

Shyam Kumar Gupta Aged About 39 Years Son ... vs Om Prakash Bhagat Son Of Kamleshwar ... on 22 February, 2024

Author: Subhash Chand

Bench: Subhash Chand

IN THE HIGH COURT OF JHARKHAND AT RANCHI
First Appeal No.30 of 2022

1. Shyam Kumar Gupta aged about 39 years son of Birendra Prasad
resident of Mouza Whitty Bazar, Giridih Town, P.O. Giridih, P.S.
Giridih (T), District Giridih.
2. Suraj Prasad Jaiswal aged about 66 years son of Late Kamta Prasad
Jaiswal resident of Mauza Makatpur, Mohalla Barganda, P.O. Giridih,
P.S. Giridih (T), District Giridih. Plaintiffs/Appellants
Versus
Om Prakash Bhagat son of Kamleshwar Bhagat resident of Mouza
Whitty Bazar, Giridih Town, P.O. Giridih, P.S. Giridih (T), District
Giridih Respondent

PRESENT
HON'BLE MR. JUSTICE SUBHASH CHAND

.....

For the Appellants : Dr. Vandana Singh, Advocate Mrs. Sandeep Verma, Advocate For the
Respondent : Mrs. Snehlika Bhagat, Advocate

C.A.V. on 22.01.2024 Pronounced on 22.02.2024

1. Heard learned counsel for the appellants and learned counsel for the respondent.
2. The instant appeal is preferred on behalf of the appellants against the impugned Judgment dated 9th February, 2022 and decree dated 19th February, 2022 passed by the learned Civil Judge (Senior Division)-III, Giridih in Original (Title) Suit No.06 of 2007, whereby and whereunder the suit was dismissed.
3. The brief facts leading to this appeal are that the plaintiffs Shyam Kumar Gupta and Suraj Prasad Jaiswal has instituted a suit against Om Prakash Bhagat for specific performance of agreement to sale with these averments that an agreement was executed between plaintiffs and the defendant on 14th February, 2005 and it was agreed that 4 acre of land under Khata No.1 appertaining to Plot No.927 area 12 decimal, Plot No.928 area 3 decimal, Plot No.931 area 47 decimal, Plot No.933 area 1 acre 17 decimal and the area of Plot Nos.937 and 940 was to be ascertained after measurement Plot No.935 area 25 decimal and the Plot No.1090 area 59 decimal, Plot No.1092 area 9 decimal, Plot No.1006 area 32 decimal and land of Khata No.11 appertaining to Plot No.930 area 13 decimal, total area 4 acre of Mouza Koldiha, P.S. Giridih (Town), District Giridih and the details of the same are given in Schedule 'A' of the plaint as shown in the deed of agreement dated 14th February, 2005. It

was also agreed that the land as described in Schedule 'A' of this plaint was to be sold in consideration of Rs.37,45,833/- and on the very day, the plaintiffs had paid five lacs rupees as the earnest money to the defendant which was accepted by the defendant. It was also stipulated in the agreement to sale that on payment of rest consideration amount of Rs.32,45,833/-, the defendant shall execute and register a sale deed in regard to the land shown in the Schedule 'A' of the plaint. Subsequently, the defendant also received Rs.1 lac from the plaintiffs on 10th April, 2005. Apart from this payment, the defendant has further received Rs.1 lac from the plaintiffs on 8th April, 2006.

Thus, the balance amount which was to be paid was left Rs.30,45,833/-.

3.1 The deed of agreement was for a period of six months from the date of execution of agreement to sale i.e., 14th February, 2005. It was also agreed in that deed that the period will also be further extended up to six months on payment of 2% interest on principal amount.

3.2 It was also stipulated that the defendant shall get the land measured before execution of the sale deed and at the time of execution of sale deed defendant shall hand over the rent receipts and other related documents of the land to the plaintiffs.

3.3 The plaintiffs had always been ready and willing to perform their part of contract within the period stipulated in the deed of agreement.

3.4 The plaintiffs tendered the balance consideration amount to the defendant on 10th June, 2005 and 15th July, 2005 within a stipulated period of six months and requested to the defendant to execute and register sale deed but the defendant refused to receive the balance consideration and to execute the sale deed in favour of the plaintiffs either on the one pretext or the other. The legal notice was given by the plaintiffs through their counsel on 20th August, 2005 requesting defendant to perform his part of contract. Again, a legal notice was sent through their advocate on 29th September, 2005 to the defendant stating the readiness and willingness on the part of the plaintiffs to tender the balance amount of Rs.30,45,833/- and to perform his part of contract for execution of the sale deed in compliance of agreement to sale. Reply notice was issued by the defendant to plaintiffs on 9th October, 2006 and 5th October, 2005 on the wrong averments. As such there was no way out but to file this suit with the prayer for a decree of specific performance of agreement to sale directing the defendant to execute and register the sale deed in respect of suit land of Schedule 'A' of the plaint after receiving the balance amount of Rs.30,45,833/- and to deliver the possession of the land shown in Schedule 'A' to the plaintiffs. In failure to execute the sale deed by the plaintiffs, the sale deed be executed in favour of the plaintiffs by the Court. Another relief was also sought for a decree in favour of the plaintiffs directing the defendant to perform his part of contract as mentioned in the agreement to sale dated 14th February, 2005. The amendment was also sought in the plaint during pendency of the suit that the defendant has already sold 7 decimals out of 46 decimals in Plot No.937 and 2 decimals out of 40 decimals in Plot No.940 before the agreement to sale to Ram Chandra Gope. In that case the area of said Plot No.935 and 1006 be excluded from the total area of 4 acre of land in suit and the area of 7 decimals out of 46 decimals in Plot No.937 and 2 decimals out of 40 decimals in Plot No.940 be deducted from the total area in the suit land and

