
(2013) 02 MP CK 0089

In the Madhya Pradesh High Court

Case No : First Appeal No. 358 of 1995

Smt. Dulari Bai, Rajesh, Sunil and Sanjay

APPELLANT

Vs

Rameshwar Dayal Shrivastava and Smt. Sangeeta

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 41 Rule 27, 96
Specific Relief Act, 1963 — Section 20, 20(1), 20(2)(a)

Citation : (2013) ILR (MP) 1619

Hon'ble Judges : A.K. Shrivastava, J

Bench : Single Bench

Advocate : Mrigendra Singh and Mr. Amit Khatri, for the Appellant; Manikant Sharma, Advocate for Respondent No. 1 and Shri A.K. Choubey, Advocate, for the Respondent

Judgement

A.K. Shrivastava, J.—Feeling aggrieved by the judgment and decree dated 04.08.1995 passed by learned Second Additional District Judge, Hoshangabad in Civil Suit No. 19-A/1991 (Old No. 91-/1986) whereby the suit of plaintiff-respondent has been decreed, this appeal u/s 96 of the CPC has been filed by the defendants no. 1 to 4-appellants. In the Trial Court the suit has been filed by Rameshwar Dayal Shrivastava against Prem Narayan alias Rabude however during the pendency of the suit the defendant died and present appellants as well as respondent no. 2 Smt. Sangeeta were brought on record as defendants, however, the fifth defendant (respondent no. 2) Smt. Sangeeta was proceeded ex parte.

2. The facts in compendium are that a suit for specific performance of contract has been filed by the plaintiff-first respondent in respect to a double-storeyed house, the description whereof has been mentioned in the plaint and which is the subject matter of the suit. According to the plaintiff in order to contest the election the original defendant Prem Narayan was in need of money, as a result of which, he gave an offer to the plaintiff to purchase his house for a consideration of Rs. 25000/- which was readily accepted by the plaintiff-

respondent. Thereafter, on 17.04.1980 a registered agreement of sale was executed between the parties in which it has been stated that today i.e. 17.04.1980 the original defendant has obtained a sum of Rs. 22,984/- towards advance money and balance amount of consideration Rs. 2016/- would be paid within three year latest by 17.04.1983 and thereafter the sale-deed can be executed and the possession would also be delivered at that time. It was also agreed between the parties that the possession of the house in question will be delivered to plaintiff after getting the tenant evicted from the suit shop. When the original defendant failed to get the sale-deed executed, on 28.05.1983 a notice was sent to him by the plaintiff to get it executed. But, the original defendant requested that because at present he is unable to get an alternative residential accommodation for him and his family members and hence requested on humanitarian ground to provide some more time to get the sale-deed executed. Thereafter on 05.07.1983 another agreement of sale was executed between the parties wherein it has been mentioned by defendant that since still he could not arrange an alternative residential accommodation, therefore, further period of one year more may be provided to execute the sale-deed. This agreement was notarized. When the original defendant did not execute the sale-deed, again an agreement was executed acknowledging the earlier execution of agreements of sale and this was also stated in the said document that although in the agreement dated 05.07.1983 the original defendant sought time to execute the sale-deed but because again alternative residential house was not found, therefore, again time of one year was sought to execute the sale-deed. In the agreement dated 23.06.1984 it has been mentioned that additional sum of Rs. 16/- has also been paid towards advance by the plaintiff which has been received by original defendant Prem Narayan and he is only required to obtain balance consideration of Rs. 2000/-. Thereafter another agreement was executed by said Prem Narayan on 11.10.1985 wherein it was agreed by the defendant to get the sale-deed executed of the disputed house in favour of plaintiff upto 17.04.1986. But when the defendant failed to perform his part of contract after sending a registered AD post notice to him on 12.04.1986 and also on 07.10.1986 the plaintiff has filed the present suit for specific performance of contract.

3. In the plaint it has been pleaded by the plaintiff that he was throughout ready and willing to perform his part of contract but every time under the pretext that defendant could not arrange alternative house for himself and his family members, therefore, the sale-deed was not executed by him. In the plaint it is also pleaded that even today the plaintiff is ready to purchase the suit house after making the payment of requisite balance consideration of Rs. 2000/- and thus it has been prayed that a decree of specific performance of contract be passed.

