

Gajendra Prasad Sharma vs Deepak Jain And Others 2 Ma/110/2015 ... on 27 July, 2018

Author: Sharad Kumar Gupta

Bench: Sharad Kumar Gupta

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AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No.7 of 2012

- Gajendra Prasad Sharma S/o Late Shri Radhey Shyam Sharma, R/o Ward No. 11, Village- Dondi-Lohara, Post- And Tehsil- Dondi- Lohara District Durg C.G.

---- Petitioner

Versus

1. Deepak Jain S/o Hazari Mal Jain, Occupation Business, Village Dondi-Lohara Post & Tahsil Dondi Lohara, District- Durg C.G.
2. Government Of Chhattisgarh Through Collector, District- Durg C.G.

---- Respondents

For Appellant: Shri Kshitiz Sharma, Advocate
For Respondent No.1 : Dr. N. K. Shukla, Senior Advocate with Shri Vikram Sharma, Advocate

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Shri Justice Sharad Kumar Gupta
CAV Order

PER MANINDRA MOHAN SHRIVASTAVA, J.

/07/2018

1. This appeal is directed against impugned judgment and decree dated 03-12-2011 passed by the Additional District Judge, Balod in Civil Suit No.13- A/2011, by which, plaintiff's suit has been decreed. The appellant is the defendant, against whom, a decree of specific performance of contract has been passed.

2. The respondent-plaintiff filed a suit for grant of decree of specific performance on the pleadings that the defendant No.1-Gajendra Prasad Sharma entered into an agreement to sell his property in

dispute for a consideration of Rs.8,21,000/- on 18-06-2007 and agreement to that effect was executed by him in the presence of two independent witnesses. It was further pleaded that an advance of Rs.61,000/- was paid by the plaintiff. According to the agreement, the defendant was required to execute the sale deed within a period of 6 months by receiving the balance amount of consideration and after getting the tenant-bank evicted from the house. It was further pleaded that under the agreement, the parties agreed that if for some reason, the defendant fails to execute the sale deed, the period for execution of sale deed could be extended for a further period of six months. The plaintiff further pleaded that later on, the plaintiff paid various installments of Rs.35,000/-, Rs.10,000/- and Rs.10,000/-, in all Rs.55,000/- on various dates from 25-07-2007 up to 30-11-2007, thus paid Rs.1,16,000/-, out of Rs.8,21,000/-. According to the plaintiff, he was ready and willing to perform his part of contract by paying the balance amount and get the sale deed executed. However, despite request made, the defendant avoided to execute the sale deed on one pretext or the other. The plaintiff then requested the defendant to execute another agreement in continuation of earlier agreement and thereafter, another agreement was also executed on 02-05-2008 in presence of two witnesses and in that agreement, payment of Rs.1,16,000/- was also admitted. It was agreed that if defendant fails to get the tenant evicted within the stipulated period, he shall proceed to execute the sale deed in favour of the plaintiff and thereafter amount of rent would be received by the plaintiff. The plaintiff thereafter, proceeded towards execution of sale deed and got notice published in the newspaper on 25-07- 2018 inviting objection, in response to which, the defendant disowned the agreement and sent notice dated 04-08-2008 to the plaintiff, denying execution of agreement of sale of the property and instead came out with a story of loan transaction saying that whatever amount he received was towards loan transaction and he never executed any agreement to sell the property to the plaintiff. The plaintiff again and again demanded execution of sale deed, but when the defendant did not execute the sale deed in favour of the plaintiff, finally the plaintiff filed a suit seeking specific performance of contract, after giving due notice on 14-10-2008, demanding execution of sale deed in favour of the plaintiff, stating that he is prepared to pay the balance amount at the time of registration.

3. On the other hand, the defendant denied the case of the plaintiff and came out with a story that the defendant never executed any agreement to sell his property in favour of the plaintiff nor he received any amount towards sale of his property. The defendant, though, admitted having received the aforesaid amount from the plaintiff, total amount of Rs.1,46,000/-, case of the defendant was that the plaintiff taking undue advantage of disability and that he is a blind person, obtained signatures on blank papers, cheating the defendant that he is only getting the loan documents prepared. Market value of the property in dispute in the year 2007 was Rs.25 Lakhs or even more, therefore, it is highly improbable that the plaintiff would be agreeing to sell his property for song's price.

4. On the basis of the pleadings, learned trial Court framed as many as 9 issues, which included issue as to whether, there was any agreement of sale of the property in dispute, entered into between the plaintiff and the defendant and whether the defendant paid Rs.1,16,000/- towards part payment of sale amount under the agreement of sale. Learned trial Court also framed issue as to whether the plaintiff was ready and willing to perform his part of contract. By the impugned judgment and decree, learned trial Court relied upon the two agreements dated 18-06-2007 and 02-05-2008, that

there was an agreement of sale executed by the defendant in favour of the plaintiff and the defendant received payment of Rs.1,16,000/- towards part payment of sale consideration and further that the plaintiff was ready and willing to perform his part of contract and thereby decreeing the suit of the plaintiff.

5. Aggrieved by the impugned judgment and decree of learned trial Court, learned counsel for the appellant makes following submissions:-

- The two agreement of sale are fabricated documents. It was essentially a loan transaction.
- The appellant is blind and his signatures were obtained on the two agreements stating that those were loan papers. The appellant and defendant are resident of the same area and known to each other since long. Therefore, believing that his signatures are being obtained for preparation of loan papers, the appellant signed the stamp papers which was, later on, fabricated as agreement of sale of property. When the notice of objection was published in the news paper, the appellant/defendant came to know that an attempt is being made to grab the property on the basis of fabricated document of agreement of sale i.e. Ex. P/1 and Ex. P/2.
- The appellant had taken a loan of Rs.30,000/- from the respondent / plaintiff, which is not disputed. Therefore, it is a case of loan transaction and not an agreement of sale. The agreement is said to be executed at Rajnandgaon whereas both the parties reside at Dondilohara where there is a Office of Registrar and Tahsil Court both. This raises doubt with regard to bonafides of the agreement.
- The property is valuable and could not be sold on such a low price of Rs.8,21,000/- when compared with sale deed (Ex.P/15) evidencing sale transaction of appellant's land in the year 2008 for Rs.2,31,000/- towards sale of plot of 336 sq. ft.
- The appellant is blind and therefore undue advantage has been taken. • There are two agreements.
- The plaintiff has admitted in his evidence that he is a money lender. • The plaintiff has failed to prove his readiness and willingness which is essential requirement under Section 16C of Specific Relief Act to get a decree of specific performance of contract.
- No clinching evidence is led that the plaintiff had the required financial capacity to pay the remaining amount of about 6 lakhs towards purchase of land. It has come in the evidence that the plaintiff does not have any independent business but he worked along with his father in a cloth business. A very small amount is lying in the account. No other property or source wherefrom money could be generated has been proved. • There was no willingness.

- The so called notices dated 15/07/2008 and 28/07/2008 were not produced during the trial nor proved.

- In the proved facts and circumstances of the case, the Court below ought not to have exercised its discretion in favour of the plaintiff and the only decree that could be passed was to return the amount allegedly paid along with monitory compensation. The discretion has not been exercised judiciously according to the mandate of Section 20 of the Specific Relief Act.

- The order passed by the Court below is cryptic, without decision on each and every issue. Without marshaling of evidence on record, learned trial Court jumped to the conclusion. No consideration as to why discretion was exercised in favour of the plaintiff. Mandate of Section 20 was completely ignored.

- The stipulation in the agreement that the sale would be made as and when premises are vacated by the bank makes agreement in-executable as it is based on a contingency which did not happen. Only on this count, suit is liable to be dismissed. Stipulation in the agreement that it would be either purchased by the plaintiff or some other persons, shows that it was not an agreement of sale but only a loan transaction. • The plaintiff has not taken any steps for recovery of Rs.30,000/- allegedly given by way of loan.