accordingly the land be transferred to the remaining area of 3.37 acre to the plaintiffs on receiving the consideration money from the plaintiffs.

4. The written statement was filed on behalf of the defendant with these averments that the suit of the plaintiffs is not maintainable, barred by law of limitation, barred of principles of waiver, estoppel and acquiescence, barred by provisions of Transfer of Property Act and also by the provision of Law of Contract since the land in suit was the immoveable property so there must be specific description of the property in suit, for lack of the same the plaint was not maintainable. The agreement to sale is also hit by the provisions of Section 29 of the Indian Contract Act, 1872 because the agreement to sale was uncertain in regard to the area and measurement of the land. Indeed, the agreement to sale which was signed by the responding defendant alone on 14th February, 2005 had never been executed in view of provisions of the Indian Contract Act, 1872. The defendant had been impressed by his cousin brother by giving the false promise, so he put the signature on agreement to sale and later on came to know in regard to the exact contents of the agreement to sale in regard to the land shown in the Schedule 'A' of the plaint which the responding defendant has never intention to sell. The plaintiffs and their henchmen more particularly the cousin brother of the defendant had also helped the plaintiffs in getting another rider regarding extension of time period only with intent to help the plaintiffs and to cause wrongful loss to the defendant. The property in suit is not identifiable in the agreement to sale itself, as such, the specific performance of the same cannot be enforced.

4.1 The land of Plot Nos. 937 and 940 were wrongly included in the agreement to sale, since these two plots 937 and 940 were also crossed and deleted by the defendant in the agreement to sale itself but the plaintiffs having ignored the deletion of those plots in the agreement to sale filed the instant suit for specific performance of contract in regard to Plot Nos.937 and 940 also. So far as the Plot Nos.935 and 1006 of Khata No.1 are concerned, same are not owned by the defendant. The defendant has no right, title or interest in these two Plot Nos.935 and 1006 of Khata No.1. As such the question of executing the agreement to sale of those plots does not arise. These two plots have been included in the agreement to sale by playing fraud. The said agreement was only signed by the defendant and the plaintiffs or their henchmen, namely, Suraj Prasad Jaiswal and Deepak Kumar @ Dullu having not put their signature on the said agreement on the pretext of executing fresh agreement and photocopy of the same was also supplied by them to the defendant. The agreement which has been annexed by the plaintiffs with the plaint for specific performance of contract, the same is in four pages. The description appearing in the two copies of the agreement will categorically crystalize the conduct of the plaintiffs and their henchmen. Hence, the provision of Section 20 of the Specific Relief Act is attracted against the plaintiffs. The plaintiffs are not entitled to any relief whatsoever claimed in the plaint. The agreement to sale is vague and ambiguous. As per alleged deed of agreement to sale the land was agreed to be sold for consideration of Rs.37,45,833/- out of which Rs.5 lacs was paid in advance. The said advance was paid on 15th October, 2004 under the oral agreement.

4.2 Before the date of agreement to sale, rest of the amount was left Rs.32,45,833/- which ought to have been offered but only Rs.1 lac is said to have been offered. The agreement was valid till 13th September, 2005 but it is only 29th September, 2005 when Advocate's notice is said to have been

issued by the lawyer Tripurari Prasad Buxi making offer to get the amount from the plaintiffs not offering payment itself. As such, the plaintiffs were not performing their part of contract. The agreement to sale was never drafted at the instance of the defendant. The fraud was committed by inserting the Plot Nos.1006, 937 and 940 in the agreement to sale. Since the plaintiffs have themselves violated the terms and conditions of the agreement to sale, so the advance money paid by them also stands forfeited and they are not entitled to any relief as claimed in the plaint, in view of, time is the essence of the contract. The agreement which was valid up to 13th September, 2005 was never extended by the defendant, not only this, the plaintiffs had also filed a criminal case being Giridih Town P.S. Case No.81 of 2007 under Sections 420, 467 and 468 of the I.P.C., wherein the plaintiffs had himself admitted that the agreement to sale dated 14th February, 2005 was illegal and fraudulent document. On such admission the plaintiffs are not entitled to get the decree for specific performance of the contract. In view of aforesaid, prayed to dismiss the suit.

