

From The Judgment And Decree Dated ... vs Sri Binoyendranath Banerjee (Dead) on 25 October, 2013

Author: B.K. Patel

Bench: B.K. Patel

HIGH COURT OF ORISSA: CUTTACK.

F.A. NO.185 of 1997

From the judgment and decree dated 17.5.1997 passed by Shri G.C.Panigrahi, Civil Judge (Senior Division), Baripada in T.S.No.103 of 1994.

Durga Prasad Agarwalla and another Appellants

- Versus -

Sri Binoyendranath Banerjee (dead)
after him Ranjan Banerjee and others Respondents

For Appellants : M/s. A.Mukherjee, Senior Advocate,
G. Mukherjee, P. Mukherjee,
B. Mishra, Miss. J. Rath
& A.C. Pradhan

For Respondents : M/s. K.N. Parida, M. R. Mishra,
R.K. Mohanty, N.C. Rout,
A. Tripathy
M/s. B. Pati, S. Gupta
M/s. P.K. Nanda, L.B.M. Chand,
Mr. P.K. Nanda &
Mr. Manoj Kumar Mishra,
Senior Advocate

PRESENT:

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of hearing - 5.7.2013 :: Date of judgment - 25.10.2013

B.K. PATEL, J.

Plaintiffs in T.S.No.103 of 1994 are in appeal against the judgment and decree dated 17.5.1997 by which learned Civil Judge (Senior Division), Baripada, while rejecting plaintiffs' prayer for specific performance of contract of sale Ext.3, decreed the suit in part and directed refund of earnest money of Rs.70,000/- with pendente lite and future interest @ 6 per cent per annum from defendants 1 to 5.

2. T.S.No.103 of 1994 is essentially a suit for specific performance of contract by defendants 1 to 11 on receiving balance consideration amount. In the alternative, a prayer has been made that in case agreement for sale Ext.3 is found valid to the extent of share of defendant nos. 1 to 5 only, decree for

specific performance of contract be passed to that extent in respect of 2/5th of the suit land on receipt of proportionate balance consideration amount.

3. The suit land, as described in Scheduled 'A' to the plaint, originally belonged to late Surendranath Banerjee who was governed by Dayabhag School of Hindu Law. On his death on 3.7.1980 the suit land devolved on his two sons defendant no.1 and late Soumendra Banerjee, and three daughters defendants 6, 7 and 8. Late Soumendra died leaving behind his widow defendant no.2, son defendant no.3 and two daughters defendant nos. 4 and 5. Late Surendranath Banerjee had leased out the suit land to M/s Esso Eastern Inc. by entering into a registered lease deed dated 15.12.1973. Subsequently, M/s Esso Eastern Inc. was taken over by defendant no.12 M/s Hindustan Petroleum Corporation Limited. Plaintiffs along with their partners are running a petrol pump over the suit land as dealer under defendant no.12.

4. It is also not disputed that defendant nos.6 to 8 executed unregistered power of attorney Ext.1 dated 30.12.1982 in respect of immovable properties in favour of defendant no.1. Power of attorney Ext.1 has been admitted into evidence and marked Ext.E also on behalf of the defendants. There was partition among the legal heirs of late Surendranath Banerjee in terms of registered partition deed Ext.6/a dated 17.2.1988. Thereafter defendant no.1 and late Soumendra entered into agreement for sale dated 6.6.1993 Ext.3 with the plaintiffs in respect of the suit land for total consideration of Rs.5,70,000/- and accepted Rs.70,000/- towards earnest money or advance consideration. Also admittedly, late Soumendra along with defendant nos.1, 6, 7 and 8 executed registered sale deed Ext.C dated 27.9.1993 in respect of the suit land for purported consideration amount of Rs.4,20,000/- in favour of defendant nos.9 to 11.

5. Plaintiffs' case is that by virtue of authority under the power of attorney Ext.1 executed by late Soumendra as well as defendant nos. 6 to 8, defendant no.1 executed agreement for sale Ext.3 along with late Soumendra and received advance consideration money of Rs.70,000/- as per terms of Ext.3. Defendant no.1 and late Soumendra took the responsibility of procuring presence of their sisters defendants 6 to 8 for execution and registration of the sale deed. It was also stipulated in Ext.3 that the entire exercise of procuring attendance of defendants 6 to 8 as well as execution and registration of the sale deed would be completed within three months and that the plaintiffs would be intimated ten days before arrival of defendants 6 to 8. On execution of Ext.3 the suit land was symbolically delivered to the plaintiffs in their individual capacity, they being in possession over the same in their capacity as dealer under defendant no.12. It is further pleaded that the plaintiffs were given to understand by defendant no.1 and late Soumendra that their sisters having executed power of attorney in favour of defendant no.1 there would be no difficulty in executing sale deed and both the brothers also referred to registered deed of partition Ext.6/a dated 17.2.1988 among the brothers and sisters. Plaintiffs were told that by virtue of power of attorney Ext.1 defendant no.1 has been authorized also to collect rent on behalf of his brothers and sisters. Since the date of execution of Ext.3 plaintiffs were all along ready and willing to perform their part of the contract to pay balance consideration amount and get the sale deed executed and registered. However, on one pretext or other, execution of sale deed was deferred by defendant no.1 and late Soumendra. Therefore, plaintiffs issued registered notices to them as they had taken responsibility of getting the sale deed executed and registered after procuring the presence of their sisters. However, defendant no.1 and

late Soumendra did not receive the notice being fully aware of the contents thereof. On the other hand, defendant no.1, late Soumendra and defendant 6 to 8 executed sale deed Ext.C on 27.9.1993 in favour of defendants 9 to 11 though plaintiffs had issued registered notice Ext.17 dated 23.9.1993 to the purchasers and given intimation Ext.7 to the District Registrar apprising them of existence of Ext.3. It is pleaded that such notice had been received by defendant no.9 on 25.9.1993. It is averred that since defendants 9 to 11 purchased the suit land being fully aware of existence of agreement for sale Ext.3, they are bound by the same as they were not bona fide purchasers of the suit land without notice. Having got the sale deed Ext.C executed in their favour, defendants 9 to 11 made attempts to trespass into the suit land by breaking boundary wall and erecting temporary shed towards north-east corner of the suit land. In such circumstances, plaintiffs filed the suit.