4. The original defendant before he passed away filed written-statement but his statement could be recorded in the Court. Upon his death, the present appellants and second respondent were brought on record as defendants 1 to 5. In the

written-statement filed on behalf of original defendant averments made in the plaint were denied but on bare perusal of the pleading of the written-statement and particularly by paying heed to additional pleas it is gathered that document of agreement of sale dated 17.04.1980 was executed by the defendant but it was a loan transaction and in order to settle the loan account this document was executed. In para 16 and 17 of the additional pleas it has been pleaded by the defendant that since relationship between the plaintiff and him was quite cordial, therefore, on 14.04.1978 he obtained a loan of Rs. 3000/- and similarly in March, 1983 he obtained loan from him. According to the plaintiff earlier to 1978 also he was taking loan from the plaintiff. In the year 1980 the plaintiff asked defendant to clear and settle all accounts and loan amount which defendant has taken by repaying to him, but, the defendant put his inability that presently his financial condition is weak and therefore he is unable to pay the loan amount in lump sum. Thus, by calculating the original amount of loan and the interest, document of agreement of sale dated 17.04.1980 was executed. It has also been pleaded by him that he never executed a document of agreement of sale dated 17.04.1980. It is also pleaded that on 17.04.1980 the plaintiff never paid any amount towards advance to him and the said document is without consideration and has been executed towards the security of earlier loan.

5. In para 18 it has been specifically pleaded by defendant that suit house is situated on main Court road of Hoshangabad city and on 17.04.1980 its value was Rs. 2 lac and therefore the question of selling it for a meagre amount of Rs. 25000/- does not arise. It is also pleaded by him in this para that houses in the nearby locality where the suit house is situated are also having high valuation. According to the defendant the suit house is constructed in a huge area and is a double storeyed Pakka house. Since on 17.04.1980, when it is said that the document of agreement of sale was executed the valuation of suit house was Rs. 2 lac, therefore one could infer that transaction between the parties was of loan. According to the defendant on 17.04.1980 the cost of the doors and windows of the disputed house was more than Rs. 30,000/- and therefore entire house which is 100 sq. feet towards northern and southern side and 25 sq. feet towards eastern and western side cannot be agreed to be sold for a meagre amount of Rs. 25,000/-. According to defendant on 17.04.1980 the valuation of the plot itself was Rs. 1 lac and therefore double storeyed house built upon it cannot be sold for Rs. 25,000/- hence it has been prayed that the suit be dismissed.

6. The learned Trial Court framed necessary issues and after recording the evidence of the parties, decreed the suit of the plaintiff. In this manner this appeal has been filed by the LRs of the original defendant.

7. The contention of Shri Mrigendra Singh, learned counsel for appellants is that if the evidence of plaintiff and his witnesses is considered in proper perspective manner and is tested on the touchstone and anvil of the evidence of defendant and his witnesses it would reveal that the transaction between the parties was of loan. Learned counsel further submits that there is overwhelming documentary

evidence on record that on 17.04.1980 (the date of execution of agreement of sale) the valuation of the suit house which is constructed in a huge area and double storeyed was having valuation of Rs. 2 lac and therefore learned Trial Court erred in decreeing the suit of the plaintiff.

8. Apart from this it has also been vehemently argued by him that the document of agreement of sale dated 17.04.1980 which is a registered document has been attested by two attesting witnesses, they are Shankar Singh and Dhanpal Singh. By inviting my attention to the testimony of plaintiff it has been argued that according to the plaintiff both these attesting witnesses have died which is ex facie false because one of the witnesses Shankar Singh was alive and the appellants have filed the affidavit of attesting witness Shankar Singh dated 02.11.1995 alongwith application under Order XLI Rule 27 CPC (I.A. No. 1388/2012) on 23.11.2012 but later on said Shankar Singh died and the appellants have also filed his death certificate alongwith the application. Learned counsel submits that the grant of decree of specific performance of contract is a discretionary relief and discretion should be exercised in favour of plaintiff only when he comes with clean hands. Learned counsel submits that looking to the controversy in the matter since the valuation of the suit house is having handsome value even on the date of alleged agreement of sale and because the grain may not come out of chaff in order to expose the plaintiff that the real intention between the parties was of loan transaction, deliberately he did not examine the attesting witnesses and particularly Shankar Singh whose affidavit has been filed by him alongwith application under Order XLI Rule 27 CPC. By inviting my attention to the averments made in the affidavit of Shankar Singh it has been contended by him that ex facie falsely the plaintiff deposed that this witness died when the trial of the suit was going on. In the affidavit attesting witness Shankar Singh has deposed by giving the details of his sons, who are residing at Sehore and Jabalpur and has deposed that he used to stay with his sons also. He has also deposed that transaction between the parties was of loan and on the date of alleged document of agreement of sale the valuation of the suit house was in between Rs. 2.50 lac and Rs. 3 lac and thus it has been prayed that by allowing the application (I.A. No. 13388/2012) the additional evidence may be taken on record. Learned counsel submits that no reply of the said application has been filed by the plaintiff nor any affidavit in rebuttal to the affidavit of Shankar Singh is filed that said Shankar Singh is not the same person who attested the document of agreement of sale dated 17.04.1980 (Ex.P/1). Learned counsel has also submitted that in the registered document (Ex.P/1) the name of Shankar Singh S/o. Kanhaiya Singh Rajput R/o. Sanischara Tehsil and District Hoshangabad is mentioned and in para 1 of the affidavit said Shankar Singh S/o. Kanhaiya Singh has specifically stated that he was earlier residing in Ward No. 1, Sanischara, District Hoshangabad but for certain reasons he has shifted and now residing in Village Bori Post Semri Tehsil Budhni P.S. Rehati District Sehore. It has also been deposed that for some days in every year this witness used to stay with his sons who are residing in Sehore and Jabalpur and