6. On the other hand, learned counsel for the respondent No.1 makes following submission:-

- Agreement is in respect of very small piece of 2170 sq. ft. of land. • The stamp was purchased by defendant No.1 and he received an advance of Rs.61,000/- which shows that it was towards sale of land and not loan transaction.

- Stamp paper for execution of agreement dated 18-06-2007, Ex.P/1 was purchased for agreement as noted in the stamp paper. • The defendant admits having received Rs.1,16,000/- and also Rs.30,000/-.

- It is an admitted position that out of total receipt of Rs.1,46,000/-, Rs.30,000/- was paid to the defendant by way of loan.

- It has come in the evidence that the plaintiff is a money lender and runs business of sale and purchase of clothes and therefore, he is a person of sound financial capacity. Already paid Rs.1,46,000/- in a short span of few months. This shows his financial capacity to pay the balance amount of sale consideration, which is only about Rs.6 lakhs. • Financial soundness carries presumption of capacity to carry fund for purchase of property and it is not necessary for the plaintiff to show availability of cash fund in his hand.

- The defendant's defence is evasive and contradictory. At one place, he says that he did not sign the documents and then he says that his signatures were obtained by misrepresentation of facts. Defendant is not firm on the stand but he is changing his stand. Sometimes, it has been said in the pleadings and evidence that it is a case of misrepresentation of facts in as much as it is sought to be defended on the plea that the defendant being blind, his signatures were obtained on stamp papers stating that loan papers are being prepared whereas sometimes, defence has been taken that Ex.P/1 and Ex.P/2 does not contain his signature and his signatures are forged and fabricated.
- Falsity of plea weakens the evidence which is liable to be rejected. • The defendant has not come out with a plea or evidence as to why he wanted to get loan whereas in the past, he has sold various properties at different point of time. This shows that he was possessed of huge fund as also properties.
- The defendant's story is highly improbable. At the time when the first agreement was renewed under second agreement dated 02/05/2008, the entire amount of Rs.1,16,000/- was already paid. Rs.30,000/- was also paid before that date. After 02/05/2008, no amount was paid. Once the entire amount was already paid prior to 02/05/2008, there was no need for the defendant to sign a document for the purposes of getting loan. Thus, pleading of loan transaction is improbable and against natural human conduct.
- There is no pleading that exercise of discretion in favour of plaintiff would be unjust and unfair for any special reason.
- The defendant has sold various properties before the disputed agreement. In any of the documents including disputed documents, there is no recital of defendant being blind.
- The Registrar (DW2) has stated that the defendant never informed before him that he is blind, otherwise this fact would have been mentioned in the recitals of the agreement. The conduct of the defendant shows that he never presented himself as blind person in any of the offices of the Registrar which shows that the defendant was not completely blind but may be partially blind and is otherwise able to execute documents without any assistance.
- Certificate of blindness has been issued by the doctor without proper examination under requirement of disability act and rules made thereunder. The certificate does not show which test was applied to form a medical opinion that the defendant is fully blind. Therefore, it is not a case of defendant being fully blind but only partially blind.
- The defendant admitted having signed the documents and admits in his cross examination that he does not sign any document without understanding the contents of the same.

- Even according to DW2, valuation of property on the date of execution of agreement of sale was only Rs.5,79,000/- which is much below the sale consideration of Rs.8,21,000/- agreed upon and mentioned in the agreement of sale.
- Though the agreement Ex.P/1 and Ex.P/2 have been proved by the plaintiff by leading various witnesses in support of its execution, the defendant has not come out with any sufficient evidence of any other person in support of his defence that it is only a loan transaction and not meant for sale of property.
- It has been stated in the agreement that in order to purchase a house at Raipur, defendant wanted to sell the property.

7. We have bestowed our considerations to the contentions raised by learned counsel for the respective parties and perused the records.

8. After hearing learned counsel for the parties and the grounds raised in appeal, following points arise for determination in this appeal :-

(A) Whether the plaintiff succeeded in proving that there was an agreement to sell the property in dispute executed between the parties under two agreements of sale dated 18-06-2007, Ex.P/1 and 02-05-

2008, Ex.P/2 or whether the defendant has proved that the real nature of transaction was that of loan and there was no agreement to sell the property.

(B) Whether the plaintiff has pleaded and proved that he was and is ready and willing to perform his part of contract in fulfillment of statutory requirement under Section 16(C) of the Specific Relief Act, 1963. (C) Whether on the facts and circumstances of the case, the learned trial Court ought to have exercised its discretion under Section 20(2) of the Specific Relief Act, 1963, not to decree specific performance on the ground that the performance of the contract would involve hardship on the defendant which he did not foresee, whereas non-performance would involve no such hardship on the plaintiff and further that it will be inequitable to enforce of specific performance.

9. The plaintiff's case, as pleaded in the plaint is that the defendant- Gajendra Prasad Sharma is owner and in possession of residential complex consisting of house, open land and galli approaching main road, which is described in the property in dispute. As pleaded, the defendant No.1, in need of money, proposed to sell his house to the plaintiff which was accepted by the plaintiff, whereafter there was an agreement entered into between the parties, under which, the defendant agreed to sell his house and land to the plaintiff for a consideration of Rs.8,21,000/- and agreement to that effect was executed on 18-06-2007 in presence of two witness. According to the plaintiff, an advance of Rs.61,000/- was paid. Under the said agreement, the plaintiff was required to pay the balance amount till May 2008 and upon receipt of the same, defendant will get tenant, namely, Durg Rajnandgaon Gramin Bank evicted from the house and sale deed would be executed in favour of the plaintiff. Further pleading was that if the defendant fails to execute the sale deed within the period

stipulated, period could be extended for a further period of six months. It was also specifically pleaded by the plaintiff that from 18-06-2007 to 30-11-2007, total Rs.1,16,000/- was paid by the plaintiff to the defendant in various installments and the plaintiff was ready and willing to perform his part of contract, but the defendant did not execute the sale deed by stating that vacant possession was not obtained and revenue papers was not ready. On a request made by the defendant to extend the period, another agreement was executed on 02-05-2008, in continuation of the first agreement dated 18-06-2007, in presence of two independent witnesses and the fact of having received Rs.1,16,000/- was included in the new agreement dated 02-05-2008. According to the plaintiff, when he got published notice inviting objection in the newspaper, the defendant No.1 sent notice on 04-08- 2008, completely disowning the entire transaction and denied that there was any agreement executed by the defendant for sale of his property. When despite notice, the defendant did not execute the sale deed, finally suit was filed for specific performance. It was also pleaded that the plaintiff had filed a suit on the ground that he came to know from sources that the defendant is proceeding to sell the property to the third party with no intention to honour his commitment under the agreement of sale of the property in dispute in favour of the plaintiff. The plaintiff also pleaded that the plaintiff is ready and willing to perform his part of contract with all arrangement for payment of balance amount.

However, the defendant's case is of total denial and according to him, he never intended to sell his property to the plaintiff and according to him, it was essentially a loan transaction between the parties, under which he had received total amount of Rs.1,46,000/- from the plaintiff on various dates. According to the defendant, there was no need to sell his property. However, the defendant's stand with regard to execution of the agreement are contradictory. In para 3 of his written statement, he has stated that from time to time, he has taken various amounts as loan from the plaintiff and in respect of that the plaintiff had obtained his signatures on two stamp papers, which has been misused by the plaintiff taking advantage of visual disability of the defendant and he got fabricated a forged agreement of sale on the said document. However, in para 17 of written statement, it is stated that the two documents dated 18-06-2007 and 02-05- 2008 did not contain the signatures of the defendant No.1.

10. While the plaintiff's burden is to prove that there was an agreement between the parties for sale of the property in dispute, as it was the plea of the defendant regarding loan transaction, it was for the defendant to prove that whatever amount received by him from the plaintiff, was only towards transaction of loan and not as part payment towards consideration for sale of property in dispute.