5. The learned trial court in view of the pleadings and materials on records, framed the following issues :

I. Is the suit maintainable in its present form ?

II. Whether the plaintiff has cause of action for the present suit ?

III. Is the suit property valued and the court fee paid thereon is legal and correct ?

IV. Is the suit barred by law of limitation, estoppel, acquiescence, waiver and against the provisions of Specific Relief Act ?

V. Whether the plaintiff has paid Rs.7,00,000/- (Seven lacs) as advance amount to the defendant on different dates ?

VI. Whether the plaintiff was and is ready and willing to perform the part of the agreement ?

VII. Is the written agreement dated 14.02.2005 in between the plaintiff and the defendant is legal, valid and enforceable in law ?

VIII. Whether the plaintiff is willing and ready to perform part of the agreement dated 14.02.2005 ?

IX. To what relief or reliefs the plaintiff is entitled ?

6. On behalf of the plaintiffs in oral evidence examined P.W.-1 Shyam Kumar Gupta, P.W.-2 Deepak Kumar Jaiswal, P.W.-3 Birendra Prasad, P.W.-4 Suraj Prasad Jaiswal, P.W.-5 Tuplal Gope and P.W.-6 Tarkeshwar Prasad Sinha and in documentary evidence filed original agreement dated 14.02.2005 Ext.1, carbon copy of notice dated 20.08.2005 Ext.2, carbon copy of notice dated 29.09.2005 Ext.2/A, signature of witness Typist T.P. Sinha, Giridih on notice dated 20.08.2005

Ext.3, signature of witness Typist T.P. Sinha, Giridih on notice dated 29.09.2005 Ext.3/A, Postal receipt no.5186 Ext.4.

7. On behalf of the defendant in oral evidence examined D.W.-1 Om Prakash Bhagat and D.W.-2 Snehlika Bhagat and in documentary evidence filed photocopy of khatian of Khata No.47, Mauza Koldiha which was marked X for identification, reply of notice dated 6.10.2005 given by learned lawyer Kumar Sudhanshu Ext.A, postal receipt no.5107 Ext.B, reply of notice dated 9.10.2006 given by learned lawyer Kumar Sudhansu Ext.A/1, postal receipt no.5898 Ext.B/1, government

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rent receipt no.2223657 Ext.C, certified copy of order sheet dated 07.04.2007 of Giridih (T) P.S. Case No.81 of 2007 Ext.D, certified copy of arrest memo of Giridih (T) P.S. Case No.81 of 2007 Ext. E, certified copy of warrant of arrest of Giridih (T) P.S. Case No. 81 of 2007 Ext. F, certified copy of protest petition-cum-complaint dated 5.07.2007 of Giridih (T) P.S. Case No.81 of 2007 Ext.G and certified copy of Hon'ble High Court order relating to Cr.M.P. No.1708 of 2007 dated 13.08.2009 Ext.H.

8. The learned trial court after hearing the rival submissions of the parties and on the basis of oral and documentary evidence dismissed the suit of the plaintiffs.

9. Aggrieved from the impugned judgment and decree this appeal has been preferred on behalf of the plaintiffs/appellants on the ground that the impugned judgment passed by the learned trial court is bad in the eyes of law. The learned trial court has failed to consider that the agreement to sale dated 14th February, 2005, Ext.1 was duly proved by the plaintiffs. From the recital of the agreement itself, it is evident that the defendant himself has deleted Plot No.937 area 43 decimals and plot no.940 area 40 decimals and in the margin of the said agreement, the defendant himself has written "Plot No.937/940 " and put his signature and defendant did not choose to get the suit property measured as per terms

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and conditions of the agreement to sale. The learned trial court has also failed to consider that the defendant was bound by the terms and conditions of the agreement to sale and the said agreement was well enforceable in the eyes of law. The learned trial court has misconstrued the principles of consensus-ad-idem while deciding the issue relating to the essential element of contract. There was no ambiguity in the agreement to sale and the same was very much enforceable in the eyes of law. The learned trial court has also wrongly erred to hold the same to be void document. The learned trial court has wrongly applied the Sections 93 and 98 of the Indian Evidence Act, 1872 while dismissing the suit of the plaintiffs. The plaintiffs were always ready and willing to perform their part of contract and are still ready and willing for the same but the learned trial court had given a wrong finding while deciding the said issue against the plaintiffs. In view of above, prayed to allow this appeal and to set aside the impugned judgment passed by the learned trial court.

10. I have heard the learned counsel for the appellants, learned counsel for the respondent and perused the materials available on record.

11. For disposal of this appeal, following points of determination are being framed :-

I. Whether the agreement to sale dated 14th February, 2005 is enforceable in law ?

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II. Whether the plaintiffs were ready and willing to perform their part of contract and are still ready and willing to perform the same in compliance of the agreement to sale dated 14th February, 2005 ?