therefore since the plaintiff has not come with clean hands the suit of specific performance be dismissed.

9. On the other hand Shri Sharma, learned counsel appearing for plaintiff-respondent no. 1 argued in support of the impugned judgment and submitted that since the factum of admitting the signature upon the document of agreement of sale and its attestation has been admitted by the plaintiff, therefore, the burden was upon him to prove that the transaction was of loan and parties never agreed to sell the suit property. Learned counsel submits that as per the defendant's pleading the plaintiff is a money lender but there is no cogent evidence of his to prove this fact and therefore the arguments which are advanced by the learned counsel for appellants are not having any sanctity in the eye of law. Learned counsel submits that throughout his life, first defendant was a Councilor in the Municipality Hoshangabad and in order to contest the election of M.L.A. he was in need of money and therefore he requested the plaintiff to purchase his house for a consideration of Rs. 25000/- and accordingly a document of agreement of sale was executed which is a registered document. Learned counsel submits that first defendant is not an illiterate person and from time to time he executed three agreements acknowledging the original agreement of sale dated 17.04.1980 and every time sought time to get the sale-deed executed because he is not in a position to get an alternative residential accommodation where he could settle his family to reside and therefore learned Trial Court after considering each and every aspect of the matter rightly decreed the suit of the plaintiff.

10. By inviting my attention to the document (Ex.P/20) which is a certified copy of the order-sheet dated 30.03.1981 of the Court of First Civil Judge, Class-II Hoshangabad in Civil Suit No. 35-B/1979 (Gyan Chand S/o. Hazarilal v. Prem Narayan and Smt. Dulari Bai) it has been contended by learned counsel that in the said suit there is an admission of defendant Prem Narayan that house in question has been agreed to be sold in favour of the plaintiff and therefore the house may not be attached upon the application under Order XXXVIII Rule 5 CPC. Hence, it has been prayed that looking to the admission of defendant Prem Narayan there is no scope of any interference in the impugned judgment which has been passed by learned Trial Court decreeing the suit of plaintiff for specific performance of contract.

11. Learned counsel for plaintiff-respondent no. 1 further submitted that a false plea has been taken in the written-statement stating that valuation of the suit house is Rs.2 lac. Indeed since the price index of immovable property has been escalated tremendously between 1980 and 1985, therefore, with a mala fide intention false plea has been taken by the defendant so that he may sell the house in question for a high price to third person. Thus, it has been prayed that the appeal be dismissed.

12. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

13. On the basis of arguments advanced before me, I am constrained to decide the following questions :-

(i) Whether, the document Ex.P/1 which is an agreement of sale has been executed in between the parties with an intention that plaintiff has agreed to purchase the suit property or it was a loan transaction?

(ii) Whether, the subsequent agreements between the plaintiff and defendant Ex.P/5, Ex.P/9 and Ex.P/13 are the documents extending time to repay the loan obtained by original defendant Prem Narayan or these documents were executed to extend the time to get the sale-deed executed?

(iii) Whether, on 17.04.1980 when the document of agreement of sale Ex.P/1 was executed between the plaintiff and defendant Prem Narayan, the valuation of the suit house was Rs.2 lac? If yes, whether can it be inferred that the real intention between the parties was not to get the disputed property sold in favour of plaintiff?

(iv) Whether, in the facts and circumstances of the case, the discretion should be exercised not to pass a decree of specific performance of contract according to section 20 of the Specific Relief Act?