11. The plaintiff -Deepak Jain has examined himself as first witness, in which, he has deposed that the defendant proposed to sell his house (house in dispute) to the plaintiff which was accepted and it was agreed to sell the house for a consideration of Rs.8,21,000/- and agreement to that effect was executed in presence of two witnesses namely Samay Lal Parakh and Prakash Kumar Dumre. He further deposed that the stamp papers were purchased by the plaintiff himself. He further deposed that as per the agreement, an advance of Rs.61,000/- was paid by him to the defendant. In para 20 of his cross- examination, this witness deposed that the agreement, Ex.P-1 was type-written as stated by Gajendra Prasad Sharma. He further admits that at the time of Ex.P-1 being type-written, he was present at the spot. He has denied suggestion that the signatures of the defendant No.1 were

obtained on stamp papers, Ex.P-1 & P/2. He has denied suggestion that in document dated 18-06-2007 and 02-05-2008, the plaintiff has not signed.

12. K.D.Verma, PW-2, who is registered Notary, has deposed that both plaintiff and the defendant had approached him and he had first obtained the photographs of plaintiff and the defendant both and affixed in the agreement of sale. He further states that after getting the agreement notarized, the plaintiff and the defendant both approached him along with the witnesses. He further states that at the time of notarization of documents, the witnesses were present and the agreement dated 02-05-2008, Ex.P-2 was notarized by him. He further deposed that in his presence, both seller and purchaser read the document and then signed. It is also stated by him that thereafter signatures have been made on pages 1, 2 & 3 of the document and he has affixed his seal. In cross-examination, he states that he does not know about the blindness of Gajendra Prasad Sharma, because Gajendra Prasad Sharma signed in his presence, after reading the documents. He has denied the suggestion that Gajendra Prasad Sharma did not read the document nor signed the document.

13. Sampat Lal Parakh, PW-3 has stated in his affidavit that an agreement to sell the house in dispute was executed between the plaintiff and the defendant for a consideration of Rs.8,21,000/- and advance of Rs.61,000/- was paid by the plaintiff to the defendant in his presence. He states that the agreement was executed on 18-06-2007 at Rajnandgaon when both the parties had come to his shop. He further states that he had signed the said agreement as witness and one Prakash Kumar Dumre also signed the document. This witness has proved his signature. He further deposed that in his presence, Gajendra Prasad Sharma, Deepak Jain and Prakash Kumar Dumre signed the document and it was agreed to sell the house. This witness is brother-in-law of the plaintiff Deepak Jain. In para 12 of his cross-examination, he further deposed that he had read Ex.P-1 and then he had asked Gajendra Prasad Sharma whether documentation was proper and Gajendra Prasad Sharma admitted the same. This witness on the suggestion that the defendant was unable to read on account of visual disability, has emphatically replied that the defendant has signed in his presence. He further states that he does not know that the defendant is disabled, but he counted the money in his presence. Suggestion given to him that the defendant Gajendra Prasad Sharma is visually blind and Rs.61,000/- was given to him towards loan and as security towards repayment of loan, Ex.P/1 was prepared, has been denied.

14. In order to prove agreement, the plaintiff has examined Mulchand Bhansali, PW-4, one of the witnesses, who has deposed that on 18-06-2007, an agreement was executed between the plaintiff and the defendant for sale of the house of the defendant. He further states that on 02-05-2008, another agreement was executed between the parties and the parties had agreed for sale of the house for a consideration of Rs.8,21,000/- and from time to time, the plaintiff paid various amount totaling Rs.1,16,000/- to the defendant on the promise that the balance amount would be paid at the time of registration of the sale deed. He deposed that agreement dated 02-05-2008 was also executed in his presence and as one of the witness and he had signed the agreement. One Tirath Kumar Sahu was witness to the execution of the agreement and he also signed on the document. The agreement was notarised by the Public Notary Shri K.D.Verma, who certified the signatures of the plaintiff and defendant No.1 in the agreement. He further deposed that in his presence, Deepak and

Gajendra Prasad Sharma read the document and then signed. He further states that the photos were also affixed on the agreement and Notary Mr. Verma attested the documents. In cross-examination, he admits that Deepak Jain, is son of his uncle and knows Gajendra Prasad Sharma since childhood. He denied suggestion that Gajendra Prasad Sharma is visually disabled in both the eyes and states that in his presence, Gajendra Prasad Sharma read out the documents. He further deposed that when he signed the document, Ex.P-2, he read it out. He deposed that there was settlement and deal for sale was struck in his presence and further that at the time when the deal was going on, he was also present.

15. Next plaintiff's witness Prakash Kumar Dumre, PW-5 also supported the case of the plaintiff that on 18-06-2007, an agreement was executed between the parties for sale of the house in dispute for a consideration of Rs.8,21,000/- and Rs.61,000/- was paid in advance to the plaintiff to the defendant No.1. He also stated in his affidavit that when he asked the defendant No.1 regarding the said agreement, the defendant said that he is selling land and house to the plaintiff for a consideration of Rs.8,21,000/- and executed the agreement. He further stated that in his presence, the defendant and the plaintiff signed the agreement dated 18-06-2007 and he along with Sampat Lal Parakh signed the agreement as its witness. In cross-examination, he has admitted that the document was not prepared in his presence. This witness further deposed in his cross-examination that the deal was discussed in the shop of Sampat as told to to him by Sampat, but deal was not struck in his presence. He further deposed that in his presence , the defendant No.1 had read the agreement Ex.P-1. He has denied suggestion that acting under influence not Sampat Lal Parakh, brother-in-law of Deepak Jain, he is making false statement with regard to Ex.P-

1. He denied suggestion that no deal was struck in his presence.

16. Defendant No.1-Gajendra Prasad Sharma claims to be visually disabled person. In his affidavit under Order 18 Rule 4 CPC, he has stated that he had received Rs.1,46,000/- from the plaintiff towards loan. According to him, he had received the amount on 18-06-2007 and thereafter, received various amount of Rs.35,000/-, Rs.10,000/- and Rs.30,000/- from time to time, which was part of loan transaction only and in respect of that, the plaintiff obtained his signatures on two stamp papers for being used as security towards repayment of loan. He has stated that the plaintiff took undue advantage of the blindness of the defendant and prepared forged document, whereas defendant No.1 never entered into any such agreement regarding sale of house nor received money from time to time towards part payment of sale considerations. In para 6 of his affidavit, he has stated that I have not signed document dated 18-06-2007 and 02-05-2008 and no agreement was executed between the parties towards sale of the property in dispute. In cross-examination, he admits that he had known Deepak Jain since long and both are resident of Lohara. He admits in cross- examination that both the stamp papers were purchased by him at Rajnandgaon. He does not remember as to when, he signed the stamp papers. He purchased stamp papers on different dates, but he does not remember those dates. Then, he admits that he signed the document, but he cannot say, on which documents, his signatures were obtained. He further admits that at the time of purchasing stamp paper, for the first time, he himself, Deepak Jain and driver of taxi were present. He further denies that Deepak Jain and he came to the shop of brother's son-in-law, where he stayed for 10-15 minutes. He further states that he signed the document in the Court as well as in the

shop of brother-in-law of Deepak. He admits that when Deepak told him that he would be giving money at Rajnandgaon, he went to Rajnandgaon and purchased stamp paper. He also admits that before transaction of money, the documents were prepared at Rajnandgaon and thereafter he signed the document in the shop of brother-in-law of Deepak Jain, whereafter, he was paid Rs.60,000/- and Rs.1,000/- but he denies having signed the document after having read over the contents of the same. He states that he does not know that the document contained recital of agreement of sale of the property. He further admits that he had signed in the same agreement of sale of the property. He further admits that he never requested anyone to read out Ex.P-1. He further admits that he had signed in the same agreement, on the back of the stamp paper of having received two cheques of Rs.20,000/-. He further admits that upon receipt of Rs.30,000/- on 25-01-2007, he again signed on the back of the stamp paper, Ex.P-1. He denied that while purchasing stamp paper, he disclosed to the stamp vender that he was purchasing stamp paper for execution of agreement and sale purposes. However, this witness denies that the agreement was read over to him in presence of witnesses and then signed by him. He further deposed that he was taken to the Court stating that renewal document is to be prepared, his photographs were taken and he does not know that whether the renewal document was attested by the Notary or not but he admits that he had signed the documents. In para 27 of his evidence, he admits that whenever he executes any document containing writings or in the matter of sale and purchase, he signs the document only after the same is read over and explained to him.

