

Mool Chand Vs. Ved Prakash and ors.

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SooperKanoon Citation : sooperkanoon.com/463095

Court : Allahabad

Decided On : Feb-11-1981

Reported in : AIR1981All152

Judge : Deoki Nandan, J.

Acts : [Specific Relief Act, 1963](#) - Sections 16 and 20; Transfer of Property Act - Sections 55(3)

Appeal No. : Second Appeal No. 1019 of 1976

Appellant : Mool Chand

Respondent : Ved Prakash and ors.

Advocate for Def. : Mr. G. P. Bhargava

Advocate for Pet/Ap. : Bharatji Agarwal, Adv.

Disposition : Suit dismissed

Judgement :

Deoki Nandan, J.

1. This is a plaintiff's second appeal in a suit for specific performance of a contract for sale of a certain area of land situate at Hapur.

2. According to the plaintiff's case the defendants agreed to sell the land detailed at the foot of the plaint at Rs. 6 per square yard. The agreement was entered into on 21st April, 1966 and the sale was to be completed within one month. The sum of Rs. 1,000 was paid as advance and a receipt for the same was executed by the defendants, the same day. That receipt is Ext. I on the record. The plaint proceeds on to allege that the defendants had agreed to carve out a 10 feet wide passage on the south of the land to be sold and the land of the passage was to be excluded in calculating the area of the land to be sold and the price to be paid therefor. For this purpose the land to be sold had to be measured and a site plan was to be prepared on scale showing the passage to be so carved out, before the execution of the sale deed. The defendants held the land as Sirdars at the time when the agreement was executed. They had also to become Bhumidhars by depositing 10 times the land revenue, and to obtain a Bhumidhari sanad before the execution of the sale deed. According to the plaintiff, the defendants failed to complete the said requirements, which were required to be performed before the execution of the sale deed, within the one month's time agreed to between the parties. The plaintiff attended the registration office on 20th May 1966 after previous intimation but the defendants failed to turn up. The defendants did not inform the plaintiff about the deposit of 10 times the land revenue with the Government and the acquisition of Bhumidhari rights and the grant of Sanad even after 20th May, 1966, but the plaintiff had come to know that the defendants had acquired Bhumidhari rights and obtained a Sanad in respect of the land recently but had not got a site plan prepared for carving out the 10 feet wide land for passage in order to work out the exact area of the land to be sold. According to the plaintiff, the entire area of the land was .1 Bigha, 4 biswas, and excluding the area for the 10 feet wide passage on the south, the area of the land to be sold worked out approximately to 3330 sq. yards, of which the price worked out to Rs. 19,980, at the agreed rate of Rs. 6 per sq. yard. The plaint proceeds on to allege that the plaintiff is ready and was ever ready to perform his part of the contract. He is ready to pay and was ever ready to pay the balance sum of Rs. 18,980 or whatever amount of consideration may be found payable on preparation of the site plan and calculation of the area. He is also ready to do all other things and to incur all other necessary expenses on the execution of the sale deed. The plaintiff also requested the defendants to execute

the sale deed on receipt of the balance consideration and registration notices were served upon the defendants but they have not only refused to execute the sale deed but have further asserted that the amount of Rs. 1,000 paid by the plaintiff to the defendants had been forfeited. Hence the suit. The receipt which contains the terms of the agreement appears to have been filed on 13th February, 1969 a few days after 27th January, 1969, the date on which the plaint was filed.

3. The two defendants filed separate written statements. In the first written statement of Raghubir Saran, defendant No. 1, he admitted the fact of the agreement on 21st April, 1966 between him and the plaintiff to sell the land in suit at Rs. 6/- per sq. yard and the receipt of Rs. 1000/- as 'earnest money' by him and added that it was stipulated that if the plaintiff did not get the sale deed executed within the prescribed tune, the earnest money would be liable to be forfeited. It was then admitted that the plaintiff paid Rs. 1,000 to the first defendant and got his signatures on a typed receipt dated 21st April, 1966 for the same but the plaintiff's case that the amount was paid as part of the sale consideration was false. It was then admitted that the first defendant was to get a scale map prepared showing the 10 feet wide passage which had been carved out by him and for which no price was to be paid so that the amount of the price to be paid may be found out from the scale map. This is followed by the denial of the contents of paragraph 4 of the plaint coupled with the assertion that the first defendant was in fact a Zamindar of the land and believed that he must have been recorded as a Bhumidhar thereof on the abolition of the Zamindari but when he came to know of the wrong entry of some land as Sirdari, he deposited 10 times the land revenue on 24th May, 1966 and having done so he served a notice dated 27th May, 1966 on the plaintiff to have the sale deed executed.

In the next paragraph of the written statement the contents of paragraph 5 of the plaint were denied, coupled with the assertion that the plaintiff had got the land measured and the 10 feet wide passage which had been carved out by the defendants was shown in the scale map which was ready on 20th May, 1966 and a ferroprint copy thereof was given by the first defendant to the plaintiff, and that the plaintiff's allegations to the contrary were false. The written statement then proceeds on to acknowledge the receipt of the plaintiff's notice dated 20th May,

1966 by the first defendant on 23rd May, 1966 in which it is said that the plaintiff had dishonestly not mentioned the fact of the measurement of the land and the preparation of the scale map and the receipt of its ferroprint by him. It is then explained that as soon as the first defendant came to know that some of the and was recorded as Sirdari, instead of getting involved in proceeding for correction of papers, he deposited the 10 times of the land revenue on 24th May, 1966 and showed the receipt to the plaintiff, and 1st June, 1966 was fixed for the execution of the sale deed. By way of abundant caution the first defendant also informed the plaintiff by notice dated 26th May, 1966 that he should get the sale deed executed on 1st June, 1966 and if he did not do so, the earnest money could be forfeited. The plaintiff, it was said, deliberately and dishonestly did not receive that notice and it was accordingly received back by the first defendant on 14th June, 1966. The plaintiff's allegation that the first defendant was not prepared to execute the sale deed within the agreed time, was said to be false and that on the contrary it was the plaintiff who had avoided to do so and his right to have the sale deed executed had come to an end. The contents of paragraph 6 of the plaint were thereafter denied, and, after repeating much that had already been said, it was said that the plaintiff did not get the sale deed executed and he was guilty of dishonesty and falsehood.