Regarding questions No.(i) and (ii)

14. In the present case the registered document of agreement of sale dated 17.04.1980 is Ex.P/1. This has been signed by first defendant Prem Narayan and has been attested by two witnesses namely Shankar Singh S/o. Kanhaiya Singh R/o. Sanischara district Hoshangabad and Dhanpal Singh S/o. Semri Harchand Tehsil Suhagpur District Hoshangabad. Apart from the registered document there are some more agreements which are Ex.P/5 dated 05.07.1983, Ex.P/9 dated 23.06.1984 and Ex.P/13 dated 19.10.1985. Apart from these three agreements there are notices which were sent by plaintiff's counsel through registered AD post, the acknowledgment receipts as well as postal receipts are also on record. On going through the basic document Ex.P/1 which is a registered document dated 17.04.1980 it is gathered that the house in question was agreed to be sold by defendant Prem Narayan in favour of plaintiff for a consideration of Rs. 25,000/- and a sum of Rs. 22,984/- was obtained towards part consideration of the sale price which is more than 90%. In this document further it has been mentioned that a sum of Rs. 12,984/- has been received at the house and a sum of Rs. 10,000/- would be taken in the office of Sub Registrar. In this document it is mentioned that three years time was obtained by defendant to get the sale-deed executed and the reason has also been assigned that because one person is residing in the suit house, therefore, after getting it vacated from him the sale-deed would be executed. However, the name of that person is not mentioned and this much is mentioned that (at present one gentleman is residing and after getting it vacated from him sale-deed will be executed). Nowhere in this document it is mentioned that defendant is residing in different locality or in the part of the suit house. It is also not mentioned that said person is residing in the

entire house in its one part. In the plaint para 3 it has also been pleaded that in the suit house the tenants are residing and it was agreed that defendant will execute the sale-deed after getting it vacated from the tenants but if we test the pleading of plaintiff on the touchstone and upon the anvil of subsequent agreements Ex.P/5, Ex.P/9 and Ex.P/13 this Court finds that the time has been sought on the ground because the defendant is not able to find any suitable residential house for him. Hence on this point the pleading of plaintiff is contrary to his own documents. Thus, according to me, when the defendant was not at all residing in the suit house why by executing subsequent agreements Ex.P/5, P/9 and P/13 he sought time to get sale-deed executed under the pretext that he is unable to find out alternative suitable residential house for himself and his family members. Apart from this, in a document of agreement of sale if some advance money is paid, normally it is in round figure and not in the odd figure. On bare perusal of the document dated 17.04.1980 (Ex.P/1) as well as averments made in the plaint it is gathered that a sum of Rs. 22984/- has been paid to the defendant towards advance money. Why a meager amount of Rs. 116/- was not paid in order to put the advance money in round figure of Rs. 23,000/-. It is well settled in law that civil cases are decided on the basis of high degree of preponderance and probabilities and thus by keeping this important principle of law in my mind, I shall examine the evidence of the parties.

15. Shri Sharma learned counsel for plaintiff-respondent no. 1 appears to be correct that looking to the additional pleadings taken by the defendant in the written-statement that the transaction between the parties was of loan and thus the burden of proof was on defendant to prove this plea. Thus, I shall examine the evidence of plaintiff and the defendant in this regard. Right from beginning the stand of defendant is that transaction between the parties was of loan and the defendant never intended to get the suit house sold. Although suggestion in this regard has been denied by the plaintiff but in cross-examination para 18 it has been specifically stated by plaintiff that he did not remember whether he has handed over the pro-notes executed by the defendant Prem Narayan or not. According to me, the plaintiff very conveniently is trying to avoid the factum of loan transaction because if the loan transaction did not take place between him and defendant, straightway he should have denied the suggestion that he is not having any pro- notes executed by the defendant but instead of denying it he avoided by saying that he did not remember whether he has handed-over all the pro-notes to defendant Prem Narayan or not. Not only this Banshilal, witness of plaintiff (PW2) who is the attesting witness of all the subsequent agreements Ex.P/5, P/9 and P/13 has categorically stated in his examination-in-chief itself that at the time of execution of the document Ex.P/5, P/9 and P/13 interaction between the plaintiff and defendant was in regard to payment of money and for its payment the time was sought by defendant by executing the agreements. According to me, when plaintiff's own witness is saying in examination-in-chief that the transaction was of money, the plaintiff is bound by the statement given by his own witness that too in examination-in-chief. Not only this in cross-

examination also again this witness (PW2) has reiterated this fact and has deposed that all the agreements (i.e. Ex.P/5, P/9 and P/13) were executed to extend the period of time to pay the amount which defendant took from the plaintiff. According to me, if the transaction between the parties was not of loan why the plaintiff's own witness is admitting that document Ex.P/13 was executed only to extend the time to make the payment to plaintiff by defendant. Thus, it appears and it can be inferred that transaction between the parties was of loan.