6. Separate written statements, adopting substantially similar stands, were filed by the defendant no.1, the defendant nos.6 to 8 and the defendant nos. 9 to 11.

7. While denying the plaint averments it is pleaded by defendant no.1 that after the expiry of lease period on 30.11.1991, defendant no.12 no more continued as tenant. Defendant nos.6 to 8 had never agreed for sale of the suit land to the plaintiffs. Consequently, agreement for sale Ext.3 failed. Also plaintiffs were not ready and willing to perform their part of the contract. Defendant no.1 admits the sale in favour of defendant nos. 9 to 11 and pleads symbolical delivery of possession of suit land to them. It is pleaded that no notice was served on him. It is asserted that plaintiffs are not entitled for specific performance of contract since agreement for sale was incomplete and unenforceable. Claim of plaintiffs for specific performance of contract in respect of 2/5th share is also resisted on the basis of the pleading that the defendant no.1 and his brother late Soumendra never agreed to sell their shares. According to defendant no.1, after refusal of defendant nos. 6 to 8 to execute sale deed in favour of plaintiffs, late Soumendra returned advance amount of Rs.70,000/- with interest of Rs.4000/- in the shape of a cheque with covering letter dated 24.9.1993 but the plaintiffs refused to receive the same. It is also pleaded that on 14.4.1993 oral agreement was arrived at between defendant no.1, late Soumendra and defendant nos. 6 to 8 on the one hand, and defendant nos. 9 to 11 on the other. According to defendant no. 1 on execution of partition deed Ext.6/a in the year 1988, all the documents including power of attorney got cancelled. The partition deed provided that until final demarcation was made, parties were prohibited from transferring their share and in case of transfer by any co- sharer there would be right of preemption in favour of others. It is further asserted that power of attorney Ext.1 was only for the purpose of collecting rent and to deal with lease in favour of defendant no.12. It is asserted that the power of attorney was specifically cancelled by endorsement Ext.E/1 dated 18.10.1991 made thereon. It is also pleaded that on 12.11.1991 all the co-sharers sent a registered letter to defendant no.12 to give vacant delivery of possession of the suit land.

8. Defendant nos. 6 to 8 have denied the plaint averments including factum of execution of power of attorney Ext.1. It is pleaded that they never authorized defendant no.1 and late Soumendra to enter into any agreement for sale. According to them, defendant no.1 was authorized only to collect rent and to manage the property. It is alleged that agreement for sale Ext.3 was created by the plaintiffs. It is asserted by these defendants also that power of attorney was revoked by endorsement Ext.E/1 dated 18.10.1991 and that sale deed Ext.C executed in favour of defendant nos. 9 to 11 is genuine.

9. Defendant nos. 9 to 11 claim in their written statement to be bona fide purchasers of the suit land pursuant to an oral contract dated 14.4.1993. Defendant nos. 6 to 8 along with defendant no.1 and late Soumendra executed registered sale deed Ext.C in their favour and delivered symbolic possession of the suit land. It is pleaded that after receipt of notice regarding Ext.3 from the plaintiffs, defendant no.9 made enquiry. However, defendant no.1 and defendant no.5 gave out that there has been no complete contract for sale whereas defendant nos. 6 to 8 expressed complete ignorance regarding the same. In such circumstances, plaintiffs' notice was ignored. These defendants too plead that power of attorney in favour of defendant no.1 was revoked by endorsement Ext.E/1.

10. On the basis of rival contentions the following issues were settled.

- (I) Is the suit maintainable as framed?
- (II) Have the plaintiffs cause of action to bring the suit?

(III) Is the suit had for mis-joinder of parties and the defendant nos. 6 to 8 and 12 necessary and proper parties to the suit?

- (IV) Is the suit barred by estoppel, waiver and acquiescence?
- (V) Is the deed of agreement for sale dt.6.6.93 executed by defendant no.1 and late Soumendra

for themselves and on behalf of defendant nos. 6 to 8 valid and are the plaintiffs entitled to get a decree for specific performance of contract on the strength of the same?

- (VI) Whether defendant nos.9 to 11 entered into any oral contract with defendant no.1 Late Soumendra and defendant nos. 6 to 8 for purchase of the suit land?

- (VII) Is the sale deed executed by defendant no.1, Late Soumendra and defendant nos. 6 to 8 in favour of defendant nos.9 to 11 valid and binding on plaintiffs?

- (VIII) Are the plaintiffs entitled to the shares of defendant no.1 and late Soumendra as specified in Schedule "B" of the plaint as per the registered partition deed dated 17.2.88?

- (IX) Whether defendant nos. 9 to 11 were aware of the deed of agreement for sale before their purchase and if they purchased without notice of the plaintiffs?

- (X) Are the plaintiffs entitled to a decree for refund of

the earnest money of Rs.70,000/- with interest
thereon ?

- (XI) Have defendant nos. 9 to 11 trespassed into the
suit land and put a temporary shed on a portion

of the suit land on 25/26.12.94 after institution of the suit?

(XII) To what other relief or reliefs, if any, the plaintiffs are entitled?

11. In order to substantiate their case plaintiffs examined 17 witnesses including plaintiff no.1 as P.W.15 and plaintiff no.2 as P.W.16 and also placed reliance on documents marked Exts. 1 to 46. On the other hand, defendants examined 5 witnesses including defendant no.6 as D.W.4 and defendant no.9 as D.W.5 and placed reliance on the documents marked Exts. A to P. It also appears that the report of the handwriting expert with regard to revocation endorsement Ext. E/1 was marked Ext.C-1 as a piece of court exhibit upon refusal of defendant nos. 9 to 11 to exercise right to cross-examine the handwriting expert.

Also in course of hearing of this appeal public documents marked Exts. 47 and 48 were admitted into evidence on behalf of plaintiffs-appellants, and Exts.Q & R were admitted into evidence on behalf of defendants-respondents 9 to 11 in response to applications filed under Order 41 Rule 27 of the C.P.C.