17. But for the issue relating to the blindness/degree of blindness of the defendant No.1, entire case of the plaintiff that the agreement was executed by the defendant Gajendra Prasad Sharma for sale of his property for a consideration of Rs.8,21,000/- is proved from the two agreements Ex.P-1 dated 18-06-2007 and Ex.P-2 dated 02-05-2008 as the witness of the execution of the said document have proved their signatures in these two agreements and those witnesses have not only proved that they were witnesses of the execution of the two agreements, but have also stated that deed of sale was struck in their presence and further that after the defendant agreed to sell his property for a total consideration of Rs.8,21,000/-, the plaintiff paid advance of Rs.61,000/- to the defendant. However, as the defendant No.1 has come out with a case that he is the person suffering from 100% visual disability and has also filed certificate prepared by C.S. More, DW-3 and certificate, Ex.D-3, this aspect is required to be examined and finding is also required to be recorded on this aspect of blindness of the defendant as the transaction as alleged by the plaintiff has been seriously contested by the defendant No.1 on the ground that he is a blind person and taking undue advantage of his blindness, in a loan transaction, his signatures were obtained on two stamp papers by stating that the loan papers were prepared, but those two stamp papers were misused and agreement of sale was fabricated by the plaintiff.

18. With regard to plea of visual disability, the defendant has made following pleadings:-

3. --- XXXX ----

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13- --- XXXX ---

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oknh izfroknh dzeKad 1 ds vka[k ds fodykaxrk dk uktk;t Qk;nk mBkrs gq, oknh }kjk izfroknh dzeKad 1 dks tks 1]46]ooo@& :i;k dtZ dh jde nh xbZ gS] ds vkM+ esa oknh izfroknh dzeKad 1 ds mijksDr Hkwfe ,oa Hkou dks gM+iuk pkgrk gSA tks fd voS/kkfud gSA** The pleading of the defendant is that he is visually disabled. However, the extent of visual disability has not been specifically pleaded by the defendant. It is important to note that in para 12 of the written statement, referred to above, the defendant has pleaded that with the aid of others, he performs his daily routine work including bank transactions and earlier also whenever defendant No.1 executed sale deed, the same was executed only after having understood the contents upon being read over by others. In the entire pleading, the defendant, however, has not made any specific pleading regarding presence of any of his relative at the time of alleged transaction under two agreements. In Para 12 of the written statement, the defendant states that he executed the sale document only when contents of the same was read over to him by others. In other pleadings of the written statement, it has been repeatedly stated that his signatures were obtained on two stamp papers and those signatures were misused and fabricated under the agreement of sale by the plaintiff.

19. The defendant-Gajendra Prasad Sharma in his affidavit under Order 18 Rule 4 CPC has stated that the plaintiff taking undue advantage of permanent visual disability, got the document of sale fabricated. Similar statement of permanent visual disability has been made in para 3 & para 5. What is important is to note that while in the pleading the plaintiff used the word "vkWs[kksa dh fodykxark", in the affidavit under Order 18 Rule 4 CPC, he has made improvement by stating that "vkWs[kksa dh LFkk;h fodykxark", but then, in his affidavit, he also states that all his daily routine work including bank transactions are conducted with the aid of other persons and further that in the past, sale deed was executed only when contents of the same was read over to him by others. In order to prove visual disability, the defendant has produced certificate dated 23-10-2010 said to be issued by the Medical Board. Photocopies of earlier disability certificates dated 07-09-2007 & 03-09-2004 have also been produced. In his cross-examination, he states that he is the Block President of Indian National Congress Party. He further states that he was earlier possessed of 20

acres of land and now only 5- 6 acres of land is left and rest of the land is already sold. He further admits that whenever he sold his property in the past, in none of the registered documents of sale, it was stated that he is 100% blind. He also admits that whenever he sold lands by registered deed, he has always signed those deeds. He further admits that on 25-01-2005, he sold lands by registered sale deed in favour of Rajendra Kumar and Angad Kumar of Dhourabhata, in which, he has put his signatures, as stated by his aide. He then admits that in those documents, it has not been stated that he has signed the documents as stated by his assistant. He also admits that on 17-06-2005, he again sold lands to Tilak Ram Tilok Chand and signed the sale deed, but there is no recital that he has put his signatures by taking assistance of others. He admits that there is no recital that he is a blind person. He admits that he has sold properties vide sale deeds Ex.P-30 to Ex.P-38 i.e. 9 sale deeds have been executed by him, which are signed by him, but in none of these sale deeds, there is recital that he is blind person nor in any of the sale deeds, it is written that for putting his signature, he is taking assistance of other person. He admits that the signatures in above documents are either in Hindi or in English. He has also admitted that he never informed to the bank that he is a blind person. He further states that while withdrawing money from the bank, he takes assistance of others, but his signatures are not taken on the document. In para 28 of his cross-examination, he has denied suggestion that only to defend the case that he has got prepared forged disability certificate.

From the aforesaid evidence of the defendant-Gajendra Prasad Sharma, it is clear that the defendant, though claims to be visually disabled, this fact has not been stated in any of the sale deeds, executed by him in the past. It is relevant to notice that the defendant has been very frequently selling his property and in the year 2005 itself, he executed as many as 11 sale deeds which are all admitted to be signed by him. He further admits that in none of the sale deeds, it is written that he is a blind person or that he has signed the document with the aid and assistance of any other person. Moreover, it is also admitted that he carries on bank transaction and puts signature, but in those documents also, there is no recital that he having signed the documents with the assistance of any other person.

20. The defendant has also examined Shyam Kumar Chokhandre, DW-2, who was the Deputy Registrar in the office of the Registrar. This witness, in his cross-examination, states that Rent Deed Ex.D-2 was registered in the office during the period of his posting, in which, the name of Gajendra Prasad Sharma was written as Landlord, a person letting on rent. This witness further states that the defendant Gajendra Prasad Sharma signed the document of registration, at the time of registration in his presence, but he did not disclose that he is a blind person nor he insisted that the contents of the document be read over to him. He admits that Gajendra Prasad Sharma came to the office of the Registrar and got the registration completed like any other person of normal eyesight. He states that if any party discloses before him that he is a blind person, this fact is stated at the time of registration and when it is not informed to him, then upon making query and satisfaction, he gets the signatures or affix thumb impression on the documents in his presence. According to this witness, Gajendra Prasad Sharma did not disclose regarding his alleged blindness.

21. The defendant, Gajendra Prasad Sharma, in order to prove that he is a blind person, examined Dr. C. S. More, DW-3, who has stated that the case of Gajendra Prasad Sharma was referred for

issuance of Certificate of Visual disability, which was issued by Dr. K. K. Mishra for a period of five years and the said certificate disclosed permanent visual disability. He further states that on 25-10-2010, after seeing the old certificate, eyes were checked and then renewal certificate was prepared, in which, name of the disease was written as Retinitis Pigmentosa and Optic atrophy (In short "RP") and after getting eyes checked, disability certificate was issued by the Medical Board. He has proved his signatures on the said document, Ex.D-3. He also states that as Members Dr. Vipin Jain, Dr. P. Balkishore and as a President of the Medical Board, Eye Specialist Dr. Prashant Shrivastava also signed on the said document. In his cross-examination, he admits that the disability certificate was not issued for Court purposes, but certificate was issued for other purposes. He states that where certificate are proposed to be issued for Court purposes, opinion is rendered after medical examination by a team of five Doctors including one Eye Specialist. He admits that the certificate, Ex.D-3 has not been issued for Court purposes. It is relevant to note that the certificate was issued after filing of the suit.

