IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.96 of 1991

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1. Ambika Singh (since deceased) represented by legal representatives.
1(i) Manju Singh, D/o Late Ambika Singh, W/o Sri Niwas Singh, Resident of Mohalla- Krishna Patti, P.S.- Town, District- Jamui.
1(ii) Sachidanand Singh
1(iii) Astik Singh
1(iv) Shailendra Singh
1(v) Dilip Singh
All sons of Late Ambika Singh.
1(vi) Raman Kumar Singh, son of late Nand Kishore Singh, grand son of Late Ambika Singh.
All resident of Village + PO- Bukar, District- Jamui.

... ... Appellant/s

Versus

1. Mosomat Sohagi Devi (since deceased) represented by her legal heirs.
1(a) Ashok Tanti, S/o Arjun Tanti and grand son of Late Sohagi Devi.
1(b) Meena Devi, daughter-in-law of late Sohagi Devi.
1(c) Bachi Devi, daughter of Late Sohagi Devi.
1(d) Champa Devi, daughter of Late Sohagi Devi.
1(e) Muna Tanti, son of Chapa Devi and grand son of Sohagi Devi.
All resident of Mohalla Krishna Patti, PO- Jamui in the town and district of Jamui.

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. J.S. Arora, Sr. Adv. with
Mr. Prabhat Ranjan Singh, Adv.
Mr. Kumar Shashank, Adv.
Mr. Prabeen Kumar Singh, Adv.
For the Respondent/s : Mr. Kamal Nayan Choubey, Sr. Adv. with
Mr. Achal Kumar Singh, Adv.
Mr. Amarendra Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
C.A.V. JUDGMENT
Date : 04-03-2020

The Appellant/Plaintiff being aggrieved and dissatisfied with the judgment dated 21.09.1990 and decree dated 06.11.1990 passed by the learned Sub-Judge-II, Jamui (Munger) in Title Suit No.46 of 1986, whereby and whereunder instead of granting the main relief so sought for relating to directing the

respondent/defendant to execute sale deed in pursuance of an agreement dated 15.06.1986 after receiving the balance consideration amount, the court below allowed the suit and passed a money decree of Rs.10,000/- against defendant no.1/respondent no.1, Most. Sohagi Devi on contest with costs acknowledging an alternative relief. Consequent thereupon, directed the defendant no.1/respondent no.1 to pay Rs.10,000/- to the plaintiff within 90 days of the judgment, failing which the plaintiff/appellant was allowed to realize the same through the process of the court at the expense of defendant no.1/respondent no.1, Most. Sohagi Devi. Furthermore, Pleader's fee of Rs.16/- and Pleader's Clerk fee of Rs.2/- has only been allowed.

2. In order to appreciate, the parties status as per plaint is being acknowledged herein.

3. The plaintiff filed Title Suit No.46 of 1986 asking for following reliefs:

(a) A decree for specific performance of contract be passed in favour of the plaintiff against the defendants.

(b) The defendants be directed to execute a registered sale deed with respect to the suit house in favour of the plaintiff within a reasonable time specified by the court.

(c) If the defendants fail to comply the direction of the court, the court be pleased to execute the sale deed in favour of the plaintiff on behalf of the defendants.

(d) The plaintiff be directed to deposit the rest of the consideration amount Rs.13,000/- in the court in favour of the defendants.

(e) In the alternative it is prayed that if any decree for specific performance of contract is not passed in favour of the plaintiff, then a money decree of Rs.10,000/- be passed and the same be recovered from the defendants. It be declared by the courts that the sale deeds in favour of the defendant no.2 and 3 are not binding to the plaintiff.

(f) All costs of the suit be awarded to the plaintiff.

(g) Any other relief or reliefs for which the plaintiff is found entitled by the court be also awarded in favour of the plaintiff.

4. In order to poise the reliefs, it has been pleaded that after coming in urgent need of money, Most. Sohagi Devi (since deceased) floated her intention to sell her property along with a house standing thereupon lying at Mohalla- Krishna Patti bearing R.S.P. No. 50 corresponding to Khata No.15, area $5^{1}/_{2}$ decimals

which she was inherited after death of her husband Pati Tanti and, after finalisation of the negotiation at a consideration amount of Rs.23,000/-, demanded money and further disclosed that for the present she was not in a position to execute the sale deed as she was to rush to medical treatment. Whereupon, she volunteered to execute the deed of *Baibayana* after receiving Rs.10,000/- as an earnest money out of total consideration amount of Rs.23,000/- which the plaintiff accepted in spite of the fact that he was in possession of total consideration amount. Thus after receiving Rs.10,000/- as an earnest money Sohagi Devi executed *Baibayana* on the same day i.e. on 15.06.1986 and, delivered physical possession to the plaintiff over the suit land wherein one of the relatives of the plaintiff is residing. Furthermore, she had assured at that very moment that within two months she will execute sale deed after receiving the remaining consideration amount. In spite of due diligence at the end of the plaintiff repeatedly contacting requesting Sohagi Devi to accept the remaining consideration amount and execute the sale deed with respect to the suit land, aforesaid Sohagi Devi began to defer the matter on one pretext or the other.

It has further been submitted that aforesaid Sohagi Devi with mala-fide intention got a fraudulent, sham**,** ferzi sale deed

executed in favour of defendant nos.2 and 3 respectively who were knowing since before with regard to negotiation having been finalized amongst the plaintiff and Sohagi Devi, receipt of earnest money, transfer of delivery of possession. Showing the cause of action paying the court fee in consonance with the relief as disclosed hereinabove the suit has been filed at the end of the plaintiff Ambika Singh (since deceased).