The contents of paragraph 7 of the plaint were thereafter not admitted with the further assertion that a 10 feet wide passage had already been carved out by the first defendant and had been shown to the plaintiff and also demarcated on the map and the map also showed the area of the land to be sold but the plaintiff was bent upon making wrong statements. The area of the land to be sold was said to be 37701/4 sq. yards and the price thereof Rs. 22,621-50. In paragraph 8 of the written statement, the contents of paragraph 9 of the plaint were denied and it was asserted that the plaintiff raised objections which showed that he was not prepared to take the sale, that the suit was much delayed which also showed that the plaintiff was not ready to take the sale, but since the prices of the land had doubled and trebled, the plaintiff had filed the suit on wrong allegations. In paragraph 9 of the written statement, after denying the contents of paragraph 9 of the plaint, it was asserted that the plaintiff's right to have the sale deed executed came to an end long ago and the earnest money of Rs. 1,000 stood forfeited. The

agreement had also come to an end. The plaintiff was falsely trying to revive it. A correct reply was given to the plaintiff's notice.

In paragraph 10 of the written statement, after denying the contents of paragraph 10 of the plaint, it was asserted that the plaintiff's right to have the sale deed executed came to an end when he raised objections. The first defendant had fulfilled the terms of the agreement to be performed by him but the plaintiff had not, in spite of the expiry of the period of one month for the execution of the sale deed come forward to have the sale deed executed in spite of fixing of a date for doing so on two occasions. His right to have the sale deed executed has come to an end. He has no right to maintain the suit. After raising technical pleas in paragraphs 11, 12 and 13, the written statement proceeds on to state the additional pleas of the first defendant in paragraph 14 onwards. Much of it is a repetition of what had already been stated in the parawise reply to the plaint, but certain allegations not made earlier must be noticed.

It was stated that the plaintiff did not receive the first defendant's notice dated 26th May, 1966. After that, in order to give the plaintiff another chance, the first defendant asked the plaintiff by notice dated 24th June, 1966 that he should get the sale deed executed on 5th July, 1966 failing which the earnest money would stand forfeited and the plaintiff would have no right thereafter to have the sale deed executed. But the plaintiff did not appear in the registration office on that date and did not get the sale deed executed from which it was apparent that the plaintiff was not prepared to have it executed nor did the plaintiff have the necessary funds to pay the sale consideration. It is then stated that by a telegram and a notice dated 6th July, 1966 the first defendant had informed the plaintiff that since he had not come to have the sale deed executed on 5th July, 1966 the earnest money paid by him had been forfeited and his right to have the sale deed executed had come to an end to which the plaintiff did not send any reply. The plea of estoppel was raised on these facts. The plaintiff's notice dated 28th April, 1967 was said to contain false and incorrect averments. The first defendant sent a reply dated 1st May, 1967 which was also not received by the plaintiff. The first defendant wanted to buy urban property at Hapur after selling the village property. However, since the plaintiff did not buy the land. The defendant No. 1 gave up his intention of

selling the land. The plaintiff again kept quiet for about 1 year and 5 months and sent a notice dated 14th November, 1968 to which also a reply was given on 18th November, 1968, but the acknowledgment card not having been received another reply was sent on 13th December, 1968. It was pleaded that the plaintiff's notice was useless, his right to have the sale deed had come to an end long ago and became barred by time. The plaintiff, it was alleged was guilty of breach of contract. Time was of the essence of the contract. The first defendant wanted to sell the land and buy urban property at Hapur and the price of urban property had doubled and trebled in the meanwhile. The plaintiff was well aware of these facts. If the plaintiff had taken the sale on 5th July, 1966, the defendant would have invested the sum of Rs. 21,000 and odd, in urban property at Hapur and would have become owner of the property valued at twice or thrice the amount, and if he had invested the amount at the rate of Rs. 11/2 per cent per mensem, he would have earned more than Rs. 10,000 by then. The plaintiff wanted to take undue advantage of the first defendant's position and was on this ground also not entitled to have the sale deed executed.

In paragraph 26 of the written statement, it was stated that the paper with the revenue stamp affixed thereon which had been filed by the plaintiff as the agreement for sale, was forged. The receipt which had been typed, and on which the first defendant had put his signatures, was not the one that had been filed by the plaintiff. It appeared from the receipt filed by the plaintiff that he had transferred the revenue stamp from the receipt, and the portion of the signatures outside the revenue stamp had been forged, and the signatures of the first defendant at another place and of the second defendant also, were forged, and the document was a forgery.

4. The written statement of the second defendant is brief. She denied the plaintiff case, and claimed that she is the owner of 1/2 share of the property, the first defendant being the owner of the other 1/2, that she is a widow, and issueless, and her relations with the first defendant were not good, as the latter wanted to misappropriate her property. She claimed that she never entered into any contract of sale of the property with the plaintiff nor did she sign any receipt nor receive any amount of Rs. 1,000.