12. On appraisal of pleadings, contentions and materials on record, the trial court arrived at the following findings:

- (i) Late Soumendra and defendant nos. 6 to 8 had executed power of attorney Ext.1 in favour of defendant no.1;
- (ii) Defendant no.1 and late Soumendra had executed agreement for sale Ext.3 in favour of the plaintiffs;
- (iii) Plaintiffs were ready and willing to perform their part of the contract;
- (iv) Endorsement of revocation of power of attorney Ext.E/1 is not genuine and has been forged;
- (v) There was no oral agreement to sell the suit property between defendant no.1, late Soumendra and defendant nos. 6 to 8 on the one hand and defendant nos. 9 to 11 on the other;
- (vi) Defendant nos. 9 to 11 had received notice Ext.17 issued by the plaintiffs regarding existence of prior agreement for sale Ext.3;

- (vii) Agreement for sale Ext.3 contemplated that the defendant no.1 and late Soumendra would procure willingness of their sisters defendant nos. 6 to 8 for sale of the suit property to the plaintiffs;
- (viii) Power of attorney was impliedly revoked upon execution of partition deed Ext.6/a among the defendant no.1, late Soumendra and defendant nos. 6 to 8;
- (ix) Agreement for sale Ext.3 had not been executed by defendant no.1 as power of attorney holder of defendant nos. 6 to 8 and the same is not binding on them;
- (x) Equitable discretionary relief of specific performance of contract cannot be granted to the plaintiffs even in respect of 2/5th share of defendant no.1 and late Soumendra as the entire suit property is the subject matter of one tenancy in favour of defendant no.12; and
- (xi) Plaintiffs are entitled to refund of advance consideration amount from defendant nos. 1 to 5.

13. Sri Ashok Mukherjee, learned Senior Advocate appearing for the appellants submitted that it is obvious from the trial court judgment that most of the findings which are very vital were answered in favour of the plaintiffs. However, the entire balance tilted in view of adverse findings with regard to material issue no. (V) and also with regard to finding on issue no. (VIII) relating to alternative prayer for specific performance of contract for 2/5th share of respondent-defendant no. 1 and late Soumendra.

14. Sri Mukherjee, learned Senior Counsel strenuously contended that findings with regard to issue no. (V) against the plaintiffs being result of gross misappreciation of recitals of power of attorney Ext. 1 as well as agreement for sale Ext. 3 and also of error of record, are not sustainable. It was argued that execution of neither Ext. 1 nor Ext. 3 by the purported executants is in dispute. Recitals of power of attorney Ext. 1 clearly indicate that all other co-sharers by executing the power of attorney authorised defendant no. 1 to sell, or to execute any agreement or sale deed and to take all necessary steps to get such documents registered. Section 2 of the Power of Attorney Act makes it clear that donee of a power of attorney can execute any instrument in and with his name and signature and every such instrument shall be as effectual in law as if it had been executed or done by the donee in the name, and with the signature of the donor thereof. Defendant no. 1 having executed agreement for sale Ext. 3 containing recitals that the sisters had authorised him for sale, absence of specific reference of power of attorney Ext. 1 in agreement for sale Ext. 3 is of no consequence in view of provision under Section 2 of the Power of Attorney Act. Agreement for sale Ext. 3 is as

effectual in law as if it had been executed by defendant no. 1, the donee of power of attorney on behalf of his brother Soumendra and sisters defendant nos. 6 to 8. Execution of agreement for sale Ext. 3, when power of attorney Ext. 1 was in existence, amounts to execution of agreement for sale Ext. 3 by all the signatories to the power of attorney.

15. Sri Mukherjee, learned Senior Advocate would also contend that trial court has mis-quoted and misconstrued the agreement for sale Ext. 3. Agreement for sale Ext. 3 nowhere stipulates that the sisters had no 'consent' for sale or that defendant no. 1 and late Soumendra undertook to obtain 'consent' or 'willingness' of their sisters for effecting sale. Read as a whole, agreement for sale Ext. 3 provides that the sale deed would be executed by all the legal heirs within three months. In Ext. 3, it has been specifically mentioned that the three sisters had agreed to sell the property and authorized the executants defendant no. 1 and late Soumendra to finalise the deal. It was argued that defendant no. 1 could himself alone have executed agreement for sale and also the sale deed. However, late Soumendra also joined defendant no. 1 as a signatory to Ext. 3. Moreover, it was stipulated that all the owners would execute the sale deed. Such stipulations may be unusual but do not at all effect the legality or authenticity of agreement for sale Ext. 3 executed by defendant no.1 in whose favour a valid power of attorney was executed by other co- sharers. In order to allay any confusion and ensure certainty, it was also clearly stipulated in Ext. 3 that defendant no. 1 and other co-sharers would give ten days prior intimation to the plaintiffs to get ready with balance consideration amount before the execution and registration of the sale deed. Trial court has misconstrued the stipulation regarding time frame for informing the plaintiffs ten days in advance to be stipulation regarding obtaining of willingness or consent of the sisters for sale.

16. Sri Mukherjee, learned Senior Advocate further submitted that there is no dispute with the legal proposition that a power of attorney can be revoked either expressly or by implication. In the present case, defendants never pleaded that there was express or implied revocation of the power of attorney by any subsequent conduct or circumstance. Power of Attorney Ext. 1 was admitted into evidence by defendants themselves as Ext. E and it was contended that the power of attorney has been expressly revoked by endorsement Ext. E/1 made therein in the year 1991. However, on being sent for examination, in the report of the handwriting expert marked Ext. C-1 it was pointed out that signature of late Soumendra under Ext. E/1 had been forged. Report of the handwriting expert Ext. C-1 has been admitted into evidence without objection as defendants did not want to cross-examine the handwriting expert. It was argued that in the original written statement, none of the defendants had pleaded regarding express revocation of power of attorney in the year 1991. Such plea was taken in an additional written statement. Trial court has come to a categorical finding that revocation endorsement Ext. E/1 is forged. It was contended that the attempt on the part of defendants to set up the plea express revocation on the basis of forged endorsement Ext. E/1 would itself go to show that defendants themselves treated the power of attorney to be in existence and operation till 1991. So there is no substance in the contention that partition deed Ext.6/a contains recitals which have the effect of cancellation of the power of attorney by implication. Admittedly, late Soumendra died in the year 1994. Belated plea of express revocation by endorsement Ext. E/1, which has been found to be forged, would lead to the only inference that the defendants resorted to forgery and made a fugitive attempt to make out a false case of express revocation only after the death of late Soumendra when late Soumendra was not available to append his signature in Ext. E/1. It was

further contended that on the face of it the sale deed Ext.C executed in favour of defendant nos.9 to 11 is a tainted and suspect instrument in view of the fact that though agreement for sale Ext.3 was executed in favour of the plaintiffs for a consideration amount of Rs.5,70,000/-, defendant nos.9 to 11 claim to have purchased the suit land for Rs.4,20,000/- only.

