RAJASTHAN HIGH COURT

Ameer Mohammed

Vs.

Barkat Ali

Civil First Appeal No. 33 of 1989
(Prakash Tatia, J.)

01.05.2002

JUDGEMENT

Prakash Tatia, J.

1. This is appeal against the judgment and decree dated 2- 12-1988 passed by the District Judge, Sirohi in Civil Original Suit No. 47/83 (189/84) by which the trial Court decreed the suit of the plaintiff-respondent for specific performance of the contract dated 9-10-89.

2. Brief facts of the case are that the plaintiff alleged in the plaint that the defendant agreed to sell his house to the plaintiff on 9-10-1980 for a consideration of Rs. 47,000/-. This agreement was oral According to the plaintiff it was agreed that the defendant will bring the title deeds, from village Basni and will hand over the documents to the plaintiff. The plaintiff thereafter, will be satisfied with the title of the house of the defendant. The defendant will also hand over the possession of the rest of the building within one year except the portion in which the plaintiff is already in possession as tenant. After completion of above, the stamps will be purchased at the cost of the plaintiff and the sale deed will be executed and will be registered. At the time of registration of the sale deed, the plaintiff will make payment of balance amount of the sale consideration. It is further submitted by the plaintiff that the defendant by showing need of money for construction of house at village Basni, took Rs. 5000/- on 24-12-1980 and Rs. 5000/- on 6-1-1981. On 6-10-1981, the account was settled between the plaintiff and the defendant of the due rent and the amount taken by the plaintiff. As per the accounts, it was found that the defendant took total loan amount of Rs. 5120/- at various times and repaid Rs. 800/- on 25-9-1980. The rent due in the plaintiff was from 1-6-1980 to 1-10-1981 which was Rs. 480/-, therefore, the

plaintiff gave credit of Rs. 1280/-(Rs. 800/-+Rs. 480=Rs. 1280/?). This Rs. 1280/- was given deduction from the loan amount received by the defendant of Rs. 5120/-. The remaining amount of Rs. 3840/- was adjusted towards the payment of sale consideration of the property in dispute. According to the plaintiff, in view of the above facts till 6-10-81 the defendant received total Rs. 18,840/- (Rs. 5000/- first payment of advance + Rs. 5000/- on 24-12-1980 + Rs. 5000/- on 6-1-1981 + Rs. 3840/- as per the settlement of account). It was submitted that in part performance of the contract, the plaintiff continued in possession of the shop which was earlier in possession of the plaintiff as tenant. From 1-10-1981 the plaintiff was exempted from the rent.

3. The plaintiff submitted that when the defendant completed construction of his house at village Basni and came at Sirohi, the plaintiff requested the defendant to comply with the terms of the contract but the defendant did not comply with. When the plaintiff found that the limitation will expire for performance of the contract, he served a notice dated 26-5-1983 through the Advocate requesting the defendant to come with the documents of the house and execute the sale-deed. The plaintiff, expected reply from the defendant from 1-6-1983 to 7-6-1983 but the defendant deliberately returned the registered notice with an endorsement as unclaimed. The plaintiff received one notice of defendant dated 11-6-1983, on 15-6-1983. In this notice of the defendant, the defendant suppressed the fact of the agreement for sale of the property and asked the plaintiff to hand over the possession of the property treating the plaintiff as tenant of the premises. The plaintiff gave reply of the notice of the defendant on 24-6-1983 and attached the copy of the notice dated 26-5-1983 which was sent by the plaintiff to the defendant and the plaintiff again requested the defendant to comply with the terms of the contract and offered the balance amount to the defendant. The defendant despite above neither executed the sale deed nor handed over possession of the rest of the property. Therefore, the plaintiff filed the suit for specific performance of the contract on 16-8-1983.

4. The defendant submitted his written statement and denied the agreement to sell and also denied receipt of any amount from the plaintiff. It was also stated that the defendant has no house at Basni village nor he took any money from the plaintiff for raising construction at village Basni. It was also denied that on 6-10-1981 any account was settled. The defendant further denied re-payment to the plaintiff of Rs. 800/- on 25-9-1980. It was stated that the plaintiff paid rent of the shop upto 31-10-1981 and

the defendant had already filed the suit for eviction against the plaintiff. It was also submitted that the plaintiff was never willing to perform his part of the contract. The defendant in additional plea stated that the property in dispute is belonging to not only the defendant alone but it is owned by his four brothers also and it is stated that they were not made parties, therefore, the suit is not maintainable.

5. The trial Court framed nine issues. The plaintiff appeared as PW-1 and produced witnesses PW-2 Laxmi Narain, PW-3 Krishna Charan and PW-4 Shafi Mohd. whereas the defendant appeared as DW-1 and also examined his brother DW-2 Gulam Mustafa. The trial Court, after hearing the parties, found that the plaintiff able to prove the oral agreement dated 9-10-80 for the sale of the property in dispute for a consideration of Rs. 47,000/- and the defendant received Rs. 5000/- as advance amount and also received Rs. 5000/- on 24-12- 1980 and Rs. 5000/- on 6-1-1981. The trial Court also held that after settlement of the accounts. Rs. 3840/- was found due in the plaintiff of the defendant which was agreed to be adjusted in the above transaction of sale of the property. The trial Court held that the plaintiff was ready and willing to perform his part of the contract but held that the plaintiff cannot be treated as owner of the shop which was taken on rent by the plaintiff. The brothers of the defendant were not found to be necessary parties and it was held that the suit was properly valued and ultimately the trial Court decreed the suit of the plaintiff for specific performance of the contract.