16. Unfortunately in the present case although written-statement was filed by defendant Prem Narayan but he could not appear in the Court as he passed away before he could be examined, but his son Rajesh (DW1) has specifically deposed in his testimony that in the year 1978 a sum of Rs. 3000/- was obtained by his father from plaintiff towards loan and this fact was told by his father to him being his eldest son. Thereafter, in the year 1980 a sum of Rs. 10,000/- was obtained because he wanted to contest the election of MLA and he was in need of money. He also deposed that how the figure of Rs. 22,984/- is shown in the document of agreement of sale Ex.P/1 and he has stated that total amount of loan was Rs. 13,000/- which his father obtained from plaintiff and if by calculating the future interest of three year which was agreed by them a figure of Rs. 22984/- would come and therefore this amount has been shown as advance money in the document of agreement of sale. He has also deposed that since he is eldest son of his father the factum of obtaining loan was stated to him by his father and therefore according to me from the plaintiff's evidence only it can be inferred on the basis of preponderance and probabilities that the transaction between the parties was of loan and not of sale.

17. Learned Trial Court in para 14 of its judgment has simply narrated that part of evidence of Banshilal (PW2) who is the attesting witness to the documents (Ex.P/5, P/9 and P/13) that plaintiff and defendant Prem Narayan were interacting on the point of payment of money, but, the Court has not marshalled this evidence vis-a-vis to the evidence of plaintiff and defendant. The learned Trial Court has not considered and marshalled the material evidence of plaintiff which has come during his cross-examination para 18 which I have already mentioned hereinabove that plaintiff has very conveniently tried to avoid to give specific answer that he did not remember whether he handed over the pro-notes to the defendant Prem Narayan or not. I would like to quote the said piece of testimony of para 18 of the plaintiff which reads thus (I did not write letters from time to time regarding loan to Prem Narayan. I do not remember whether I handed-over the pro-notes to Prem Narayan or not). At this juncture only, I would like to quote that part of examination-in-chief of plaintiff's witness Banshilal (PW2) as well as his cross-examination wherein the transaction was of loan has been stated by him, (in my presence both of them were interacting in respect to payment of money and thrice the documents were executed for extension of time of payment of money). The same version he has given in the cross-examination also that (for three times the documents were executed to extend the period for payment of money and accept this no other conversation

took place between the parties). This piece of material evidence going to the root of the matter has not been properly considered and marshalled vis-a-vis to the statement of plaintiff and his witness Banshilal (PW2). Learned Trial Court has paid heed simply on the statement of Rajesh (DW1) who is son of deceased-defendant who has deposed that pro-notes were got executed by the plaintiff, but, when and in whose presence it was written there is no evidence of defendant. According to me, the entire episode is to be visualized by keeping in mind that what actually transpired between the parties. The original defendant Prem Narayan has passed away before his evidence could be recorded. Therefore, certainly the son of defendant Prem Narayan was not in a position to depose all the facts and the conversation which actually took place between his father Prem Narayan and plaintiff. However, I do not find any ground to disregard his evidence that being the eldest son his father told him about receiving of the loan from plaintiff. In the present case the interesting feature is that the case of defendant is proved from the evidence of plaintiff and his witness Banshilal who is attesting witness of all the three agreements (Ex.P/5, Ex.P/9 and Ex.P/13). In these state of affairs, it can be inferred that transaction between the parties was of loan and defendant never intended to sell the house in question to the plaintiff. In the entire judgment of learned Trial Court while deciding issues from 1(a), 1(b), 2, 3, 4 and 5 from para 10 to 30, narration of evidence has been stated and also the execution of the document of agreement of sale Ex.P/1 and other agreements as well as other documents in regard to sending notice etc. have been mentioned. Looking to the pleadings and evidence, the execution of documents is not at all disputed. Learned Trial Court has paid heed that defendant Prem Narayan was fully literate person and he was also a Councilor hence certainly he will not sign upon the blank papers or would sign the papers without reading them. The document of agreement of sale (Ex.P/1) is a registered document. The contention of learned counsel for plaintiff-first respondent appears to be correct that the deceased defendant would not sign the blank papers or before signing the documents he would not read them. According to me, although deceased defendant Prem Narayan signed the documents but the real intention between the parties was clear between them that the transaction was of loan only and defendant never intended to execute the sale-deed.

18. Learned Trial Court as well as learned counsel for plaintiff-respondent no. 1 has put much emphasis on Ex.P/20 which is a certified copy of the order-sheet in Civil Suit No. 35-B/1979 of the Court of First Civil Judge, Class-II Hoshangabad between Gyan Chand v. Prem Narayan and Smt. Dulari Bai. Indeed Smt. Dulari Bai is wife of Prem Narayan. In the said order-sheet dated 10.03.1981 upon the application filed under Order XXXVIII Rule 5 CPC to get the house attached it was stated by Prem Narayan that defendant has agreed to sell this house to present plaintiff. Thus, according to learned counsel for plaintiff-respondent no. 1 this amounts to admission of defendant that transaction between the parties was to execute the sale-deed and not the loan transaction. To me, the admissions are

always not conclusive and it may be explained also. Certainly defendant Prem Narayan who was also defendant in the suit filed by Gyan Chand in order to save his skin and to come out from the clutches of attachment of house before judgment must have stated that house in question has been agreed to be sold to present plaintiff. But, this admission of plaintiff is to be tested on the touchstone and anvil of the present scenario upon the documentary and oral evidence of the present case. Apart from this, document Ex.P/20 was not confronted to defendant Rajesh (DW1) in his cross-examination. Hence, no reliance can be placed upon Ex.P/20 in this suit.