17. Learned Senior Advocate also vehemently contended that non- examination of defendant no. 1, the donee of power of attorney and executant of agreement for sale, who supported the other defendants, as a witness by the defendants calls for a strong adverse inference against the case of the defendants, in the absence of his version regarding the circumstances under which the documents were signed and implications thereof. Evidence of any other defendant examined in court has no relevance. Defendants have not offered any explanation for non- examination of defendant no. 1.

18. Sri Mukherjee, learned Senior Advocate would also argue that defendants having resorted to forgery and fraud, are not entitled to any relief. Learned Civil Judge (Senior Division), Baripada ought to have rejected the case of the defendants in toto instead of accepting the new case of implied revocation of the power of attorney.

19. Learned Senior Advocate appearing for the appellants further argued that defendants never questioned execution of power of attorney Ext. 1. Having admitted the execution thereof, the defendants pleaded express revocation in the year 1991. At their instance, power of attorney Ext. 1 was admitted into evidence as Ext. E. However, in course of hearing of this appeal, plaintiffs assail admissibility of power of attorney on technical grounds though such plea was never taken in the written statement. Such attempt itself indicates that the defendants are in no position to defend their conduct.

20. In course of his argument, Sri Mukherjee learned Senior Advocate placed reliance on provisions under Sections 1(A) and 2 of the Power of Attorney Act as well as Sections 182, 186, 226, 231 and 233 of the Indian Contract Act in support of his contention that contract executed by an agent can be enforced by other contracting party even if other contract party does not know that the executant was an agent or even though the identity of the principal is not disclosed.

21. In reply, Sri Manoj Kumar Mishra, learned Senior Advocate appearing for respondents-defendant nos. 9 to 11 supported the impugned judgment so far as it relates to findings of the trial court rendered against the plaintiffs. It was contended that the learned Civil Judge (Sr. Division), Baripada rightly held that the power of attorney Ext. 1 was impliedly revoked upon execution of partition deed Ext. 6/a in the year 1988. It was argued that the finding of the trial court that agreement for sale Ext. 3 contemplated that defendant no. 1 and late Soumendra would procure the willingness of their sisters for sale of suit property to the plaintiffs is unassailable and the sisters having denied to give consent for sale of suit land to the plaintiffs, there is no infirmity in the finding that agreement for sale Ext. 3 is incomplete contract which is not binding on defendant nos. 6 to 8. In course of his argument, Sri Manoj Kumar Mishra, learned Senior Advocate sought to assail admissibility of power of attorney Ext. 1 by contending that the document has not been stamped as per requirement under Section 35 of the Indian Stamp Act, 1899. Upon an extensive reference to evidence of witnesses examined on behalf of the plaintiffs as well as defendants, more particularly

that of P.Ws. 4, 5, 15 and 16 as well as D.Ws. 4 and 5 it was argued that there is absolutely no basis to conclude that agreement for sale Ext. 3 was executed by defendant no.1 in exercise of authority granted to him under power of attorney Ext. 1. It was urged that in view of categorical assertion of defendant no.6 examined as D.W. 4 that the sisters had not authorised execution of agreement for sale by defendant no. 1, the agreement for sale is a void document. It was also argued that in the absence of consent of the sisters, agreement for sale Ext. 3 amounted to contingent contract dependant on uncertain future event of obtaining the consent of the sisters within the meaning of Sections 31 and 32 of the Indian Contract Act and, therefore, is void. Also, in the absence of consent of the sisters agreement for sale was not concluded contract. Defendant no. 1 and late Soumendra having cancelled the agreement for sale by remitting the advance consideration amount, plaintiffs have no cause of action to enforce the agreement for sale.

22. Sri Mishra, learned Senior Advocate would also submit that Section 20 of the Specific Relief Act provides that jurisdiction to declare specific performance of contract is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. In the present case, defendant nos. 9 to 11 have purchased the suit land way back in the year 1993. Their status as landlord of the defendant no. 12 Company has been recognized by the Hon'ble Supreme Court in the order under Ext. Q pursuant to which defendant no. 12 filed undertaking to pay rent to defendant nos. 9 to 11 till the end of November, 2013 and to vacate the suit land thereafter. Defendant nos. 9 to 11 have paid good consideration amount for purchasing the suit land. In the meanwhile, there has been exorbitant rise in the market value of land. In such circumstances, learned Civil Judge (Senior Division) rightly refused to grant the relief of specific performance of contract in respect of 2/5th share of defendant no. 1 and late Soumendra.

23. It was also contended on behalf of defendants that non- examination of defendant no. 1 is inconsequential in view of specific pleading and evidence of defendant no. 6 examined as D.W. 4 that the sisters had not given consent for execution of agreement for sale by defendant no. 1.

24. It was also argued that the absence of pleading by the defendants with regard to revocation of power of attorney is not material as defendants specifically denied that power of attorney was executed authorising defendant no. 1 to execute the agreement for sale.

25. Sri Mishra, learned Senior Advocate also in course of his argument contended that the trial court having not given categorical finding that revocation endorsement Ext. E/1 is a forgery, the report of handwriting expert Ext. C-1 cannot be utilised for any purpose. The power of attorney Ext. 1 is not a valid document. It was argued that defendant no. 1 was neither the agent of late Soumendra and defendant nos. 6 to 8 nor late Soumendra and defendant nos. 6 to 8 were principal within the meaning of Indian Contract Act and the Power of Attorney Act.

26. It was also contended on behalf of the defendants that provisions under Sections 182, 186, 226, 231 and 233 of the Indian Contract Act relied upon by Sri Mukherjee, learned Senior Advocate are of no help to the plaintiffs.

27. Reliance was placed on decisions of the Hon'ble Supreme Court and different High Courts on behalf of the appellants as well as the respondents.

28. In view of the nature of rival pleadings and contentions as well as in view of findings of the trial court the most important question which is required to be addressed to is the validity and implications of the two documents Exts. 1 and 3. According to the defendants the power of attorney executed in the year 1982 was no longer in force when agreement for sale Ext. 3 was executed on 6.6.1993.