5. Examined under Order 10, Rule 2, the second defendant stated that the agreement paper No. 10-Ka (which was filed by the plaintiff as the original agreement) did not bear her signatures, that the first defendant was her husband's younger brother; that her share in the property was 1/2 while the other half belonged to the first defendant and that she was not aware of any talk between the first defendant and the plaintiff about the sale of the land.

6. The first defendant when examined under Order 10, Rule 2 stated that he had agreed to sell the entire land to the plaintiff. His share was 1/2. He had entered into the contract to sell the land without asking the second defendant about it. He had entered into the agreement. The second defendant had not entered into the agreement nor did he mention it to her. The agreement was written on 21st April, 1966. He had signed on the original. The second defendant had not signed thereon. The original had been given to Chetan Prakash after signature. Chetan Prakash was admittedly the scribe. It did not bear any signature or thumb impression of any witness. Chetan Prakash had given to him a copy of the agreement, paper No. 29-Ca, a month or so after its execution. The paper filed by the plaintiff was not the original agreement. Only that portion of the signature which was on the revenue stamp was his, the rest was not his. The plaintiff was then examined under Order 10, Rule 2. He stated that the talk about the contract had taken place between him and the first defendant. He had no talk with the second defendant. The first defendant had told him that he was negotiating on behalf of the second defendant also and was responsible for her. The agreement was signed by the first defendant and the second defendant in his presence.

7. The following were the issues framed by the trial court, namely:

'1. Did the parties enter into an agreement on 21-4-66 for the sale of the land in dispute @ Rs. 6/- per square yard?

2. Which of the parties committed breach of agreement?

3. Does the amount of Rs. 1,000 paid as advance stands forfeited to defendant No. 1?

4. To what relief, if any, is the plaintiff entitled?'

Having framed the issues the trial court noted:

'issues read over. No other issue pressed.'

It may be here observed that although the document relied upon by the plaintiff as the original agreement and filed by him as paper No. 9-C was there and although it was asserted by the defendants that it was forged, no issue was framed on that point and all that was observed about it was, 'plaintiff 1 paper by 9-C not admitted and requires proof.'

8. The first issue raised the question whether the parties entered into an agreement on 21st April, 1966 for the sale of the land in dispute at the rate of Rs. 6 per square yard. The trial court opened the discussion of its finding on that issue by observing that there is no dispute between the parties that an agreement dated 21-4-1966 was entered into between the parties and that 'the land was to be sold at the rate of Rs. 6 per square yard,' and further that there was an agreement between the parties to the effect that although the negotiation for the sale took place only between the plaintiff and the first defendant, the latter had authority of the second defendant to do so on her behalf. Plainly the whole issue was thus answered by saying that the parties were not on issue on the question raised by the language of issue No. 1. Nevertheless, the trial court proceeded to discuss the issue in 9 foolscap typed pages and answered it in the following words:

'Thus the conclusion is that the defendants did execute an agreement to sell on 21-4-66 describing themselves as bhumidhars, while in fact they were bhumidhars of part of the land proposed to be sold and they held only sirdari rights in respect of the remaining land. The terms of the agreement were those as written in Ext. A-36. The agreement was entered into between the plaintiff and defendant No. 1 but that defendant No. 1 had represented to the plaintiff that he was entering into the agreement on his behalf and on behalf of his brother's widow Smt. Gendia Devi.'

This conclusion was reached by the learned Civil Judge who tried the suit after holding that the document filed by the plaintiff, as the agreement Ext. I was a

manufactured document and that the document filed by the defendants as the copy of the agreement that had been executed. Ext. A-36 was genuine.

9. On issue No. 2, the trial court found that 'the plaintiff cannot be believed and the case as set up by him, is incorrect', and that 'the defendants did not commit any breach of the contract'. On issue No. 3 the finding was that the plaintiff being responsible for committing breach of the contract, he was not entitled to the refund of the earnest money and after recording the finding, on issue No. 4 that he was not entitled to any relief, the trial court dismissed the suit with costs.

10. The lower appellate court noticed the basic facts of the agreement between the parties; that the sale deed could not be executed and that the parties blamed each other for the same and proceeded to record that:

'When the parties went to the registration office on 20-5-66, it was discovered that some part of the land was sirdari land and it was decided between the parties that the defendants will convert this sirdari right into a bhumidhari by depositing ten times rent and, thereafter, the sale deed shall be executed. What transpired, thereafter, is that on 24-5-66, the defendants gave a notice to the plaintiff that they had deposited the ten times rent and had delivered to him the site-plan of the land and the plaintiff should now come to the registration office on 1-6-66 for executing the sale deed. I may explain here that the preparation of the site-plan became necessary, because in accordance with the agreement, 10 ft. wide Rasta had been left in the south of the land and that rasta had to be shown in the site-plan. The site-plan was necessary because the property in the agreement deed had been described by boundaries and by mentioning the area as 1 bigha, 4 biswas and the exact measurements on the spot were to be mentioned in the site-plan.'

11. The lengthy discussion contained in the judgment of the trial court on issue No. 1 was characterised by the lower appellate court as 'another controversy between the parties over which there was sufficient shadow boxing and which also engaged unnecessary attention of the trial court.'

