for the appellants to file the suit. The appellants sought a decree for a direction to the second respondent to deliver the registration receipt relating to the sale deed dated 22.2.1988 by receiving the balance sale consideration of Rs.5000 and that in case the second respondent had already obtained the original sale deed from the office of the Sub-Registrar, then for a direction to deliver the same to the appellant. The said suit was valued at Rs.5000.

3. The second respondent filed his written statement. He alleged that he had agreed to sell the property as he urgently required the money for celebrating the marriage of his daughter; that he executed and registered the sale deed on 22.2.1988; that the appellant did not pay any part of the consideration and the allegation that he had paid Rs.17000 towards the sale price at the time of execution of sale deed was false; that the appellants had played a fraud upon him by stating in the deed that Rs.17000 was already paid towards the sale price and making him to sign the sale deed without reading the deed; that when he demanded the sale price, as the appellants stated that the sale consideration would be paid later, he retained the registration receipt and did not deliver possession; that it was the intention of parties that title in the property should pass to the appellants and possession should be delivered, only on payment of the consideration of Rs.22000 by the appellants; that as the appellants failed to pay the sale consideration, he cancelled the said sale deed dated 22.2.1988 on 18.3.1988 and sold the property to the first respondent on 29.8.1988 for a

consideration of Rs.19000 and also delivered possession of the property to the first respondent and ever since then the first respondent is in possession of the suit property. He contended that as the title and possession remained with him even after execution and registration of the sale deed in favour of the appellants, and as the sale price was not paid, he was justified in canceling/rescinding the sale and the appellants were not entitled to any relief.

4. The subsequent purchaser (first respondent herein) was thereafter impleaded as the second defendant in the suit. The court framed appropriate issues as to whether a sale deed executed on 22.2.1988 was for consideration; whether Rs.17000 was paid by the appellants towards the sale price at the time of execution of the sale deed; whether the appellants had tendered the balance of Rs.5000 to the second respondent; whether the sale deed was cancelled on 18.3.1988; whether the second respondent had any right to execute a sale deed dated 29.8.1988 in favour of the first respondent;

whether the appellants were entitled to receive the original sale deed dated 22.2.1988; whether the suit as framed was maintainable and appellants had valid cause of action for the suit; and whether the suit was barred by limitation. The appellant examined seven witnesses and the defendant examined six witnesses. Both sides marked several documents.

5. The trial court by judgment dated 27.8.1990 decreed the suit with costs subject to payment of court fee by the appellants, on Rs.22000. The trial court held that the appellants had proved the payment of part sale price of Rs.17000 to second respondent; that on the execution of the sale deed by the second respondent, title passed to the appellants and the appellants were entitled to declaration of title and recovery of possession. Feeling aggrieved the first respondent filed an appeal. The first appellate court, by judgment and decree dated 16.12.1997, allowed the appeal and dismissed the suit. It held that the plaintiffs/appellants had failed to prove payment of Rs.17000 or of any part of the consideration; that as no part of the sale price was paid and as the Registration Receipt and possession were retained by the second respondent, the intention of parties was that title should not pass to the appellants until payment was made; and that as a consequence of non-

payment of the price, the second respondent was justified in cancelling the sale deed and selling the property to the first respondent. The second appeal filed by the appellant, was dismissed by the High Court by the impugned judgment dated 3.1.2002, affirming the finding of facts recorded by the first appellate court. The said judgment is challenged in this appeal by special leave.

6. On the contentions urged, the following questions arise for consideration in this appeal :

- (i) Whether the appellants had paid Rs.17000/- towards sale price to second respondent?
- (ii) Whether title to the property passed to the appellants on execution of the sale deed?

(iii) Whether the second respondent-vendor was justified in cancelling/ repudiating the sale on the ground that the sale consideration was not paid?

(iv) Whether the appellants are entitled to the relief claimed in the suit?

Re: Question (i)

7. In the plaint, the specific plea of the plaintiffs-appellants in regard to payment of Rs.17000 was that it was initially agreed that the consideration would not be paid at the time of execution and registration of the sale deed, but would be paid later, against exchange with the Registration Receipt; that the appellants paid Rs.17000 to the second respondent at the time of registration of the sale deed; and that though the appellants were ready to pay the balance of Rs.5000, the second respondent stated that he would take the said amount when he needed it in exchange of the registration receipt.