29. When the language of an instrument is clear and unambiguous, the nature and intent of the same is to be determined from the recitals thereof. When the recitals are clear, co-lateral evidence or extraneous material is of no help in finding out the intention of the parties.

30. So far as power of attorney Ext. 1 is concerned, attempt has been made at the appellate stage to assail the admissibility thereof. As has been pointed out above, execution of power of attorney Ext. 1 and Ext. 3 remained undisputed. Defendants themselves got the power of attorney Ext. 1 admitted on their behalf as Ext. E. Parties proceeded with the trial on the premises that power of attorney Ext. 1 was executed by late Soumendra and defendant no. 6 to 8 in favour of defendant no. 1. Evidence was accordingly adduced. It is pertinent to point out that there was no pleading by the defendants that the power of attorney was impliedly revoked. Pleading with regard to explicit revocation of power of attorney was also raised at a later stage in an additional written statement. In such circumstances, defendants cannot be permitted to raise the plea of admissibility of power of attorney Ext. 1. Raising of plea of revocation presupposes execution of power of attorney. In view of nature of pleadings and evidence adduced by the parties as well as peculiar facts and circumstances of the case, decisions of the Hon'ble Supreme Court in Deb Ratan Biswas and others -vrs.- Most. Anand Moyi Devi & others:

(2011) 7 S.C.R.303 with regard to implied revocation of the power of attorney; and of the Privy Council in Ram Rattan -vrs.- Parma Nand :

AIR (33) 1946 Privy Council 51 and of this Court in Rajkishore Sahu -

vrs.- Khitish Chandra Sahu : 42 (1976) CLT 553 with regard to provision under the Indian Stamp Act, 1899 relied upon by the learned Senior Advocate appearing for the defendants are of no assistance to the defendants. Section 36 of the Indian Stamp Act expressly provides that where an instrument has been admitted in evidence such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. In the present case, not only the defendants never objected to admission of power of attorney Ext.1 into evidence but also got it admitted as Ext.E on their behalf.

31. The plea of explicit revocation of power of attorney by endorsement Ext. E/1 on 18.10.1991 has been rejected outright by the trial court on the basis of the report of handwriting expert Ext. C-1 that

the endorsement is a forgery. Though it was sought to be argued on behalf of the defendants that the trial court has not rendered a categorical finding that Ext. E/1 is a forgery, it is apparent from the impugned judgment that the learned Civil Judge (Senior Division) tersely rejected the plea of explicit revocation of power of attorney holding the same to have come 'a cropper after signatures of one of them i.e. late Soumendra Banerjee was found to be forged by handwriting expert whose report is marked as Ext.C-1'. It appears from the lower court record that the defendants specifically made statement that they do not propose to cross-examine the handwriting expert. In such circumstances, report of the handwriting expert was admitted into the evidence without objection or challenge. Apart from other implications which entails forgery and fraud, as has been held by the Patna High Court in Chandreshwar Singh and others vs. Ramchandra Singh and others: AIR 1973 Patna 215, if the signature of one of the executants of a document is forged, the entire document is vitiated. By making the forged entry Ext. E/1 in the power of attorney the defendants resorted to a fugitive act for material alteration of the document purported to have been made in the year 1991. In Nathu Lal and others vs. Mt.Gomti Kuar and others : AIR 1940 Privy Council 160, it has been explained that a material alteration is one which varies the rights, liabilities, or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

32. He who seeks justice must come with clear hands in a judicial proceeding. Resorting to forgery amounts to fraud on Court which avoids all judicial acts, ecclesiastical or temporal. Fraud and collusion vitiate even the most solemn proceedings in any civilized system in jurisprudence. (See Smt. Shrisht Dhawan -vrs.- M/s. Shaw Brothers :

AIR 1992 SC 1555 and Hamaza Haji -vrs.- State of Kerala and another : (2006) 7 SCC 416). Such being the ramifications of forgery or fraud, defendant nos. 1 to 11 having found to have resorted to forgery by insertion of fraudulent endorsement Ext. E/1, on that count only they are not entitled to any relief or protection either under law or under equity.

33. Be that as it may, plea of explicit revocation of power of attorney in the year 1991 on the strength of endorsement Ext. E/1, conclusively goes to show that defendants themselves considered and accepted power of attorney Ext. 1 to be in existence till the purported date of endorsement Ext.E/1 in spite of execution of partition deed Ext.6/a among the co-sharers in the year 1988. This conclusion is fortified by the fact that defendants did not raise theory of implied revocation in the written statement. In such circumstances, finding of the trial court that power of attorney was impliedly revoked upon execution of partition deed Ext. 6/a is not sustainable. The power of attorney was very much in existence and force when agreement for sale Ext. 3 was executed.

34. In view of clear and categorical recitals in Clause -1 and 2 of power of attorney Ext. 1, there is absolutely no scope to urge that Ext. 1 did not confer on defendant no. 1 the authority to sell the suit land. Clauses 1 and 2 of the Power of Attorney read as follows:

"1. To sell by private treaty or by any other mode convey or transfer by way of sale or lease; all or any of the immovable properties mentioned below lands, houses, vacant sites, buildings sites enclosures belonging to us and situate at Baripada Town with all right, title and interest there to any person or persons whether in block or separately for any consideration whatsoever.

2. To execute any agreement for sale or sale deed or other documents like lease necessary to effectuate the aforesaid purpose or purposes and to cause the same to be stamped, registered or authenticated as the case may be."

Thus, power of attorney Ext. 1 executed by the principals late Soumendra as well as defendant nos. 6 to 8 authorised the agent defendant no. 1 not only to execute any agreement for sale but also to execute sale deed. The language being clear and unambiguous, there is no necessity to look for any co-lateral evidence or material to come to a conclusion that the principals by executing power of attorney Ext. 1 authorised defendant no. 1 to execute agreement for sale as well as sale deed.

35. So far as recitals in Ext. 3 agreement for sale are concerned, the material stipulations occur at paragraphs 4 to 7. According to the trial court, agreement for sale Ext. 3 stipulated that defendant no. 1 and late Soumendra undertook to obtain 'willingness' of defendant nos. 6 to 8 for sale of suit land to the plaintiffs. On a plain reading of the agreement for sale there appears nothing to support such finding of the trial court.