12. According to the lower appellate court the differences between two documents, the one relied upon by the plaintiff, Ext. I, and that relied upon by the defendants,

Ext. A-36, were more apparent than real and of no consequence. It then stated that the plaintiff did not turn up for execution of the sale deed on 1-6-65 as desired by the defendants in their notice dated 27-5-66 because the plaintiff did not receive it. However, defendants' subsequent notice dated 24th June, 1966 (Ext. A-22) was received by the plaintiff. By that notice the defendants informed the plaintiff that they had deposited the ten times revenue and that the site-plan had been handed over to the plaintiff, after preparation on 20th May, 1966 in the office of the Sub-Registrar and that the plaintiff should come to the Sub-Registrar's office on 5th July, 1966 and in case the plaintiff did not come, the amount of earnest money shall stand forfeited. The plaintiff did not turn up at the Sub-Registrar's office on 5th July, 1966 and on 6th July, 1966 the defendants gave a telegram Ext. A-25 and a notice Ext. A-26 forfeiting the earnest money.

13. Further, according to the lower appellate court the site-plan was given to the plaintiff in the Sub-Registrar's office on 20th May, 1966 as alleged by the defendants. The plaintiff did not send any reply to the defendants' telegram or notice dated 6th July, 1966. Instead he sent a letter dated 28th July, 1967, Ext. A-28 and then, after keeping silent for 17 months, served a notice dated 14th November, 1968. The plaintiff did not turn up on 5th July, 1966 for execution of the sale deed in spite of notice and then kept silent for a long period of time initially for 9 months and thereafter again for a period of 17 months. That showed that the defendants were all the time willing and keen to get the sale deed executed but the plaintiff became indifferent and kept silent. 'On these facts', the lower appellate court raised the question, 'whether an inference should be drawn that the plaintiff had abandoned or waived his right to get the sale deed executed;' and ultimately after noticing the cases cited before it, it held that the pleas offered in justification for his prolonged silence by the plaintiff are without substance and without any foundation whatsoever and that since the plaintiff kept silent for a prolonged period of time despite persistent demands 'from the defendants' for the sale deed being executed and despite every thing being done by them towards the fulfilment of the contract, the only natural inference must be that the plaintiff was unwilling to fulfil his part of the contract and had either waived or abandoned his claim for the fulfilment of the contract,' and that, therefore, the suit was rightly dismissed by the trial court.

14. Mr. Rajeshwari Prasad, learned counsel for the plaintiff-appellant urged before me that the case of waiver and abandonment of the contract on account of delay, that has been carved out by the lower appellate court for the defendant-respondents is unwarranted by law. The suit was filed well within limitation. There was nothing in the conduct of the plaintiff to have led the defendants to believe that the plaintiff had waived the performance of the contract by them or that he had abandoned it such as to have led the defendants to do some thing, or to place the defendants in such a position as may render it unjust or inequitable to require them to perform the contract after the so-called delay of 9 months plus 17 months = 26 months, that had been worked out by the lower appellate court against the plaintiff. The claim being within limitation, the real question was whether the defendants could have rescinded the contract as they claimed to have done, and to forfeit the 'earnest money' of Rs. 1,000 by their notice dated 6th July, 1966. Once the defendants had taken the position that plaintiff had committed a breach of the contract by not presenting himself at the Registration office on 5th July, 1966 as to have entitled them to forfeit the 'earnest money' and thus to put an end to the contract, there was nothing much which the plaintiff could do about it except to file a suit, which he in fact did within the limitation of 3 years from the date fixed for the performance of the contract or when he had notice that the performance was refused. According to the plaintiff-appellant, the date fixed for the performance of the contract was 20th May, 1966 and that the defendants failed to perform their part of the contract on that date, and in spite of the plaintiff's notice dated 20th May, 1966 requiring them to do their part by obtaining a Bhumidhari Sanad and specifying the land reserved for the Rasta on a plan drawn to scale. All that they did was to send a notice dated 24th June, 1966 in which, they said that the amount of ten times' land revenue had been deposited by them on 24/25th May, 1966 but the Bhumidhari Sanad could not be obtained till then, and even so they insisted upon the execution of the sale deed on 5th July, 1966 and on the plaintiff's unwillingness to have the sale deed executed before the grant of the Bhumidhari Sanad, and before what he regarded to be a proper specification of the Rasta land on a plan drawn to scale, it was wrongful of the defendants to have purported to forfeit the earnest money and to rescind the contract by the telegram and the notice dated 6th July, 1966. The plaintiff was not obliged in law to go about

hankering after the defendants or to enter into fruitless controversy with them before filing the suit. However, since the plaintiff appears to have been ready and willing to purchase the property even after the expiry of the time limited by the agreement, he did serve a notice dated 28th April, 1967 on the defendants asking them to let him know whether the Bhumidhari Sanad had till then been obtained or not and since the defendants did not thereafter inform the plaintiff that they had been able to obtain the Bhumidhari Sanad or to have expressed their willingness to execute the sale deed in reply to that notice, all that the plaintiff could do and did was to have waited for some time more, and when he came to know that the defendants had in fact been able to obtain the Bhumidhari Sanad in the meanwhile, to have required them by notice dated 14th November, 1968 to execute the sale deed fixing 30th November, 1968 for the said purpose, and on the defendant's failure to comply with that notice, to have instituted the suit giving rise to the present second appeal which he did on the 27th January, 1969.