12. Point of Determination No.I :

The plaintiffs' case is that an agreement to sale was executed by the defendant in favour of plaintiffs on 14th February, 2005 in regard to the land, details of which is given at the foot of the plaint in consideration of Rs.37,45,833/-. The land in suit was 4 acres in area and rate was 15,500/- per katha. Rs.5 lacs was paid while executing the agreement to sale on 14th February, 2005 and rest of amount was to be paid on the date of execution of sale deed which was to be executed within a period of six months. Further if the said sale deed was not executed within six months, the same might be executed within further six months but 2% interest was payable on the total amount of the transaction. It is also the case of the plaintiffs that in the agreement itself it was stipulated that the land of certain plots was to be measured and after measurement of the same the sale deed was to be executed within the prescribed time. The plaintiffs have also paid Rs.1 lac on 14th April, 2005 after execution of agreement to sale and further Rs.1 lac was also paid on 8th April, 2006, as such, Rs.7 lacs has been paid to the defendant and the plaintiffs have performed their part of performance of the said agreement to

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sale but the defendant did not perform his part of performance as per stipulation of the agreement to sale. The plaintiffs also issued two notices to the defendant i.e., on 20th August, 2005 and 29th September, 2005. Both these notices were replied by the defendant with the wrong averments and resisted the specific performance of the said agreement to sale.

13. Per contra, it is the case of the respondent/defendant that an oral agreement had taken place between the plaintiffs and the defendant to sell the land and Rs.5 lacs was also paid to the defendant on 15th October, 2004. Subsequently, written agreement was executed on 14th February, 2005 and the alleged amount of Rs.5 lacs was not paid, rather it had been paid on 15th October, 2004. It is also the case of the defendant that though he had put his signature on the agreement to sale which

was brought by his cousin brother and relying upon his cousin brother without going through the contents of the said agreement to sale he had put his signature thereon. Later on, he came to know that in that agreement to sale, the Plot Nos.937 and 940 have also been included of which part area he had already transferred to one Ram Chandra Gope and thereafter he had deleted plot nos.937 and 940 of Khata No.1 from the said agreement and had put his signature thereon. Further the two plots of the said Khata No.1 i.e., 935 and 1006 were also mentioned in the said agreement. The said plots were not in ownership of the responding defendant, as such,

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the defendant was not authorized and entitled to transfer the same. Moreover, in the agreement itself, it is mentioned that after measurement of certain plots, the sale deed was to be executed. Indeed, the contents of the said agreement to sale were inserted therein by playing fraud upon the responding defendant. The said agreement to sale being uncertain was void and on the said agreement to sale, only the responding defendant had put his signature without going through the contents of the same having reposed trust upon his cousin brother, who had asked him to sign thereon. None of the plaintiffs had put their signature on the said agreement to sale even the witnesses had not put their signature in his presence. As such, the alleged deed dated 14th February, 2005 was not an agreement to sale in the eyes of law. It is also the admitted case of the defendant that further Rs.1 lac was also paid to him by the plaintiffs in regard to executing the sale deed in compliance of the agreement to sale. The plaintiffs have also filed a criminal case against the responding defendant in regard to the said land which was the subject matter of agreement to sale and allegations was made that the said agreement to sale was forged and was executed by playing fraud upon the plaintiffs. In criminal case, the defendant was sent to jail and after investigation, the I.O. had filed final report. Against the same protest petition was filed by the plaintiffs and the cognizance was taken by the court concerned for the offence

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under Sections 420, 467 and 468 I.P.C. inter alia along with other sections. The said order of cognizance was challenged by the responding defendant before this Court and the same was quashed. Now to the contrary, the plaintiffs has sought the specific performance of the very agreement to sale which shows that the plaintiffs has not come to seek the relief of specific performance with clean hands.

14. The agreement to sale which is the basis of the suit of the plaintiffs is Ext.1 of the Trial Court Record. From the very perusal of this agreement to sale (Ext.1), it is found that this agreement to sale is between Om Prakash Bhagat first party, who is the defendant in the suit and Shyam Kumar Gupta and Suraj Prasad Jaiswal second party, who are the plaintiffs in the title suit. The consideration of the land to be transferred is shown Rs.37,45,833/-. The period in which the sale deed is to be executed is six months and if after six months, the same is not executed it was to be executed in further six months and 2% interest was payable on the agreed amount. Rs.5 lacs shown to have paid on the date of agreement to sale. The details of property are shown 4-acre land parti gadha situated in mouza Koldiha, P.S. Giridih Nagar, District Giridih under Thana No.228 Khata

No.1, Plot Nos.927 area 12 decimals, 928 area 3 decimals, 931 area 47 decimals, 933 area 1 acre 17 decimals. Plot No. 937 area 43 decimals (has been deleted and signature of Om Prakash Bhagat is put thereon). Plot Nos.935

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area 25 decimals, 940 area 40 decimals (has also been deleted and signature of Om Prakash Bhagat is also thereon). Plot Nos.1090 area 59 decimals, 1092 area 9 decimals, 1006 area 32 decimals Khata No.11 Plot nos.930 area 13 decimals, total khata 2, total plots 11, total area 4 acre and boundaries of the same are shown thereof. In this very agreement to sale at the very top, where the total area of the land to be transferred is mentioned, it is mentioned thereon that the area may be less (kam bhi ho sakta hai) and signature of Om Prakash Bhagat is also thereon. Further in the very agreement to sale, it is also mentioned that plot nos.937 and 940, if some area is left same will be agreed to sale after measurement. The signature of Om Prakash Bhagat is also thereon.