6. Aggrieved against the above judgment and decree dated 2-12-1988, the defendant-appellant preferred this appeal.

7. According to the learned counsel for the appellant, the trial Court committed serious illegality in decreeing the suit of the plaintiff as the defendant never agreed to sell his house in dispute to the plaintiff nor he was in position to sale the house because of the fact that house was owned by the father of the defendant who expired and the defendant has four more brothers, therefore, the defendant has no right to sell the house in dispute. The defendant has already filed the suit for eviction against the plaintiff for ejectment. It was submitted that from the totality of the facts and the evidence, the plaintiff failed to prove oral agreement for sale of the property and the payment of any amount to the defendant. The learned counsel for the appellant vehemently challenged the documentary evidence produced by the plaintiff.

8. It is also submitted by the learned counsel for the appellant that the alleged accounts book produced by the plaintiff is absolutely unbelievable document and it is not regularly kept accounts books. Not only this but the entire account book is containing the only transaction with the defendant which clearly shows that the document is totally fabricated document. It was also submitted that the witnesses produced by the plaintiff are only interested witnesses and even one of the witnesses is an unemployed person and claimed that he is earning by selling cinema-tickets. The presence of the witnesses was also seriously disputed. It was also submitted that even the facts mentioned in the plaint itself make the story of the plaintiff unbelievable. It is admitted by the plaintiff that he even did not look into the title deeds of the property before the alleged agreement to sell. It is also stated that even in Ex. 1 and Ex. 2 there is no mention of the sale consideration being Rs. 47,000/-. This sale consideration was for the first time disclosed by the plaintiff in the notice dated 26-5-1983 which was not received by the defendant.

9. The learned counsel for the appellant further submitted that the grant of decree for specific performance of the contract is discretionary relief and, looking to the facts of the case, it is clear that grant of the decree for specific performance of the contract will be absolutely unjust against the defendant, particularly in view of the fact that there is no documentary evidence, evidencing the agreement. The story set up by the plaintiff is highly improbable. The witnesses and alleged book are created and fabricated. The defendant was hopelessly poor person. Even he had to ask for loan of Rs. 100/- from the plaintiff as stated by the plaintiff himself. The plaintiff cannot be said to be a person bona fide. It was also the case of the plaintiff that the defendant used to take loan from the plaintiff. The plaintiff also filed the suit after inordinate delay, therefore, also the plaintiff is not entitled for the relief of specific performance of the contract.

10. The learned counsel for the respondents vehemently submitted that the trial Court has considered the all aspects of the matter and discussed the oral as well as documentary evidence and found that Ex. 1, Ex. 2 and Ex. 3 are proved to be written in the handwriting of the defendant. There is direct evidence of the handwriting of the defendant and the plaintiff also produced handwriting expert PW-3 Krishna Charan to prove the handwriting of the defendant over Ex. 1, Ex. 2 and Ex. 3. The defendant even did not choose to produce any handwriting expert to rebut the evidence of the handwriting expert of the plaintiff or to prove that it is not in defendant's handwriting. Mere denial of the plaintiff of his handwriting on Ex. 1, Ex. 2 and Ex. 3 is not of worth

reliance. The learned counsel for the plaintiff-respondent also submitted that a look at the account books itself shows that both the plaintiff and defendant were not very much literate persons. What they have thought fit, they put in writing and, therefore, Ex. 1, Ex. 2 and Ex. 3 cannot be discarded and even if it does not fall within the category of regularly kept account book even then the writing of the defendant can be used as admission of the defendant against the defendant (plaintiff). According to the learned counsel for the respondent-plaintiff, when the defendant has stated that he has never entered into agreement to sell then it does not lie in the mouth of the defendant to say that the plaintiff was not ready and willing to perform his part of the contract. In addition to above, it was submitted that from the conduct of the plaintiff it is clear that the plaintiff proved his readiness and willingness to perform his part of the contract and the delay in filing the suit is fully explained. The plaintiff and the defendant fixed the time for execution of the sale deed as one year. It was the duty of the defendant to get clear title of the house and it has also come on record in the evidence of the defendant himself that the defendant obtained power of attorney from his brothers. The power of attorney was also obtained in the year 1980 and unless there was agreement for sale with the plaintiff by the defendant there was no reason for obtaining the power of attorney from his brothers. It also came on record from the evidence that one of the brothers of the defendant refused to sign for partition. The document for partition was submitted before the Registrar and penalty was imposed by the Sub-Registrar. The appeal was also preferred and, thereafter, the documents were released. These events show that the time was taken by the defendant for getting the title clear for sale of the property in dispute in favor of the plaintiff. It is also come in evidence from the statement of DW-2 Gulam Mustafa that the rent of the house was not received by any of the brothers of the defendant and the brothers of the defendants are not even aware who was the tenant in the house in dispute. Therefore, the delay caused by the defendant himself cannot be a ground for dismissal of the suit of the plaintiff. It was also vehemently submitted that the defendant has not taken any defense like lack of readiness and willingness of the plaintiff nor pleaded any ground on the basis of which it can be said that grant of decree in favour of the plaintiff will be inequitable or unjust. Even the plaintiff has not been put to any question in cross-examination. Both the counsel in support of their contentions places reliance upon the various judgments which will be dealt with at appropriate place.