In response to a question that the certificate does not disclose the kind of medical examination performed, it is admitted that the same is not stated in the certificate. He further admits that the medical examination is conducted by the Eye Specialist alone and all other Members sign without any examination. He admits that the certificate, Ex.D-3 does not show dates, on which, doctors have put their signatures and he has also not noted the date while affixing the photographs and without looking into the records, he cannot say as to on which date, Gajendra Prasad Sharma was medically examined and on which dates, certificate was signed. A suggestion has been given but he has denied that when any person comes for renewal of certificate, renewal certificate is granted formally. He admits that in the year 2007-2008, a complaint was made regarding issuance of forged medical certificate and one member was also suspended during enquiry and certain enquiry is still pending. In para 7 of his cross- examination, he states that at the time of examination, Trycile-P Eye Drop was applied and after pupil were dilated, examination was carried out and disease was diagnosed. He further states that on the basis of vision and field defect, it can be diagnosed as to what is the percentage of disability. He admits that in the certificate, there is no mention of vision report nor it has been mentioned on which date, vision report was given. He states that during his entire service, he has not issued disability certificate for Court purposes and he does not know as to what facts are required to be stated. He also admits that the defendant has not signed in his presence, but in the presence of Clerk and at the time of preparation of certificate, the clerk obtained his signatures. In his evidence, he further admits that the persons, who are resident of Durg, certificates of disability are issued by the District Medical Board, Durg only, not from Raipur or any other place. Finally, a suggestion that the certificate, Ex.D-3 is a forged document, has been denied and suggestion that certificate was issued formally without proper examination, has also been denied.

22. Section 45 of the Indian Evidence Act deals with the opinions of experts, which reads thus:-

45. Opinions of experts.--When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.

23. Upon survey of decisions of Hon'ble Supreme Court and various High Courts in the cases of Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras¹, Hazi Mohammad Ekramul Haq, v. The State of West Bengal², Vinod Kumar Bhaiyalal Jain and another vs. State of Madhya Pradesh³, The State v. Karu Gope and another⁴, Palaniswamy Vaiyapuri, Original Accused v. State⁵, Prem Shankar Mishra v. State⁶, Ajitrai Shivprasad Mehta v. Bai Vasumati⁷, Pratap Misra and others v. State of Orissa⁸, Union of India v. Kewal Kumar⁹, Law Society of India v. Fertilizers and Chemicals Travancore Ltd. and others¹⁰, Ram Prasad v. Shyamlal and others¹¹, Balkrishna Das Agrawal v. Smt. Radha Devi and Ors.¹² and Abhayanand Mishra v. The State of Bihar¹³ regarding opinion of experts, following settled legal position emerges:-

(a) Opinion of experts are neither conclusive nor binding on the Court but are like any other evidence and it is required to be weighed and judged along with other evidence and further that it 1 AIR 1957 SC 49 2 AIR 1959 SC 488 3 1987 MPLJ 214 4 AIR 1954 Patna 131 5 AIR 1968 Bombay 127 6 1957 Cr.L.J. 108 7 AIR 1969 Gujarat 48 8 AIR 1977 SC 1307 9 (1993) 3 SCC 204 10 AIR 1994 Kerala 308 11 AIR 1984 NOC 77 (ALL) 12 AIR 1989 All 133 13 AIR 1959 Patna 328 cannot be taken as substantive evidence but has corroborative value.

(b) When the trial Court allows evidence of expert to be brought on record on technical matter, it does not abdicate its function to judge itself whether the opinion of expert is correct or not on a matter at issue.

(c) Expert evidence is good even if not decisive; the Court is not bound by such evidence but must consider it along with other evidence and circumstances on record; the Court may not place any reliance on expert opinion if it is unsupported by reasons.

(d) It would be better, if in the reports, reasons for the opinion expressed are given. This should be a simple matter as the expert himself keep some note of the points where he finds tallying at the time when he makes his examination of the documents for the purpose of expressing his opinion. The setting out of the reasons at length will help to clarify his ideas and it will furnish a valuable guide to the parties and to the Court in deciding the value to be attached to that opinion. It will also be fair to persons against whom opinion is to be used that the reasons for the opinion are definitely expressed.

(e) Expert should put before the Court all the materials which induced him to come to the conclusion, so that Court, although not an expert, may form its own judgment on those materials.

(f) The expert witness is expected to place before the Court all materials including the data which induced him to come to the conclusion. He should also enlighten the Court on the technical aspects of the case, so that, it may form its own judgment with due regard to expert's opinion. Where expert witness gives no data in support of his opinion, their evidence may be rejected or it may only be treated as weak evidence.

(g) The Court ought not to blindly accept the report. It is the duty of expert to furnish to the Court, the necessary criteria for testing the accuracy of his conclusion so as to enable the judge to form his

own independent judgment by application of the criteria to the facts proved in evidence.

(h) Where it finds the expert conclusion as unsatisfactory, the Courts are not bound to accept their report, even if it is submitted by a Committee of Experts. The opinions are corroborative in nature and it is not the province of the expert to act as a Judge or jury. Ultimate decision has to be by the judge. Value and acceptability of the opinion, depends upon the facts on which, it rests and upon the validity of the process, by which, the conclusion is reached. Ultimately what weight is to be attached to the experts opinion depends upon reasonableness and scientific quality and not on expert's practice length.

(i) The opinion of expert engaged by the party suffers from the defect that it is given by the remunerated witness. He knows before hand why he has been called and what the party calling him wishes to be proved. It is not improbable that he has an unconscious bias in favour of the party who has called him to appear as his witness. Therefore, in a case, where the expert's opinion has not been obtained by the Court but led by one of the parties, the Court must cautiously weigh expert opinions.

24. This Court is called upon to enter into the exercise of evaluating the evidenciary value of the expert opinion in the peculiar facts and circumstances of the present case, because other established facts and circumstances raises doubt whether the defendant Gajendra Prasad Sharma is fully blind or only suffers from partial visual disability. Those facts and circumstances established from the oral and documentary evidence on record shall be referred after analyzing the expert opinion in the light of principles referred to hereinabove. At the first place, the expert opinion is not one called by the Court but the defendant has produced expert witness to prove the medical certificate of his disability. Secondly, in the paragraphs hereinabove, it has been noticed, upon perusal of the pleadings and the affidavit under Order 18 Rule 4 CPC that while in the pleadings it has been said that the respondent suffers from visual disability, the nature and extent of disability has not been specifically pleaded. While in the pleading, it has been stated " vkWs[kksa dh fodykxark", in the affidavit, it has been stated as " vkWs[kksa dh LFkk;h fodykxark". It is thus seen that the pleadings contained in the written statement, there was no pleading of permanent disability or 100% disability or complete blindness. Even in the affidavit, " LFkk;h fodykxark" (permanent disability) has not been specifically stated. Extent of disability and whether the disability is permanent nature are two different things. In the affidavit also, it has not been clearly stated that the respondent is completely blind in the sense that he cannot do any work without aid and assistance.

The most important witness of the defendant Dr. C. S. More, DW-3, admits that the appellant was checked after seeing the old certificates. However, in the medical certificate, there was no descriptions of the technique applied or details of the test applied to form an opinion. Though, he states that the certificate has been issued by the Medical Board, he admits that the certificate was not issued for Court purposes. He further states that for Court purposes, different kind of certificates are issued and in such cases, opinion is to be formed by a team of five doctors including Specialist. It is noticed that the certificate was issued after filing of the suit. He admits that the certificate does not disclose the kind of medical examination performed. He further admits that the examination is conducted by the Specialist alone and all other members have signed the certificate without any examination. Though, it is stated that some medicine was applied in the eyes and after dilation of

pupil, examination was carried out, he fails to disclose that what kind of examination was carried out and how the conclusion was arrived at. While on the basis of vision and field defect, it can be diagnosed as to what is the percentage of disability, he admits that in the certificate, there is no mention of opinion/report nor it has been mentioned as to on which date vision report was given. He has not produced any other diary containing observations, nature of examination performed and what was the result of those examinations which impelled him to form an opinion regarding blindness. The kind of disease, on the basis of which, opinion has been formed, is mentioned as "Retinitis Pigmentosa". In an authentic medical treatise relating to ophthalmology¹⁴, "Retinitis Pigmentosa" has been described as genetic disorder of eyes that causes loss of vision and symptom of decreased peripheral vision in the night. According to this text, as peripheral vision reduces, people may experience "tunnel vision". Moreover, complete blindness is uncommon. The process of diagnosis involving examination of Retina in dark pigment deposits. Other supportive test may include electroretinogram, visual field testing or genetic testing. The aforesaid test also reveals that initially retinal degenerative symptoms of retinitis pigmentosa are characterized by the decrease in night vision which may progressively lead to further loss of vision.