14.1 From very perusal of the plaint, it is also found that in Schedule 'A', the details of the property in suit are given in which the Plot Nos.937 and 940 are also compromised and it is also mentioned in front thereof that area will be ascertained after measurement before execution and registration of the sale deed. Further in the details of the property shown the Plot No.935 area 0.25 acre and Plot No.1006 area 0.32 acre of Khata No.1 are also mentioned. As such the specific performance of the agreement in regard to the total land of 11 plot numbers, total area 4 acre is sought by the plaintiffs. Admittedly, on this agreement to sale, there is no signature of any of plaintiffs. This agreement to sale is in four pages and on each page there is signature of

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Om Prakash Bhagat giving the date 14th February, 2005 where there is deletion and addition, thereon is also the signature of Om Prakash Bhagat who is vendor of the land in suit and in last page of the said agreement to sale deed dated 14th February, 2005 there is signature of Duplal Gope, Clerk of Advocate and T.P. Sinha Giridih, the typist and signature of Sandeep Kumar Jaiswal and also on the 4th page there is signature of witness Birendra Prasad and on the third page there is signature of witness Vishnu Prasad Jaiswal and on the very first page there is also signature of witness Dipak Kumar Jaiswal. On this agreement to sale, there is signature of witnesses and the defendant Om Prakash Bhagat who is shown first party to transfer the land in suit.

15. On behalf of the plaintiffs to prove the execution of this agreement to sale, in view of Section 67 of the Indian Evidence Act, 1872 have been examined attesting witnesses P.W.-2 Deepak Kumar Jaiswal, P.W.-3 Birendra Prasad and P.W.-5 Tuplal Gope, the scribe of the agreement to sale and Clerk of the Advocate and P.W.-6 Tarkeshwar Prasad Sinha, the typist of the agreement to sale. All the four witnesses have stated that the agreement to sale dated 14th February, 2005 was executed by Om Prakash Bhagat in favour of Shyam Kumar Gupta and Suraj Prasad Jaiswal in regard to the land, details of which are given in the agreement to sale and total consideration was Rs.37,45,833/- Rupees 7 lacs was

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also paid by the Suraj Prasad Jaiswal and Shyam Kumar Gupta to Om Prakash Bhagat and rest of the amount was to be paid on the date of execution of sale deed. All these witnesses have stated that in their presence, Om Prakash Bhagat put his signature and they also put their signature in presence of the witnesses inter se and Om Prakash Bhagat as well. P.W.-2 Deepak Kumar Jaiswal and P.W.-3 Birendra Prasad both have also stated that after agreement to sale Rs.1 lac was paid in their presence and further Rs.1 lac was also paid in their presence to Om Prakash Bhagat by Shyam Kumar Gupta and Suraj Prasad Jaiswal. As such by producing all these witnesses, the execution and attestation of the agreement to sale has been proved by all these attesting witnesses in view of Section 67 of the Indian Evidence Act, 1872.

16. Further the plaintiff no.1 Shyam Kumar Gupta has examined himself as P.W.-1 and plaintiff no.2 Suraj Prasad Jaiswal has examined himself as P.W.-4. Both these witnesses have also corroborated the averments made in the plaint and also denied the averment of the defence case in the written statement of the defendant. They have stated that though they did not put their signature on the agreement to sale, yet the defendant Om Prakash Bhagat had agreed to sell the land in question in favour of the plaintiffs in consideration of Rs.37,45,833/- and Rs.5 lacs was paid by them on the date

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of agreement and further Rs.1 lac was paid on 10th April, 2005 and further Rs.1 lac was paid on 8th April, 2006 by them to Om Prakash Bhagat. It is also deposed by P.W.-1 and P.W.-4 that they had asked Om Prakash Bhagat to get the measurement of the land as per stipulation of the agreement to sale but he did not pay heed to them. They had also given notice to him twice and the same was responded with wrong averments. The notices dated 20th August, 2005 and 29th September, 2005 have been proved on behalf of the plaintiffs as Exts.2 and 2/A and the signature of Advocate on the notice have been proved as Exts.3 and 3/A. The postal receipt of the sending notice has been proved as Ext.4.