11. The learned counsel for the respondent in support of his contention relied upon the judgment of the Hon'ble Apex Court delivered in the case of *Sarju Pershad Ramdeo*

Sahu hv. Jwaleshwari Pratap Narain Singh, [1] wherein the Hon'ble Apex Court held :-

> "Where the question for consideration for the appellate Court is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case, the appellate Court has got to bear in mind that it has not the advantage which the trial Judge had in having the witnesses before him and of observing the manner in which they deposed in Court."

and after considering the jurisdiction of the appellate Court in interfering with the finding of the trial Court on question of fact, the Hon'ble Apex Court held that :-

> "The duty of the appellate Court in such cases is to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the Court, outweighs such finding."

12. In the light of above decision it is to be seen that this Court whether can interfere in the finding of fact by appreciation of evidence. The interference in the finding of fact depends upon the appreciation of evidence. In this case, the evidence of the plaintiff started 11-1-1985. The evidence of the plaintiff was closed on 30-7-1987. After more than 2-1/2 years, the defendant's evidence started on 17-9-1987 and all the witnesses were examined by 7-11-1987. The case remained pending for final arguments from 7-1-1988 till 24-11-1988 and the judgment was pronounced on 2-12-1988. It appears from the record that the suit was decided by the learned Judge of the trial Court who has not recorded the evidence of the parties, therefore, the learned Judge of the trial Court who decided the suit had no advantage of observing the manner in which the witnesses deposed in Court nor the learned Judge of the trial Court passed the finding on the basis of demeanour of the witnesses. In the above facts of the case and in view of the law laid down by the Hon'ble Apex Court in the judgment of Sarju Pershad Ramdeo Sahu (AIR 1951 Supreme Court 120) (supra), it is the duty of the appellate Court to see whether the evidence taken as a whole can reasonably justify the conclusion which the trial Court arrived at or whether there is an element of improbability arising from proved circumstances which, in the opinion of the Court, outweighs such finding recorded by the trial Court. Therefore, it will be relevant to consider the evidence of the parties in detail.

13. The first question arises for determination in the suit is that whether the defendant entered into agreement for sale of the house in dispute on 9-10-1980 for a

consideration of Rs. 47,000/- and received Rs. 5000/- against advance payment of the sale price and thereafter, Rs. 5000/- on 24-12-1980 and Rs. 5000/- on 6-1-1981 and on 6-10-1981. Above question involves issue Nos. 1, 2, 3 and 4. Since the case of the plaintiff is that it was an oral agreement for sale, therefore, rest of the pleadings and evidence are with respect to the acting upon the contract by making payments or giving credit of the amount after settlement of the accounts. For proving oral agreement for sale dated 9-10-1980, the plaintiff in his suit pleaded that the defendant agreed for sale of the house, time was fixed one year from the date of the agreement obviously for the reason that till then the defendant will be able to get the vacant possession of the premises which was in occupation of the tenants. It was agreed by the defendant that the defendant will bring the title deeds from village Basni and will hand over the title deeds to the plaintiff and will satisfy the plaintiff with respect to the title of the defendant. It is alleged that before filling the suit, the plaintiff served the notice upon the defendant which is dated 26-5-1983 which appears to be about more than 20 months from the date of alleged agreement. In this notice dated 26-5-1983 or another notice which was dated 24-6-1983 which was given in reply to the defendant's notice dated 28-4-1983 (Ex.A-2), the plaintiff has not stated that the agreement for sale was entered into between the parties in presence of any person nor it has been mentioned in the notice or in the plaint that the defendant, after taking Rs. 5000/- as earnest money and, thereafter, Rs. 5000/- on 24-12-1980 and Rs. 5000/- on 6-1-1981 and after settlement of account on 6- 10-1981 made any entries in any book in his own handwriting. The defendant denied the above oral agreement and receipt of the amount as alleged by the plaintiff in the written statement. When the plaintiff based his suit on the basis of the oral agreement of sale then it was the duty of the plaintiff to disclose all material facts and particulars with all the conditions of the agreement and the surrounding circumstances including the fact that if oral agreement was entered into between the parties then whether it was in presence of any person and if there was any mediator who was he and what negotiations took place and if the agreement was acted upon then all the material particulars; how it was acted upon which includes the writing of any document by the parties, including the payments, mode of payment, receipt if was executed or the transaction was entered into books of accounts and what are the entries which are in the handwriting of other party. These basic facts are required to make the other party know about the detail facts which will be used by the party seeking performance of the contract against the other party, so that the other party can take his defenses. It also avoids chances of subsequent improvement otherwise it may put the other party in disadvantageous position. It can safely be said

that by not getting a document in writing for sale of immovable property, the purchaser takes a serious risk because normally there appears no reason for non-execution of an agreement for sale evidencing the transaction containing the terms and conditions when it is a case of immovable property. Even if oral agreement is permissible under the law and is enforceable through the Court of law even then the plaintiff is required to prove the oral agreement with certainty so that the Court can enforce the agreement to sell in entirety and unless and until all the conditions are not before the Court relating to the contract requiring performance by the parties then the Court cannot enforce the agreement which is required to be enforced specifically and not generally. If after entering into oral agreement containing a period sufficiently long for performance of the contract then the parties get sufficient time and opportunity to put the every thing in black and white in document, then further burden lies upon the party alleging oral agreement that why the formal deed was not executed. It may be made clear that the requirement of formal deed is not mandatory requirement for enforcement of contract even then it may be one of the circumstance which may go against the party seeking performance of oral agreement. It is also true that the suit cannot be rejected on the basis of the absence of formal deed of agreement for sale but the plaintiff will then be required to prove the oral agreement as a whole by trustworthy evidence.