15. It is undisputed that the plaintiff did not turn up on 5th July, 1966 in the Sub-Registrar's office and did not give any reply to the defendants' telegraphic notice dated 6th July, 1966 forfeiting the earnest money and rescinding the contract. The question is whether the plaintiff was justified in doing so. What happened after 5th July, 1966 is not relevant for finding out whether the plaintiff was justified in omitting to have the sale deed executed on 5th July, 1966 or in not requiring the defendants to execute it within a short period thereafter; and instead of going into the evidence of witnesses to discover the reasons for the plaintiff's omission to have the sale deed executed on 5th July, 1966, the best evidence to be looked at in this context is the plaintiff's notice dated 28th April, 1967, Ext. A-28. It was signed by the plaintiff himself and is addressed to the two defendants. After reciting the fact that the addressees had agreed to sell the land of plots Nos. 2668 area 13 biswas, 2669 area 11 biswas total 1 bigha, 4 biswas, of village Asaura, pargana and Tahsil Hapur, district Meerut, vide receipt dated 21st April, 1966 for Rs. 1,000 paid as advance by 20th May, 1966 the notice proceeds on to say that since the land was the Sirdari holding, and the addressees of the notice did not get the sale deed executed within the time fixed and that they the addressees had been required in writing to deposit ten times the revenue and to obtain bhumidhari sanad and to give notice, of their having done so to the plaintiff, but they the

addressees had not till then given him any information whether they had obtained a Bhumidhari Sanad or not. This is followed by the demand that if the addressees had obtained Bhumidhari Sanad they should immediately inform the plaintiff in writing as to the date on which they were prepared to execute the sale deed and that in case he did not receive any reply, he will have to approach the court for specific performance of the contract and that they, the addressees will be liable to his costs and damages. According to this notice dated 28th April, 1967 the only reason given for the non-execution of the sale deed till then was that the defendants had not informed him that they had obtained the Bhumidhari Sanad, which they were required to do by the plaintiff's earlier notice in writing.

The plaintiff's earlier notice in writing was that dated 20th May, 1966 itself. After reciting the very same terms of the agreement to sell, it shows that it was the last day of its performance but the addressees had not till then got the land finally measured in order to have a map prepared on scale and that he waited for them the whole day in the Tahsil but they did not turn up. It is further stated that when he got the revenue records inspected, he came to know that the land was their Sirdari and it was accordingly necessary for them to deposit ten times the revenue and he could not, therefore, get the sale deed executed. The notice required the defendants to deposit ten times the revenue in accordance with law and to obtain Bhumidhari Sanad and Bhumidhari rights as also to clearly specify the land to be left for the passage, and, when they had done all that, to inform him by letter sent by registered post that they had done all that and that he would then get the sale deed executed and also that if they failed to do so he would have to sue for specific performance and they would be liable for his costs and damages. By this notice the plaintiff insisted upon two things, namely, firstly the deposit of ten times the revenue and acquisition of Bhumadhari rights as also the obtaining of Bhumidhari Sanad in proof thereof, and secondly the clear specification of the Rasta land after final measurements. There are two communications from the defendants' side, in between the said two notices dated 20th May, 1966 and 28th April, 1967, apart from the defendants' telegraphic notice dated 6th July, 1966. The first communication is dated 26th May, 1966 from the defendants. This was sent through counsel and was not received by the plaintiff before the date fixed therein for execution of the sale deed and is admitted to have come back to the

defendants. Since it was not received by the plaintiff, nothing much could be aid on its basis unless it were proved that the plaintiff was aware of its contents and deliberately avoided receiving it. Moreover, the second communication dated 24th June, 1966 says almost the very same things which were said in the first communication dated 26th 'May, 1966. It was not necessary for me to read the whole of it for it has been seen above that the only reason suggested by the plaintiff in his notice dated 28th April, 1967, for his omission to have the sale deed executed on 5th July, 1966 was the absence of communication that Bhumidhari rights had been obtained by, and a Bhumidhari Sanad had been granted to, the defendants. About the acquisition of Bhumidhari rights, this communication dated 24th June, 1966 from the defendants says that 10 times the revenue had been deposited in the Tahsil vide receipt No. 59-50 dated 24/25th May, 1966 but the sanad could not be obtained till then; that the receipt had been shown to the plaintiff and that, therefore, Bhumidhari rights had been acquired.

16. The next question which, therefore, arises is whether the plaintiff was justified in refusing or omitting to take the sale unless the defendants had obtained the Bhumidhari Sanad and had apprised the plaintiff of the fact of having done so, by notice in writing, since it is indisputable that the defendants did not do so at any point of time before 5th July, 1966 or even thereafter till the receipt of the plaintiff's notice dated 28th April, 1967.

17. Mr. G. P. Bhargava, learned counsel for the defendant-respondents urged in this context, that the mere deposit of the amount of ten times the revenue was tantamount to acquisition of Bhumidhari rights and if the plaintiff meant business like a reasonable man, there was no good ground for him to have omitted to attend the registration office on 5th July, 1966 for obtaining the sale deed. My attention was invited to a Full Bench decision of this court in *Banshidhar v. Smt. Dhirajadhari* : AIR1971 All526 . Its head note says:--

'A Sirdar, who has made an application under Section 134, U.P.Z.A. and L.R. Act and made the necessary deposit acquires the status of a bhumidhar when the Assistant Collector makes the order of the grant of a certificate, the event of actual issuance of the certificate is immaterial. If the applicant is alive on the date of the

order granting a certificate to him, he will become a bhumidhar from the date of deposit, irrespective of the actual issuance of the certificate. After his death, his widow is not entitled to make an application for the refund of the deposit made by him, or to say that the certificate be not granted. The ministerial act of issuing the certificate has to be completed, once an order has been made.'