17. On behalf of the defendant in oral evidence examined D.W.-1 Om Prakash Bhagat and D.W.-2 Snehlika Bhagat.

18. D.W.-1 Om Prakash Bhagat in his statement had admitted the signature on the agreement to sale and has stated that his signatures were taken on the agreement to sale by his cousin brother Deepak Kumar @ Dullu and he had not perused the contents of the agreement to sale. Subsequently, he went through the contents of the agreement to sale. He also made correction thereon and deleted two plot nos.937 and 940 because he had already sold the land of those plots. It was also stated by him that if any land was left of those plots, the same shall be included after measurement of the land. He also deposed that the Plot Nos.935 and 1006 were not of him. He

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was not owner of them and the same has been wrongly included therein. Plot No.935 is shown Mahadev Mandir in the revenue records and owner of Plot No.1006 is someone else. He has also stated that prior to execution of agreement to sale, Rs.5 lacs had been paid to him by the plaintiffs and further Rs.1 lac was paid to him after execution of agreement to sale, as such, he has admitted that Rs.6 lacs which has been paid to him and the sale deed of the same could not have been executed on account of the uncertainty in regard to the identity, description, measurement, plot numbers and area of the land to be sold. He has also deposed that though the plaintiffs are seeking specific performance of this agreement to sale and they also proved the execution of the same by producing the attesting witnesses, yet in criminal case they have denied the execution of this agreement to sale and said that this agreement to sale was forged one. A criminal proceeding was initiated by both the plaintiffs against the responding defendant (Om Prakash Bhagat-D.W.-1). This witness has also proved the photocopy of Khatian which was marked 'X'. Reply of the notice dated 5th October, 2005 Ext.A, postal receipt Ext.B, reply of another notice dated 9th October, 2006 Ext.A/1, postal receipt of the same Ext.B/1. The revenue receipt in the name of Om Prakash Bhagat Ext.C. The arrest memo Ext.E and the warrant of arrest

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Ext.F, protest petition Ext.G and the order passed by this Court quashing the cognizance order Ext.H.

19. It is found that Plot No.935 is recorded as Mahadev Mandir and Plot No.1102 is in the name of Budhan Rai and others of Khata No.1 in Mouza Koldiha which shows that both these plots of Khata No.1 are not in the name of Om Prakash Bhagat. From the Ext.C revenue receipt, it is found that it is in the name of Om Prakash Bhagat Mouza Koldiha Giridih.

20. From the very perusal of the agreement to sale dated 14th February, 2005 which is the basis of the suit of the plaintiffs and from the oral evidence adduced on behalf of the parties, this fact is well proved that in the agreement to sale, the plot nos.937 and 940 which are shown as a part of land in the plaint had already been sold by Om Prakash Bhagat, the defendant much before execution of this agreement to sale and in the agreement itself the Om Prakash Bhagat has deleted these plot numbers and area as well and has endorsed that after measurement if any area of both plots i.e., 937 and 940 was left same will be added while executing the sale deed.

21. From the very agreement to sale, it is found that there is also endorsement of Om Prakash, first party that total area of the land 4 acre of all the 11 plots of Khata No.1 and 11 may be less after the measurement.

22. These two recitals in the agreement to sale itself makes this agreement to sale uncertain.

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23. Further the plot nos.935 and 1006 and their area has also been shown in the agreement to sale and same has also been comprised in the land in suit of which specific performance is sought by the

plaintiffs. In view of Khatiyani filed on behalf of the defendant Ext.X and as per admission of the plaintiffs these two plot numbers and their area do not belong to the defendant Om Prakash. Comprising these two plots and their area in the agreement to sale, makes this agreement to sale void in the sense that a person who is not entitled to transfer any land how the agreement of the same can be executed and consequently no specific performance of the same can be enforced to execute the sale deed.

24. So far as the nature of this agreement to sale is concerned, whether it is agreement to sale in the eyes of law, it would be relevant to give the certain statutory provisions of the Indian Contract Act, 1872.

"Section 2(e) - Every promise and every set of promises, forming the consideration for each other, is an agreement; Section 2(h) - An agreement enforceable by law is a contract.

Section 10. What agreement are contracts.--All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

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Section 29. Agreements void for uncertainty.-- Agreements, the meaning of which is not certain, or capable of being made certain, are void."

25. It would be also be relevant to give herein the certain statutory provisions of the Specific Relief Act, 1963 :

"Section 9. Defence respecting suits for relief based on contract.--Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contract.

Section 17.Contract to sell or let property by one who has no title, not specifically enforceable.--(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor-- Who, knowing himself not to have any title to the property, has contracted to sell or let the property; Who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property."

26. It would be also be relevant to reproduce herein the Section 7 of the Transfer of Property Act, 1882 which read as under :

"Section 7. Persons competent to transfer.--Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force."

27. The agreement to sale dated 14th February, 2005 is unregistered and in view of Section 18 of the Registration Act, 1908, registration of the same is optional.

