

R.F.A. No. 02 of 2014  
Mahesh Kumar Trivedi v. Smt. Nanda Rani Devi & Ors.  
With  
C.O. No.2 of 2015  
Mahesh Kumar Trivedi v. Smt. Nanda Rani Devi & Ors.

**THE HIGH COURT OF SIKKIM: GANGTOK**  
**(Civil Appellate Jurisdiction)**

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**S.B.: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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**R.F.A. No. 02 of 2014**

Shri Mahesh Kumar Trivedi,  
Son of late Pandit Ramagya Trivedi,  
C/o Trivedi Stores,  
Singtam,  
East Sikkim.

.... Appellant

**versus**

Kamala Prasad (Since Deceased and substituted by the following  
Legal Representatives)

1. Smt. Nanda Rani Devi,  
Wife of late Kamala Prasad,
2. Shri Sonu Prasad,  
Son of late Kamala Prasad,
3. Shri Deepak Prasad,  
Son of late Kamala Prasad.
4. Master Niraj Prasad,  
Son of late Kamala Prasad.
5. Ms. Radha Prasad,  
D/o late Kamala Prasad.
6. Ms. Kusum Prasad,  
D/o late Kamla Prasad.
7. Ms. Puja Prasad,  
D/o late Kamala Prasad.
8. Ms. Rubi Prasad,  
D/o late Kamala Prasad.

All Residents of Singtam Bazaar,  
P.O. & P.S. Singtam, East Sikkim

.... Respondents

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**With**  
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Shri Mahesh Kumar Trivedi,  
 Son of late Pandit Ramagya Trivedi,  
 R/o Singtam Bazaar, Singtam,  
 East Sikkim.

.... Appellant

**versus**

1. Smt. Nanda Rani Devi,  
Wife of late Kamala Prasad,
2. Shri Sonu Prasad,  
Son of late Kamala Prasad,
3. Shri Deepak Prasad,  
Son of late Kamala Prasad.
4. Master Niraj Prasad,  
Son of late Kamala Prasad.
5. Master Nakul Prasad,  
Son of late Kamala Prasad.
6. Ms. Radha Prasad,  
D/o late Kamala Prasad.
7. Ms. Kusum Prasad,  
D/o late Kamala Prasad.
8. Ms. Puja Prasad,  
D/o late Kamala Prasad.
9. Ms. Rubi Prasad,  
D/o late Kamala Prasad.

All Residents of Singtam Bazaar,  
 P.O. & P.S. Singtam, East Sikkim

.... Respondents

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**Appeal under Order XLI, Rules 1 and 2 of the Code of  
 Civil Procedure, 1908 & Cross Objection under Order XLI,  
 Rules 22 of the Code of Civil Procedure, 1908.**

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**Appearance:**

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Aruna Chettri, Ms. Hemlata Sharma and Mr. Sonam Rinchen Lepcha, Advocates for the Appellant.

Mr. B. Sharma, Senior Advocate with Mr. Sudhir Prasad, Advocate.

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**J U D G M E N T**

(04.09.2018)

**Bhaskar Raj Pradhan, J**

1. The judgment passed by the learned District Judge dated 13.09.2013 (the impugned judgment) in Title Suit No. 02 of 2010 (the suit) dismissing the suit filed by the Appellant-the Plaintiff in the suit as well as the counter-claim preferred by late Kamala Prasad-the sole Defendant in the suit has led to the Appellant as well as the Respondents-the substituted Defendants preferring R.F.A. No. 02 of 2014 and C.O. No. 02 of 2015 respectively. Both the Regular First Appeal and the Cross Objection are taken up together for disposal.

2. The Appellant had filed the suit for specific performance and consequential reliefs on 22.06.2004 against late Kamala Prasad basing his claim of ownership on a document (Exhibit-1) purportedly an agreement to sell praying for the following reliefs:

- “(i) *For specific performance of the contract of sale of the Schedule “A” property in favour of the plaintiff for which the defendant may be directed to execute the sale deed in respect of the Schedule “A” property in favour of the plaintiff, do the needful for registration of the same and to accept the remaining sum of consideration value as per agreement dated 02.11.1999.*
- “(ii) *In the event the defendant fails or refuses to execute the sale deed in respect of the Schedule “A” property then order*

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*compulsory registration of the sale deed after executing the sale deed in respect of the Schedule "A" property by and through this Hon'ble Court and upon direction to the defendant to accept the remaining consideration value as per the agreement dated 02.11.1999;*

- (iii) Recovery of possession of the Schedule "C" property from the defendant by evicting the defendant, his agents, servants etc. from the Schedule "C" premises; in favour of the plaintiff;*
- (iv) In the event it is found that the defendant is not the exclusive owner of Schedule "A" property by virtue or partition then to declare that the defendant shall execute the sale deed and cause registration of the same as and when he becomes the owner of the Schedule "A" property by partition or otherwise;*
- (v) Declaring that the plaintiff is the owner of the Schedule "A" property having right title and interest on it;*
- (vi) Cost of all the proceedings;*
- (vii) Any other decree, relief or reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

**3.** Exhibit-1 is in Hindi and titled "*Kararnama*" which means agreement to sell. The said Exhibit-1 translated reads as under:

**"Kararnama" (AGREEMENT)**

**Exhibit-1**

*"I Kamal Pd. S/o Lt Ram Das Ram, R/o Gram Num Nagar, P.O. Jalalpur Bazar, Zilla Saran (Bihar).*

*Am executing this agreement on this 2/11/1999, Tuesday, on the following terms and condition.*

*My Lt. Father Shri. Ram Das Ram and his younger brother Lt. Shri Ram Fal Ram have their land and house situated at Gangtok, Singtam and Rangpo Bazars, out of which the land situated at Singtam Bazar measuring an area of 40x62 has been transferred to me by my brothers and panchayat vide a document. Out of the said area of land I and Mahesh Kumar Trivedi have orally agreed for the sale of half of the land and house measuring 20x62 feet which*

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*is under occupation of Trivedi Stores being his shop and residence since 1963. It has been agreed that the sale price of the land, house, wood and entire property is ₹3,21,000/- (Three Lakhs Twenty One Thousand) out of which payment of half amount would be made at the time of registration of the land and the remaining half amount within six months thereof on installment has been agreed upon.*

*2. I have received the amount Rs.5,501/- (Five Thousand Five Hundred One) as and by way of advance. The said amount will be deducted from the total amount to be paid. I have signed on this agreement after reading it and in full consciousness, on the advice and in the presence of my eldest son Rabi Prasad and other witnesses, so that there may not be any dispute in future. If I be unable to register sale deed within four years then Mahesh Kr. Trivedi can take legal action against me and he shall have full right over the said land and on the shop.*

Witnesses.

- |  |  |
|--|--|
| 1. Shiv Shanker Singh<br>Sd/- Ext- 1/E | Kamala Prasad<br>Thumb impression (Ext-1/B(colly))<br>Thumb impression (Ext-1/B (colly)) |
| 2. Shri Ram Prasad<br>Sd/- Ext- 1/F    | Thumb impression (Ext-1/B (colly))   |
|  | Ravi Kumar Prasad (Ext-1/C (colly))  |

**4.** Exhibit-1 has not been signed by the Appellant. It purports to contain the thumb impression of late Kamala Prasad and signed by his son Ravi Kumar Prasad in the presence of two witnesses Shiv Shankar Singh and Ram Prasad (P.W.2). It is a

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hand written document. The recital reflects that there was an agreement between the Appellant and late Kamala Prasad for sale of “*Land*” and house measuring 20'x62' for an amount of ₹3,21,000/- (Rupees three lakhs twenty one thousand) only. It also reflects that it is a document evidencing payment of ₹5,501/- (five thousand five hundred one) only as advance.