In that case the application for bhumidhari rights was made on 24th June, 1964 and on the same day the Tahsildar ordered: 'Declared bhumidhar. Issue Sanad'. In the present case, according to the material placed on the record, two applications were made for the acquisition of bhumidhari rights on 24th May, 1966 vide Exts. 2 and 4 but the orders for the grant of Sanad were passed thereon on 20th July, 1966, vide Exts. 3 and 5, respectively. It is thus apparent that the order for the grant of a Sanad had not been passed by the authority empowered to do so until 20th July, 1966. It could not be said that the defendants were competent to sell the land or confer a valid title on the plaintiff on the 5th July, 1966, or on any date before that. Moreover, the decision of the Full Bench shows that in *Habibullah v. Board of Revenue*, Civil Misc. Writ No. 261 of 1970, decided on January 15, 1970 a Division Bench of this Court had held that a person becomes a bhumidhar not upon the mere order for grant of a certificate, but when the certificate was issued. It cannot, therefore, be said that in the year 1966 when the transaction in question in the present case took place two Opinions were not possible, or that the plaintiff was not justified in insisting upon the obtaining of a bhumidhari sanad by the defendants before proceeding to take a sale from them. The assertion of the defendants in their communications dated 26th May, 1966 and 26th June, 1966, to the effect that they had acquired bhumidhari rights on making the deposit of 10 times the revenue on 25th May, 1966 was accordingly not correct, inasmuch as they could be said to have become bhumidhars only when the bhumidhari sanad was granted to them according to the law declared by a Division Bench or this Court in *Habibullah v. Board of Revenue*, Civil Misc. Writ No 261 of 1970 decided on January 35, 1970 and when the order directing the issue of bhumidhari sanad was passed on the 20th July, 1966 by the Assistant Collector, though with effect from the date when the deposit was made, according to the view of the Full Bench in *Banshidhar's case* which overruled that Division Bench.

Moreover, under Section 55(3) of the, Transfer of Property Act the seller is bound to deliver to the buyer all documents of title relating to the property which are in the seller's custody as soon as the whole of the purchase money has been paid. In the present case the whole of the purchase money was payable on the execution of the sale deed and the bhumidhari sanads to be granted related to the whole of the land agreed to be sold. The defendants who were the sellers were in law bound to deliver to the plaintiff, the purchaser, the documents of title, namely, the bhumidhari sanad or sanads simultaneously with the execution of the sale deed when the purchase money was paid to them. The defendants had in clear terms by their communications dated 26th May, 1966 and 24th June, 1966 said that the bhumidhari sanad or sanads could not be obtained, till then. They were not justified in law in requiring the plaintiff to have the sale deed executed on payment of the sale consideration without being in a position to deliver the bhumidhari sanad or sanads on 5th July, 1966. The plaintiff was thus entitled in law to ignore the defendants' notice dated 24th June, 1966 and not to attend the registration office on 5th June, 1966, and further on in not doing anything, and rather in waiting till he was informed by the defendants by notice in writing that they had obtained bhumidhari sanad or sanads for the land agreed to be sold, as required by his first notice dated 20th May, 1966.

18. It is not known when the defendants actually obtained the bhumidhari sanad or sanads for the land agreed to be sold, but it is undisputed that they never communicated the fact of having obtained them, to the plaintiff at any time before the plaintiff served his final notice dated 14th November 1968. The defendants could not have, therefore, claimed that the plaintiff had committed any breach of contract by not appearing at the registration office on 5th July, 1966, and that they had forfeited the earnest money of Rs. 1,000 by the telegraphic notice dated 26th July, 1966 on that ground. The entire conduct of the defendants after 6th July, 1966 was based upon the stand that the earnest money had been properly forfeited and the contract did not subsist vide their reply dated 15th May, 1967 Ext. 15 to the plaintiff's notice dated 28th April, 1967 and that dated 13th December, 1968 Ext. 18 to the plaintiff's notice dated 14th November, 1968 and if the defendants were wrong in that, as found above, the plaintiff cannot be blamed for having given them a chance to make amends and to have waited before filing the

suit until when he was finally told by the defendants' reply dated 13th December, 1968 served through counsel, to his notice dated 14th November, 1968 that the defendants were not only not willing to execute the sale-deed any longer but claimed to have forfeited the earnest money and even claimed the costs of communications and notices sent by them.

19. I do not think that there could be any question ,of the plaintiff having waived or abandoned his right to specific performance of the contract for sale, by not replying to the defendants' notices dated 24th June, 1966 and 6th July, 1966 for the plaintiff had already made his position clear in the first notice which he sent on 20th May, 1'966 nor was the plaintiff bound to act immediately on receipt of the defendants' reply dated 15th May, 1967, Ext. 15 to his notice dated 28th April, 1967, for the defendants did not in that reply say that the bhumidhari sanad had been obtained. Instead, all that they said was that the earnest money stood forfeited and the plaintiff had now right left under the agreement. The plaintiff could wait till he came to know that bhumidhari sanad had been granted and to act only when he acquired that knowledge, though not from the defendants, and served the final notice dated 14th November, 1968. Obviously, the plaintiff was still ready and willing to perform his part of the contract for, if he had not been so ready and willing he could not have served the notice dated 14th November, 1968 soon after he had come to know that the bhumidhari sanad had been obtained by the defendants in respect of the land agreed to be sold to him. It has not been suggested by anything on the record that the plaintiff delayed the service of this notice. Indeed, It is said in paragraph 4 of the notice that he had come to know that bhumidhari sanad had recently been prepared. In the absence of any evidence to the contrary, this averment of the plaintiff appears to be quite credible. From the facts recited in the judgment of the Full Bench in Banshidhar's case : AIR1971 All526 it appears that the sanad in that case was not prepared for more than 3 years in one case and more than 2 years in the other.