28. Though on this agreement to sale there is no signature of the second party that is the purchaser, yet this agreement to sale is

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between the two parties the seller and the purchaser. Taking into consideration, the provisions of Sections 10 and 29 of the Indian Contract Act, 1872 together, this agreement to sale is not enforceable by law as a contract reason being, the recitals of this agreement to sale in regard to the details, identity and area and boundary of the property to be transferred are quite uncertain. It is mentioned that since the area of certain plots was to be measured of which part portion of the land had also been sold by the vendor much before the agreement to sale in regard to Plot Nos.937 and 940. Further the total area of all the plots was four acres; but it was mentioned that the same might be less after measurement. The plot nos.935 and 1006 along with their area have also been comprised in the agreement to sale. All these recitals shows that this agreement to sale in regard to the property to be transferred is quite uncertain and in view of Section 29 of the Indian Contract Act, 1872, this agreement to sale is void because the meaning of the subject matter of the property to be transferred is uncertain and in view of Section 10 of the Indian Contract Act, the agreement being expressly declared to be void under Section 29 of the Indian Contract Act is not a contract as per Section 10 of the Indian Contract Act. As such, the same is not

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enforceable agreement to be a contract as per Indian Contract Act, 1872.

29. Though the defendant has admitted his signature on the agreement to sale; but denied the contents thereof. He has resisted this agreement to sale on the very ground that this agreement being uncertain is void. In view of the analysis of the evidence on record as discussed hereinabove, the agreement to sale in question is found to be void.

30. The Hon'ble Apex Court in the case of Pawan Kumar Dutt and Another vs. Shakuntala Devi and Others reported in (2010) 15 SCC 601 at paragraphs 7 and 8 has held as under :

"7. But the position in the present case is different; that a portion out of the total larger extent was agreed to be sold, but, without specification of the area agreed to be sold. It is clear from the suit agreement that no boundaries of the suit property which was sold are specified in the agreement. It is not clear from what point the area is to be measured. It is also not clear that these 4 bighas 2 biswas is a portion of the land situated in the middle of the total land or in one portion or at the extreme end or at a particular place, in other words, there is no clear identity of the property agreed to be sold. The courts are not expected to pass a decree which is not capable of enforcement in the courts of law. If the argument of the learned counsel for the appellants is to be accepted and if a decree is to be granted for specific performance, without identification of the suit property, it will not be possible to enforce such a decree.

8. This Court, in Nahar Singh v. Harnak Singh in para 5, has also taken a view that if the property itself cannot be identified, the relief of specific performance cannot be granted."

31. The Hon'ble Apex Court in the case of Vimlesh Kumari Kulshrestha vs. Sambhajirao and Another reported in

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(2008) 5 SCC 58 at paragraphs 23, 24 and 25 has held as under :

"23. There is no dispute with regard to the aforementioned legal proposition. However, we have not been called upon to construe an agreement entered into by and between two businessmen. The maxim, certum est quod certum reddi potest instead of being of any assistance to the appellant, runs counter to her submission. It means that is certain which can be made certain. In relation to "uncertainty" it is stated:

"The office of the habendum in a deed is to limit, explain, or qualify the words in the premises; but if the words of the habendum are manifestly contradictory and repugnant to those in the premises, they must be disregarded. A deed shall be void if it be totally uncertain; but if the King's grant refers to another thing which is certain, it is sufficient; as, if he grants to a city all liberties which London has, without saying what liberties London has.

An agreement in writing for the sale of a house did not describe the particular house, but it stated that the deeds were in the possession of A. The Court held the agreement sufficiently certain, since it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A, and,

consequently, the house might easily be ascertained, and *id certum est quod certum reddi potest*.

Again, the word 'certain' must, in a variety of cases, where a contract is entered into for the sale of goods, refer to an indefinite quantity at the time of the contract made, and must mean a quantity which is to be ascertained according to the above maxim."

24. Reference to the said legal maxim, in our opinion, is not apposite in the facts and circumstances of this case. By reference to the boundaries of the premises alone, the description of the properties agreed to be sold did not become certain. For the purpose of finding out the correct description of the property, the entire agreement was required to be read as a whole. So read, the agreement becomes uncertain.

25. An agreement of sale must be construed having regard to the circumstances attending thereto. The relationship between the parties was that of the landlord and tenant. The appellant was only a tenant in respect of a part of the premises. It may be that the boundaries of the house have been described but a plan was to be a part thereof. We have indicated hereinbefore that the parties intended to annex a plan with the agreement only because the description of the properties was inadequate. It is with a view to make the description of the subject-matter of sale definite that the plan was to be attached. The plan was not even prepared. It has not been found that the sketch of map annexed to the plaint conformed to the plan which was to be made a part of the agreement for sale. The agreement for sale, therefore, being uncertain could not be given effect to."

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32. In view of aforesaid discussions as made hereinabove Point of Determination No.I is decided against the appellants/plaintiffs and in favour of the respondent/defendant.