**5.** Late Kamala Prasad filed a written statement alleging forgery of the purported agreement to sell dated 02.11.1999 and alternatively of being taken advantage of being an alcoholic but admitting nevertheless that he was the owner of the said suit property. Issues would be framed. Since late Kamala Prasad had raised no dispute regarding ownership of the suit property no issue regarding ownership would be framed. There is therefore no documentary proof of ownership of the scheduled property. After the completion of the recording of the evidence of the Appellant and his two witnesses the evidence in affidavit of late Kamala Prasad would be filed and authenticated. However, he would pass away before his cross-examination and therefore substituted by the present Respondents as Defendants. Their attempt to file an independent written statement contrary to the written statement filed by late Kamala Prasad and be impleaded as defendants under Order 1 Rule 3 of the Code of Civil Procedure, 1908 (CPC) would be declined by the learned District Judge and thus the Respondent No.1 would file a written

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statement which was directed to be not in conflict with the written statement filed by late Kamala Prasad. No evidence would be produced at the time of filing the application under Order 1 Rule 3 read with Section 94 and Section 151 CPC to *prima facie* reflect that their claim of joint ownership was *prima facie* true. The order passed declining the application would also not be assailed. The written statements originally filed by late Kamala Prasad as well as the one filed by Respondent. No.1 who substituted him along with other Respondents makes a counter claim for eviction of the Appellant from the scheduled property as well as claim arrears of rent so does the written statement filed by the Respondent No.1.

**6.** Heard Mr. A.K. Upadhyaya, learned Senior Advocate for the Appellant and Mr. B. Sharma, learned Senior Advocate for the Respondents and the Cross Objector. The issues framed by the learned District Judge during the trial are taken as points for determination in the present Appeal and Cross Objection upon consent. The said issues were:-

- 1) *Whether the suit is maintainable in its present form?*
- 2) *Whether the suit is barred by law of Limitation?*
- 3) *Whether the plaintiff is entitled to decree of specific performance of the contract of sale of the schedule 'A' property in his favour?*
- 4) *Whether the plaintiff is liable to be evicted as prayed for by the defendant?*

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- 5) *To what relief or reliefs, if any, is the plaintiff entitled?*
- 6) *Whether the plaintiff is a tenant in the suit property? If so, whether the plaintiff is liable to pay the arrear house rent as claimed by the defendant?*
- 7) *Whether the document dated 2.11.1999 executed by the defendant in favour or the plaintiff is a valid document and enforceable in law?*
- 8) *To what relief or reliefs the defendant is entitled?*

**7.** It is seen that the burden of proof for issue nos.1), 2) and 3) lay with the Appellant and for issue nos. 6), 7) and 8) with the Respondents.

**8.** It is the duty of the Appellate Court to appreciate the entire evidence and arrive at its own independent conclusions, for reasons assigned, either of affirmation or difference. The jurisdiction of the First Appellate Court while hearing the First Appeal is very wide like that of the trial Court. It is the final Court of fact, ordinarily, and therefore, the parties are entitled to an independent consideration of all points on both facts and law.

**9.** Each of the issues are taken up, the correctness of the opinion and the decision of the learned District Judge examined and this Court's decision on each of the said issues along with the reasons are given hereunder.

**10.** The learned District Judge would examine issue nos.1, 3 and 7 together in this manner:

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*“48. The whole case of the Plaintiff is based on the agreement dated 02.11.1999 (Exhibit 1). He has categorically pleaded in his pleadings and later deposed on oath before the Court that the original Defendant having come to own the Schedule-A property pursuant to a family partition executed the said agreement on 02.11.1999 (as an agreement for sale) whereby he sold the said property to the Plaintiff at a consideration value of ₹3,21,000/-. The said agreement was executed in front of the concerned witnesses namely Ram Prasad (PW 2) and Shiv Shanker Singh. Though the original Defendant (since deceased) denied the above claims of the Plaintiff I find that so far as the execution of Exhibit 1 is concerned the Plaintiff has been able to substantiate the same. PW 2 Ram Prasad and PW 3 Jeetendra Singh have corroborated the Plaintiff’s evidence above so far as the execution of Exhibit 1 (in two pages) is concerned. According to PW 2, the above agreement was entered into between the original Defendant as the seller and the Plaintiff as the purchaser. He has categorically identified Exhibits 1/A (collectively) on the two pages of Exhibit 1 as the initials/signatures of the original Defendant Kamala Prasad. Apart from that he has also identified Exhibits 1/B (collectively) as the thumb impressions of the original Defendant on both pages of Exhibit 1; Exhibits 1/C (collectively) as the signature/initials of the son of the original Defendant (Ravi Kumar Prasad-also deceased); and Exhibit 1/D on the front page of Exhibit 1 as the thumb impression of Ravi Kumar Prasad. PW 2 has also identified his signature on Exhibit 1 as Exhibit 1/F. Further, as per him Exhibit 1/E is the signature of the other witness Shiv Shanker Singh. He has empathetically deposed that Exhibit 1 was executed/signed in his presence. On the same day, he claims, the original Defendant also took ₹5,501/- as advance against the consideration value. Similarly, PW 3 Jeetendra Singh has also deposed regarding the execution of Exhibit 1 by the original Defendant. He too has identified the signature/initials/thumb impressions of the original Defendant and his son Ravi Kumar Prasad (deceased) on Exhibit 1. The evidence of the Plaintiff, PWs 2 and 3 to the above extent have not been demolished during their respective cross-examinations by the concerned Defendant(s). A conjoint reading of their*

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*evidence makes it amply clear that Exhibit 1 was executed by the original Defendant. So far as the validity and enforceability of Exhibit 1 are concerned the same shall be considered hereinafter.*

**49.** *It may also be mentioned here that though PW 3 is not a signatory/attesting witness to Exhibit 1 nevertheless his evidence clearly establishes that he was present while it was being executed and signed. As regards PW 2, it may be mentioned that though during his cross-examination he admitted that he did not remember 'exactly' as to what is written in Exhibit 1, his evidence (when read as a whole) is clear that he knows what Exhibit 1 purports to.*

**50.** *The original Defendant took contradictory pleas as regards Exhibit 1. At one place he would say that he has not signed Exhibit 1. Again in the same breath he would claim that if at all he had executed it the same was under the influence of alcohol and without understanding the contents thereof. It is quite astounding to note that between 02.11.1999 (date when the document was executed) and 22.06.2004 (date when the present suit was instituted) the original Defendant made no attempts to challenge and/or have the concerned document/agreement set aside (by approaching appropriate forums). So far as the substituted Defendants are concerned, as mentioned earlier above they have claimed ignorance about the said document.*

**51.** *The question of validity and enforceability of Exhibit 1 as well as the question of the Plaintiff's entitlement to specific performance of Exhibit 1 shall be considered now.*

**52.** *As mentioned above, it is admitted position that the original Defendant came to possess the Schedule-A property pursuant to a family partition (original Defendant has admitted this). It has, however, not been mentioned specifically if the partition was under Hindu Law and if the Defendant(s) are governed by the Mitakshara School of Hindu Law or the Dayabagha School of Hindu Law. Since the original Defendant and the substituted Defendants are Hindus it has to be*

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*necessarily presumed that the concerned partition was under the Hindu Law. Again, it not clear as to when the partition took place. Neither the Plaintiff nor the original Defendant has cared to explain or highlight as to when the concerned partition actually took place. Going by the facts and circumstances of the case, it is at least not the case of the Plaintiff that the concerned partition was between the original Defendant and his five sons who would be coparceners along with him (if Mitakshara Hindu) in relation to the Schedule-A property which obviously was inherited by the original Defendant and became ancestral in his hands as regards him and his sons (the concerned property is still standing in the names of the father of the original Defendant late Ram Das Ram and his late uncle late Ram Phal Ram). If the Defendant(s) are governed by the Dayabhaga School of Hindu Law in that case every adult coparcener, whether male or female, would be entitled to a share on partition. If the partition had taken place after the birth of the sons (and daughters in case of Dayabhaga Hindu) of the original Defendant then he could have only taken the Schedule-A property per stirpes as regards every other branch in the family and per capita as regards himself and his sons (and daughters in case of Dayabhaga Hindu). In that case, the original Defendant would have been entitled only to 1/6th or 1/10th, as the case may be, of the Schedule-A property (as he had five sons and four daughters). As the exact date of partition is not clear even if it is assumed that one or two sons or one or two daughters of the original Defendant were not born when the partition took place even then he would only be entitled to certain limited share i.e., much less as compared to the whole chunk of the Schedule-A property. By no stretch of imagination can he be regarded as being the owner of the whole of Schedule-A property so as to be competent or having the requisite title over it to transfer ownership over it in favour of the Plaintiff.*

**53.** *The question which now arises here is whether it would be equitable and just to hold/declare that the Plaintiff is entitled to the specific performance of Exhibit 1. I am afraid, the answer here would be in the negative. It is well-settled that specific*