14. In the present case, if the facts are examined then it is clear that first notice dated 26-5-1983 given by the plaintiff to the defendant contains the terms and conditions of the oral agreement which contains most of the acts to be performed by the defendant. In these conditions, it is nowhere provided that in case of non-performance of the contract by any party, what will happen. (Independently, it cannot be ground to refuse specific performance of the contract). It is also clear from the conditions alleged by the plaintiff in the notice as well as in the plaint that at the time of entering into agreement with the defendant, the defendant was not sure about the title of the property in dispute nor he saw the title deeds. It is admitted case that from condition No.1 that first of all the defendant was to bring the title deeds from village Basni and it was to be handed over to the plaintiff and the defendant was to satisfy the plaintiff, with respect to the title of his property. This is admitted case of the plaintiff that neither the defendant brought the title deeds nor handed over the title deeds to the plaintiff and the plaintiff nowhere said that he was satisfied with the title of the property. Condition No.2 was that the defendant will get the property vacated from the tenants and will hand over the possession of the rest of the property within one year.

Admittedly, this condition was also not complied with within one year or even till the filing of the suit. Thereafter, condition No.3 comes which provides that after compliance of conditions No. 1 and 2, the defendant will execute the sale deed and will get it registered and will receive the balance amount of the sale price.

15. According to the plaintiff himself, the defendant himself usually visited to the plaintiff from village Basni. Not only this, it is also the case of the plaintiff that the accounts were settled on 6-10-1981 which is just three days only before expiry of the one year from the date of the agreement and the time fixed for giving possession by the defendant to the plaintiff. For such almost 12 months, why the conditions No.1 and 2 were not performed by the defendant and what efforts the plaintiff made to persuade or compel the defendant to comply the conditions No.1 and 2, have not been explained by the plaintiff. Not only this, the plaintiff, for the first time, gave a notice to the defendant on 26-5-1983, after about 31 months and filed the suit for specific performance of the contract on 16-8-1983.

16. In the background of above circumstances if the evidence is examined, produced by the parties to prove the oral agreement for sale dated 9-10-1980, there is a statement of the plaintiff who stated that Laxmi narain and Ashok Kumar were present when the plaintiff and the defendant entered into agreement. The plaintiff was cross-examined from the side of the defendant. In support of the oral agreement, the plaintiff produced two sets of evidence; one is oral and another is documentary evidence. In oral evidence, the plaintiff produced PW-2 Laxmi Narain, who stated on oath that on 9-10-1980 the transaction took place in the presence of the witness Ashok Gehlot. The sale consideration was fixed Rs. 47,000/- and it was stated by him that the defendant admitted that after few days, he will bring the title deeds and will show it to the plaintiff. Rs. 5000/- was paid to the defendant by the plaintiff and, entry in Ex. 1 from A to B was made by the defendant himself in his own handwriting. It is clear that name of Laxmi Narain (PW-2) came in picture only on 11-1-1985 in the statement of the plaintiff and, as mentioned above, names of the Laxmi Narain and Ashok Kumar were not disclosed in notice (Ex.5) or reply-cum-notice dated 24-6-1983 (Ex. 7) nor it was disclosed in the plaint. The plaintiff stated that one Ashok Kumar was also present at the time of oral agreement dated 9-10-1980. Ashok Kumar was not produced.

17. The plaintiff also produced one more witness Shafi Mohd. (PW-4), who stated that

in the month of October, 1981, he was present at the shop of the plaintiff and one Achal Chand was also there. At that time, the defendant came and demanded Rs100/? from the plaintiff, upon which the plaintiff said that he has already given lot of money to the defendant, first settle the account. Ameer Mohd. (defendant) agreed for settlement of the account. The account was settled and the defendant wrote in the account book which was marked as Ex. 2. He further stated that at that time, the defendant stated that the amount of Rs. 18840/- is adjusted in the cost of the house which was Rs. 47,000/- and the defendant agreed that rest of the amount will be paid to him when he will bring the documents from the Nagaur and then the registered deed will be executed. Since the defendant received the above amount, therefore, it was decided that no further rent will be paid by the plaintiff which was agreed by the defendant. He also stated that the reading of the electric meter was recorded on that day. This witness put this note of reading in the same book of the plaintiff and entry was marked as Ex. 4. Name of this witness Shafi Mohd. is nowhere mentioned in the notice or the pleading of the plaintiff.

18. The defendant on oath, denied the entire transaction and also denied that the oral agreement took place in presence of Laxmi Narain and also denied all the entries in Ex. 1, Ex.2 and Ex.3 in the handwriting of defendant as alleged by the plaintiff.