19. It is matter of common parlance that if immovable property that too a house is to be purchased certainly the intending purchaser would see and examine the property which he is purchasing in order to ascertain whether he is paying right price for the said house or not. But, in the present case the plaintiff before entering into the agreement of sale neither at that time nor later on saw the house of the defendant Prem Narayan. In cross-examination para 15 he has admitted that length, width and dimension of the house in question, he does not know. According to him, who has prepared the plaint map, he cannot say. Further he has stated that who has measured the dimension while preparing the plaint map he cannot say. This witness is unable to state that what is the length and width of house from east to west and north to south. Further has stated that he has seen the hotel (restaurant) on the frontage of the suit house but has not seen the rear side of the house. He has further admitted that on the date of agreement of sale also he did not see the house. He cannot say house in question consists of two big rooms and six small rooms. House in question might be having latrine, bathroom and open verandah. To me, surprisingly the plaintiff is purchasing a house but without inspecting it he has agreed to purchase the house which is highly unnatural and thus it can be inferred that real intention of plaintiff was not to purchase the house in question and defendant Prem Narayan never intended to sell his house to plaintiff.

20. For the reasons stated hereinabove, point No.(i) is decided that transaction between the parties was of loan and defendant never intended to sell the disputed house to the plaintiff. Point No.(ii) is decided that the subsequent agreements (Ex.P/5, Ex.P/9 and P/13) are the documents of extension of time to repay the loan amount and not to extend period of time to get the sale-deed executed. Both these points are decided against the plaintiff-respondent no. 1.

Regarding Point No.(iii)

21. The burden of proof was on defendant to prove that on 17.04.1980 when the document of agreement of sale (Ex.P/1) was executed the valuation of house in question was Rs.2 lac and not Rs. 25,000/- which is sale consideration mentioned in Ex.P/1. The defendant Prem Narayan unfortunately passed away before he could be examined in the Court and thus on behalf of defendant Rajesh (DW1) who is eldest son of Prem Narayan has been examined. This witness has categorically proved the pleadings pleaded by defendant Prem Narayan in his oral

testimony and by other documentary evidence and also by cross-examining the plaintiff and his witness in this regard. Thus, this Court is required to see whether the value of the house in question on the date of agreement of sale was Rs. 25,000/- or it was Rs.2 lac as per the case of defendant. In para 4 of the examination-in-chief Rajesh (DW1) has deposed that in the year 1980 the valuation of his house must be between Rs. 2.75 lac or Rs. 3 lac. In cross-examination para 7 this witness has stated that in between year 1980 and 1982 the rate of open plot upon the main road was Rs. 40-45 to Rs. 70/- per square feet. At this juncture only, I would like to mention that it is borne out from the pleadings and evidence placed on record that house in question is a double-storeyed house and the plot area according to plaint map is 90x19.4 feet. It is a pakka constructed house having two shops on the frontage and the disputed house is on the main road. In between two shops which are on the front side of disputed house, there is a space of entrance to go inside the residential house. The residential portion consists of one hall, three rooms, three verandahs, latrine and bathroom on the ground floor and on the first floor there are five rooms and two open verandahs. In this regard para 1 of the testimony of Rajesh (DW1) may be seen.

22. During the cross-examination, the suggestion has been given to the plaintiff that the house in question would fetch Rs.2 lac in the year 1980, although this suggestion has been denied by him, but, the plaintiff was further cross-examined on this point and he has very conveniently tried to avoid and admit the factum of valuation of house in question. He has simply stated by trying to sweep and avoid the cross-examination that valuation of the suit house which he has said to be Rs. 25,000/- is based upon approximation. Defendant Rajesh (DW1) has examined Pratap Singh (DW2) and Ram Singh (DW4) in order to prove the fact that the valuation of disputed house was much high. The house of DW2 is in the same locality. According to him, he has seen the house of defendant Prem Narayan which is located on the main road. This witness has purchased a plot adjacent to the disputed house of defendant from Narottam Rao. His plot area is 1055 sq. feet which he purchased in the year 1985 for a consideration of Rs. 20,000/-. It be noted that plot area of defendant's house as mentioned in Ex.P/1 is 1740 sq. feet. This witness has also proved his sale-deed Ex.D/1. This witness has further stated that when he bought his plot at that juncture the double storeyed house of Prem Narayan was already there. In the sale-deed Ex.D/1 of this witness on the eastern side the house of Prem Narayan (defendant) has been shown. On bare perusal of the sale-deed of this witness and the map attached to it this Court finds that from main road frontage of plot of this witness is only 12 feet while frontage of defendant's house is 19.4 feet. Thus, the evidence of this witness is having higher credential value and it can be inferred that in the year 1980 when the plot area of the defendant was near about double of the area of the plot of this witness, its value must be at-least Rs. 25,000/- because on 19.08.1985 when this witness purchased the plot of 1055 sq. feet its valuation was Rs. 20,000/-. DW2 further says that after purchasing the plot he