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*performance of contract/agreement is an equitable relief and where the grant of such relief is likely to be iniquitous the Court would not be obliged to grant the relief. As the original Defendant had no more right than his limited share over the schedule-A property he could not have entered into the concerned agreement to sell off the whole of it. The Plaintiff cannot also seek remedies under Section 53-A of the Transfer of Property Act, 1882 as Exhibit 1 has not been signed by all the other co-sharers/co-parceners. At the most, the Plaintiff can institute a fresh suit for general partition of the schedule-A property amongst the Defendants and the alienation by the original Defendant would be valid to the extent of his limited share alone.*

**54.** *The above discussions and observations would also make it clear that the suit as framed is not maintainable.*

*The issues no.7), 3) & 1) are, accordingly, decided in the negative against the Plaintiff. It is, however, made clear that the Plaintiff shall be at liberty to initiate appropriate proceedings for the money advanced by him to the original Defendant in pursuance of Exhibit 1 against the property left behind by the latter. ”*

- 1) Whether the suit is maintainable in its present form?**
- 3) Whether the plaintiff is entitled to decree of specific performance of the contract of sale of the schedule ‘A’ property in his favour?**

**11.** Both the issue nos. 1) and 3) can be taken up and decided together. The Appellant filed a suit for specific performance of a contract and consequential reliefs. The learned District Judge would hold that the suit was not maintainable and that the Appellant was not entitled to specific performance.

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**12.** The learned District Judge would examine this issue and hold that the suit was not maintainable. However, this Court is not in agreement with the reasoning of the learned District Judge on the said issue which reasoning shall be dealt with appropriately later.

**13.** The Appellant has sought the reliefs prayed for in the plaint based Exhibit-1 dated 02.11.1999 only. During the hearing a question was raised by this Court as to whether the suit was maintainable and whether the Appellant was entitled to specific performance of Exhibit-1 in view of the specific pleadings made by the Appellant in the plaint and specifically paragraph 4 thereof as it suggest that the readiness and willingness to perform the essential terms of Exhibit-1 which are to be performed by the Appellant was conditional even if one was to consider it as an “*agreement*”. Mr. A. K. Upadhyaya would contend that this was a plea not taken by the Respondents and therefore it was not permissible for this Court to examine it. This submission of the learned Counsel is not tenable on the face of the provision under which the Appellant has preferred the present Appeal. The Appeal preferred by the Appellant is under Order XLI, Rules 1 and 2 of the CPC. The said Order XLI, Rule 2 of the CPC provides:

**2. Grounds which may be taken in appeal.**- *The appellant shall not, except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the*

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Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

*(Emphasis supplied)*

**14.** In the written statement filed by Late Kamala Prasad as well as the Respondent No.1 herein, maintainability of the suit would be one of the preliminary objections raised. The Appellant was given an opportunity to examine and make submission on the maintainability of the suit in view of Section 16 (c) of the Specific Relief Act, 1963. Mr. A. K. Upadhyaya would contend that the readiness and willingness of the Appellant to perform the essential terms of Exhibit-1 could not be termed as conditional. He would refer to paragraph 14 of the plaint in which the Appellant had averred:

**“14.** *That the Plaintiff is always ready and willing to pay the remaining sum of consideration value to the defendant and to act as per the agreement after he executed the sale deed in favour of the plaintiff and also do the needful for completing the registration. The plaintiff is ready and willing to complete the sale deed as per the agreement dated 2.11.1999.”*

**15.** It is trite that the averments in the plaint must be read as whole and not isolated sentences to understand the nature of the pleadings.

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**16.** Section 16 (c) of the Specific Relief Act, 1963 provides:

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

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

*Explanation.—For the purposes of clause (c),—*

- (i) *where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;*
- (ii) *the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.”*

**17.** The Appellant had filed a suit for specific performance and consequential reliefs in which it was also averred:

**“4.** *That the said agreement was prepared in presence of witnesses. After receipt of ₹5501/- the defendant again took ₹2000/- on 13.3.2000 towards consideration value. Thereafter he again took ₹3203/- in cash against consideration value; including this amount of ₹3203/- the plaintiff spent ₹25,500/- (Rupees twenty five thousand and five hundred) on account of transportation fare, house repairing etc. Apart from this the defendant did not pay ₹25,500/- towards license fee from March, 2001 and also mesne profit till January, 2004 amounting to ₹25,500/-. Thus altogether a sum of ₹58,501/- (Rupees fifty eight thousand five hundred and one) was spent by the plaintiff in the account of the defendant as consideration value, transportation, cash amount paid etc. Adjusting ₹58,501/-*

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from ₹3,21,000/- the plaintiff has now to pay a sum of ₹2,62,499/- to the defendant towards consideration value; which he is ready and willing to pay at any time to the defendant.” [Emphasis supplied]

**18.** The Appellant thereafter authenticated his evidence in affidavit in which he deposed :

**“5.** *That the said agreement was prepared in presence of witnesses. After receipt of Rs.5501/- the defendant again took Rs.2000/- on 13.3.2000 towards consideration value. Ext.2 is the said Money Receipt and Ext.2/A is the signature of the defendant and Ext.2/B is the signature of witness, Jeetendra Singh. Thereafter he again took Rs.3203/- in cash against consideration value; including this amount of Rs.3203/- I spent Rs.25,500/- (Rupees twenty five thousand and five hundred) on account of transportation fare, house repairing etc. Apart from this the defendant did not pay Rs.25,500/- towards license fee from March, 2001 and also mesne profit till January, 2004 amounting to Rs.25,500/-. Thus altogether a sum of Rs.58,501/- (Rupees fifty eight thousand five hundred and one) was spent by me in the account of the defendant as consideration value, transportation, cash amount paid etc. Adjusting Rs.58,501/- from Rs.3,21,000/- I have now to pay a sum of Rs.2,62,499/- to the defendant towards consideration value; which I am ready and willing to pay at any time to the defendant.”*

*[Emphasis supplied]*

**19.** Reading the paragraph 4 and 14 of the plaint in a wholesome manner with the Appellant’s statement in paragraph 5 of the evidence in affidavit there is no room for doubt that the Appellants readiness and willingness was to pay only the residue of the amount of consideration payable i.e. ₹3,21,000/- (Rupees three lakhs twenty one thousand) only after deduction of the

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amount of ₹58,501/- (Rupees fifty eight thousand five hundred one) only as claimed.

**20.** In re: *Inderchand Jain (DEAD) THROUGH LRS. v. Motilal (DEAD) THROUGH LRS.*<sup>1</sup> the Supreme Court would hold:

*“15. Section 16(c) of the Specific Relief Act, 1963 mandates that the discretionary relief of specific performance of the contract can be granted only in the event the plaintiff not only makes necessary pleadings but also establishes that he had all along been ready and willing to perform his part of the contract. Such readiness and willingness on the part of the plaintiff is not confined only to the stage of filing of the plaint but also at the subsequent stage viz. at the hearing. It has been so held in Umabai v. Nilkanth Dhondiba Chavan [(2005) 6 SCC 243] in the following terms: (SCC p. 256, paras 30-31)*

*“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.*

*31. In terms of Forms 47 and 48 appended to Appendix A of the Code of Civil Procedure, the plaintiff must plead that ‘he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice’ or ‘the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant’. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfil the requirements of law.”*

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<sup>1</sup> (2009) 14 SCC 663

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**21.** A perusal of Exhibit-1 quantifies the consideration amount for the sale of the suit property at ₹3,21,000/- (Rupees three lakhs twenty one thousand) only. An amount of ₹5,501/- (Rupees five thousand five hundred one) only as advance was acknowledged by late Kamala Prasad being paid to him. No further amount was quantified or acknowledged in Exhibit-1. It is Exhibit-1 which the Appellant seeks specific performance of. However, in the plaint as well as in the evidence of the Appellant he seeks adjustment of various amounts which did not form part of Exhibit-1 and it is the specific case of the Appellant that:

*“adjusting ₹58,501/- from ₹3,21,000/- the plaintiff has now to pay a sum of ₹2,62,499/- to the defendant towards consideration value; which he is ready and willing to pay at any time to the defendant.”*

**22.** The Appellant has also failed to plead in the Appeal that he was ready and willing to pay the entire consideration amount as agreed vide Exhibit-1. In fact even in the written submission filed by the Appellant on 05.07.2018 before this Court the aforesaid pleading regarding readiness and willingness to pay the remaining amount after adjustment of ₹58,501/- (Rupees fifty eight thousand five hundred one) only is reiterated. The conduct of the Appellant judged having regard to the entirety of the pleadings as also the evidences brought on record this Court has no hesitation to hold that the readiness and willingness of the Appellant if at all was conditional and therefore in terms of

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Section 16(c) of the Specific Relief Act, 1963, specific performance of Exhibit-1 even if it was to be considered to be an “*agreement*” could not be granted in favour of the Appellant.