19. To judge the credibility of the oral evidence, the documentary evidence produced by the plaintiff is also having important bearing. The book produced by the plaintiff contains only four pages, out of which, third page has been torn out from the book. On the first page of the book there are number of entries. In the right side column of the book at first page, which is marked as Ex. 3, first entry is with respect to the rent of the shop, entry is for Rs. 800/- dated 25-9-1980 and it is mentioned that the above amount was given to Barkat. Thereafter one entry of Rs. 180/- saying rent up to 1-12-1980 for six months. Thereafter, there is entry of Rs. 300/-, for rent of the shop for 10 months from 1-12-1980 to 9-1981 and total given is Rs. 1280/-. The entries on the back of the first page contains date 9-10-1980, thereafter 13.10, thereafter 15.12 and thereafter 12-12-1980 and 1-1-1981 and the last entry dated 6-1-1981. The page No.2 again starts with the date 9-10-1980. This page No.2 was marked as Ex. 1. In Ex.1, A to B is the entry which is relied upon by the plaintiff on the basis of which it is said that the defendant agreed to sell the house in dispute and took Rs. 5000/- in advance and it was alleged that it is also in the handwriting of the defendant. In this page itself, next entry is dated 24-12-1980 of Rs. 5000/- and it is written that for house

construction. Both first two entries in Ex.1 are in red ink. It appears from the second entry of Rs. 5000/- that the date '24' is written in red as well as in blue ink. The last entry in Ex. 1 at page 2 of the book is dated 6-1-1981 for Rs. 5000/- cash. On the back of the second page which is marked as Ex.2, starts with the date 14-9-1981 on the top of it. Thereafter there are dates of 20-9-1981, 27-9-1981, 6-10-1981. Thereafter totals were given and ultimately last figure given in 18840/-. The next page (No.3) was torn out from the book. The fourth page is totally blank and in the back of the fourth page, there is a writing stating that in the presence of both the parties Ameer Ahmed and Barkat Ali, sub-meter reading was taken note as 1893 (sic). This document was said to be written by Shafi Mohd. on 6-10-1981 and was marked as Ex. 4.

20. The details of the above book was required to be given in view of the fact that there is no written agreement between the parties for sale of the house. The witnesses produced were neither named in the notice nor in the plaint and they gave evidence with respect to these entries. A bare perusal of the book itself, it makes clear that the book was not any sort of the account book much less to the regularly kept account book. This book contains only four pages as said above, one page is torn out, but at the same time, the book is containing a cloth cover usually used by the traders for keeping their accounts books. The most important entry is dated 9-10-1980 by which it is said that the defendant received Rs. 5000/- as advance against the agreement for sale of the house which is on the second page of the book and marked as Ex.1. It is strange that entry dated 9-10-1980 is on the second page whereas entries written up to 1-10-1981 is on the first page. Not only this but on the back of the first page, there are entries of 9-10-1980, 16-12-1980, 12-12-1980 and even of 1-1-1981. The witness PW-2 Laxmi Narain, in his cross-examination, stated that on 9-10-1980 the back page of Ex. 3 (page 1 of book) was blank and he could not explain why the entry A to B dated 9-10-1980 was not made on the back of Ex. 3 (page No.1 of the book). He also stated that the entries in the book of Ex. 3 (page No.1 of the book) was not written in presence of witness Laxmi Narain. The witness PW-4 Shafi Mohd. who was said to be present on 6-10-1981 when the account was settled between the parties and who stated that he made the entry A to B in Ex. 4 on the last page of the book could not explain any reason for not getting the sign of both the parties or of the defendant and he could not even disclosed the reason why the important events were not written on 6-10-1981 when all the talks took place on 6-10-1981 in presence of this witness and absolutely insignificant event was written in the book. He very categorically stated that on Ex. 2 (back of second page), the entry A to B was not written in his presence. When he was

put to a question that when this book was opened, whether there was entry A to B was already there in Ex. 2 or not ?, he avoided to give answer to this question by saying that this entry was not made before him by the defendant. Why back of page No.2 of the book was kept complete blank till 6-10-1981 and why on the back of page No.4 the note of only electric meter reading was made by PW-4 Shafi Mohd. particularly when front of the page No.4 was blank makes not only documents unbelievable but makes the witness unbelievable. Ex. 1 to Ex. 3 cannot be said to be reliable piece of evidence so as to conclude that there was any oral agreement for sale of the house in dispute and Ex. 1, Ex. 2 and Ex. 3 do not give true and correct events much less to proving the fact that it is a true and correct statement of the account in furtherance of the agreement to sell as alleged by the plaintiff.

21. It is true that the events do not occur in a classified manner but it is also equally true that there may be mistakes by the persons who are not acquainted with the legal provisions but it cannot be believed that a person doing the business like plaintiff will commit mistakes one after another, first by not writing the agreement, second by not demanding the title deeds, third by not making himself satisfied with the title of the seller, fourth will feel satisfied with one entry in one book containing the entry of advance of Rs. 5000/- against the sale price as earnest money without mentioning full sale consideration and particulars of property and thereafter he will obtain the entries in the handwriting of the defendant at all the places of the four different sheets but he will never ask the defendant to write the exact amount of the sale consideration and will not ask the defendant to write clearly and specifically that he has received certain amounts against the sale price. The plaintiff alleges that he has paid much more amount than the agreed amount even then the defendant did not even obtain at least the title deeds from the defendant. The defendant did not hand over possession of the property as required under the terms of the agreement, even then the plaintiff did not secure his rights by specific averment in the form of any writing and has not recorded final settlement of the account specifically. Not only this but instead of all above, asked a third person (PW-4) to only write about only electricity consumption reading. The presence of the witnesses and in the manner in which they were brought, is also an important factor for consideration in the facts of this case. Even the witnesses who are also related to the entries in the book have not acted even as ordinary person of ordinary prudence with which even an illiterate person will act. These facts make the total case of the plaintiff as concocted one.