The subject text is referred to assess the evidentiary value of the opinion of the expert. The certificate as also the evidence of the expert of the doctor does not reflect the nature of test or examination carried out, results, observations in the medical terms. Even in the absence of that, this Court cannot altogether ignore the expert's opinion, but may judge, in the established facts and circumstances of the case whether respondent appears to be fully blind or suffering from partial visual disability.

25. In an interesting case, Rampurwalah Sharafaali vs. L. Hainglianna Secretary (Preventive Detention) and another¹⁵, while challenging the legality and validity of detention order, a plea of total blindness was taken, which was disputed and occasion arose for the Division Bench of the Bombay High Court (Nagpur Bench) to examine this aspect. The pleas examined in following manner to reach to the conclusion that the plea of total blindness was not acceptable to all appeared to the Court was that the detenu was partially blind:-

15. Shri Habibuddin Ahmed, learned Asstt. Govt. Pleader, submitted in this regard that the petitioner does not appear to be a person who is said to be a totally blind as he was visiting Dubai and dealing in purchase of the foreign make articles and was bringing them to India on 14 en.wikipedia.org/wiki/Retinitis_pigmentosa¹⁵ 1991 Cr.L.J. 190 earlier occasion too. It is further submitted that he was dealing in the affair visiting Dubai alone without any aid whatsoever which is not possible for a person who claims himself to be a person totally blind. It has been brought to our notice that earlier to 10-6-88 the petitioner had left India on 13-11-1984, 25-2-1986, 28-10-1987, 13-3-1988 and lastly on 3-6-1988, and while returning on 10-6-1968 he was intercepted.

These dates have been mentioned from the passport which is seized by the Customs Officials.

"Blindness" is defined in Concise Medical Dictionary.

16. From the evidence referred to above, we have to see whether the petitioner was suffering from blindness, was totally blind or suffering from partial blindness. "Blindness" is defined in Concise Medical Dictionary as :

"blindness the inability to see. Lack of all light perception constitutes total blindness but there are degrees of visual impairment far less severe than this that may be classed as blindness for administrative or statutory purposes."

The definition of "blindness" is also given in a books Epidemiological and Vital Statistics Report", Vol. 19, No. 1, 1960 at page 506. "Total blindness" is defined as under :-

"(i) Totally blind, i.e., those who have to be led.

(ii) Inability to move about in unfamiliar surroundings unaided, such aid including the blind man's stick.

(iii) Inability to perceive the movement of fingers close to the eyes.

(iv) Inability to do any kind of work, industrial or otherwise, for which eyesight is essential.

(v) Census instructions : All persons who are totally blind, or cannot find their way to places unknown to them before by means of their sight shall be registered as blind.

(vi) Inability to move about in unfamiliar places, to accomplish work for which eyesight is essential or to count fingers at more than one metre, even with the aid of glasses.

(vii) Inability to read ordinary type, even with the aid of glasses, or to carry on ordinary occupations for which eyesight is essential.

(viii) Inability to find one's way alone.

(ix) Visual acuity too low to permit normal school education in children or normal vocational training or occupation in adults.

(x) The visual acuity was so low that the children were unable to attend regular public schools due to their visual handicap.

(xi) Total blindness : absence of light perception in both eyes. Near blindness : the patients are sufficiently handicapped to be unable to look after themselves or find their way about, and visual acuity cannot be brought to 20/200 for either eye.

(xii) Visual acuity not sufficient for the ordinary affairs of life or for the performance of tasks for which eyesight is essential, even with best correction.

(xiii) Perception of light, perception of, hand movement, or less.

(xiv) Total blindness, the patient being, always dependent on a third person for the essential activities of life.

17. From the above definitions, it is aptly clear that the person who has reported blindness has no projection as well as perception of light and such person cannot perform his normal duties without the aid and move freely even in familiar and unfamiliar surrounding unaided. Means as blind as a bat at noon.

18. The book on the subject : "Blindness and Visual Handicap", The Facts written by John H. Dobree and Eric Boulter. In para 23, aids and devices which are essential for the total blind persons have been discussed. A person who is totally blind can educate himself through braille alphabets. The equipment for writing in braille ranges from a small pocket frame and styles which can be used for jotting down notes, telephone numbers, addresses, and so on to the braille writing machine used for writing letters or any lengthy material. The braille frame or slate, whether pocket or desk size, consists of a series of cut-cuts places over a matched series of recesses. Braille pocket watches and wrist watches which are available can be used; the long cane, is a means through which many blind men and women may be able to accomplish free and safe movement even on crowded streets, enabling them to detect danger points, safely negotiate steps up and down kerbs, uneven pavements, projecting building lines, and other hazards.

19. The Blind Persons Act of 1920 defined blindness for the purposes of registration as 'so blind as to be unable to perform any work for which eye-sight is essential'. This definition has been reproduced in a book :

"Clinical Ophthalmology" edited by Sir Stephen Miller in Chapter 23, page 571.

20. From this, the complete or total blindness be described as :-

"The eye is unable to see the projection of light as well as perception of light is called the 'total blindness' or 'complete blind eye'.

In other words, the eye is unable to know the direction of light as well as to see whether there is light or not.

21. The petitioner in his application which he had submitted before the Additional Chief Metropolitan Magistrate, Bombay which is in the form of retracting his earlier averments made in his statement, he has shown himself as a partial blind. Therefore, we feel it necessary to describe what is meant by 'partial blindness'.

22. "Partial blindness" is also defined in the book "Epidemiological and Vital Statistics Report, Vol. 19, No. 1, 1966 at page 506 as under :-

- (i) Partial blindness visual acuity of 1/60 snellen or more but less than 3/60 snellen.
- (ii) Central visual acuity of less than 6/60 Snellen (0.1, 20/200) in the better eye or an equally disabling loss of the field of vision.
- (iii) Vision reduced in at least on eye so that the individual cannot count fingers at a distance of six metres.
- (iv) Inability to count fingers at 2 metres.
- (v) Visual acuity of more than 6/60 but not exceeding 6/60 snellen in the better eye, even with best correction.

23. From these definitions, one gets clear idea about the partial blindness. A person who is partially blind, he can see the perception as well as projection of light, even can count the fingers at the distance of 4, 5 and 6 metres but the acuity of vision is not sufficient to work, i.e., for reading, writing and seeing the object or objects at a distance of more than six metres.

24. From the averments made by the petitioner in his petition that he had gone to Soudi Arabia to purchase and to bring articles and thereafter to sell them in India and thereby to earn money. The petitioner is doing all his duties without any aid of a person or the devices which are being devised for the blind persons. In the statement which was recorded by the Custom Officials on 10-6-1988 he specifically mentioned that he has studies up to S.S.C. and knows Hindi and English. It is, therefore, very difficult for us to hold that the petitioner is a totally blind person. We are more inclined to accept his statement which he made in the application before the Additional Chief Metropolitan Magistrate that he is a partially blind person. It means, the petitioner has a vision to perform his usual duties, to move in the familiar and unfamiliar surrounding unaided. In spite of this, the petitioner is pretending total blindness which means 'malingering blindness'.