**23.** Section 20 of the Specific Relief Act, 1963 provides:

**“20. Discretion as to decreeing specific performance.**—(1) *The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.*

(2) *The following are cases in which the court may properly exercise discretion not to decree specific performance:—*

- (a) *where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*
- (b) *where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or*
- (c) *where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.*

*Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).*

*Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship*

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*has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.*

*(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.*

*(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”*

**24.** The circumstances referred to in sub-section 2 to 4 are not exhaustive in regard to exercise of discretion for granting a decree for specific performance. Section 20 of the Specific Relief Act, 1963 provides that the relief for specific performance is discretionary and is not given merely because it is lawful to do so. The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

**25.** In re: **Ganesh Shet v. C.S.G.K. Setty (Dr)**<sup>2</sup> the Supreme Court would hold:

*“13. It is again well settled that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.”*

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<sup>2</sup> (1998) 5 SCC 381

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**26.** The case of the Appellant in the plaint was that late Kamala Prasad was the owner of the suit property. Specific performance of Exhibit-1 was sought for by the Appellant on the ground that late Kamala Prasad was the owner of the suit property. Exhibit-1 also records that late Kamala Prasad is the owner of the suit property. However, in the written statement filed by the Appellant to the counter claim for eviction and arrears of rent preferred by late Kamala Prasad as well as the Respondents in the same proceedings he would deny that late Kamala Prasad was the owner of the suit property. Similarly in the counter claim to the written statement filed by the Respondent No.1 the Appellant would deny that the Respondents are the joint owners of the suit property. When the Appellant who seeks specific performance waives on the most crucial aspect i.e. the ownership of the suit property which he desires to own by seeking specific performance of Exhibit-1, the discretionary relief as contemplated by the Specific Relief Act, 1963 cannot be granted to the Appellant.

**27.** Consequently, it is held that the Appellant was not entitled to specific performance of Exhibit-1 and further that the suit as framed was not maintainable.

**(2) Whether the suit is barred by law of Limitation?**

**28.** The learned District Judge would hold that the suit was not barred by limitation as it was filed on 22.06.2004 within one

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year of the expiry of the time stipulated in Exhibit-1. Article 54 of the Limitation Act, 1963 provides the period of limitation for specific performance of a contract to be three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. Exhibit-1 provided that if late Kamala Prasad is unable to register sale deed within 04 years then the Appellant can institute legal action against him and have full right over the said land and the shop. It is seen that the Exhibit-1 is dated 02.11.1999. Four years from 02.11.1999 would be 02.11.2003. Admittedly no sale deed relating to Exhibit-1 was registered on or before 02.11.2003. The cause of action for filing the suit for a specific performance would thus arise only on the expiry of the four years period on 02.11.2003. As per Article 54 of the Limitation Act, 1963 the limitation for filing a suit for specific performance of Exhibit-1 dated 02.11.1999 would be three years from 02.11.2003. The suit was admittedly filed on 22.06.2004 within the three years limitation period as such no interference is required to be made with the judgment of the learned District Judge with regard to the said issue.

**4) Whether the plaintiff is liable to be evicted as prayed for by the defendant?**

**6) Whether the plaintiff is a tenant in the suit property? If so, whether the plaintiff is liable to pay the arrear house rent as claimed by the defendant?**

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**29.** These two issues relate to the counter-claim made by the Respondents and therefore, the burden of proof lay on the Respondents.

**30.** Order VIII Rule 6A CPC provides:

**“6A. Counter- claim by Defendant-** 1) *A Defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter- claim is in the nature of a claim for damages or not:*

*Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.*

(2) *Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.*

(3) *The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.*

(4) *The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.”*

**31.** Late Kamala Prasad would, in the written statement, seek a counter-claim for a decree declaring the Appellant as a defaulter with respect to the suit property and a decree of eviction on the ground of default. In the written statement filed on 20.10.2004 late Kamala Prasad would categorically admit the assertion made by the Appellant that he was the owner of the suit property and

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that he had acquired it through family partition. In the counter claim filed by late Kamala Prasad he would assert that he is the owner of the suit property; the Appellant is a tenant thereof at a monthly rate of ₹ 700/- (Rupees seven hundred) only and that the Appellant has defaulted to pay rent of the suit property and thus liable to be evicted.

**32.** The Appellant filed a written statement on 22.04.2005 to the said counter-claim. He denied the ownership of late Kamala Prasad of the suit property although in the plaint he had asserted that late Kamala Prasad was the owner thereof. The Appellant also denied that he is a tenant under late Kamala Prasad. The Appellant denied that he had defaulted in paying rent for the suit property as he had become the owner of the suit property on and from 02.11.1999 on the execution of Exhibit-1. The Appellant would also deny that he was a tenant under late Kamala Prasad at a monthly rent of ₹700/- (Rupees seven hundred) only and that he had defaulted in paying the said rent from the year 1999.

**33.** On 19.02.2011 late Kamala Prasad filed his evidence in affidavit. In his evidence late Kamala Prasad however, took a turn on his claim of ownership of the suit property and stated instead the he could not transact the suit property on the ground that other legal heirs and successors of late Ram Phal Ram and his own sons and daughters have claim in the said suit

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property. The evidence of late Kamala Prasad to the extent that it is in conflict with the written statement filed by late Kamala Prasad cannot be considered as no amount of evidence contrary to the pleading can be relied on or accepted.

**34.** Late Kamala Prasad also asserted that it was the brother of the Appellant one Ramesh Trivedi who was a tenant in the suit property and that the Appellant had been posing himself to be the tenant thereof. Late Kamala Prasad authenticated his evidence in affidavit on 22.02.2011. Late Kamala Prasad, however, died on 22.05.2011 and thereafter the learned District Judge permitted the substitution of late Kamala Prasad by his legal heirs, the Respondents herein.

**35.** In the written statement filed by Respondent No.1 on 19.09.2012 she would simply deny the assertion made by the Appellant of late Kamala Prasad's ownership of the suit property due to lack of knowledge. It was asserted that the Appellant was a tenant in the suit property. It was also asserted that the Appellant has made himself liable for eviction due to default. It was asserted that late Kamala Prasad was co-owner of the suit property and that the Respondents are also co-owners of the suit property. The Respondent No.1 also asserted that the Appellant was a tenant in the suit property at a monthly rent of ₹700/- (Rupees seven hundred) only and that he defaulted in payment

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of rent. The Respondent No.1 therefore sought a counter claim for a decree for eviction of the Appellant on the ground of default in payment of rent and a decree for realization of arrears of rent from 02.11.1999 till date together with interest @ 9%.

**36.** On 03.12.2012 a written statement would be filed by the Appellant against the counter-claim. In the said written statement it would be denied that late Kamala Prasad along with others is the joint owner of the suit property and that the Appellant was tenant thereof. It was once again claimed that the Appellant became the owner by virtue of the sale transaction of the suit property. The Appellant admitted that before execution of Exhibit-1 he was a tenant. It was denied that he was a tenant with respect to the suit property at a monthly rent of ₹700/- (Rupees seven hundred) only and that he had defaulted.