33. Point of Determination No. II :

On behalf of the appellants/plaintiffs, it has been stated that the agreement to sale in question is admitted to the defendant. The defendant has admitted his signature on the agreement to sale. Though he has denied the contents of the same, yet receiving further payment in compliance of the agreement to sale shows that he admitted the agreement to sale. Certainly, in the agreement to sale there are conditions that after measurement the sale deed was to be executed. The area of the land in suit might be less and the area of certain plot numbers be added after measurement. The plaintiffs had always been ready and willing for the measurement of the same as per stipulation of the agreement to sale and they have also given two notices to the defendant which have been proved on behalf of the plaintiffs which shows that the plaintiffs were always ready to perform their part of contract. The uncertainty which lies in agreement, the same might have been removed, had the defendant been willing to perform his part of contract. As such, the plaintiffs cannot be said to be at fault in getting the sale deed executed in compliance of the agreement to sale in

question.

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34. On behalf of the defendant/respondent, it has been submitted that since the agreement to sale was itself uncertain as to what property, what area of land of what plot number was to be sold and the agreement to sale being void on account of the uncertainty, the same was not enforceable in the eyes of law even if there is readiness and willingness on the part of the plaintiffs, same has no significance.

35. On behalf of the plaintiffs P.W.-1 Shyam Kumar Gupta and P.W.-4 Suraj Prasad Jaiswal have stated that they had always been ready and willing to get the sale deed executed in compliance of the agreement to sale as per stipulation contained in the agreement to sale and had been thoroughly asking the defendant to get the land measured, so that the sale deed could have been executed. Certainly, from the evidence on record, on behalf of the plaintiffs there is readiness and willingness as per provisions of Section 16(C) of the Specific Relief Act. The same fact has been pleaded by the plaintiffs in the plaint and evidence has also been adduced to that effect by the plaintiffs but the agreement to sale itself being void in view of Section 29 read with Section 10 of the Indian Contract Act being not enforceable in the eyes of law, the readiness and willingness on the part of the plaintiffs cannot help the plaintiffs in getting the relief of the specific performance of the agreement to sale in their favour.

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Accordingly, the Point of Determination No.II is disposed of.

36. In view of the facts and circumstances of the suit in question, it is well evident that the agreement to sale in question was executed by the defendant/respondent Om Prakash Bhagat. As per admission of the defendant he had received Rs.5 lac prior to the agreement to sale and Rs.1 lac further he had received after execution of the agreement to sale. Since the defendant has opposed the specific performance of this agreement to sale on the ground that this agreement to sale being void, the specific performance of the agreement to sale cannot be enforced; but at the same time, the benefit which the defendant/respondent has taken under this agreement, as he had received total Rs.6 lacs and he is liable to pay the same as per the provision of Section 33 of the Specific Relief Act. Though as per plaint case, Rs.7 lacs was paid and only oral evidence has been adduced on behalf of the plaintiffs to this effect. There being no documentary evidence in regard to payment of the said amount in view of the admission of the defendant/respondent himself, who has rebutted the oral evidence adduced on behalf of the plaintiffs. The defendant has fairly admitted that he has received only Rs.6 lacs in regard to the agreement to sale in question.

37. Further in the agreement to sale, the plot nos.935 and 1106 to which the vendor Om Prakash was not authorized to transfer

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and has no title thereof of the same, no specific performance of the same can be enforced in view of Section 17 of the Specific Relief Act read with Section 7 of the Transfer of Property Act. Since it is settled principle of law that no person can transfer a better title than he himself has. In view of two plots and their area being comprised in the agreement in question, the agreement was void in itself in view of Section 17 of the Specific Relief Act read with Section 7 of the Transfer of Property Act and Section 10 of the Indian Contract Act.

38. Section 33 of the Specific Relief Act, 1963 provides as under :

"33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.--(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require. (2) Where a defendant successfully resists any suit on the ground--

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby."

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39. Section 65 of the Indian Contract Act, 1872 provides as under :

"65. Obligation of person who has received advantage under void agreement, or contract that becomes void.--When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

40. Since the plaintiffs in the plaint in itself has not sought the alternate relief for refund of the earnest money or the further amount so paid, the Court cannot give direction for refund of the said amount to the plaintiffs/appellants in view of Section 22(2) of the Specific Relief Act, 1963.

41. Section 22 of the Specific Relief Act, 1963 provides as under :

22. Power to grant relief for possession, partition, refund of earnest money, etc.--(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for--

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-

section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief. (3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

42. In view of discussions made hereinabove and keeping in view the settled legal proposition of law as held by the Hon'ble Apex

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Court, this Court is of the considered view that the impugned judgment and decree passed by the learned trial court bears no infirmity and illegality and this appeal deserves to be dismissed.

43. Accordingly, this first appeal is, hereby, dismissed and the impugned judgment and decree is, hereby, affirmed.

44. Pending interlocutory application(s), if any, also stands dismissed.

(Subhash Chand, J.) Jharkhand High Court, Ranchi Dated, the 22nd February, 2024.

Rohit / A.F.R.