36. Clauses 4 to 7 of agreement for sale Ext. 3 read as follows:

"4. That the First Party members along with their sisters Mrs. Rekha, Mrs. Sikha and Mrs. Monila who are the heirs of late Surendra Nath Banerjee, the original owner of the schedule 'A' land want to sell away the schedule-'A' land for a consideration of Rs.5.7 lakhs (Rupees Five point Seven lakhs only) which the Second Party members agree to pay.

But the married sisters although agreed to sell the land and authorise the 1st. Party members to negotiate about the sale in favour of 2nd. party members for the above consideration money and to finalise it and to sign the Agreement for sale on their behalf as they could not come to Baripada to execute the Sale Deed due to some difficulties. They have intimated the first party members to make an agreement for sale till a Regular Registered Sale Deed is executed by the First Party members along with their sisters and they are expected to come and to execute the sale deed, within three month from the date of this AGREEMENT.

5. That the 1st Party members undertake and take responsibility for bringing their sisters Mrs. Rekha, Mrs. Sikha and Mrs. Monila to execute the registered sale deed at Baripada within three months and receive the advance money of Rs.70,000/- (Rupees Seven thousand only), today, from the 2nd Party members on behalf of their sisters, in part performance for the contract for sale. And promise to execute the Registered Sale Deed along with their sisters as stated above within stipulated period, failing which the second party members can get the Registered Sale Deed

executed through Court paying the rest consideration money of 05 lakhs)Rupees five lakhs) only.

6. That the first party members or their sisters cannot demand more consideration money as stated above nor they can sell, lease, gift or deal the said Schedule A land to any other person or interfere with the peaceful possession of the second party members in any manner whatsoever. In case of any defect of title of the first party member and their sisters, the advance money is refundable with compensation @ 18% per annum.

7. On the prior intimation of the 1st. party & their sisters at least 10(ten) days before the Execution and Registration of the sale Deed, the second party must be ready with the balance consideration money of 05 lakhs (five lakhs) only to be paid to the first party members and their sisters on the very date of Registration failing which the advance money would be forfeited." (underlines supplied)

37. Thus, recitals of agreement for sale Ext.3 are explicit in stating that all the co-sharers including the sisters wanted to sell the suit land to the plaintiffs for Rs.5.7 lakhs. There is specific mention that the sisters "agreed to sell the land" and authorized the defendant no.1 and late Soumendra to negotiate sale in favour of the plaintiffs as well as to finalize the transaction and to sign the agreement for sale "on their behalf". Also it has been stated therein that sisters have intimated their brothers to make an agreement for sale till a regular registered sale deed is executed. While executing agreement for sale, defendant no.1 and late Soumendra simply undertook to take the responsibility of bringing their sisters to execute registered sale deed at Baripada. On behalf of their sisters defendant no.1 and late Soumendra also undertook that they would not demand more consideration money than as agreed upon in the agreement for sale. Thus agreement for sale clearly reveals that the instrument was executed on behalf of the sisters. There is specific mention in the agreement for sale that the sisters wanted and agreed to sell the suit land to the plaintiffs and they authorized execution of agreement for sale in their favour. It is apparent from Ext.3 that the sisters had willingness and consent for sale of suit land to the plaintiffs. The trial court has erroneously observed that the executants of Ext.3 undertook to obtain 'willingness' of their sisters. Finding based on such observation is an error on the face of record.

38. No doubt there is no explicit reference to power of attorney Ext.1 in the agreement for sale Ext.3. Trial court also appears to have adversely considered lack of description by defendant no.1 below his signature in the agreement for sale to have appended his signature as the agent of his sisters. However, a donee of a power of attorney is legally entitled to execute an instrument in and with his own name and signature, which would bind the principal. Power of attorney has been defined under section 1-A of the Powers of Attorney Act,1982 to include any instrument empowering a specified person to act for and in the name of the person executing it. Section 2 of the Powers of Attorney Act,1882 reads as follows:

"Execution under power-of-attorney.- The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the

name, and with the signature and seal, of the donor thereof.

xxx xxx xxx xxx xxx xx xxx."

39. Section 182 of the Indian Contract Act, 1872 defines an "agent" to be a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal". Section 186 of the Indian Contract Act provides that agent's authority may be expressed or implied. In consonance with Section 2 of the Powers of Attorney Act, Section 226 of the Indian Contract Act provides that a contract executed by an agent stands has the same legal effect as that of a contract executed by the principal. Section 226 of the Indian Contract Act reads as follows:

"Enforcement and consequences of agent's contracts.- Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person."

40. Section 231 of the Indian Contract Act provides for implications of a contract entered into by an agent without disclosing his status as an agent. In the present case, trial court appears to have been influenced by want of specific mention of or reference to the power of attorney Ext.1 'in clear and explicit terms' in the agreement for sale Ext.3 contrary to the specific provisions under section 231 of the Indian Contract Act that such non-disclosure of status as an agent does not effect rights of other contracting party. Section 231 of the Contract Act reads as follows:

"Rights of parties to a contract made by agent not disclosed.- If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract."

41. In Jagrup Singh and others -v- Ram Kishan Das:

AIR 1920 Oudh 105 it has been specifically held that omission on the part of an agent to describe that he is acting as such is not material. It has been held:

"The omission on the part of an agent to describe in a deed that he is acting for and on behalf of a principal is immaterial. The question whether an agent is to be taken to have contracted personally or on behalf of his principal depends on the intention of

the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances."

It has been further held :

"Where an agent is given power to execute deeds of transfer in his own name and he executes a deed relating to the property of his principal without describing himself as the latter's agent the omission is immaterial and the deed is binding on the principal and his representatives."