**37.** The learned District Judge would examine these two issues at paragraph 55, 56 and 60 of the judgment dated 13.09.2013. Paragraphs 55 and 56 of the judgment dated 13.09.2013 which deals with issue nos. 6 are extracted below:

**“55.** *The issue no.6) shall be taken up now.*

*“6) whether the Plaintiff is a tenant in the suit premises. If so, whether the Plaintiff is liable to pay the arrear house rent as claimed by the Defendant?”*

**56.** *Going by the plea set up by the Plaintiff it is noted that as per him after 02.11.1999 (i.e., when the concerned agreement was executed by the original Defendant) he has become the owner of the*

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*Schedule-A property. I am afraid, the same is not the case. It is well-settled that an agreement to sell does not convey any right, title or interest in the property. It creates only an enforceable right between the parties. So far as the validity/enforceability of Exhibit 1 and the right of the Plaintiff to have the concerned agreement enforced are concerned this Court has already given its findings in that regard above. By no stretch of imagination can the Plaintiff be regarded as the owner of the suit property on and after 02.11.1999. He can only be regarded as the tenant of the suit premises. Now, it has been pleaded by the Defendant(s) that the Plaintiff has failed to pay the rent from the year 1999 onwards. The same has not been refuted by the Plaintiff who, on his part, had his own justification for not paying the rent. Be that as it may, it can only be concluded that the Plaintiff is still a tenant of the suit premises/Schedule-A property and as such liable to pay the arrears of rent as claimed by the Defendant(s).” (Emphasis supplied)*

**38.** The learned District Judge would thus hold this issue in favour of the Respondents. The learned District Judge would hold that the Appellant was a tenant in the suit premises and that he was liable to pay the arrears of house rent as claimed by the Respondents. The learned District Judge would hold so on mere consideration of the Appellant plea regarding his claim of ownership on execution of Exhibit-1 without examining the evidence adduced.

**39.** The learned District Judge would also examine issue no.4 i.e. “*Whether the plaintiff is liable to be evicted as prayed for by the defendant?*” and hold thus:

**“60.** *The original Defendant/substituted Defendants in their Counter-claim have pleaded that since the Plaintiff has failed to pay the rent (of ₹700/- per month) for the Schedule-A premises after executing Exhibit 1*

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*and since he has also disputed the ownership of his landlord(s) he is liable to be evicted from the Schedule-A premises on those grounds. So far as the non-payment of rent is concerned neither the original Defendant nor any of the substituted Defendants has cared to explain if the aforesaid amount of rent is as per the rents prevailing in the locality/standard rent. Further, there is nothing to indicate that the rent (arrears) was ever demanded by the Defendant(s) at any point of time. Even otherwise, in view of the Rent Law applicable to the concerned property i.e., the Notification No.6326-600-H&W-B dated 14.04.1949 of the Health & Works Department, Government of Sikkim (Old Law of Sikkim) which provides that the landlord may be permitted to evict the tenant on 'due application' to the appropriate Court (District Court) and also considering that the matter needs to be gone into detail in the appropriate eviction proceedings, it would be appropriate if the Defendant(s) approach the Court concerned under the concerned Rent Law on duly presenting an application as required. So far as the other ground is concerned, Ld. Senior Advocate Shri B. Sharma had contended that in view of Section 116 of the Indian Evidence Act, 1872 the Plaintiff being the tenant is estopped from denying the ownership-title of his landlord(s). I am afraid the submissions of Shri Sharma are not legally sound as Section 116 would only be applicable if the Plaintiff had been put into possession by the Defendant(s). In the present case the Plaintiff was in possession of the concerned tenanted premises/Schedule-A properties even before the Defendant(s) came to possess/own it. It is trite that the Rule of Estoppel above only applies to cases in which the tenants are put into possession of the concerned property by the persons to whom they have attorned and not to cases in which the tenants have previously been in possession.*

*The substituted Defendants shall however be free to initiate eviction proceedings, if so advised.”*

**40.** Even while holding issue no.6 in the affirmative i.e. the Appellant is a tenant in the suit property and that the Appellant was liable to pay arrears of rent as claimed by the Respondents the learned District Judge in the decree passed on 13.09.2013

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dismissed the counter-claim of the Respondents. The Appeal filed by the Appellant makes no specific grievance against the finding recorded by the learned District Judge in the judgment dated 13.09.2013 with regard to issue no. 6. In the synopsis of argument submitted by the Appellant it is submitted that this issue is to be decided under the Rent Control Act of the State and not in a suit for specific performance of contract and that under the Rent Control Act of Sikkim specific eviction suit is to be filed by depositing specific amount of court fee for eviction of a tenant before the Principal Civil Court of original jurisdiction and as such eviction suit cannot be in the form of counter-claim in a specific performance of a contract.

**41.** While framing issues it must be kept in mind that issues are framed when one party asserts a fact which is denied by the other. While framing issues the Court must necessary fix the burden of proof of the specific issue on the party who asserts it. The findings rendered thereon must always be based on the evidence adduced.

**42.** The learned District Judge would refer to Notification No.6326-600-H&W-B dated 14.04.1949 which deals with the rent law applicable to the rest of Sikkim beside Gangtok which is governed by the Gangtok Rent Control and Eviction Act, 1956. The said Notification No.6326-600-H&W-B dated 14.04.1949 is extracted below:

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**“GOVERNMENT OF SIKKIM**  
**Health and works department.**  
 Notification No.6326-600-H&W-B

*Under powers conferred in para 2 of Notification No.1366-G, dated the 28<sup>th</sup> July 1947, the following Rules have been framed to regulate letting and sub-letting of premises controlling rents thereof and unreasonable eviction of tenants as the scarcity of housing accommodation still exists in Sikkim.*

1. *The landlords can charge rent for premises either for residential or business purposes on the basis of the rents prevailing in locality in year 1939, plus an increase upto 50 percent so long as the scarcity of housing accommodation lasts.*

2. *The landlords cannot eject the tenants so long as the scarcity of housing accommodation lasts, but when the whole or part of the premises are required for their personal occupation or for thorough overhauling the premises or on failure by the tenants to pay rent for four months the landlords may be permitted to evict the tenant on due application to the Chief Court.*

3. *Any tenant may apply to this Department for fixing his rent. On receipt of such application the Department will enquire about the rent prevailing in the locality in 1939, and fix rent as per Rule (1) above.*

4. *Any person acting in contravention of this Notification will be liable to prosecution under para 4 of notification No. 1366-066-G, dated the 28<sup>th</sup> July, 1947.*

5. *The tenant means those person in actual occupation. Landlord, means owner of the premises.*

*These rules will come into force with immediate effect.*

*By order of His Highness the Maharaja of Sikkim.*

*R.B. Singh,*

*Gangtok  
 The 14<sup>th</sup>, April, 1949.*

*Secretary,  
 Health and Works Department,  
 Government of Sikkim.”*

**43.** A perusal of the afore-quoted notification makes it evident that the said notification was meant to control rents and unreasonable eviction of tenants as the scarcity of housing accommodation still existed in Sikkim. Clause 2 of the said notification provides for the grounds on which a landlord could

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eject a tenant. So long as the scarcity of housing accommodation lasts the landlord cannot eject the tenant save on the grounds provided. When whole or part of the premises are required for their personal occupation or for thorough over-hauling the premises or on failure by the tenants to pay rent for four months the landlords “*may be permitted*” to evict the tenant on due application to the Chief Court. As per clause 5 “*tenant*” means those persons in actual possession and “*landlord*” means owner of the premises. The Respondents sought eviction of the Appellant for non-payment of rent. Therefore, the Respondents were required to prove that they were the owners of the said property; the Appellant was a tenant thereof; that there was a failure on the part of the Appellant to pay rent for at least four months. On proving the aforesaid facts the discretion was with the Court to evict the Appellant.

**44.** The plea of the Appellant that eviction suit cannot be in the form of a counter-claim in a suit for specific performance of contract has no legal basis in view of the provision of Order VIII 6A CPC quoted above which provides that a Defendant in a suit may, in addition to his right of pleading a set off under Rule 6, set up, by way of counter-claim against the claim of a Plaintiff, “*any right or claim in respect of a cause of action accruing to the defendant against the plaintiff .....*”

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**45.** The language of Order VIII 6A CPC quoted above is wide enough to include a counter claim for eviction and arrears of rent.

**46.** In view of the written statement filed by late Kamala Prasad admitting the assertion of the Appellant regarding his ownership to the suit property no issues would be framed and consequently no evidence adduced. Resultantly no authoritative finding as to who is the owner of the suit property would be pronounced by the learned District Judge. As held above no amount of oral evidence led by the Respondent No.1 could be relied upon which was in conflict with the pleadings in the written statement filed by late Kamala Prasad. The counter claim was filed by the Respondents and therefore the burden of proof lay upon them.