But the evidence led by the appellants was contrary to the pleadings. PW3 (the attesting witness to the sale deed), PW4, PW6 (first plaintiff) and PW7 (husband of the first plaintiff) deposed that a sum of Rs.17,000 was paid to the defendant at the residence of the first plaintiff, that thereafter they went to the Sub-Registrar's office at Arrah and got the sale deed written by the scribe - PW5, and that thereafter, the second respondent executed the sale deed and got it registered. The sale deed dated 22.7.1988 also recited that Rs.17000 was received by the vendor prior to the execution of the sale deed and the balance of Rs.5000 was to be paid at the time of transfer of Registration Receipt. The first appellate court after analyzing the evidence held that the evidence was contrary to the pleadings and therefore liable to be rejected. When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply.

The first appellate court also found that there was no endorsement in the sale deed by the Sub-Registrar about payment of Rs.17000 in his presence, nor any separate receipt existed to show the payment of Rs.17000 prior to the preparation and the execution of the sale deed. The first appellate court believed the evidence of DW1 (attesting witness to the sale deed) and DW4 (the second respondent) that they did not go to the residence of the first appellant on 22.2.1988, but had gone directly to the Sub-Registrar's office;

that by then the sale deed had already been got written by the first appellant's husband; that the sale deed was not read over to them; that the second respondent was informed that the sale price would be paid subsequently at the village and that sale could be completed and possession be delivered on payment and exchange of the Registration Receipt. The first appellate court also noted that the appellants alleged that there were two independent witnesses present at the relevant time, namely Dharmanand Pandey and Bindeshwar Pandey, but neither of them was examined. The first appellate court also referred to the recitals in the sale deed and the manner of the execution of the sale deed and concluded that no part of the sale consideration had been paid. This finding of fact recorded by the first appellate court, that the appellants had not established the payment of Rs.17000, after consideration of the entire evidence, affirmed by the High Court in second appeal,

does not call for interference, in an appeal under Article 136 of the Constitution in the absence of any valid ground for interference.

Re: Questions (ii) and (iii)

8. Where the intention of the parties is that passing of title would depend upon the passing of consideration, evidence is admissible for the purpose of contradicting the recital in the deed acknowledging the receipt of consideration. In *Bishundeo Narain Rai vs. Anmol Devi & Ors.* [1998 (7) SCC 498], this Court had occasion to consider the question as to when the ownership and title in a property will pass to the transferee, under a deed of conveyance. This Court observed :

"Section 8 of the Transfer of Property Act declares that on a transfer of property all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidence thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of Section 8 and Section 54 of the Transfer of Property Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act, 1872."

9. In *Kaliaperumal vs. Rajagopal & Anr.* [2009 (4) SCC 193], this Court again considered the issue and held:

"It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ("the Act", for short) defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration

(price) is a condition precedent for passing of the property.

The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or 'ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by section 92 of Evidence Act. x x x x There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to hold, possess and enjoy the scheduled properties from the date of sale, neither the possession of the properties nor the title deeds were delivered to the purchaser either on the date of sale or thereafter. It is admitted that possession of the suit properties purported to have been sold under the sale deed was never delivered to the appellant and continued to be with the respondents. In fact, the appellant, therefore, sought a decree for possession of the suit properties from the respondents with mesne profits. If really the intention of the parties was that the title to the properties should pass to the appellant on execution of the deed and its registration, the possession of the suit properties would have been delivered to the appellant."

10. Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him, title in the property would not pass to the purchaser.

11. At this stage, we may refer to the practice prevalent in Bihar known as 'ta khubzul badlain' (that is, title to the property passing to the purchaser only when there is "exchange of equivalents"). As per this practice, where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but the Registration Receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the Registration Receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the Sub-Registrar) authorizing the holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or

part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed, as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. The prevalence of this practice in Bihar is noticed and recognized in several reported decisions - the decision of this Court in Bishundeo Narain Rai (supra) and the decisions of the Patna High Court in Sarjug Saran Singh vs. Ramcharitar Singh (1968 BLJR 74), Shiva Narayan Sah vs. Baidya Nath Prasad Tiwary (AIR 1973 Patna 386), Baldeo Singh vs. Dwarika Singh (AIR 1978 Patna 97), which explain the practice of ta khubzul badlain, after relying upon the principles laid down in the earlier decisions of that court in Md. Murtaza Hussain vs. Abdul Rahman (AIR 1949 Pat. 364), Motilal Sahu vs. Ugrah Narain Sahu (AIR 1950 Patna 288), and Panchoo Sahu v. Janki Mandar (AIR 1952 Pat. 263), 11.1) In Bishundeo Narain Rai (supra), this Court held :

"It appears that in the State of Bihar a practice is prevalent that when whole or part of sale consideration is due or any other obligation is undertaken by the vendee, then on execution and registration of the sale deed by the vendor, title to the property, subject matter of sale, does not pass 'ta Khubzul Badlain', that is, until there is 'exchange of equivalent' and in such a case registration receipt is retained by the vendor, which on payment of consideration due or on fulfillment of the obligation by the vendee is endorsed in his favour or if the sale deed has already been received by the vendor then the sale deed is delivered to the vendee. Even so, this only shows that such agreement are common in that part of the country but it is essentially a matter of intention of the parties which has to be gathered from the document itself but if the document is ambiguous then from the attending circumstances, subject to the provisions of Section 92 of the Evidence Act."