5. All the defendants, namely, Sohagi Devi (defendant no1), Janki Devi, wife of Satya Deo Singh (defendant no.2) and Chandrdeo Singh (defendant no.3) have filed their independent written statement whereunder, apart from raising ornamental objection, completely disowned the narration whatsoever been made in the plaint.

Specifically it has been pleaded at the end of defendant no.1 (Sohagi Devi) that the allegation of the plaintiff of coming in need of money, she had shown her inclination to sell the property in question, finalisation of negotiations at Rs.23,000/- assurance having at his end to execute the sale-deed after receiving the balance consideration amount later on as was indisposed as received Rs.10,000/- as an earnest money and in token thereof, execution of deed of *Baibayana* are all false and frivolous. She never floated news of sale nor there was finalisation of

negotiation. She never received Rs.10,000/- as an earnest money against total consideration amount of Rs.23,000/-, never executed deed of *Baibayana*. It has further been pleaded that Sri Niwas Singh is her tenant since before who has been directed to vacate the house. As Sri Niwas Singh happens to be son-in-law of the plaintiff Ambika Singh who, after receiving notice came at his side who might have manipulated the documents in the background of the aforesaid controversy. Then it has been pleaded that after receiving due consideration amount she had sold away the suit property in favour of Chandradeo Singh and Janki Devi on 12.08.1986 and 04.12.1986 respectively and handed over possession of the suit property to them. In the aforesaid background, Sri Niwas Singh is now tenant of aforesaid purchasers. Also pleaded dismissal of the suit on account of non-joinder of necessary party and to stress thereupon, it has been pleaded that heirs of her son Arjun Tanti who predeceased father namely, Ashok Tanti and wife Meena Devi have not been impleaded, as Ashok Tanti happens to be co-sharer and being minor, was under custody of natural guardian, his mother Meena Devi and so their absence in the suit appears to be fatal.

It has also been pleaded that as the plaint is contrary to Forms 47 and 48 of the Code of Civil Procedure, cumulative deficiency macerate the suit as framed hence is fit to be dismissed.

6. Defendant nos.2 and 3 basically stood on same plank. Additionally, they pleaded that they have no notice with regard to the earlier transaction if any, so pleaded at the end of the plaintiff which they also controverted akin to defendant no.1. They have also pleaded non-maintainability of the suit on account of absence of Meena Devi as well as Ashok Tanti. Further, they have also claimed to be bonafide purchasers who paid full consideration amount, got possession over the land and so, the validity of their sale deeds go out of the purview of the instant suit. In likewise manner, it has also been pleaded that in the background of lacking of notice no adverse order could be passed against them. They have also reiterated the version of the defendant no.1 (Sohagi Devi) that aforesaid Sri Niwas Singh (tenant) succeeded in getting thumb impression of Sohagi Devi which, in due course of time manipulated. So, pleaded for dismissal of the suit.

7. The learned lower court had framed the following issues:

(i) Is the suit as framed maintainable?

(ii) Has the plaintiff cause of action to bring the suit?

(iii) Is the suit barred by estoppel, waiver and acquiescence?

(iv) Is the agreement of sale dated 15.06.1986 allegedly executed by the defendant No.1 in favour of the plaintiff genuine, valid and for consideration?

(v) Has the plaintiff been always ready and willing to perform his part of the contract?

(vi) Is the suit barred by law of Specific Relief Act?

(vii) To what relief or reliefs, if any is the plaintiff entitled?

And decided the same in the manner as indicated hereinabove. Hence this appeal.

8. Learned counsel for the appellants while challenging the finding recorded by the learned lower court has submitted that manner whereunder main relief of the appellant/plaintiff has been refused by the learned lower court happens to be contrary to the spirit of law whereupon, is fit to be set aside. In order to buttress such plea, learned counsel for the appellants has submitted that the learned lower court had accepted genuineness, validity, and legality of the agreement arrived at by the parties (appellant as well as Sohagi Devi) with regard to the sale/purchase of the land in question, on a consideration amount of Rs.23,000/-, accepted

receiving of Rs.10,000/- by Sohagi Devi, then in that circumstance, refusing to grant of specific relief of contract in favour of the appellant/plaintiff was nothing but soaked with arbitrariness because of the fact that :

(a) Admittedly, the land belonged to Pati Ram, husband of Sohagi Devi. The couple had only one son Ashok Tanti who predeceased the Pati leaving behind wife, Meena Devi and son Arjun Tanti, minor. In the aforesaid background irrespective of the fact that female cannot be a coparcener (before 2005 amendment) but family structure as admitted did justify presence of Sohagi Devi to be the head of the family and, Meena Devi, widow daughter-in-law as well as Arjun Tanti minor under her nurture.

(b) That being so, Sohagi Devi stood at her pedestal with due recognition as head of the family and so, was fully competent to negotiate not for herself but for the family as a *Karta* and *Karobari* which, in the facts and circumstances of the case could be very much acknowledged, for the welfare of the family.

(c) It is needless to say that the land under question was the self acquisition of the husband of Sohagi Devi and so, after his death, the land became ancestral property for the descent and, in terms of notional partition as prescribed under Section 6 of the Hindu Succession Act in the background of presence of Arjun

Tanti, Sohagi Devi would have her share and to that extent, even de-recognizing (though not admitted only for argument sake), was legally entitled to dispose it off.

(d) There happens to be conclusive evidence over negotiation, receipt of earnest money, transfer of possession, willingness, readiness of the plaintiff to perform his obligation, hence there was no occasion to refuse.

(e) Finding of lower court while negating the plea over presence of minor is of no more relevance as is found pieroped from subsequent conduct/sale in favour of other defendant/respondents.