26. There are certain striking features of the present case, which are in conflict with respondents assertion of his complete blindness. As stated hereinabove, the defendant has avoided to make specific averment or states specifically even in his affidavit that he is completely blind so much so that he cannot do even daily work without assistance. He has ingeniously chosen the words "vkWs[kksa dh fodykxark". It is not in dispute that the defendant has been signing the document and it is not a case that he affixes his thumb impression. The defendant has not made any specific pleading with regard to presence of any relative at the time of alleged transaction. If he is to be believed that he is totally blind, it is quite improbable that he would be moving around without any assistance. The plaintiff has examined number of witnesses to prove conversation and agreement relating to sale of the property by the defendant- Gajendra Prasad Sharma in favour of the plaintiff -Deepak Jain followed by the signatures of Gajendra Prasad Sharma but those witnesses did not say that they had come along with the defendant on his request as his assistant. The two agreements

dated 18-06-2007, Ex.P-1 and 02-05-2008, Ex.P-2 did not contain any recital that the defendant is a blind person and without any recital therein that with the aid of any person, he signed the document at the indicated space therein. The other striking feature is that the defendant has admitted that he possessed huge property and he has sold parcel of land from time to time, but in none of these documents of sale, it has ever been recorded that he suffers from visual disability much less that he is completely blind. He admits that he always signs those deeds. Earlier sale deeds have also been executed by him. He also executed Rent Deeds. It has not been stated in his evidence that in any of those transactions, any other person appeared as witness and put his signature stating that in his presence, defendant Gajendra Prasad Sharma, a blind person, has put his signature. The defendant has not brought any evidence before the Court that whenever he used to attend the office of the Registrar, in connection with registration of sale deed or sale of the property or registration of rent deeds, in all being more than 10, he was assisted by anyone. Since 2005, the defendant has been selling the property and executing sale deeds and he has executed as many as 11 sale deeds, but there is no recital therein that his signatures were obtained on those sale deeds as a blind person, in the presence of any authority or witness. Not only this, the defendant admits that he carries on bank transaction and puts signature, but in none of these bank transaction, there is any recital that he had signed these documents with the assistance of any other person on the reason that he is completely blind. The Deputy Registrar in the office of the Registrar, who is the defendant witness namely Shyam Kumar Chokhandre, DW-2 in his cross-examination has stated that deed, Ex.D-2 was registered in the office during the period of his posting, in which, the name of Gajendra Prasad Sharma is described as landlord. It is stated that the defendant has signed the document of registration in his presence without disclosing that he is a blind person nor he insisted that the documents be read over to him. He admits that Gajendra Prasad Sharma came to his office and got the registration completed like any other normal person. Normally, any person comes before him by disclosing that he is a blind person, then upon making query and satisfaction, signatures/thumb impression are obtained.

27. Thus, in view of the established facts and circumstances of the case, which has been discussed hereinabove, this Court is inclined to hold that though the respondent-Gajendra Prasad Sharma may be suffering from visual disability to some extent, it cannot be said that he is completely disabled from understanding the contents of the document and signing the document.

28. While the plaintiff has come out with a case of agreement of sale of the property in dispute, based on agreement in writing executed not once but twice, execution of which, is proved from the evidence of attesting witness, the defendant has set up a case of all loan transaction. Obviously, the burden is on the defendant to prove the same.

If the contents of written statement are looked into, this Court finds that there is contradiction in pleadings. As noted above, at one stage, he states that the plaintiff obtained his signatures on two blank papers by stating that he would be preparing the document of loan transaction and the other stage, he states that he has not signed the documents dated 18-06-2007 and 02-05-2008. The defendant does not dispute having received the total amount of Rs.1,16,000/-, but his case is that this amount was received as loan from the plaintiff. None of the witnesses, who are present at the time of execution of two agreements, have stated that the transaction was intended to be loan

transaction and that the agreements were executed only to secure repayment of loan. The defendant does not state as to what was the exact need which required him to take loan. He not even states as to how much money, he needed, for which, he is taking loan. In the past, the defendant has executed as many as 11 sale deeds and in the present case, only 2178 Square Feet of land is involved. Moreover, if the two agreements prepared on stamp papers are looked at, it is clear that they were purchased in connection with sale of the property by the plaintiff. While the first agreement records that the stamp paper has been purchased by Gajendra Prasad Sharma for execution of agreement, in which, parties were shown to be seller and purchaser, in the second agreement, it records that it has been purchased for the purpose of sale. The defendant admits in his examination that these two documents were purchased by him. Moreover, the pleadings and evidence of the defendant are self-contradictory as sometimes, it is said that the defendant is blind and his signatures were obtained by misleading but sometimes it is said that he did not sign the documents and signatures are forged and fabricated. The defendant did not produce any report of expert of handwriting nor sought such opinion to be produced by moving an application before the Court below. It is noticeable that the first agreement was executed on 18-06-2007. The second agreement was to be executed as sale deed could not be executed within the time stipulated in the earlier agreement. However, by that time, Rs.1,16,000/- was already paid by the plaintiff to the defendant. It is not the case of the defendant that either on 18-06-2007 and thereafter, he took loan. It is highly improbable that a person only to acknowledge loan liability, would again execute agreement of sale of property. What was the occasion for the defendant to again execute the agreement of sale on 02-05-2008 has not been clearly explained by him. If he had taken loan from time to time, after agreement dated 18-06-2007, which according to him, was only intended to be security towards repayment of loan, there was no occasion for execution of another agreement on 02-05-2008, if at all, it was intended to be loan transaction. Detailed discussion of plaintiff's evidence and contents of two agreements, execution of which, has been found proved and further that the defendant Gajendra Prasad Sharma in his evidence, admits that whenever he executes agreement in the matter of rent or in the matter of sale and purchase, he signs the document only when the same is read over and explained to him. It, therefore, has to be held that the defendant has failed to prove against the written documentary evidence that the two agreement were only sham documents and the nature of transaction was only that of loan. Much insistence has been laid by learned counsel for the appellant-defendant on the execution of agreement at Rajnandgaon whereas both persons are resident of Dondi Lohara, where there is office of the Registrar and Tahsil Court also to say that it renders the transaction doubtful. It has also been stated that the execution of two agreement is doubtful and also that the plaintiff is moneylender and that the aspect of blindness has also been relied upon in respect of transaction is that of loan.

Once this Court is satisfied with regard to due execution of two agreements and in the absence of there being any oral evidence led by the defendant to prove that it was a loan transaction and further that the parties are known to each other since long, coupled with the finding that the defendant does not appear to be completely blind and that he has been selling his property in the past, particularly taking into consideration the execution of two agreements, we have no doubt in our mind that present was a case of transaction for sale of property rather than a loan transaction.

29. The next issue which arises for consideration is whether the plaintiff was ready and willing to perform his part of contract.

In view of the provision contained in Section 16(c) of the Specific Relief Act, the burden is on the party seeking decree of specific performance to prove that he was ready and willing to perform his part of contract. It is not only required to be proved by leading cogent evidence but also specific pleading in that regard is required to be made in order to succeed in a suit for specific performance of contract. {Please see J. P. Builders vs. A. Ramdas Rao and another, (2011) 1 SCC 429, Manjunath Anandappa URF Shivappa Hanasi vs. Tammanasa and others, (2003) 10 SCC 390, Man Kaur (Dead) by Lrs. vs. Hartar Singh Sangha, (2010) 10 SCC 512.}