(emphasis supplied) 11.2) In Sarjug Saran Singh (supra) after referring to the recitals in a sale deed that the vendor had delivered possession to the vendee as absolute owner, it was observed :

"It was admitted by the plaintiffs themselves that the aforesaid recital is incorrect, both as regards the receipt of the consideration money and as regards putting the vendee in possession of the property. The registration receipt remained with the executants, namely, defendants 1 and 2, and the plaintiffs alleged that on a subsequent date, when they offered to pay the consideration money and to take the registration receipt from defendants 1 and 2 (Ta kalzul badlain exchange of equivalents), they, under the instigation of the other defendants refused to part with the receipt and sold the property to the other defendants."

The Patna High Court in that decision, upheld the decision of the first appellate court that the intention of the parties was that title should pass only on payment of the consideration and as admittedly the consideration was not paid, the plaintiffs did not obtain title by virtue of the sale deed, on the following reasoning:

"It is well settled that the intention of the parties should be ascertained on a construction of a document; and where there is any patent ambiguity in any recital, aid may be taken from evidence of surrounding circumstances and the conduct of the parties. Mr. Rai for the appellants urged that the first sentence in the recital (quoted above) was complete in itself and that sentence indicated the clear intention of the parties that title should pass at the time of the registration when the executants admitted execution before the Sub-registrar. He specially relied on the words "without any right of cancellation and revocation" occurring in that sentence. But it is well known that in construing a document due weight should be given to all the recitals. Hence the subsequent recitals as regards payment of consideration at the time of exchange of equivalents and putting the vendee into possession should also be given equal weight. x x x x x The first appellate court was, therefore, justified in observing that, if the intention was that the title should pass at the time of registration, the vendors would have insisted on payment of the consideration money before the Sub- registrar, or immediately thereafter. The very fact that the registration receipt was kept in their custody and not handed over to the vendee and possession also admittedly remained with them lead to an inference that there was no intention to convey title until the payment of the consideration."

(emphasis supplied) 11.3) In Shiva Narayan Sah (supra), the Patna High Court, following its earlier decisions, held that when the sale deed stipulates payment of balance price during the exchange of equivalents (balance sale consideration and registration receipt) and mentions only "putting the buyer in possession"

without actually delivering possession, even if the sale deed does not expressly postpone passing of the title till discharge of the consideration due and even if more than three fourth of the total price had been paid to the vendor, the title in the property would not pass to the purchaser on execution and the registration of the sale deed, but will pass only during the exchange of the equivalents.

11.4) In Baldeo Singh (supra), the sale deed recited that the consideration money had been paid and nothing was due from the vendee to whom possession had also been delivered. But the plaintiffs admitted that neither the consideration money was paid by them nor possession was delivered by them at the time of execution and registration of the sale deed. After referring to the earlier decisions of that Court the High Court held :

"On the basis of the aforesaid decision it can be said that it is almost settled that the question whether title passes on mere execution and registration of a deed or only on payment of consideration depends upon the intention of the parties, to be gathered from the deed. It has also been held that though the sale deed may recite that the consideration has been paid, but there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that, in fact, the consideration was not paid; this will not be barred by Section 92 of the Evidence Act.



In the present case, there is no dispute so far as the second aspect is concerned. The sale deed in question recites that consideration money has been paid and there is nothing due from the vendee to whom the possession has also been delivered. But, the plaintiffs admit that neither the consideration money was paid nor possession delivered to them at the time of the execution and registration of the aforesaid deed. .... In my opinion, the plaintiffs did not acquire title on mere execution and registration of the sale deed.

"In the instant case, the defendant first set has not taken the stand that he had repudiated the contract even before 10-1-1963 when the deed of cancellation was executed. If the amount is tendered by the defaulter after such repudiation, it is of no, consequence. A vendor cannot be expected to wait indefinitely to enable the vendee to perform his part, and he is at liberty in such a situation to sell the property to another person. In my opinion, in cases where the tender or payment of the consideration money is made by the vendee before the vendor repudiates the contract, the vendee will acquire a valid title over the properties covered by the deed in question."