(f) There happens to be positive evidence on record that after negotiation with the plaintiff, the land has been sold away in collusive manner to defendant nos.2 and 3 (respondent nos.2 and 3) which is indicative of the fact that there was no impediment in passing proper order as provided under the Specific Relief Act whereunder, the other respondents/purchasers could be directed to join in the sale deed.

(g) It has further been argued that in judging the suit for specific performance of contract, the readiness and willingness of the plaintiff is to be seen and, once it is found that the plaintiff has succeeded in substantiating his readiness as well as willingness

then, in that circumstance, the suit has to be decreed directing the defendants to execute the sale deed after receiving due consideration amount as, equity does not allow the court to act in arbitrariness. In its continuity it has also been submitted that there happens to be admission at the end of the respondent/defendant Sohagi Devi that she had four houses at different locations out of which one has been gifted to her daughter. In one house she is residing, third house is under dispute and the fourth one is under tenancy. So, equity lean in favour of the appellant/plaintiff as no hardship is found to Sohagi Devi, much less her conduct is also to be seen who created a litigation not only by denying the legal entitlement of the plaintiff/appellant rather selling the land to frustrate the claim.

9. Also relied upon the judgments, **Durga Prasad & Anr. vs. Deep Chand and others** reported in **AIR 1954 SC 75**, **Ramesh Chandra Chandiok & Anr. vs. Chuni Lal Sabharwal** reported in **AIR 1971 SC 1238**, **Superintending Engineer & Ors. vs. B. Subba Reddy** reported in **AIR 1999 SC 1747**, **Motilal Jain vs. Smt. Ramdasi Devi & others** reported in **AIR 2000 SC 2408**, **Surya Narain Upadhyaya vs. Ram Roop Pandey & others** reported in **1995 Supp. (4) SCC 542** and **Banarsi and others vs. Ram Phal** reported in **AIR 2003 SC 1989.**

10. In reply to the points raised at the end of learned counsel for the respondents, it has been submitted that Section 49(B) of the Bihar Tenancy Act is not at all applicable because of the fact that Tanti has been included much after the period of agreement.

11. On the other hand, learned counsel for the respondents has submitted that the instant appeal is groundless so, be dismissed.

Before coming to the merit of the case, learned counsel for the respondents has submitted that irrespective of the fact that no cross appeal has been filed against the judgment and decree impugned, no cross objection is there even then, the respondents are at liberty to challenge the judgment impugned as provided under Order XLI rule 22 of the Code of Civil Procedure and so, the respondents are entitled to raise, challenge and suggest that the finding recorded by the learned lower court even to the extent of directing the respondent Sohagi Devi to pay Rs.10,000/- having been received by her as an earnest money in token of an agreement arrived at on 15.06.1986 relating to sale of the land under dispute, is nothing but a novice approach as neither facts of the case nor under law could be so ordered. To justify such plea, it has been submitted that much before the alleged date of agreement, one Sri

Niwas Singh was inducted as a tenant by Sohagi Devi relating to the house in question who fortunately was son-in-law of Ambika Singh. As he failed to pay rent as well as declined to vacate house developed litigation in due course of time who in connivance of process server, got thumb impression of Sohagi Devi which has mischievously and malafidely converted as deed of *Baibayana*, knowing full well that sale in favour of other respondents have already been affected indulged in litigation with them also and so, the document in question is found properly explained to be a forged and fabricated one without any legal identity.

Furthermore, it has been submitted that the appellant has got no source of money, he was not at all in possession of the amount in question. Even during course of evidence he could not succeed in substantiating readiness and willingness and that being so, he was not at all entitled for any relief under Specific Performance of Contract Act much less, whatever been granted by the learned lower court.

In order to substantiate the argument, learned counsel for the respondents has referred the judgment in case of **I.S. Sikandar vs. K. Subramani** and others, reported in **(2013)15 SCC 27**.

It has also been submitted that Tanti now been a member of scheduled caste. Before that Tanti was member of a backward

and so, transfer was prohibited in accordance with Section 49(B) of the Bihar Tenancy Act unless permission is accorded by the Collector. From the record it is crystal clear that no such permission is on the record whereupon no sell could be materialized nor could be compelled as the same happens to be condition precedent. That being so, the cumulative effect did not justify the finding so recorded by the learned lower court. On account thereof, the appeal is not only to be dismissed rather the judgment is also fit to be set aside relating to the finding so given under paragraph 11 of the judgment impugned directing the defendant no.1/respondent no.1 to pay Rs.10,000/-.

12. After hearing the parties as well as going through the record, the following points appear to be relevant for the just decision of the appeal:

(a) Whether the plaintiff has cause of action or right to sue?

(b) Whether the appellant/plaintiff is entitled for a decree whereunder the respondent could be directed to execute the sale deed in favour of the appellants after receiving the balance consideration amount in pursuance of alleged negotiation dated 15.06.1986.

(c) Whether the judgment impugned is sustainable in the eye of law more particularly finding so recorded under paragraph 11 of judgment impugned in view of the objection so raised at the end of the respondents in accordance with Order XLI rule 22 of the Code of Civil Procedure.

(d) What other relief or reliefs the appellant/plaintiff is entitled to?