22. It is also strange that transaction took place in the presence of one Laxmi Narain and the rate was settled in presence of Laxmi Narain but he also did not insist that the sale price may also be mentioned in the entry Ex. 1. PW-4 Shafi Mohd. who is said to be the author of Ex. 4 dated 6-10-1981, also put a note of absolutely insignificant event looking to the nature of transaction which took place on 6-10-1981 and he could not give any reason why this important event of settlement of account, giving credit of Rs. 18840/- after accepting this consideration of Rs. 47,000/- by the defendant, was not taken note on 6-10-1981. What was the reason for getting note in the handwriting of PW-4 Shafi Mohd when it is alleged by the plaintiff that all the entries Ex.1, Ex.2 and Ex. 3 were made by the defendant himself. All these circumstances show that witnesses are planted and subsequently prepared to help the plaintiff. Neither the oral evidence of the plaintiff nor his witnesses can be believed nor the documentary evidence produced by the plaintiff can be believed to prove oral agreement dated 9-10-1980 or the payments as alleged or settlement of account dated 6-10-1981.

23. It was submitted by the learned counsel for the respondent that the defendant was required to put his defense in the written statement by taking specific pleas and in absence of which the plaintiff could not meet with the case of the defendant. This is a general rule of law but statutory provisions of law for specific performance of the contract specifically cast duty upon the plaintiff to plead and prove facts of his ready and willingness of performing his part of the contract. It is not dependent upon the defense of the defendant which comes after the pleadings of the plaintiff. The plaintiff in this type of case cannot say that after getting defense of the defendant he can furnish facts with respect to his ready and willingness to perform his part of the contract. This will be putting cart before the house. In addition to it, it is settled law that readiness and willingness of the plaintiff is not to be seen by only word of mouth but it is required to be seen from the actual conduct of the plaintiff. If it comes from the facts pleaded and from the evidence of the plaintiff himself that the plaintiff was not ready and willing to perform his part of the contract then the Court has no option but to dismiss the suit of the plaintiff.

24. Ordinarily, in civil suits, the civil Courts cannot deny relief to the plaintiff in case the plaintiff proves his right to relief unless the relief is discretionary but in case of suit for specific performance of the contract, there is a departure from the ordinary rule of law which is provided under the Specific Relief Act itself. Section 20 of the Specific Relief Act, 1963 specifically provides that the jurisdiction to decree specific

performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so. The only caution is that the discretion of the Court should not be arbitrary but must be based upon the sound and reasonable judicial principles. This specific provision of law will be negatory in case it is held that if the plaintiff proves his case for grant of decree of specific performance of the contract then the Court will have no jurisdiction to refuse the decree for specific performance of the contract, particularly even when the Court finds that three are reasonable reasons to refuse relief of specific performance of the contract. Therefore, the total facts available on record are required to be examined to find out whether in the facts of this case, it will be sound exercise of discretion of grant of decree for specific performance of the contract in favor of the plaintiff and, for that purpose also, the evidence of the parties and all the circumstances are required to be examined by the Court as the trial Court has not applied its mind properly on the point mentioned above.

25. The trial Court heavily relied upon the evidence of PW-2 Laxmi Narain holding that he is an independent witness and, therefore, be can be safely believed, whereas the trial Court has not critically examined the evidence of the plaintiff and, therefore, failed in taking note of inherent improbabilities in the evidence of PW-2 Laxmi Narain and PW-4 Shafi Mohd. as discussed above by taking into account all the surrounding circumstances including the statements of the witnesses with Ex. 1, Ex. 2 and Ex. 3 and the conduct of the plaintiff and his witnesses which appears to be contrary to the human conduct. It is further relevant to mention here that the plaintiff stated that he had a good relation with the defendant, therefore, formal deed of agreement was not written even then at least on 6-10-1981 when alleged final settlement took place certainly occasion arose for getting the document in writing from the defendant and why even PW-2 Laxmi Narain and PW-4 Shafi Mohd. did not suggest the plaintiff and the defendant of getting the sign of defendant any where and to have something in writing about contract were not explained and hence make them as unreliable witnesses. Therefore, the reasoning given by the trial Court for holding the oral agreement to sell dated 9-10-1980 between the parties, deserves to be set aside.