20. The case of Sriram Cotton Pressing Factory (P.) Ltd. v. Narayanaswami Naidu : AIR1965 Mad352 was referred to and relied upon by the lower appellate court in this context. It was held in that case that there was palpable failure on the part of the plaintiff to carry out its part of the contract and from the considerable delay and

laches on its part, it could be inferred that there was waiver or abandonment of the contract; that time was of the essence of the contract in that case, and that in view of the events which had happened the granting of the decree for specific performance would involve hardship and inequity on the defendants. On the question of waiver reference was made to a passage extracted from an earlier decision of the Madras High Court in *S. V. Sankaralinga Nadar v. Ratnaswami Nadar* : AIR1952 Mad389 to the effect that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant, and that it was well settled that waiver is not to be inferred merely from delay in the institution of the suit, I do not think that on the facts of the present case it could at all be said that the plaintiff had waived the performance of the contract by the defendants or that he had abandoned the contract. As laid down by the Privy Council in *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha* 'waiver is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. There is nothing on the fact of the present case to show that the plaintiff ever agreed, whether expressly or by implication from anything in his conduct to release or not to assert his right under the contract. The decision of the Supreme Court in *Satyanarayana v. Yelloji Rao* : [1965]2SCR221 was a case concerning the exercise of the court's discretion under Section 22 of the old Specific Relief Act equivalent to Section 20 of the [Specific Relief Act, 1963](#) and that the plea of waiver for non-suiting a plaintiff in a suit for specific performance of a contract was different from the plea of refusing the relief in the exercise of the court's discretion to enforce or not to enforce a contract specifically, is clear from the very passage quoted by the lower appellate court from that judgment, wherein it was said that if abandonment or waiver is established, no question of discretion on the part of the court would arise, The two cases relied upon by the trial court and referred to by the lower appellate court at the very end of its judgment without naming them were of *Dhanji Pasu v. Karamshi Varjang* (AIR 1951 Kutch 14) and *Lal Singh v. Tej Mal* (AIR 1954 Ajmer 75). There is nothing in these cases which could lead to the inference that on the facts of the

present case the plaintiff could be said to have waived or abandoned the contract.

21. This was sufficient for the disposal of this second appeal but Mr. G. P. Bhargava appearing for the defendant-respondent urged that the Court should yet refuse to decree specific performance of the contract for sale in the present case in the exercise of its discretion in the light of the rules laid down in Section 20 of the [Specific Relief Act, 1963](#). He urged that the contract gave an unfair advantage to the plaintiff in view of the phenomenal rise in the price of land in the meanwhile, and its specific performance would therefore, cause great hardship to the defendants who could lose their land, for what would be in the light and its present day prices, nothing more than a song, Mr. Bhargava reinforced the argument by urging that if the plaintiff had been in real earnest he would have set about the business of purchasing the land by seeing to it that the bhumidhari sanad or sanads were obtained as soon as possible after the defendants had done all that they could by depositing the amount of ten times the revenue on 24th or 25th May, 1966. It was suggested by Mr. Bhargava that the plaintiff did not have ready money as found by the trial court, and that was the real reason why he invented an excuse for not taking the sale in due time, and time having been made of the essence of the contract by the defendants' notice dated 24th June, 1966 they were fully justified in forfeiting the earnest money and rescinding the contract by their notice dated 6th July, 1966. Reference was also made in this context to Section 16(c) which says that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, Lastly Mr. Bhargava urged that the copy of the agreement Ext. 1 which was the basis of the suit had been found to be forged by the trial court. The lower appellate court had not reversed that finding and in view of it the suit must fail, for the court cannot enforce the specific performance of a contract other than that sued upon by the plaintiff, and the document relied upon by the plaintiff having been found to be forged, the court cannot look to another paper for ascertaining the terms of the contract to be enforced.

22. It is no doubt true that since the year 1966 when the contract in suit was arrived at or even since January 1968 when the suit was filed, the prices of land

have risen many fold throughout India, particularly in urban areas on account of increasing pressure on land with the general increase in population all round and the movements from villages to cities, and also, in no small measure on account of inflation, the general increase in the prices of things and the corresponding fall in the value of currency. Nevertheless I do not think that the court would be entitled to make any allowance in favour of the defendants on account of the lapse of about 13 years since January, 1969 when the suit was instituted, and of about 15 years since the contract was entered into between the parties. The court has to look to the conduct of the parties for judging whether the specific performance of a contract of this nature ought to be refused or not, in the exercise of its discretion on the guidelines provided by Section 20 of the Specific Relief Act. On the conduct of the parties, as has been seen above, it does not appear to me that the plaintiff could be blamed for anything which he did except probably for not entering into a deal with the defendants every time the defendants sent a communication to him. I have also found that it were the defendants who had been unjustifiably insisting on the execution of the sale-deed even before the order for the issue of a Sanad was passed by the Assistant Collector in their favour. They were not competent to sell the land at that time. Indeed, as shown above, the plaintiff served his notice dated 14th November, 1968 requiring the defendants to execute the sale-deed soon after he came to know that the bhumidhari sanad or sanads had been prepared, but the defendants were not prepared to execute the sale-deed although the prices of the land could not be said to have risen so appreciably between 1966 and 1968 as to have caused them any prejudice. I do not, therefore, think that the court would be justified in refusing to enforce the specific performance of the contract for sale in the present case on any of the grounds specified in Section 20 of the Specific Relief Act.

23. As to the plaintiff's readiness and willingness to perform his part of the contract, Section 16(c) of the Specific Relief Act is in the following terms:

'16. Specific performance of a contract cannot be enforced in favour of a person--

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation:-- For the purposes of Clause (c),

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court.

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.'