13. In order to substantiate his case, the appellant/plaintiff has examined altogether eight witnesses who are Gopal Singh (PW-1), Kartik Prasad (PW-2), Raj Kishore Prasad (PW-3), Radha Raman Tiwari (PW-4), Mathura Raut (PW-5), Ambika Singh, plaintiff himself (PW-6), Sri Niwas Singh (PW-7) and Ganga Sahay (PW-8), side by side has also exhibited five exhibits which are Bainama (Exhibit-1), Signature of Sadanand Prasad on Hazari dated 13.09.1982 (Exhibit-2), Signature of Sanand Prasad on Bainama (Exhibit-2/a), notice U/s 107 Cr.P.C. (Exhibit-3), certified copy of order sheet dated 07.08.1989 of Eviction Suit No.12 of 1989 (Exhibit-4) and certified copy of order dated 21.03.1990 of Eviction Suit No.17 of 1989. In likewise manner, the respondent-defendants have also examined fourteen DWs, out of whom defendant 1st set has examined 3 witnesses who are DW-1, Sohagi Devi (defendant no.1), DW-2, Meena Dvi, DW-

3, Sudhir Kumar Dubey and in likewise manner defendant second set has examined DW-1, Nandu Ram, DW-2, Jai Kishore Prasad, DW-3, Jadunandan Prasad, DW-4, Mahendra Mandal, DW-5, Sada Nand Prasad, DW-6, Chandra Deo Singh, DW-7, Bhola Singh, DW-8, Md. Khalil, DW-9, Satya Deo Prasad Singh, DW-10, Sunil Kumar Sinha and DW-11, Surendra Kumar Pandey and likewise manner also exhibited seven documents which are information petition dated 29.10.1986 (Exhibit-A), Vakalatan notice dated 29.07.1986 (Exhibit-B), Registered envelope (Exhibit-C), postal receipt (Exhibit-D), Acknowledgment (Exhibit-E), F.I.R. (Exhibits F & F/1).

14. Before coming to the points so formulated hereinabove, first of all the legal position pertaining to Order XLI rule 22 read with rule 33 of the Code of Civil Procedure has to be seen, more particularly when there happens to be no cross objection at the end of the respondent challenging the judgment impugned. According to the learned counsel for the appellant, the matter goes out of consideration when the respondent failed to file a cross objection and, taking aid of Order XLI rule 22, it has been submitted that when the aforesaid rule is properly appreciated in its entirety, it is manifest that the respondent is competent only after having the cross objection at its end in order to challenge the

judgment impugned. Because of the fact that the respondent did not challenge the finding by way of cross objection so, is precluded to raise the issue and, in support thereof has relied upon the judgment reported in **AIR 1999 SC 1747 (Superintending Engineer & others vs. B. Subba Reddy)** whereunder it has been observed, after scrutinizing, analyzing the earlier pronouncement though relating to Arbitration Act.

> **"24.** From the examination of these judgments and the provisions of Section 41 of the Act and Order 41 Rule 22 of the Code, in our view, the following principles emerge:
>
> (1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.
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> (2) Cross-objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.
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> (3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by an indigent person also apply to cross-objection.
>
> (4) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.
>
> (5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the court like in appeal.
>
> (6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to the whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the

> same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order."

15. In **Banarsi & others vs. Ram Phal** reported in **AIR 2003 SC 1989** the Apex Court elaborately considered the matter (fortunately the case was also relating to Specific Relief Act) and, the question so formulated is present one as is evident from paragraph 6 and then it has been answered in paragraphs 8, 9 and 10.

> **"8.** Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See *Phoolchand and another* v. *Gopal Lal* [AIR 1967 SC 1470 : (1967) 3 SCR 153]; *Smt. Jatan Kanwar Golcha* v. *M/s. Golcha Properties (P) Ltd.* [(1970) 3 SCC 573]; *Smt. Ganga Bai* v. *Vijay Kumar* and others [(1974) 2 SCC 393] . No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against *decree* and not against *judgment.*
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> **9.** Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided

against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging the finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of the defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection. A right to file cross-objection is the exercise of right to appeal though in a different form. It was observed in Sahadu Gangaram Bhagade v. Special Dy. Collector, Ahmednagar and another [(1970) 1 SCC 685 : (1971) 1 SCR 146] that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection — both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.

10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41, Rule 22, sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a *finding*. The difference which has resulted we will shortly state. A respondent may *defend* himself without filing any cross-objection to the extent to which decree is in

> his favour; however, if he proposes to *attack* any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-
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> (*i*) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.
>
> (*ii*) The decree is *entirely* in favour of the respondent though an *issue* has been decided against the respondent.
>
> (*iii*) The decree is *entirely* in favour of the respondent and all the *issues* have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent."

16. On the other hand, learned counsel for the respondent has submitted that Order XLI rule 22 of the Code of Civil Procedure got a drastic change after 1976 amendment and, from plain reading of Order XLI rule 22 of the Code of Civil Procedure it is apparent that irrespective of the fact that no cross objection (ought to be) preferred, even then the respondent has got right to raise the issue, challenging the finding so recorded by the learned lower court.

17. In **Ravinder Kumar Sharma vs. State of Assam and others** report in **AIR 1999 SC 3571**, while answering the question no.1 so formulated and detailed under paragraph 7, after discussing all the relevant provisions, objection concluded under para 22 acknowledging the liberty so provided to the respondents

to challenge the judgment impugned irrespective of absence of cross objection at his end and, concluded in following way:

> **"22.** In our view, the opinion expressed by Mookerjee, J. of the Calcutta High Court on behalf of the Division Bench in *Nishambhu Jena's case* (1985 (89) Cal.WN 685) and the view expressed by U.N. Bachawat, J. in *Tej Kumar's case* (AIR 1981 Madh.Pra. 55) in the Madhya Pradesh High Court reflect the correct legal position after the 1976 Amendment. We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose of sustaining the decree to the extent the lower court had dismissed the suit against the defendant-respondent. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory. In other words, the law as stated in *Venkata Rao's case* (AIR 1943 Mad 698) by the Madras Full Bench and *Chandre Prabhuji's case* (AIR 1973 SC 2565) by this Court is merely clarified by the 1976 Amendment and there is no change in the law after the amendment."