42. When a person is authorized to enter into a sale transaction on behalf of others under certain circumstances, none mentioning of such circumstances in the instrument of transaction also has been held to be immaterial in *Labhchand Shankarlal and others -v- Mst.Sharifabi* :AIR 1961 Bombay 215. In the context of Section 53-A of Transfer of Property Act, it was held that liberal construction should be placed on the expression "signed on his behalf". In the aforesaid decision, a contract of sale was entered into by the father as the karta of the family on behalf of minor sons also. It was held that as the father, who had signed the contract of sale, had in law authority to enter into the contract on behalf of his minor sons, he being the karta of the family, it follows that he had signed it on their behalf also and the sons are debarred from instituting a suit for recovery of possession under section 53-A. Failure to expressly mention in the contract that it is being signed on behalf of the sons does not come in the way of the transferee from raising a defence under section 53-A of the Act, if he can on evidence establish that the contract had been signed by the contracting party on behalf of the minor sons. In the present case, therefore, considering the specific recitals of agreement for sale Ext.3 referred to above, non-reference to or non-mentioning of power of attorney Ext.1 in the agreement for sale Ext.3 has no bearing upon the status of the defendant no.1 as agent of his sisters. Reliance placed on behalf of defendant nos.9 to 11 on the decisions of the Hon'ble Supreme Court in *Vimaleshwar Nagappa Shet -vrs.- Noor Ahmed Shariff and others* : (2011)12 SCC 658 and in *HPA International -vrs.- Bhagwandas Fateh Chand Daswani and others* : (2004) 6 SCC 537 as well as of Patna High in *Udho Rai & Ors. -vrs.- Ambika Tiwary & Ors.* : AIR 2007 Patna 136 (DB) to assail the authority of defendant no.1 to execute Ext.3 is, therefore, under the facts and circumstances of the case misplaced. So also defendant nos.9 to 11 cannot avail any benefit from the decision in *Ganesh Shet -vrs.- Dr. C.S.G.K. Setty and others* : AIR 1998 SC 2216, cited by the learned Senior Advocate appearing for respondent nos.9 to 11 to urge that Ext.3 is not a concluded contract.

43. Apart from the above, it was defendant no.1 who was holding the power of attorney Ext.1 and who has, on the face of it, signed the agreement for sale being authorized by his sisters who had agreed to sell the suit land to the plaintiffs. Defendant no.1, however, filed written statement supporting his sisters' plea that they never agreed for sale of the suit land to the plaintiffs. Such plea on the part of the defendant no.1 is contrary to the explicit recitals of the agreement for sale. Nevertheless, defendant no.1, who is the executant of agreement for sale was not examined as witness on behalf of the defendants. Non-examination of defendant no.1, the most material witness, tells upon the conduct of the defendants in colluding together to nullify the agreement for sale Ext.3 and thereby deprive the plaintiffs of the right to enforce it. Therefore, it has been rightly urged by learned Senior Advocate appearing on behalf of the appellants that non-examination of defendant

no.1 as a witness will lead to adverse presumption against the case of the defendants in view of the provisions under section 114 of the Evidence Act. In this connection, reliance was placed in *Vidhyadhar -v- Manikrao and another*: (1999)3 SCC 573 wherein it has been held at para-17 as follows:

"Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbakhsh Singh v. Gurdial Singh*: AIR 1927 PC 230: 32 CWN 119. This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh*: AIR 1930 Lah.1: ILR 11 Lah 142 and the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh*: AIR 1931 Bom. 97 : 32 Bom.LR 924. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat*: AIR 1970 MP 225:1970 MPLJ 586 also followed the Privy Council decision in *Sardar Gurbakhsh Singh* case. The Allahabad High Court in *Arjun Singh v. Virendra Nath*: AIR 1971 All 29 held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass v. Bhishan Chand*: AIR 1974 P&H 7 drew a presumption under section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box."

44. Reliance also has rightly been placed on behalf of the appellants on *Iswar Bhai C.Patel alias Bachu Bhai Patel -vs- Harihar Behera and another*: (1999)3 SCC 457 to urge that adverse inference has to be drawn for non-examination of defendant no.1 who was the most competent person to depose regarding the circumstance under which agreement for sale Ext.3 was executed.

45. Defendant nos.9 to 11 admit to have received notices sent by the plaintiffs regarding execution and existence of agreement for sale Ext.3. Therefore, finding of the trial court that defendant nos.9 to 11 had prior notice of agreement for sale before the sale deed Ext.C was executed in their favour is unimpeachable. Defendant nos.9 to 11 are, therefore, not bona fide purchasers without notice. In view of the findings arrived at above with regard to power of attorney Ext.1 and agreement for sale Ext.3, there is no escape from the conclusion that the agreement for sale Ext.3 is a complete and concluded contract executed by defendant no.1 on behalf of himself and the executants of power of attorney Ext.1. Defendant nos.9 to 11 having notice of Ext.3 prior to execution of sale deed in their favour as well as defendant nos.1 to 8 are bound by the agreement for sale Ext.3. Defendant nos.9 to 11 are precluded from claiming any benefit out of sale deed Ext.C, the subsequent contract.

46. Reliance was placed on Section 20 of the Specific Relief Act, 1963 by learned Senior Advocates appearing for the plaintiffs as well as the defendants in support of their rival contentions with regard to plaintiffs' entitlement of relief of specific performance of contract. Authoritative judicial pronouncements were cited from both the sides in this regard. Section 20 of the Specific Relief Act provides that jurisdiction to decree specific performance of contract is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion should not be

exercised arbitrarily, but on sound reasoning capable of being corrected by appellate court. It is well settled that comparative hardship, conduct and behaviour of the parties and readiness and willingness to perform the part of contract are some of the vital circumstances which require consideration for exercise of jurisdiction to declare specific performance of contract. As provided under Sub-Section (3) of Section 20 of the Specific Relief Act, the Court may properly exercise discretion to decree specific performance in any case where the plaintiff has, done substantial acts or suffered losses in consequence of a contract capable of specific performance.

47. As regards readiness and willingness to perform the part of their contract by the plaintiffs, on the basis of abundance of evidence on record the trial court has rendered the finding in favour of the plaintiffs that they were all along ready and willing to perform their part of the contract. In their pleadings the defendants do not make specific averments that the plaintiffs were not ready with money to pay the balance consideration amount. Oral as well as documentary evidence was adduced to establish that the plaintiffs were financially capable to pay the amount. Defendant no.1 who could have stated on oath that the plaintiffs were not ready with requisite money has been withheld from the witness box. That apart, the plaintiffs issued notices to defendant nos.9 to 11 as well as the District Registrar indicating their willingness to perform their part of contract. In such circumstances, defendants have no scope to urge that the plaintiffs were not ready and willing to perform their part of contract.