26. There is one another important evidence is also on record which was relied upon by the trial Court and that is opinion of handwriting expert Krishan Charan. The learned counsel for the appellant submitted that the opinion of handwriting expert cannot be relied upon for which the learned counsel for the appellant relied upon the judgment of the Privy Council reported in : *Judah v. Isolyne Shrojbashini Bose,* [2]

wherein the Privy Council observed that "there cannot be any more unsatisfactory evidence than that of an interested party called as an expert." And further relied upon the judgment of the Calcutta High Court delivered in : *Gotham Construction Co. v. Amulya Krishna,* [3] wherein the Calcutta High Court went to the extent of saying that an expert may be described as remunerated witnesses available on hire to pledge their oath in favour of the party who paid them. The Calcutta High Court took help of the decision of 1873 in the case of *Lord Abinger v. Ashton* [4]

27. Contrary to above, there is a direct decision of the Hon'ble Apex Court delivered in the case of *Murarilal v. State of M.P* [5] Though this decision was given in a criminal appeal but it applies to the civil cases while appreciating evidence of the handwriting expert. The Hon'ble Apex Court held that (Para 4):-

> "An expert is no accomplice. There is no justification for condemning his opinion evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion of any expert, handwriting expert or any other kind of expert, is not because experts, in general, are unreliable witnesses - the quality or credibility or incredibility being one which an expert shares with all other witnesses, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger-prints has attained near perfection and the risk of an incorrect opinion is practically non-existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher."

28. In view of the above decision of the Hon'ble Apex Court, the opinion of the expert cannot be discarded because of the reasons given in the judgment of Privy Council in the case of Judah (AIR 1945 PC 174) (supra) and the judgment of the Calcutta High Court in the case of Gotham Construction Co. (AIR 1968 Calcutta 91) (supra). In addition to above, I am of the opinion that condemning the expert as remunerated witnesses available on hire to pledge their oath in favor of the party who has paid

them, appears to be absolutely unwarranted. Comparison of the handwriting and forming an opinion on the basis of the handwriting, is a science and the persons are accepting the profession of the handwriting expert and are being taught and thereafter the experts are permitted to give evidence as of handwriting expert. In most of the professions, the expert in the profession are being paid to plead the case or to perform their professional duties and simply because they accepted a particular profession where they have to give opinion on the basis of facts of the case and they have to draw inference which may be wrong, it does not mean that the expert or the professional are the witness available on hire or they can pledge their oath in favor of the party who had paid them. The science of identification of handwriting is not so perfect and there is chances of risk in relying upon the opinion of the handwriting expert then how it can be said that wrong opinion of the handwriting expert is only due to the fact that he has been paid for giving opinion.

29. The Hon'ble Apex Court in the case of Murari Lal (AIR 1980 Supreme Court 531) (supra) observed that (Para 11):-

> "There is no rule of law nor any rule of prudence which has crystallized into a rule of law that opinion evidence of a handwriting expert must never be acted upon unless substantially corroborated."

But at the same time, observed that :-

> "But, having due regard to the imperfect nature of the science of identification of handwriting, the approach should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of a handwriting expert may be accepted.."

30. In the light of the decision of the Hon'ble Apex Court, I have to examine the opinion given by the handwriting expert PW?3 Krishna Charan and his evidence cannot be rejected only on the ground that he was paid by the plaintiff for giving opinion nor it can be rejected solely on the ground that the opinion is based upon an imperfect science. In view of the decision of the Hon'ble Apex Court, all the facts and circumstances are required to be seen and the opinion of the expert also cannot be

accepted merely because the expert has given opinion in favor of the case of the plaintiff and there is no rebuttal evidence from the defendant as the defendant has not produced any expert to controvert the evidence of the expert. What the Hon'ble Apex Court held is that the opinion of the handwriting expert is required to be carefully considered and examined because of the reason that the identification of the handwriting is not so perfect that it excludes the chances of risk.

31. So far as the evidence of the handwriting expert in this case is concerned, it is true that the handwriting expert PW-3 Krishna Charan gave opinion that Ex. 1, Ex. 2 and Ex. 3 contain the handwriting of the defendant. It is settled law that the opinion of the handwriting expert is not based on the exact science as is in the matter of thumb impression. PW-3 Krishna Charan found that there are number of dissimilarities in the disputed writing and the admitted writing for which the expert opined that it may be treated as "attempt to disguise". He admitted that in the report Ex. 48 at page 3 in second line there is date mentioned as 8-9-1980 which is in fact 8-10-1980 and this date in Ex. 1 at page Q 1 is given as 9-10-1980 and in Ex. 33 it is 8-9- 1980. He also admitted that in the report he has not disclosed that the documents are written by what type of pens. Whether it is fountain pen or it is ball point pen. So far as the opinion of the handwriting expert is concerned, he can give opinion with respect to the similarity of the handwriting and dissimilarity of the handwriting on the basis of investigation and examination conducted by him but in my opinion the handwriting expert cannot give opinion with respect to the motive of one writing as compared to other writing because for that the handwriting expert cannot have any material before him not he could have any opportunity to judge the motive of the author of the writing, therefore, the opinion given by the handwriting expert with respect to the motive and intention of the party at the time of writing is virtually of no value. The Court is, therefore, required to examine the opinion of the handwriting expert with care and caution. When it comes from the evidence of the handwriting expert himself that there are dissimilarities in the two writings, in view of the facts of the case and after going through entire evidence of PW-3. It is absolutely unsafe to base finding of execution of document Ex. 1, Ex. 2 and Ex. 3 by the defendant. Hence, it is held that the plaintiff failed in proving oral agreement dated 9-10-1980 and payment of any amount to the defendant.