18. The aforesaid view as is evident has been reiterated by the Apex Court in **Banarsi & others vs. Ram Phal** reported in AIR **2003 SC 1989** (filed on behalf of the appellant). Consequent thereupon, it is found and held that irrespective of absence of cross objection, respondent is at liberty to challenge the finding so recorded at the end of the learned lower court.

19. Though at an earlier occasion, the same has not been exposed but, during course of trial it has come that Sri Niwas Singh who was occupying the house in question since before

happens to be son-in-law of Ambika Singh (plaintiff/appellant). Furthermore, it has also come that there was litigation in between. From Exhibits F and F/1 it is evident that a case was instituted by Sri Niwas Singh on 10.01.1986 bearing Jamui P.S. Case No.9 of 1986. On the other hand, respondent no.1/defendant no.1 Sohagi Devi had instituted a case bearing Jamui P.S. Cae No.4 of 1986 on 08.01.1986 against the aforesaid Sri Niwas Singh. That means to say, institution of aforesaid cases were prior to the date of execution of *Baibayana* deed dated 15.06.1986.

20. However, there happens to be deficiency at the end of Most. Sohagi Devi that in either of the case, on completing investigation, charge-sheet was submitted, cognizance was taken prior to the date of agreement facilitating an opportunity in having appearance of the process server who, as alleged, procured her thumb impression which was later on converted as a deed of agreement at the instance of Sri Niwas Singh. That means to say, presence of thumb impression of Sohagi Devi over the deed of agreement by way of inducement of fraudulent act is not at all found properly substantiated.

21. In the aforesaid background, the evidence of two witnesses that means to say plaintiff Ambika Singh (PW-6) in consonance with the evidence of defendant no.1 Sohagi Devi

(DW-1) is to be taken up on priority basis as they are the competent witness on each and every count. That means to say, over the negotiation, finalisation, payment/acceptance of earnest money, refusal thereof, readiness and willingness/deficiency on that very score.

22. PW-6 had deposed that he happens to be the plaintiff. After death of husband of Most. Sohagi Devi, she became head of the family. Most. Sohagi Devi has one house at Mohalla Krishna Patti. Negotiation for sale/purchase of aforesaid land was finalized on a consideration amount of Rs.23,000/- as Most. Sohagi Devi was to set off the loan, to meet expenses over ailment whereupon became inclined to sell the house. As per terms, he had paid Rs.10,000/- on 15.06.1986 and got *Bainama* which was scribed by Raj Kishore Prasad as directed by Sohagi Devi. Sohagi Devi, after being scribed got it read over and finding it correct, put her thumb impression. As per her direction, Raj Kishore Prasad and others also endorsed the same by putting their signature (ext.). As per terms, Most. Sohagi Devi transferred the possession. His son-in-law who was residing since before continued in possession on his behalf. As per terms of agreement, the sale deed was to be executed within two months after receiving the remaining consideration amount. On 15.07.1986, he had gone to the place of

Most. Sohagi Devi along with the residuary amount of Rs.13,000/- and requested her to accept the balance money and execute the sale deed. Mathura Rawat had accompanied at that very moment. Instead of accepting the remaining amount, she deferred the matter to 2-3 days. He had again gone to her on 10.08.1986 along with the remaining consideration amount and requested to accept the same but she again deferred the matter on one pretext or the other. He was always in readiness and willingness to pay the remaining amount, is in readiness and willingness to pay the amount and get the sale deed, will be always ready and willing but, it is the defendant who is at fault in deferring the matter on one pretext or the other. It has further been deposed that document was scribed at Jamui. Money was paid at Jamui. People of the locality subsequently came to know about the transaction, transfer of possession. Even then, defendant nos.2 and 3 knowingly and intentionally got the sale deeds executed which happen to be illegal, collusive. Sohagi Devi was not at all legally competent to execute the sale deed. Then he denied the suggestion that it is false to say that there was no negotiation with regard to sale/purchase of the house in question, it is wrong to say that he had not paid Rs.10,000/- as an earnest money out of Rs.23,000/-, the total agreed consideration amount, it is wrong to say that Sohagi Devi

had not executed the deed of *Baibayanama,* it is wrong to say that after obtaining thumb impression over plain paper he submitted the same to Raj Kishore Prasad which was converted as a deed of *Baibayana*. Then deposed that his claim is justified. During cross-examination he has stated that he has seen Kebala relating to the land under dispute having in the name of the husband of Sohagi Devi. There are eight rooms and a courtyard. The house is partitioned in such a way that it carries two houses. Road is east to the land. His son-in-law was tenant at the northern side while constables of Excise Department were tenant at the southern side. After execution of *Mahadanama* now his son-in-law is over that portion also. Then he denied the suggestion that southern side of the house belonged to the husband of defendant no.2 (Meena Devi, deceased son of Sohagi Devi). Then shown ignorance with regard to the institution of case over his son-in-law by Sohagi Devi as well as by his son-in-law over Sohagi Devi and others. In paragraph 5 he has stated that he is not knowing the exact area having been purchased by the other defendants. He is not knowing in whose name rent receipt is being issued. He is not remembering on which date Sohagi Devi had filed written statement. Then has deposed that on 10.06.1986 he talked with Sohagi Devi. He had not procured a separate receipt from Sohagi Devi with regard to