(emphasis supplied)

12. We have referred to several decisions of the Patna High Court in detail to demonstrate the existence of the established practice of exchanging equivalents (ta khubzul badlain). The effect of such transactions in Bihar is even though the duly executed and registered sale deed may recite that the sale consideration has been paid, title has been transferred and possession has been delivered to the purchaser, the actual transfer of title and delivery of possession is postponed from the time of execution of the sale deed to the time of exchange of the registration receipt for the consideration, that is ta khubzul badlain.

13. We may now examine the facts of this case with reference to the said principles. As noticed above the first appellate court has recorded a finding of fact that the appellants had not paid the consideration of Rs.22000 at the time of execution and registration of the sale deed. This finding of fact (accepted by the High Court in second appeal) has been recorded after exhaustive consideration of the oral evidence and is not open to challenge.

The trial court, the first appellate court and the High Court have concurrently found that though the sale deed recited that possession of the property was delivered to the purchasers, the possession was not in fact delivered and continued with the vendor (second respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed dated 22.2.1988, that the vendor had received the entire price of Rs.22000/- from the purchasers (that is Rs.17000 before execution of the sale deed and Rs.5000 at the time of exchange of registration receipt) and had transferred all his rights therein and that on such sale the vendor has not retained any title and that the vendor has relinquished and transferred the possession of the property to the purchasers, will not be of any assistance to the appellants to contend that the title has passed to them or part consideration was

paid. It is an admitted fact that the registration receipt was retained by the vendor to be exchanged later in consideration of the sale price. It is also admitted that possession was not delivered though the deed recited that possession was delivered. The sale was categorically repudiated by the second respondent on 18.3.1988 by cancelling the sale deed. There is no evidence that the appellants offered the sale price of Rs.22000/- to the second respondent before the repudiation. The only possible inference is that the intention of the parties was that title would not pass until the consideration was not paid; and as the consideration was not paid, the sale in favour of the appellants did not come into effect and the title remained with the vendor and the sale deed dated 22.2.1988 was a dead letter.

Consequently, the subsequent sale in favour of the first respondent was valid.

Re: Question (iv)

14. We are therefore of the view that on execution and registration of the sale deed dated 22.2.1988 in favour of appellants, title did not pass to the purchaser and possession was not delivered. Therefore as a consequence the vendor retained the power of repudiating the sale for non payment of the sale price within a reasonable time. As the finding is that no part of the sale price was paid, the claim of appellants that they offered to pay Rs.5000/-, even if accepted to be true would mean proving their readiness to pay only a part of the price and not the entire sale price. As the appellants have failed to prove that they tendered the price of Rs.22000/- before repudiation and cancellation on 18.3.1988, the sale deed dated 22.2.1988 in favour of appellants did not convey any title to them and after lawful repudiation, they were not entitled to claim performance.

15. We hasten to add that the practice of *ta khubzul badlain* (of title passing on exchange of equivalent) is prevalent only in Bihar. Normally, the recitals in a sale deed about transfer of title, receipt of consideration and delivery of possession will be evidence of such acts and events; and on the execution and registration of the sale deed, the sale would be complete even if the sale price was not paid, and it will not be possible to cancel the sale deed unilaterally. The exception to this rule is stated in *Kaliaperumal* (supra). The practice of '*ta khubzul badlain*' in Bihar recognizes that a duly executed sale deed will not operate as a transfer in *presenti* but postpones the actual transfer of title, from the time of execution and registration of the deed, to the time of exchange of equivalents that is registration receipt and the sale consideration, if the intention of the parties was that title would pass only on payment of entire sale consideration. As a result, until and unless the duly executed and registered sale deed comes to the possession of the purchaser, or until the right to receive the original sale deed is secured by the purchaser by obtaining the registration receipt, the deed of sale merely remains an agreement to be performed and will not be a completed sale. But in States where such a practice is not prevalent, possession of Registration Receipt by the Vendor, may not, in the absence of other clear evidence, lead to an inference that consideration has not been paid or that title has not passed to the purchaser as recited in the duly executed deed of conveyance.

Where the purchaser is from an outstation, the vendor being entrusted with the Registration Receipt, to collect the original sale deed and deliver it to the purchaser, is common. Be that as it may.

16. In view of the above, we hold that there is no merit in this appeal and the appeal is dismissed.

.....J.

(R V Raveendran)

New Delhi;

.....J.

April 15, 2011.

(Markandey Katju)