**47.** Late Kamala Prasad unfortunately, passed away before he could be cross examined on his evidence in affidavit. Late Kamala Prasad's evidence in affidavit filed on 19.02.2011 curiously did not take the stand taken by him in his written statement that he was the owner of the said property. He deposed that:

*“I cannot transact the suit property firstly on the ground that other legal heirs and successors of late Ramdas Ramphal Ram and my sons and daughter have claim in the suit property.”*

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**48.** Respondent No.1 does not claim ownership of the said property in her evidence in affidavit. In cross-examination she admits that she has filed no documents to prove that the suit property or that the landed properties in the State of Sikkim are recorded in the name of late Ram Das Ram Phal Ram. In fact in cross-examination she volunteered to state that there was no partition of the ancestral property. Regarding the issue of rent claimed by her in her counter claim she in fact categorically admitted in cross-examination that:

*“It is true that I am entitled to no rent from the plaintiff.”*

**49.** The Respondents examined Kamlesh Kumar as their witness. He also did not elucidate further on the ownership of the suit property of the Respondents. Therefore it is evident that the Respondents failed to assert even ownership of the suit property leave alone establish it.

**50.** Respondent No.1 would claim in her evidence in affidavit that it was the brother of the plaintiff Shri Ramesh Trivedi who was a tenant in the suit property.

**51.** Respondent No.1 would claim in her evidence in affidavit that:

*“the plaintiff has not paid the rent for the suit premises either to me or to other members of Ram Das Ram Ram Phal Ram since November, 1999, as such the plaintiff is liable to be evicted from the suit premises and the shop premises occupied by him on the ground of*

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*default. That I categorically state that plaintiff as a defaulter in payment of rent and as such, I may be granted relief as made in the counter-claim.”*

**52.** Respondent No.1 would however, admit in cross-examination that:

*“I know Ramesh Trivedi who is now dead. It is true that Ramesh Trivedi was not a tenant in the suit premises ..... I cannot say whether the plaintiff is a defaulter or not. I also do not understand the meaning of the word ‘Default’.”*

**53.** It is clear that the Respondents have failed to establish neither their ownership to the suit property nor the fact that the Appellant was a tenant thereof. In fact the evidence of Respondent No.1 oscillates between asserting that it was in fact the Appellant’s brother late Ramesh Trivedi who was a tenant of the suit property in her evidence in affidavit and thereafter accepting the suggestion of the Appellant’s Counsel that late Ramesh Trivedi was in fact not a tenant of the suit property.

**54.** However, Mr. B. Sharma would submit that the counter-claim was liable to be granted in favour of the Respondents on the basis of the averment made by the Appellant in the plaint itself clearly admitting the factum of the Appellant being a tenant prior to 02.11.1999 and paying rent thereof and thereafter not paying the rent in view of his claim of ownership on execution of Exhibit-1.

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**55.** In the present case no judgment was sought on admission by either of the parties. A perusal of the pleadings before the learned District Judge as well as the judgment dated 13.09.2013 it is evident that the learned Counsel for the Respondents has sought to raise the issue of the Appellant's admission for the first time at the hearing of this Appeal and cross objection. In fact even the amended cross objection filed by the Respondent No.2 on 09.03.2018 does not contain a single ground regarding the admission purportedly made by the Appellant.

**56.** Besides the pleadings of the respective parties to the suit the evidence adduced by them is also available in the records. Both the parties have taken conflicting position in the suit as well as the counter-claim.

**57.** The Appellant would aver in paragraph 12 of the plaint:

*“12. That as stated above before the sale agreement dated 2.11.1999 was executed; the plaintiff was occupying the Schedule “A” premises as a tenant under the defendant. Initially as per instructions of the defendant and the members of his family the plaintiff used to pay monthly rent to Shri. Kailash Prasad who is the son of elder brother of Kamala Prasad. However, through a letter Shri. Rajiv Prasad, son of Shri Kailash Prasad informed the plaintiff that the Schedule “A” property had fallen in the share of the defendant who has become its owner and therefore, the plaintiff should pay monthly rent to the defendant himself. After receipt of the said letter, the plaintiff started paying rent to the defendant and accordingly rent was paid in the hand of the defendant upto October 1999. However, from 2.11.1999 as the defendant had sold out the Schedule “A”*

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*property to the plaintiff therefore, there was no question of payment of rent to the defendant as the plaintiff became the owner by virtue of the agreement dated 2.11.1999.”*

**58.** The Appellant in his evidence in affidavit would state:

*“13. That as stated above before the sale agreement dated 2.11.1999 was executed; I was occupying the Schedule “A” premises as a tenant under the defendant. Initially as per instructions of the defendant and the members of his family I used to pay monthly rent to Shri Kailash Prasad who is the son of elder brother of Kamala Prasad. However, through a letter Shri. Rajiv Prasad, son of Shri Kailash Prasad informed me that the Schedule “A” property had fallen in the share of the defendant who has become its owner and therefore, I should pay monthly rent to the defendant myself. After receipt of the said letter, I started paying rent to the defendant and accordingly rent was paid in the hand of the defendant upto October 1999. Ext.5 is the said letter and Ext.5/A is the signature of Rajiv Prasad. However, from 2.11.1999 as the defendant has sold out the Schedule “A” property to me therefore, there was no question of payment of rent to the defendant as I became the owner by virtue of the agreement dated 2.11.1999.”*

**59.** The admission by the Appellant was that he was a tenant in the suit property under late Kamala Prasad till 02.11.1999 from which date he became the owner thereof. The Appellant further admits that he paid rent till October 1999 to late Kamala Prasad. With regard to the question of payment of rent after 02.11.1999 the Appellant states that from 02.11.1999 as late Kamala Prasad had sold out the schedule “A” property to him there was no question of payment of rent to him.

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**60.** The admission by the Appellant in the plaint as well as in his evidence in affidavit regarding the tenancy is that till 02.11.1999 he was a tenant under late Kamala Prasad. The Appellant has admitted in the plaint as well as in evidence in affidavit that he has paid rent to late Kamala Prasad till October, 1999. Mr. B. Sharma, seeks to press the admission of the Appellant as waiver of proof required to establish the ingredients of Clause 2 of Notification No.6326-600-H&W-P dated 14.04.1949. As held above the Respondents were required to prove that they were the owners of the said suit property; the Appellant was a tenant thereof and that there was failure on the part of the Appellant to pay rent for at least four months. Regarding ownership the Appellant's admission in the plaint as well as in the evidence of affidavit is only to the extent that late Kamala Prasad was the owner of the suit property. The Appellant has in his evidence in affidavit admitted that he was a tenant till 02.11.1999 under late Kamala Prasad. The Appellant has stated that on and from 02.11.1999 after the execution of Exhibit-1 there was no question of paying rent to late Kamala Prasad as he has become the owner thereof. The statement of the Appellant may be considered as implied admission of the fact that on and from 02.11.1999 he did not pay rent to late Kamala Prasad for the tenancy. However, as stated above both late Kamala Prasad as well as Respondent No.1 adduced evidence in Court. In the said evidences in affidavit late Kamala Prasad as well as the

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Respondent No.1 categorically stated that it was the brother of the Appellant i.e. Ramesh Trivedi who was the tenant in the suit premises.

**61.** Section 101 of the Indian Evidence Act, 1872 provides:

**“101. Burden of proof.**—Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

*When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

**62.** Section 102 of the Indian Evidence Act, 1872 provides:

**“102. On whom burden of proof lies.**—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

**63.** The burden of proof that the Respondents were the owner of the suit property, the Appellant was the tenant thereof and that the Appellant had failed and neglected to pay rent for a period of at least four months for the purpose of the counter-claim lay on the Respondents.

**64.** Section 17 of the Indian Evidence Act, 1872 defines admission in this manner:

**“17. Admission defined.**—An admission is a statement, oral of documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.”

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**65.** The word “*statement*” appearing in Section 17 of the Indian Evidence Act, 1872 not being defined the ordinary dictionary meaning is required to be applied. Thus “*statement*” would mean something that is stated. An admission must be clear and unambiguous to permit waiver of the requirement of proof.

**66.** Section 58 of the Indian Evidence Act, 1872 provides:

**“58. Facts admitted need not be proved.**-No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

*Provided that the Courts may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”*

**67.** Section 58 of the Indian Evidence Act, 1872 deals with admissions during trial i.e. “*at or before the hearing.*” Proof of such facts is not required for the reason that facts admitted require no proof. Section 58 deals with judicial admission. The section governs admission by pleadings. Admission in the manner contemplated under this section is a substitute for evidence and a waiver or dispensation with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true.