acceptance of Rs.10,000/-. At that very time Raj Kishore Prasad, Kartik Prasad, son-in-law and others were present. In paragraph 6 he has stated that so many persons are witnessed over the transfer of possession. Other defendants also knew the same. He is not remembering the names of other witnesses but, one of them is his son-in-law. At paragraph 8 he has stated that he has directed Sohagi to come on 15th at Jamui. Kebala stood in the name of husband of Sohagi Devi who died 5-6 years ago, leaving behind she along with daughter-in-law, wife of predeceased son, grand son, son of predeceased son and two daughters. He had not enquired much about the legal heirs. At the time of scribing *Baibayana* he had not called upon the residents of Krishna Patti. On 15.06.1986 at about 12.00 Noon he had arrived at the place of Sohagi Devi. He had not asked the other family members of Sohagi to become witness. He is not knowing how many residents of Krishna Patti mohalla are working as scribe. He came and sat at a temple. Stamp was along with him. He had not purchased the same. Tickets were affixed thereupon. Because of the fact that Sohagi Devi was very much eager to have the money on account thereof *Baibayana* was scribed on a plain paper on Sunday itself. He was not eager but, considering the eagerness of Sohagi, the same was effected. He is not knowing the rate of the land lying at

Mohalla Krishna Patti. He had taken Rs.10,000/- from his house and three to four thousand from Jainandan Modi. He had not given any receipt to Jai Nandan Modi. He had paid Rs.10,000/- to Sohagi. He had disclosed to her brother with regard to the total consideration amount of Rs.23,000/-, the price of the house and, payment to the tune of Rs.10,000/- as an earnest money. He had gone to make payment on Tuesday, Saturday but had not accompanied the person of Krishna Patti at that very occasion. Then he denied the suggestion that it is false to say that there was no negotiation, no payment/acceptance of Rs.10,000/- as an earnest money, execution of *Baibayana*, false assertion with regard to persistent effort for execution of sale deed after receiving remaining amount appertaining to Rs.13,000/-. He also denied the suggestion that he got the thumb impression over plain paper which was converted as a deed of *Baibayana*.

23. DW-1 is Sohagi Devi who in her examination-in-chief has deposed that she happens to be defendant no.1. Earlier the disputed land belonged to her. Her husband died about five years ago, leaving behind her two daughters, son of a predeceased son and, a widow of predeceased son. All of them were jointly residing in the same house. She had not negotiated with Ambika Singh relating to sale of land and building. She was not at all

paid/received the earnest money to the tune of Rs.10,000/-. She had not executed the deed of *Baibayana*. Then she denied the suggestion that it is false to say that in *Jyeshth* month of 1986 she had gone to Bokar Mauza and floated news with regard to transfer of the land along with the building. It is false to say that she had instructed Raj Kishore Babu to scribe *Baibayana*. She had not received a single farthing as an earnest money. She had not transferred possession of the land along with house to Ambika Singh. Then she deposed that her husband had inducted Niwas Singh, son-in-law of Ambika Singh as a tenant. Niwas Singh paid rent up till life time of her husband. He continued to pay rent two months thereafter. Then he stopped. When she had gone to demand, she was assaulted. Case has been instituted. Then she denied the suggestion that Ambika Singh repeatedly approached her along with the residuary consideration amount appertaining to Rs.13,000/-, requested to accept the same and execute the sale deed but she on one pretext or the other, deferred. Then she stated that she had not put her thumb impression over the alleged document. Again corrected that two Peons got her thumb impression over plain paper during pendency of criminal case at Munger. Then she had filed petition before the S.D.O. on that very score. She sold away the aforesaid building along with the land to

Chandra Deo Singh and Janki Devi for a consideration and after receiving money, she handed over possession to them. During cross-examination she has stated that two houses stood over the disputed land. Northern side is occupied by Sri Niwas Singh while southern side was occupied by constables of Excise Department. Northern side has been sold to Chandra Deo Singh while southern side to Satya Deo Singh. Two criminal cases are pending with Sri Niwas Singh. Then she stated that her husband was a drunkard. He was accused in different cases. Her son Arjun had married four times. He is now no more. Three wives gone away while one is staying. Then she denied the suggestion that all his wives had died. No case was instituted for death of wives of Arjun. Yogendra Singh and Birendra Singh stood in the boundary of the disputed land with whom she is also on litigating term. Civil suit is going on with Anant Babu. She has got 10 bighas of land. She has got four houses. She has gifted one house to her daughter. She has also sold a land in favour of Bachchi Devi. She had also sold a land of Mohalla Krishna Patti in 1983. She had sold away $7^{1}/_{2}$ decimals of land. She had also sold away in favour of Majo Rawat, Basanti Devi. After death of her husband, she had sold away the aforesaid land. Her daughter Champa Devi was residing in a house lying west to the disputed land. Now a days her daughter-in-law resides

therein. Dispute arose with Sri Niwas Singh when he stopped to pay rent after death of her husband. One year thereafter she had sold away the land. Sri Niwas is still residing in that portion of the house. Case is going on. There was no case with regard to default in payment of rent. She has further stated that two Peons came along with papers in the month of *Ashwin*. Then thereafter she had filed petition before the S.D.O.. She had not identified the Peons nor she interrogated them at that very time. None was present there. There were two plain papers which she had handed over to Chandra Deo Singh. Her thumb impression was taken over plain paper but she is not remembering at which side of the paper she had put her thumb impression. She had sent messenger to trace out. She had constraint relation with Sri Niwas over taking of thumb impression. She had not disclosed the event to Mohalla people. She had not reported to police station. She has then said that Sudhir, Advocate Clerk of Brahmdeo Babu was instructed to enquire about the same and thereafter, petition was filed before the SDO. Then has stated that she was not knowing Ambika Singh. She had no conversation with Ambika Singh. After receiving the notice she came about the instant case. She appeared and had filed her reply. Negotiation with Chandradeo Singh began in the month of *Asharh* and ten days thereafter, she executed two sale deeds for