32. The learned counsel for the appellant relied upon the judgments of this Court delivered in the case of *Deenanath v. Chunnilal,* [6] and another judgment of this Court

delivered in the case of *Smt. Tej Kaur v. Jeet Singh,* [7] wherein this Court has taken a view that in suit for specific performance of the contract, the vendor has no right to plead the defense of want of title of the vendor himself and in suit for specific performance of the contract of sale of joint property, the co-owner is not necessary party. There is no quarrel with respect to the law laid down in the above two cases. The defendant has no right to plead defense on the basis of his alleged want of title, therefore, the defense which is raised by the defendant on the basis of the plea that there are other co-sharers of the property is rejected. There are three more judgments, namely, (1) *Aman Behal v. Smt. Aruna Kansai,* [8] *K. Mehra v. Mrs. Anjali Bhaduri,* [9] laying down the same proposition.

33. Learned counsel for the appellant further relied upon the judgment of the Andhra Pradesh High Court delivered in the case of *Moturi Seeta Ramabrahman v. Bobba Rama Mohana Rao,* [10] wherein the Andhra Pradesh High Court held that when the parties are closely related to each other and agreement effected orally, it is not unnatural. As I also taken a view that there may be oral agreement for sale of the immovable property and oral agreement is also enforceable in law but on the facts I find that there is no agreement between the parties. Therefore, on facts of the case, the judgment of the Andhra Pradesh High Court has no application to the present case. In the case of Moturi Seeta Ramabrahmam's case (supra), there was an admission of the defendant himself with respect to the agreement to sell which is not here.

34. The learned counsel for the respondent vehemently submitted that from the evidence of the defendant himself it is clear that the defendant obtained the power of attorney from his brother and it is nobody's case that there was any other person entered into the agreement for purchase of the house in dispute from the defendant then this is an important circumstance which proves that there was in fact an agreement for sale in favor of the plaintiff by the defendant and the time was taken by the defendant for obtaining the consent of his brother. It comes from the evidence of DW-1 Ammer Ahmed that on 3-1-75 partition between the brothers was to take place but one of the brothers refused and, therefore, no deed was written. The defendant further stated that they submitted document for partition before the Registrar upon which penalty was imposed and appeal was preferred and thereafter the documents were returned to them and on that deed one of the brothers Gulam Mustafa did not sign. He shown his ignorance whether the authority was taken in the year 1980 or not. If this fact was in the knowledge of the plaintiff that the defendant obtained the proper

authority for sale of the house in dispute from his brothers then it was certainly in the notice of the plaintiff that house was belonging not only to the defendant at the time of entering into agreement to sell but it was also belonging to other persons. If it was true then the case of the plaintiff does not find any help from it but it goes against the plaintiff himself. In view of this vague evidence that the defendant obtained the authority in the year 1980 and it was in the knowledge of the plaintiff then there was no reason for the plaintiff not to seek performance of the contract immediately after one year of the agreement dated 9-10-1980 and if no authority was in fact obtained by the defendant then it is clear from the evidence on record that the plaintiff even did not insist for getting the authority from all the brothers. So far as not getting the deed in writing for agreement to sell, it is stated that there were good relationship of plaintiff and defendant but a good relationship cannot be held to be a good ground for not getting the deed in writing when the plaintiff was sure that the sale transaction will take period of one year.

35. In view of the above discussion, it is held that the plaintiff failed to prove the oral agreement dated 9-10-1980 and also failed to prove the payment of Rs. 5,000/- in advance, Rs. 5,000/- on 24-12-1980 and Rs. 5,000/- on 6-1- 1981 and also failed to prove settlement of account dated 6-10-1981.

36. In addition to above, the fact is that even the plaintiff himself set up the case in his pleading and evidence that the plaintiff was in possession of the part of the property. He had money transaction of loan with the defendant and, as per the evidence of the plaintiff himself, that the defendant on 6-10-81 came for Rs. 100/- only which shows the financial position of the defendant. It is also the case of the plaintiff himself that the amount of more than Rs. 29,000/- was due in the plaintiff if the sale consideration is Rs. 47,000/-. It is also clear from the conditions mentioned in the agreement as alleged by the plaintiff that no condition was there in the alleged contract securing performance of the contract from the seller by putting any condition that in case of non-performance of the contract within the stipulated time by the defendant or totally non-performance, there will be penalty upon the defendant-seller which normally is a condition given in the agreement for securing performance of the contract. It will make the relief of specific performance of the contract in favour of the plaintiff an inequitable relief as per sub-clause (c) of sub-section (2) of Section 20 of the Act of 1963 and grant of decree will result into hardship to the defendant and it will not cause such hardship to the plaintiff as per Clause (b) of sub-section (2) of Section 20 of the

Act of 1963 because it can be presumed that the defendant could not fore-see the situation that he will get the money in such petty installments and will not be able to convey the title.

37. In the result, the appeal of the appellant is allowed. The judgment and decree of the trial Court dated 2-12-1988 is set aside. The suit of the plaintiff is dismissed with costs.

Appeal allowed.

Cases Referred.

1. AIR 1951 SC 120
2. AIR 1945 PC 174
3. AIR 1968 Cal 91
4. (1873) 17 Eq. 358 pp. 373-374
5. AIR 1980 SC 531
6. 1974 Raj LW 383
7. AIR 1998 Raj 201
8. AIR 1987 Punjab and Haryana 52, (2) Krishna Lal v. Tek Chand, AIR 1987 Punjab and Haryana 197 and Raj
9. AIR 1981 Delhi 237
10. AIR 2000 AP 504