30. If the pleadings made by the plaintiff in its plaint are examined, it is found that the plaintiff has averred that at the time of first agreement on 18-06-2007, an amount of Rs.1,16,000/- was paid by the plaintiff to the defendant. It has also been averred that thereafter on 25-07-2007, Rs.35,000/- was paid followed by another payment of Rs.10,000/- on 28-10-2007 and further Rs.10,000/- on 30-10-2007 and thus total amounting to Rs.1,16,000/- was paid by the plaintiff. It is also specifically pleaded that after having paid Rs.1,16,000/- up to 30-11-2007, when the plaintiff repeatedly requested the defendant to execute the sale deed, the defendant avoided execution of sale deed on one pretext or the other, sometimes stating that the accommodation has not been vacated and sometimes on the ground that the revenue papers are not ready, it is pleaded, the plaintiff again requested the defendant to extend the validity of the agreement dated 18-06-2007 which led to execution of another agreement dated 02-05-2008. In this agreement, the contingency that the sale deed would be executed upon vacating of the accommodation by the tenant was modified by stating that even if the tenant does not vacate, the defendant would be required to execute the sale deed and ensure that thereafter rent, is paid by the tenant to the plaintiff. In para 10, it has been averred that the plaintiff, thereafter, got the notice dated 25-07-2008 published in the local newspaper inviting objection in the daily newspaper "Nai Duniya", Raipur Edition on 30-07-2008. However, thereafter, when the defendant disowned the said agreement by sending the notice dated 04-08-2008, the plaintiff sent notice dated 14-10-2008 to the defendant that he is ready and willing to perform his part of contract and the defendant may receive balance of the amount which is payable by the plaintiff and then execute the sale deed. In para 15 of the plaint, it is stated that even on the date of filing of the suit, the plaintiff is ready and willing to pay the balance amount and he has arrangements to pay amount to the defendant. In his evidence, the plaintiff has deposed that the aforesaid facts relating to payment of Rs.61,000/- and thereafter, various amounts total amounting to Rs.1,16,000/-, execution of another agreement dated 02-05-2008, publication of notice in the newspaper on 30-07-2008 as also sending of notice dated 14-10-2008. A copy of notice dated 14-10-2008 sent by the plaintiff to the defendant has been filed by the defendant vide Ex.D-1.

According to learned counsel for the appellant-defendant, the plaintiff has failed to prove that it had sufficient funds in his hand and the amount shown in his bank account, is too meager.

On the aspect of willingness, it is argued that as the plaintiff has failed to prove that prior to 14-10-2008, he has sent other notice on 15-07-2008 and 28-07-2008, willingness could not be proved.

In so far as availability of cash in the hands of the plaintiff is concerned, though it is argued that the plaintiff has not been able to show from its bank accounts that balance amount of Rs.6,75,000/- is available with him, but evidence on record establishes two things, firstly that out of total consideration of Rs.8,21,000/-, the plaintiff has paid Rs.1,16,000/- to the defendant. That means, a substantial amount has been paid by the plaintiff. Secondly, it has come in the evidence of the plaintiff which fact has not been disputed by the defendant that the plaintiff runs business of garments and he also accepts mortgages and is also engaged in money lending business. According to him, he is carrying on business of sale-purchase clothes since five years. In the past, he has worked at Bombay in Import-Export Company. He states that he had also worked in a company engaged in dealing with diamond for about 5-6 years. He has stated that he is an income tax payee.

31. In the case of J. P. Builders (supra), it has been held by Their Lordships in the Supreme Court that readiness and willingness cannot be treated as straight jacket formula and it has to be determined in entirety of facts and circumstances relating to intention and conduct of the parties. In the aforesaid decision, distinction between the "readiness and willingness" has been highlighted that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. The aforesaid decision further shows that in order to prove readiness and willingness, assertion in the plaint, oral and documentary evidence as to execution of agreements, part payment of sale consideration, having sufficient cash and financial capacity to execute the sale deed, bank statements as to the monies in fixed deposits and saving accounts, have been held to be relevant considerations to come to the conclusion whether the plaintiff has proved his readiness and willingness to perform his part of obligations under the contract. In the text and pleading, this Court has no hesitation that the plaintiff is ready and willing to perform his part of contract.

32. Last submission of learned counsel for the appellant that in the established facts and circumstances of the present case, it would be unfair and unjust to grant a decree for specific performance of contract, even if it is proved that the parties have entered into the agreement of sale of the property and the plaintiff was ready and willing to perform his part of contract, because, the value of the property is much more than the agreed sale consideration of Rs.8,21,000/-. In this regard, the plaintiff has relied upon sale deed Ex.P-15, in respect of sale of another parcel of land ad measuring 313 square feet for consideration of Rs.2,31,000/- in the year 2008.

33. True it is that grant of decree of specific performance is a discretionary relief and in every case, the Court is not bound to grant decree of specific performance merely because, it is lawful to do so. However, the exercise of discretion is regulated by the statutory mandate of Section 20 of the Specific Relief Act, which has been considered by the Apex Court in plethora of decisions, one of the latest decision being Jayakantham and others versus Abaykumar, (2017)5 SCC 178. The discretion is required to be exercised judiciously and not sympathetically. As early as in the case of Prakash Chand vs. Angadllal and others, AIR 1979 SC 1241, (supra), it was held by the Apex Court that ordinary rule is that the specific performance should be granted and that it ought to be denied only when equitable consideration point to its refusal and the circumstances show that damages would constitute an adequate relief. In another decision in the case of Prakash Chandra vs. Narayan, AIR 2012 SC 2826, it was held that where the defendant neither raised the defence of hardship nor lays any evidence thereof and no evidence regarding hardship was framed by the trial Court, denial of

relief of specific performance of contract of sale on the ground of hardship in the circumstances was not proper. Their Lordships in the Supreme Court in the case of K. Prakash vs. B. R. Sampath Kumar, AIR 2015 SC 9, have held that the Court ought not to refuse decree of specific performance on extraneous considerations or sympathetic considerations. It was held that the Court's jurisdiction to grant decree of specific performance is discretionary but not arbitrary and further that the discretion must be exercised in accordance with the judicial principles.

In the recent judicial pronouncement in the case of Jayakantham (supra), on which, heavy reliance has been placed by learned counsel for the appellant, Their Lordships in the Supreme Court have considered its earlier decisions and development of law in this regard, re-stating and re-framing the principles referred to hereinabove.

34. In the present case, the defendant itself has led evidence of Shyam Kumar Chokhandre, Deputy Registrar, DW-2, who has stated that as per the prevalent rates, the valuation of the house in dispute is Rs.6,79,760/-. The said valuation has been arrived at by the Deputy Registrar, taking into consideration the location of the plot, rate prescribed by the Central Evaluation Board, further taking into consideration that the accommodation is non-residential as also depreciation. Thus, from the defendant's own evidence, the value of the property was Rs.6,79,760/-, whereas under the agreement of sale, the consideration agreed to between the parties is Rs.8,21,000/-, which is much more than the market value of the property on the date of execution of agreement to sale. Reference to the consideration amount of plot of 336 square feet vide sale deed, Ex.P-15, cannot be taken into consideration because the defendant has not led any evidence with regard to valuation of that land, depending upon its location and other relevant considerations. Further, in view of Explanation 1 of sub section (2) of Section 20 of Specific Relief Act, mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). The defendant has neither pleaded nor proved any case of hardship.

35. Learned counsel for the appellant had raised submission that the learned trial Court has not properly appreciated the pleadings and evidence with regard to each and every issue framed by it but has recorded perfunctory reasons to jump to the conclusion in favour of the plaintiff, which was also appreciated by this Court, in view of what has been stated by the Supreme Court in the case of Smt. Swaran Lata Ghosh vs. H. K. Banerjee and others, 1969(1) SCC 709.

36. We have, however, considered the entire pleading and evidence on record to arrive at our own finding, independent of the findings recorded by the trial Court as to whether the plaintiff is entitled to succeed in the suit.

37. Therefore, even if it is found that the trial Court has not recorded a specific findings upon detailed consideration of the evidence on record, which otherwise available to justify grant of decree of specific performance, having examined the same, we are inclined to affirm the judgment and decree passed by the trial Court.

38. In the result, the appeal is dismissed. Impugned judgment and decree passed by the learned trial Court is affirmed. Let appellate decree be drawn accordingly. Parties to bear their respective costs.

SD/-
(Manindra Mohan Shrivastava)
JUDGE

SD/-
(Sharad Kumar Gupta)
JUDGE

Tumane