Rs.7,000/- each. She is unable to disclose the boundary having incorporated therein. She is not remembering the date on which she received money. She is not remembering on which date negotiation was finalized with Janki Devi. However, she had executed the sale deed in favour of Janki Devi as well as Chandra Deo Singh for Rs.28,000/-. She had received money in presence of Registrar and transferred the possession on the same day. Then she denied to have filed her reply. She further stated that she was unaware with the contents of reply. Then she denied the suggestion that she had negotiated to transfer the land in favour of Ambika Singh over a total consideration amount pertaining to Rs.23,000/- and, she received Rs.10,000/- as an earnest money on 15.06.1986 and executed the deed of *Baibayana* and, in spite of repeated effort at the end of Ambika Singh to receive the remaining consideration amount appertaining to Rs.13,000/- and execute the sale-deed, she deferred the matter and then, in order to defeat his interest, got the sale deed executed in favour of Janki Devi as well a Chandra Deo Singh without any consideration amount. Then she also denied the suggestion that no Peon ever came nor taken her thumb impression on plain paper.

24. Exhibit-1 is the alleged deed of *Baibayana*. On perusal of the same, it is evident that thumb impression is on the

right side of the document having presence of witnesses, identifies over the revenue ticket. Sohagi Devi (DW-1) did not speak during her examination-in-chief that by what process her thumb impression was procured. More particularly in the background of admission at her end that after death of her husband she had transferred the land, house by way of deed of sale, deed of gift. In the background of aforesaid eventuality, the finding of the learned lower court with regard to her presence over the document in question (Exhibit-1) is found voluntarily as, it is difficult to imagine that one could succeed in persuading her to give her thumb impression over a plain paper much less when she was litigating not only with Sri Niwas, son-in-law of Ambika Singh rather different persons also.

25. Now coming to readiness and willingness, first of all the settled principle of law enunciated by the Apex Court has to be seen. In **Vijay Kumar and others vs. Om Prakash** reported in **AIR 2018 SC 5098** it has been observed:

> "(7) In order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract and the readiness and willingness has to be shown through out and has to be established by the plaintiff. In the case in hand, though the respondent- plaintiff has filed the suit for specific performance on 29 th April, 2008, the respondent-plaintiff has not shown his capacity to pay the balance sale consideration of Rs.22,00,000 (Rupees Twenty Two Lakhs). In his evidence, the respondent-plaintiff has stated that he has borrowed the amount from his friends and kept the money to pay the balance sale

consideration. As rightly pointed out by the Trial Court, the respondent-plaintiff could not produce any document to show that he had the amount of Rs.22,00,000 (Rupees Twenty Two Lakhs) with him on the relevant date; nor was he able to name the friends from whom he raised money or was able to raise the money. Further more, as rightly pointed out by the Trial Court, the respondent-plaintiff could have placed on record his Accounts Book, Pass Book or the Statement of Accounts or any other negotiable instrument to establish that he had the money with him at the relevant point of time to perform his part of the contract. We are, therefore, in agreement with the view taken by the Trial Court that the respondent-plaintiff has not been able to prove his readiness and willingness on his part.

(8) The relief for specific performance is purely discretionary. Though the respondent-plaintiff has alleged that he was ready and willing to perform his part of the contract, the First Appellate Court ought to have examined first whether the respondent-plaintiff was able to show his capacity to pay the balance money. In our considered view, the First Appellate Court as well as the High Court has not properly appreciated the evidence and the conduct of the parties. The First Appellate Court as well as the High Court, in our view, was not right in reversing the judgment of the Trial Court and the impugned order cannot be sustained and liable to be set aside."

26. In **Mehboob-Ur-Rehman vs. Ahsanul Ghani** reported in **AIR 2019 SC 1178** it has been held :

13. It remains trite that the relief of specific performance is not that of common law remedy but is essentially an exercise in equity. Therefore, in the Specific Relief Act, 1963, even while providing for various factors and parameters for specific performance of contract, the provisions are made regarding the contracts which are not specifically enforceable as also the persons for or against whom the contract may be specifically enforced. In this scheme of the Act, Section 16 thereof provides for personal bars to the relief of specific performance. Clause (c) of Section 16 with the explanation thereto, as applicable to the suit in question, had been as follows:-

"16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person-

(a) *** *** ***

(b)*** *** ***

(c) [who fails to aver and prove] [By Act No.18 of 2018, the expression "who fails to aver and prove" is substituted by

the expression “who fails to 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 purpose 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] (By the same Act No.18 of 2018, the expression “must aver” is substituted by the expression “must prove.”) performance of, or readiness and willingness to perform, the contract according to its true construction.”

14. Though, with the amendment of the Specific Relief Act, 1963 by Act No. 18 of 2018, the expression “who fails to aver and prove” is substituted by the expression “who fails to prove” and the expression “must aver” stands substituted by the expression “must prove” but then, the position on all the material aspects remains the same that, specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already 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 the terms of which, the performance has been prevented or waived by the other party. As per the law applicable at the relevant time, it was incumbent for the plaintiff to take the specific averment to that effect in the plaint. Of course, it was made clear by this Court in several decisions (vide Syed Dastagir v. T.R. Gopalakrishna Setty: (1999) 6 SCC 337: (AIR 1999 SC 3029): and Aniglase Yohannan v. Ramlatha and Ors.: (2005) 7 SCC 534: (AIR 2005 SC 3503), that such requirement of taking the necessary averment was not a matter of form and no specific phraseology or language was required to take such a plea. However, and even when mechanical reproduction of the words of statue was not insisted upon, the requirement of such pleading being available in the plaint was neither waived nor even whittled down. In the case of A. Kanthamani v. Nasreen Ahmed: (2017) 4 SCC 654: (AIR 2017 SC 1236), even while approving the decree for specific performance of the agreement on facts, this Court pointed out that the requirement analogous to that contained in Section 16(c) of the Specific Relief Act, 1963 was read in its forerunner i.e., the Specific Relief Act, 1877 even without specific provision to that effect. Having examined the

scheme of the Act and the requirements of CPC, this Court said,-

"22. Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16 (c) read with requirements contained in Forms 47 and 48 of Appendix 'A' CPC"