constructed the ground floor in which he incurred a sum of Rs. 1.50 lac consisting of four rooms, kitchen, latrine and bathroom.

23. Defendant has also examined Ram Singh (DW4). This witness has purchased a house from plaintiff and his brother Ramdayal situated at Kothi Bazaar on 19.11.1984. According to this witness, the said house was purchased by him for Rs. 40,000/- vide registered sale-deed (Ex.D/2). But, this house is a single-storeyed and roof is not Pakka and is made of Khaprel (earthen tiles). The plot area in which house is constructed is only 14x44 feet (total area 616 sq.feet). This witness has specifically stated that he has seen the house of defendant Prem Narayan which is on main road while house purchased by him in the name of his wife Shakuntala is not on main road. This witness has further deposed that disputed house is double-storeyed and Pakka. In cross-examination this witness has admitted that the house which has been purchased by him in the name of his wife is inside the gali (lane).

24. The plaintiff has also examined Mukesh Shrivastava (DW3) who is a builder and is running his business in the name and style "M/s. Prabhat Constructions". According to this witness defendant Prem Narayan was known to him and he has also seen disputed house which is double-storeyed pakka house. According to this witness house is constructed in the area 1700 sq.feet and its cost at-present on the date of deposition (04.05.1995) was Rs. 7.5 lac. He has categorically stated that 15 years ago the valuation of the suit house must be Rs. 2.50 lac. This witness has been examined as an expert. In cross-examination he has admitted that he is a designer and is also performing the business of valuation of the house. He has further admitted that he is doing business of designing, valuing the house, lands etc. and also carrying the business of construction. Thus, according to me, evidence of this witness is having great weightage.

25. From the aforesaid analysis and marshalling of evidence, the point no.(iii) is decided that value of the house in question on 17.04.1980 was not less than Rs.2 lac and it would never fetch the value of Rs. 25,000/- on the date of document of the execution of agreement of sale (Ex.P/1). This point is also decided against the plaintiff-respondent no. 1.

Regarding point No.(iv) :

26. According to Section 20(1) of the Specific Relief Act a decree of specific performance is a discretionary relief and Court is not bound to grant such relief merely on its asking. No doubt it is true that discretion is to be exercised on the basis of sound and reasonable grounds and not in a arbitrary manner. In sub-section (1) itself the powers have been vested in the Appellate Authority also to examine whether discretion has been exercised on sound and reasonable reasonings guided by judicial principle and further the said discretion exercised by Trial Court is capable of correction by the Appellate Court. On bare perusal of Section 20(2)(a) of the said Act this Court finds whether terms of contract and conduct of the parties at the time of entering into contract or the other

circumstance under which the contract was entered into are such that the contract though not voidable, gives the plaintiff an unfair advantage over the defendant. If this provision is tested on the touchstone and anvil of the pleadings and evidence of the present case it would reveal that specific case of the plaintiff is that defendant is in need of money to contest the election. The case of defendant is that there was a loan transaction between the parties and he never intended to sell his house which is double-storeyed house situated on the main road having high valuation of Rs.2 lac on 17.04.1980. Since the defendant was in need of money, therefore, the plaintiff took an unfair advantage over the defendant. I have already held hereinabove by marshalling the evidence that the defendant never intended to sell the house and the transaction between the parties was of loan. Further I have already held that valuation of house on 17.04.1980 was not Rs. 25,000/- but it was Rs.2 lac or even more and therefore in these facts and circumstances sub Clause (a) to sub-section(2) of Section 20 of the said Act is squarely applicable in the present case and so also clause (c) of subsection (2) to Section 20 which speaks as to whether the defendant entered into a contract under the circumstance which though not rendering the contract voidable makes it inequitable to enforce specific performance. To me, in the facts and circumstances it is inequitable to pass a decree of specific performance of contract of a property which was having valuation of Rs.2 lac on 17.04.1980 to be sold for a meagre amount of Rs. 25,000/- particularly when it is proved that the transaction was of loan and defendant never intended to sell the disputed house. According to me, the Court should take care to see that the agreement should not be used as an instrument of oppression to have an unfair advantage to the plaintiff. In this context I may profitably place reliance upon two decisions of Supreme Court *Bal Krishna and Another Vs. Bhagwan Das (Dead) and Others*, and *Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors*, . In para 14 of the decision of *Bal Krishna (supra)* it has been held by Supreme Court that section 20 of the Specific Relief Act gives a discretion to the Court and Court is not bound to grant the relief of specific performance merely because it is lawful to do so. The exercise of discretion should be based upon equitable grounds and while considering the discretion the Court would certainly take into consideration the circumstances of the case, the conduct of the parties and their respective interest under the contract. The Supreme Court further held that decree of specific performance of contract will not be granted even if the contract is not misrepresented by fraud, if it would give unfair advantage to plaintiff and would give undue hardship to defendant. It would be profitable to reiterate para 14 of the said decision which reads thus;