**68.** The proviso to Section 58 of the Indian Evidence Act, 1872 however, provides for discretion upon the Court to require even

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the facts admitted to be proved otherwise than by such admissions.

**69.** The Respondent No.1 has failed to even assert the factum of ownership of the suit property or that the Appellant was a tenant thereof in the evidence in affidavit of Respondent No.1 to support the averments in her written statement leave alone tender evidence to the said effect. Even if the averment of the Appellant is considered as an admission it could only help the Respondents as evidence to prove what they assert. The admission was to the effect that late Kamala Prasad was the owner of the suit property. However, the failure of the Respondent No.1 to assert the said facts in her evidence in affidavit would disentitle the Respondents to take advantage of the averments made by the Appellant in the plaint or the statement made by the Appellant in his affidavit in evidence at this stage.

**70.** Although there was a clear admission of the Appellant in the plaint as well as in the evidence in affidavit that he was a tenant in the suit property the Respondent No.1's statement in her evidence in affidavit that in fact it was the brother of the Appellant i.e. Ramesh Trevedi who was the tenant would disentitle the Respondents to take advantage of the judicial admission made by the Appellant at this stage. The Respondents

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have thus failed to prove that the Appellant was the tenant in their suit property.

**71.** Notification No.6326-600-H&W-B dated 14.04.1949 grants a discretion to the Court to permit the eviction of the tenant on failure by the tenant to pay rent four months. The counter claims however, are vague. In the counter claim by late Kamala Prasad it is pleaded:

*“V. That the plaintiff is a tenant under the defendant with respect to the suit premises at a monthly rate of Rs.700/-. The plaintiff has defaulted to pay the rent of the suit premises admittedly from the year 1999 and as such is liable to be evicted from the said premises.”*

**72.** The counter claim filed by the Respondent No.1 pleads:

*“V. That the plaintiff is the tenant in the premises at a monthly rent of Rs.700/-. The plaintiff has defaulted to pay the rent of the suit is liable to be evicted from the said premises.”*

**73.** From the counter claim filed by the Respondent No.1 it is simply impossible to tell the period of non-payment of rent. It is also pleaded that the cause of action for the counter claim arose for the first time on 02.11.1999 when purported deed of agreement was alleged to be executed. The Respondents valued the counter claim at ₹8,400 (Rupees eight thousand four hundred) only both for the purpose of Court fees and jurisdiction and the Court fees of ₹504/- (Rupees five hundred four) only was paid.

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**74.** Order VII Rule 2 CPC mandates that every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. From the pleadings in the counter claim of the Respondent No.1 it is impossible to fathom the period of the failure by the Appellant to pay rent totaling to four months or more. The Respondent No.1 is the only Respondent who came as a witness. The Respondent No.1 stated in her evidence in affidavit that the Appellant had not paid rent for the suit premises since November, 1999. However, she also admitted that she could not say whether the Appellant was a defaulter or not and admitted that she was not entitled to any rent from the plaintiff. Even if this Court were to accept the statement of Respondent No.1 that the Appellant had not paid rent for the suit premises since November, 1999 much of the claim for arrears of rent would be barred by limitation. The counter claim was first made by late Kamala Prasad on 28.10.2004. Therefore, the claim of the arrears of rent from November, 1999 till November, 2002 would be barred by limitation under Article 52 of the Limitation Act, 1963 which provides a period of limitation of three years for instituting a suit for arrears of rent from the time when the arrears become due. A claim for arrears of rent from November 1999 till 28.10.2004 at the rate of ₹700/- (Rupees seven hundred) only per month would require the

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Respondents to pay Court fees much higher than ₹504/- (Rupees five hundred four) only paid. In any event it is impossible to decree the counter claim for arrears of rent without specific pleadings and specific evidence which would persuade the Court to believe the same. The failure of the Respondent to prove ownership of the suit premises and that the Appellant was the tenant thereof disentitles them on their claim for arrears of rent. In the circumstances it must also be held that the Respondents have failed to prove that the Appellant was liable to pay arrears of house rent to them. Issue nos. 4) and 6) are therefore held against the Respondents.

**7) Whether the document dated 2.11.1999 executed by the defendant in favour of the plaintiff is a valid document and enforceable in law?**

**75.** Exhibit-1 has admittedly not been signed by the Appellant as the purchaser. Thus it has become vital to examine whether Exhibit-1 is an agreement at all.

**76.** Section 2(e) and (h) of the Indian Contract Act, 1872 provides:

*“(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;”*

*“(h) An agreement enforceable by law is a contract;”*

**77.** Section 10 of the Indian Contract Act, 1872 provides:

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**“10. What agreements are contracts.**-All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

*Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”*

**78.** An agreement to sell is necessarily a bilateral contract as there must be a meeting of mind between the seller and the purchaser. The seller must agree to sell and the purchaser must agree and be willing to purchase for a lawful consideration. There must be free consent of the parties. Only those agreements which are enforceable by law are contracts.

**79.** In re: **Aloka Bose v. Parmatma Devi & Ors.**<sup>3</sup> the Supreme Court would hold:

**“14.** *Certain amount of confusion is created on account of two divergent views expressed by two High Courts. In S.M. Gopal Chetty v. Raman [AIR 1998 Mad 169] a learned Single Judge held that where the agreement of sale was not signed by the purchaser, but only by the vendor, it cannot be said that there was a contract between the vendor and the purchaser; and as there was no contract, the question of specific performance of an agreement signed only by the vendor did not arise. On the other hand, in Mohd. Mohar Ali v. Mohd. Mamud Ali [AIR 1998 Gau 92] a learned Single Judge held that an agreement of sale was a unilateral contract (under which the vendor agreed to sell the immovable property to the purchaser in accordance with the terms contained in the said agreement), that such an agreement for sale did not require the signatures of both parties, and that therefore an*

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<sup>3</sup> (2009) 2 SCC 582

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*agreement for sale signed only by the vendor was enforceable by the purchaser.*

**15.** *We find that neither of the two decisions have addressed the real issue and cannot be said to be laying down the correct law. The observation in Mohd. Mohar Ali [AIR 1998 Gau 92] stating that an agreement of sale is an unilateral contract is not correct. An unilateral contract refers to a gratuitous promise where only one party makes a promise without a return promise. Unilateral contract is explained thus by John D. Calamari and Joseph M. Perillo in *The Law of Contracts* [4th Edn., Para 2-10(a) at pp. 64-65]:*

*“If A says to B, ‘If you walk across the Brooklyn Bridge I will pay you \$100,’ A has made a promise but has not asked B for a return promise. A has asked B to perform, not a commitment to perform. A has thus made an offer looking to a unilateral contract. B cannot accept this offer by promising to walk the bridge. B must accept, if at all, by performing the act. Because no return promise is requested, at no point is B bound to perform. If B does perform, a contract involving two parties is created, but the contract is classified as unilateral because only one party is ever under an obligation.”*

*All agreements of sale are bilateral contracts as promises are made by both — the vendor agreeing to sell and the purchaser agreeing to purchase.*

**16.** *On the other hand, the observation in S.M. Gopal Chetty [AIR 1998 Mad 169] that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the*

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vendor executing the document and delivering it to the purchaser who accepts it.

*17. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.” [Emphasis supplied]*

**80.** As the Appellant has sought to rely upon Exhibit-1 admittedly signed only by late Kamala Prasad it was incumbent upon the Appellant to establish that there was either an oral agreement between them or that Exhibit-1 was executed by late Kamala Prasad and delivered to the Appellant who accepted it. It was further incumbent upon the Appellant not only to establish the execution of Exhibit-1 by late Kamala Prasad but that he himself had also agreed to purchase the scheduled property for an agreed consideration on agreed terms.

**81.** Exhibit-1 has been exhibited in the original by the Appellant in the suit. Obviously Exhibit-1 was in the possession of the Appellant. The factum of delivery of Exhibit-1 by late Kamala Prasad to the Appellant has neither been pleaded nor

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proved save the fact that the Appellant produced the original before the Trial Court.