15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in the case of Umabai (supra) as under:-

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16 (c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in- chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

*** *** ***

45. It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question…"

27. In **Beemaneni Maha Lakshmi v. Gangumalla Appa Rao** reported in **AIR 2019 SC 3013** it has been held as under:

"11. Now so far as the submission on behalf of the appellant that if the decree for specific performance of the contract is passed after number of years, it would cause undue hardship to the defendant – vendor and the reliance placed upon the decision of this Court in the case of P.R.Deb (AIR 1996 SC 1504) (supra) is concerned, it is required to be noted that in the

written statement the defendant has not pleaded any hardship to be caused if the decree of specific performance of the contract is passed against the defendant – vendor. At this stage, the decision of this Court in the case of A. Maria Angelena v. A.G. Balkis Bee, reported in AIR 2002 SC 2385 is required to be referred to. In the aforesaid case, the vendor sought to raise the plea of hardship for the first time before this Court and this Court did not permit the vendor to raise such a plea of hardship by observing that as no plea as to hardship if relief for specific performance is granted was raised by the defendant – vendor in written statement nor any issue was framed that the plaintiff – purchaser could be compensated in terms of the money in lieu of decree for specific performance, such plea cannot be entertained for the first time in appeal by way of SLP, more so, when there are concurrent findings that the plaintiff was ready and willing to perform his part of the contract has been recorded by the lower courts. Therefore, the plea raised on behalf of the vendor on hardship cannot be permitted to be raised now, more particularly when no such plea was raised/taken in the written statement."

28. In **Hari Steel and General Industries Ltd. and another vs. Daljit Singh and others** reported in **AIR 2019 SC 4796** it has been held as under**:**

"38. … … … … … … … In the judgment relied on by Sri P.S. Narsimha, learned senior counsel in the case of Aniglase Yohannan vs. Ramlatha and Ors. (AIR 2005 SC 3503) (supra), this Court has held that the basic principle behind Section 16(c) read with Explanation (ii) of the Specific Relief Act, is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. In the aforesaid judgment this Court has further held that the court is to grant relief on the basis of the conduct of the person seeking relief. Paras 12 and 13 (Paras 11 and 12 of AIR) of the judgment read as under:-

"12.The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff

entitles him to get the relief on perusal of the plaint he should not be denied the relief.

13. Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. On considering almost an identical fact situation it was held by this Court in Surya Narain Upadhyaya v. Ram Roop Pandey 1995 Supp (4) SCC 542 : AIR 1994 SC 542] that the plaintiff had substantiated his plea."

The said judgment of this Court also supports the plea of the appellants herein."

29. From the evidence of the appellant/plaintiff itself it is evident that even at the time of *Baibayana* he took Rs.10,000/- from his house while three to four thousand from Jainandan Modi. As *Baibeyana* happens to be unregistered, so there was no occasion for extra expenses. In the aforesaid background procurement of money from third person has got bearing, which in the facts and circumstances would have been explained. In like wise manner, presence of Rs.13,000/- the residuary amount which should also been seen in the background of the fact that during trial no prayer has been made to deposit the amount. In the aforesaid eventuality it was incumbent upon the plaintiff/appellant to lead positive evidence at his end in order to satisfy the ingredients of readiness and willingness by way of positive/concrete evidence that he was in possession of Rs.13,000/- the remaining amount.

For convenience sake points no.(b) and (c) are taken together.

30. Now coming to main plank it is needless to say that in a suit for specific performance, the plaintiff is under obligation to substantiate his willingness as well as readiness. The aforesaid event is to be perceived with regard to a negotiation (if any) settled, finalized amongst the parties. So far the present case is concerned, with regard to negotiation concerning sale of a land and house and, execution of *Baibayana* at the end of the defendant no.1 after receiving earnest money of Rs.10,000/- out of agreed consideration amount of Rs.23,000/-. As has been denied and resisted at the end of the respondent with regard to her voluntariness in having her thumb impression in lieu of receipt of earnest money against the finalisation of negotiation of sale of land along with house and even having as being duped at the end of process server who in connivance with Sri Niwas Singh, a tenant, son-in-law of Ambika Singh, who filed a case against her, later on converted as a valuable document (*Baibayana*). That means to say, though with some hesitation explanation, there happens to be admission at the end of defendant no.1 having her thumb impression over the document, then in that circumstance she

was/is under obligation to substantiate the same otherwise, inference will go against her.

31. The submission of learned counsel for the respondents that event is completely encompassed under Bihar Tenancy Act, whereunder defendant no.1 was not at all competent to enter into an agreement without taking permission from the Collector being a member of backward community/scheduled caste (subsequently notified) is found very much misconceived as, the aforesaid section has been declared *ultra-virus* by the Full Bench in **B. Thakur vs. K. Singh** reported in **1969 BLJR 134.**

32. Even then the deficiency at the end of the appellant/plaintiff in substantiating his willingness and readiness did not provide any kind of opportunity to pervert the judgment impugned. Whereupon, the appeal lacks merit and is accordingly dismissed on contest.

However, in the facts and circumstances of the case, the parties will bearing their own cost.

(Aditya Kumar Trivedi, J)

skpathak/-

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