14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not found to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion,

the court would take into consideration the circumstances of the case, the conduct of the parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

In this case the Trial Court decreed the suit for specific performance of contract but High Court dismissed the suit reversing the decree and the Supreme Court has upheld the decision of High Court.

27. In *Parakunnan Veetill Joseph's Son Mathew* (supra) the Trial Court denied the relief of specific performance of contract but decreed the suit only to return the advance money in addition to damages for a sum of Rs. 5625/-. But, in appeal to the High Court, judgment was reversed and it was directed to convey the suit property and transfer possession thereof. The Supreme Court allowed the appeal and reversed the judgment of High Court and restored that of Trial Court. In para 14 the Supreme Court has held that Section 20 of the Specific Relief Act preserves judicial discretion of courts as to decreeing specific performance. The Supreme Court further held that the Court should meticulously consider all facts and circumstances of the case and the Court is not bound to grant specific performance merely because it is lawful to do so. The Supreme Court has further held that motive behind the litigation should also enter into judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have unfair advantage to the plaintiff. In the present case, the motive part of defendant is proved that he was in need of money and therefore he took loan from the plaintiff and unfair part of plaintiff is that he executed the document of agreement of sale which is although not void or voidable but would give unfair advantage to him to purchase the property having valuation in the year 1980 Rs.2 lac for a meagre amount of Rs. 25,000/- only.

28. In the aforesaid decision *Bal Krishna* (supra) in para 14 it has been held by the Apex Court that while exercising discretion the Court should take into consideration the circumstances of the case respective interests and also the conduct of the parties. In the present case throughout from the beginning conduct of the plaintiff is quite unfair and this I have already held hereinabove by marshalling oral and documentary evidence vis-a-vis to evidence of witnesses of the parties. One peculiar fact which I would like to mention here that conduct of the plaintiff is also not fair rather it is unfair because in examination-in-chief he has deposed that attesting witness to the material document which is the foundation stone of the case i.e. agreement of sale dated 17.04.1980 (Ex.P/1) its attesting witnesses Shankar Singh and Dhanpal Singh are dead but his evidence is false because an affidavit of Shankar Singh has been filed in this Court wherein he has specifically stated that he is still alive and it has been incorrectly stated

by the plaintiff that he is dead. Unfortunately the said witness has also died later on 30.07.2009 and his death certificate is also filed. The plaintiff-respondent no. 1 was not having any courage to rebut the said affidavit. Thus, the conduct of the plaintiff is also quite unfair and it can be inferred that attesting witness to document Ex.P/1 was not examined by the plaintiff with uttermost object that if he would have been examined he would have deposed the truth that transaction was of loan and not to execute the sale-deed. I have already marshalled the evidence hereinabove but, at the cost of repetition I must say here again that Banshilal (PW-1) who has been examined by plaintiff not only in his examination-in-chief but in cross-examination has stated that subsequent agreements were in respect of extending time to repay the loan amount.

29. Thus, point No.(iv) is also decided against the plaintiff. It is hereby held that while exercising the power u/s 20(1) of Specific Relief Act this Court as Appellate Court, it would not be lawful to pass a decree of specific performance of contract. However, the plaintiff is entitled to a decree of refund of advance amount of Rs. 22,984/- with interest @6% per annum from the date of passing of decree by the Trial Court which is 4.8.1995.

30. Ex consequenti, this appeal succeeds in part and is hereby allowed. The judgment and decree passed by learned Trial Court is hereby set aside and the suit of the plaintiff is decreed only to the extent of refund of money of advance as indicated hereinabove.

31. In the facts and circumstances of the case, the application (I.A. No. 13388/2012) under Order XLI Rule 27 CPC is not being decided. Looking to the facts and circumstances, the parties are directed to bear their own costs.