48. Conduct of defendant nos.1 to 11 in colluding together to nullify the agreement for sale Ext.3 is writ large on the face of record. They have resorted to fraud and collusion by making an attempt to establish the theory of explicit revocation of power of attorney on the strength of forged entry Ext.E/1. Defendant no.1 has been withheld from examination in court as a witness though he supported the case of other witnesses. Contention raised by the learned counsel for the appellants that sale of the suit land to defendant nos.9 to 11 for consideration amount of Rs.4,20,000/- as against agreed consideration amount of Rs.5,70,000/- under agreement for sale Ext.3 is a circumstance indicative of undervaluation of the sale deed with a view to defrauding of State revenue and collusion between the parties to deprive the plaintiffs of the suit land, is not without force. Sale of the suit land for a value lesser than as agreed in the agreement for sale Ext.3 indicates also that defendant nos.1 to 8 have combined together with defendant nos.9 to 11 to deprive the plaintiffs not only of the suit land but also of the dealership of petroleum pump under defendant no.12. Knowing fully well about the existence of agreement for sale Ext.3 defendant nos.9 to 11 have made adventurous attempt to deprive the plaintiffs of the suit land with an oblique motive to deprive of the plaintiffs of the dealership.

49. Reliance was placed by defendant nos.9 to 11 on Ext.Q the order dated 10.2.2011 passed by the Hon'ble Supreme Court in Civil Appeal No.4889 of 2005 to urge that defendant nos.9 to 11 being in possession over the suit land, the plaintiffs are not entitled to the relief of specific performance of agreement for sale Ext.3. However, it appears from the order passed by the Hon'ble Supreme Court that on the basis of certain undertaking made on behalf of defendant no.12 an interim arrangement was made till the end of November, 2013 to ensure receipt of rent by defendant nos.9 to 11 keeping in view the pendency of the present appeal. It has been specifically observed in the order that the Hon'ble Supreme Court do not wish to say anything about the physical possession of the suit land

which is the subject matter of appeal in this Court and that this Court shall not be influenced by the order under Annexure-Q. The concluding paragraph of the order reads:

"We make it clear that the dispute between the appellants and the fifth respondent in respect of the land and its possession may have to be considered by the High Court in the pending First Appeal, uninfluenced by any of the observations made in this order."

50. Admittedly, neither the plaintiffs nor defendant nos.9 to 11 are in physical possession of the suit land which has been leased out to defendant no.12. Defendant nos.9 to 11, having purported to have paid the consideration amount of Rs.4,20,000/- to the owners, are receiving substantial rent from defendant no.12. Therefore, their interest has been adequately protected during pendency of this appeal. On the contrary, in spite of existence of a valid and binding agreement for sale the plaintiffs have been deprived of enjoyment of benefits out of the suit land so far due to fraud and collusion by the defendants. In case of refusal of grant of relief of specific performance of agreement for sale Ext.3, the plaintiffs shall be deprived of the suit land as well as the dealership under defendant no.12 and thereby suffer irreparable loss. Refusal of grant of relief shall amount to giving premium to the fraudulent conduct of the defendants. Fraudulent and collusive conduct of defendant nos.1 to 11 shows that there is no equity left in their favour for which it would be unfair and inequitable not to grant a decree for specific relief in favour of the plaintiffs who have done everything which is possible to perform their part of the contract for sale. Defendants have failed to show any circumstance as provided under sub-Section(2) of Section 20 of the Specific Relief Act against exercise of discretion not to decree specific performance. In such circumstances, this Court is of the considered view that the appellants/plaintiffs are entitled to decree of specific performance of agreement for sale Ext.3.

51. Having held that the plaintiffs are entitled to have the agreement for sale Ext.3 specifically performed, the only question that remains to be considered is the proper form of decree that ought to be passed in favour of the plaintiffs keeping in view the peculiar facts and circumstances of the case, more particularly in view of execution of sale deed Ext.C for a consideration amount of Rs.4,20,000/- paid by subsequent purchasers defendant nos. 9 to 11 in spite of notices of prior agreement for sale. The question of proper form of decree in such cases is of utmost importance in order to set at rest all disputes among the parties and rule out future complications.

52. Similar question was resolved by the Hon'ble Supreme Court in Durga Prasad and another -v- Deep Chand and others: AIR 1954 SC 75 and it was held at paragraph 42 as follows:

"In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in 'Kafiladdin v. Samiraddin', AIR 1931 Cal.67 and appears to be the English practice. See Fry on Specific Performance, 6th Edn. page 90, paragraph

207; also -'Potter v. Sanders', (1846)67 ER 1057. We direct accordingly."

53. Decision in Durga Prasad and another -v- Deep Chand and others(supra) has been referred to and followed by the Hon'ble Supreme Court subsequently. In Thomson Press(India) Limited -v- Nanak Builders and Investors Private Limited and Others:(2013) 5 SCC 397, at paragraph 41, the above dictum in Durga Prasad and another -v- Deep Chand and others(supra) was extracted and it was pointed out at paragraph 42 as follows:

"42. Again in R.C.Chandiok v.Chuni Lal Sabharwal: (1970)3 SCC 140 : AIR 1971 SC 1238 this Court referred to their earlier decision and observed:

9. It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at SCR p.369 in Durga Prasad v.Deep Chand viz 'to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor: all he does is to pass on his title to the plaintiff.

We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this Court and the High Court."

54. In the present case, while directing specific performance, it is to be borne in mind that the plaintiffs are required to pay balance consideration amount of Rs.5.00 lakhs to the defendant nos.1 to 8 who claim to have received an amount of Rs.4.20 lakhs towards consideration from the subsequent purchasers defendant nos.9 to 11. Not only defendant nos.1 to 8 have received consideration amount as agreed upon by them from the subsequent purchasers but also the subsequent purchasers defendant nos. 9 to 11, as stated above, are in receipt of return on their investment, in the shape of rent from defendant no.12.

55. Accordingly, the appeal is allowed and the impugned judgment and decree passed by learned Civil Judge (Senior Division), Baripada in T.S. No.103 of 1994 are set aside. Plaintiffs' suit for specific performance of contract is decreed. Defendant nos.1 to 8 along with defendant nos.9 to 11 are directed to execute the registered sale deed in favour of the plaintiffs within a period of two months from today upon which plaintiffs shall pay out of balance consideration amount Rs.80,000/- to defendant nos.1 to 8 and Rs.4,20,000/- to the defendant nos. 9 to 11. In case of failure to execute the registered sale deed within the time stipulated, the plaintiffs may get the sale deed executed and registered through court.

Defendant nos.1 to 11 shall bear the cost of appeal.

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B.K. Patel, J.

Orissa High Court, Cuttack, Dated 25th October,2013/Palai