The present case is not one where the plaintiff did not aver that he had performed or had always been ready and willing to perform the essential terms of the contract which were to be performed by him. Clause (1) of the Explanation shows that it was not necessary for the plaintiff to have actually tendered the money to the defendants or to deposit it in court, unless he was directed so to do by the Court. Clause (ii) says that the plaintiff must be willing to perform the contract according to its true construction. The plaintiff had in this case done all that he could to require the defendants to execute the sale-deed and the aforesaid discussion of the facts and the conduct of the parties on the question whether the plaintiff was justified in refusing or omitting to take the sale unless the defendants had obtained the Bhumidhari Sanad and had apprised the plaintiff of the fact of having done so by notice in writing would show that the plaintiff did all that which could be reasonably expected of him to do as the purchaser of the land agreed to be sold by the defendants. It cannot be said that the plaintiff was not always ready and willing to perform the essential terms of the contract which were to be performed by him.

24. Lastly about the finding that Ext I is not the genuine agreement between the parties or that Ext. A-36 was a genuine copy, I am constrained to say that a bare look at the two documents shows that Ext. I could not possibly be forged, and Ext. A-36 could not possibly but be a copy of the agreement that was executed between the parties. The finding arrived at by the trial court on this point is wholly conjectural. Further as noticed above, the parties were not on issue on any such question, and that seems to be the reason why the lower appellate court did not waste its breath in going into the trial court's finding and expressly setting it aside, more so because it had decided to dismiss the suit on another ground. I am of the view that the parties not being on issue on the question whether Ext. 1 was forged and whether Ext. A-36 was a correct copy of the agreement arrived at between the parties, the finding recorded by the trial court on that point is illegal. The judgment of the court shows that according to the defendants' case Ext. A-36 was the carbon copy of the original agreement which was executed between the parties. A bare look at Ext. A-36 would show even to the naked eye that it could not be a carbon copy but was originally typed. The manner of forgery of a part only of the signatures of the first defendant on the revenue stamp that has been suggested on behalf of the defendants is unbelievable. Further there being no difference between any of the essential terms of the contract between the parties as incorporated in Ext. I from those incorporated in Ext. A-36 it is impossible to believe that the plaintiff would have destroyed the original by removing the revenue stamp therefrom and forging another document for filing the suit and spending all that money and taking all that risk. The reasons given by the trial court for holding Ext. I to be forged are all conjectural and its finding on that point appears to me to be plainly perverse and I do not propose to write another nine sheets of foolscap paper to deal with the same. The agreement, was duly proved by the plaintiff and the defendants' denial of the same was false. The plaintiff had very clearly and candidly explained the difference between Ext. A-36 and Ext. I and his statement was more probable and inspires confidence.

25. In the result this appeal must be allowed. However, before specific performance of the contract could be granted, it appears necessary in this case to specify the area of the land to be sold and the price to be paid therefor. According to the terms of the contract the plaintiff is entitled to a 10 feet wide passage on the

southern side of the land. The site plan Ext. A-19 on the record does not show any 10 feet wide passage within the plotted area of 3770 $\frac{1}{4}$ sq. yards of the land. From the direction mark on the map, it is not clear which is the southern side of the plot of land that was agreed to be sold, for the south points to what may be described as the south-western corner of the plot and not to the southern side. The topography shows that there is a passage (Railway road) on the west leading to the land agreed to be sold, it could be reasonably said that the southern side could be either the western side measuring 54 feet plus 116 feet 3 inches, total 170 feet 3 inches or the southern side measuring 224 feet. On this point in spite of the fact that the defendants' case has failed, I would like to give the benefit of doubt to the defendants by holding that the area of 10 feet wide land for the Rasta to be excluded in computing the price was 1172 sq. ft. and 6 sq. inches or 130 $\frac{1}{4}$ sq. yds. Deducting this from the total area of 3770 $\frac{1}{4}$ sq. yards, the area of the land for which the plaintiff had to pay at the rate of rupees six per sq. yard works out to 3640 sq. yards. The plaintiff would thus be required to pay Rs. 21,840. The sum of Rs. 1,000 paid as advance or earnest money would of course be required to be deducted out of it and the plaintiff must pay the amount of Rs. 20,840 in addition to the expenses to be incurred on the execution of the sale-deed of the land shown in Ext. A-19.

26. In the result the appeal is allowed with costs. The suit for specific performance of the agreement Ext. I dated 21st April, 1966 is decreed with costs throughout. The plaintiff shall deposit the sum of Rs. 20,840 in the trial court within three months from today and the two defendants (the first defendant being now represented by defendant-respondents Nos. 1/1 to 1/5) shall execute the sale-deed conveying the area of 3770 $\frac{1}{4}$ sq. yards as shown in the plan Ext. A-19 to the plaintiff and put him into actual possession of the land sold, within 2 weeks of being informed, by notice, of the deposit of that amount in court by the plaintiff. The costs of stamp duty and registration and other incidental expenses shall be borne by the plaintiff. In case the defendants failed to execute the sale-deed or to put him into actual possession of the property sold, the plaintiff shall be entitled to have the sale-deed of the said land executed by the court and obtain possession thereon by the process of court, by putting the decree into execution in accordance with law. Ext. A-19 or a true copy thereof shall form part of the sale-

deed to be so executed. The amount so deposited by the plaintiff in court shall be payable to the defendant-respondents after setting off the costs awarded to the plaintiff and shall be paid over by the court to the defendant-respondents as soon as may be after the sale-deed has been executed in the plaintiff's favour and he has been put into possession of the property sold. In case the plaintiff fails to deposit the amount of Rs. 20,840 within three months, the suit shall stand dismissed with costs throughout.

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