**82.** Exhibit-1 records the purported agreement. In the evidence in affidavit of the Appellant, Exhibit-1 is referred to as the agreement between the Appellant and late Kamala Prasad. The Appellant also asserts that the Exhibit-1 bears the thumb impression of late Kamala Prasad and it was prepared in the presence of witnesses and signed by them. It also asserts that Ravi Kumar Prasad, the eldest son of late Kamala Prasad, had also signed it. Exhibit 1 also categorically recites that the executant was willing to sell half of the land devolved upon him from the partition by a document executed by the brothers and Panchayat being 20'x62' which had been in occupation of Trivedi Stores as house and shop since 1963 and for which the Appellant and the executants had orally agreed.

**83.** Exhibit-1 is hand written. The Appellant has identified the signatures on the first page of Exhibit-1 marked exhibit-1/A collectively as the signature of late Kamala Prasad and the thumb impressions marked exhibit-1/B collectively as late Kamala Prasad's thumb impression ("L.T.I."). The Appellant has also identified the signature of witness Shri Shiv Shankar Singh as exhibit i.e. and witness Ram Prasad as exhibit-1/F. The Appellant has identified the signatures of late Kamala Prasad's

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son Ravi Kumar Prasad as exhibit-I/C collectively. The Appellant has not identified the handwriting in Exhibit-1. The Appellant in cross-examination has denied that late Kamala Prasad had not written Exhibit-1. There are two witnesses who had purportedly signed in Exhibit-1. In cross-examination the Appellant admitted that one of the said witness Shiv Shankar Singh had been a teacher in Singtam School along with him till he resigned in the year 1984 and that the other witness Ram Prasad was his employee. The Appellant denied that he managed to manufacture Exhibit-1 with the help of his co-teacher and his employee.

**84.** Ram Prasad in his evidence in affidavit stated that he knew the Appellant and late Kamala Prasad. He stated that through an agreement dated 02.11.1999 entered between them the suit property was sold for a consideration value of ₹3,21,000/- (Rupees three lakhs twenty one thousand) only and provided the details of the said agreement. He identified Exhibit-1 as the agreement and the signature and the thumb impression of late Kamala Prasad, the signatures of Ravi Kumar Prasad, the signature of witness Shiv Shankar Singh and his own signature. He also stated that at the time of execution of Exhibit-1 late Kamala Prasad was in his full senses and that he had not consumed alcohol. Ram Prasad asserted that Exhibit-1 was executed in his presence on late Kamala Prasad's free will and that there was no coercion or any undue influence from the

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Appellant. In cross-examination Ram Prasad admitted that he had been working under the Appellant for last 34 years. He admitted that he did not remember what exactly was written in Exhibit-1 or the date of its execution. He admitted that he did not know what was written in his evidence in affidavit as he did not know English.

**85.** The other witness Shiv Shankar Singh was not examined. Jitendra Singh in his evidence in affidavit gave an identical evidence as that of Ram Prasad with regard to the execution of Exhibit-1 and also identified the signatures and thumb impressions thereon. He also stated that at the time of execution Exhibit-1 as well as the money receipt dated 13.03.2000 (exhibit-2) late Kamala Prasad was in his full senses and he had not consumed alcohol. He also stated that the said two documents were executed in his presence by late Kamala Prasad on his free will and there was no coercion or undue influence from the Appellant. In cross-examination he admitted that he was not a witness to Exhibit-1.

**86.** Late Kamala Prasad however, denied executing Exhibit-1 and alleged forgery. It is trite that one who alleges forgery must prove it. Therefore, it was incumbent upon the Respondents to prove forgery. Late Kamala Prasad also took an alternative plea inconsistent to the plea of forgery that he being an alcoholic the

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Appellant took undue advantage in his drunken stupor and had Exhibit-1 executed by him. It was also incumbent upon the Respondents to prove the alternative plea that the Appellant took advantage of late Kamala Prasad's drunken stupor and taking undue advantage of it had Exhibit-1 executed by him. The Appellant would contend that this was a mutually exclusive/contradictory stand which was not permissible in law.

**87.** In re: *Baldev Singh v. Manohar Singh*<sup>4</sup> the Supreme Court would hold:

*“16. This being the position, we are therefore of the view that inconsistent pleas can be raised by the defendants in the written statement although the same may not be permissible in the case of plaintiff. In Modi Spg. and Wvg. Mills Co. Ltd. v. Ladha Ram & Co. [(1976) 4 SCC 320] this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in the written statement. Accordingly, the High Court and the trial court had gone wrong in holding that the defendant-appellants are not allowed to take inconsistent pleas in their defence.”*

**88.** In view of the clear exposition of the law by the Supreme Court that inconsistent or alternative plea can be made in the written statement the Appellant's submission that it is not permissible is not tenable.

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<sup>4</sup> (2006) 6 SCC 498

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**89.** The defence in the present case was first pleaded by late Kamala Prasad in his written statement in which he admitted that he was the owner of the suit property and that he had become the owner through a family partition. Late Kamala Prasad took a slightly different plea in his evidence on affidavit regarding ownership. He stated that the suit premise is recorded in the name of his father and uncle Ram Das Ram Ramphal Ram. He took the plea that he could not transact the suit property because there were other legal heirs and successors of late Ram Das Ram Ramphal Ram and his sons and daughters who have claim in the suit property.

**90.** In re: *Pt. Shamboo Nath Tikoo v. S. Gian Singh*,<sup>5</sup> the Supreme Court would hold:

*“20. No doubt, the finding recorded by the learned third Judge (Farooqi, J.) that two rooms of Dharamshalla had been granted by Maharaja Partap Singh in favour of the Sikh community-defendants, accords with the finding of another learned Judge (Jalal-ud-Din, J.). But, that finding, in our view, becomes wholly unsustainable being altogether a new case made out for the defendants by him, in that, such case is not in any way traceable to the pleas of defence of the defendants set out in their written statements against their ejection from the said two rooms.”*

**91.** In re: *Rajendra Pratap Singh v. Rameshwar Prasad*<sup>6</sup> the Supreme Court would hold:

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<sup>5</sup> 1995 Supp (3) SCC 266

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*“13. When the defendant in this case did not dispute in the written statement the fact that the lease was validly made, it is not open to him to raise a contention later, viz., the instrument was not executed by both the lessor and lessee and consequently the lease is void. The High Court, has therefore, rightly confirmed the finding of the courts below that the decree for eviction on the ground under Section 11(1)(e) of the Bihar Act is not liable to be interfered with.”*

**92.** In re: **Ramesh Kumar & Anr. v. Furu Ram & Anr.**<sup>7</sup> the Supreme Court would hold:

*“33. It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted. In this case, there is variance and divergence between the pleading and documentary evidence, pleading and oral evidence and between the oral and documentary evidence. It is thus clear that the entire case of the respondents is liable to be rejected. The different versions clearly demonstrate fraud and misrepresentation on the part of the respondents.”*

**93.** In view of the settle position of law that an altogether new case cannot be set up which is inconsistent with the defence taken in the written statement and that no amount of evidence contrary to the pleading can be relied on or accepted it was not permissible for late Kamala Prasad to have taken the plea of joint ownership of the suit property in spite of the clear plea taken by him in his written statement that he was in fact the owner of the said suit property having become the owner through a family partition.

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<sup>6</sup> (1998) 7 SCC 602

<sup>7</sup> (2011) 8 SCC 613

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**94.** However, late Kamala Prasad died on 22.05.2011 after authenticating his evidence on affidavit on 22.02.2011.

**95.** In re: **Krishan Dayal v. Chandu Ram**<sup>8</sup> **H.R. Khanna, J.** of the Delhi High Court would hold:

*“ I have given the matter my consideration and am of the view that the statement of a witness in examination-in-chief, which was admissible at the time it was recorded, cannot become inadmissible by reason of the subsequent death of the witness before cross-examination. The absence of cross-examination would undoubtedly affect the value and weight to be attached to the statement of the witness, but it would not render the statement inadmissible or result in its effacement. So far as the question is concerned as to what weight should be attached to such statement made in examination-in-chief the Court has to keep in view the facts and circumstances of each individual case. Some of the factors which may be borne in mind are the nature of the testimony, its probative value, the status of the witness, his relationship or connection with the parties to the case, a likely animus which may colour his statement and any other factor touching the credibility of the witness which may emerge on the record. Regard must also be had to the fact that the witness has not been subjected to cross-examination. The Court should see whether there are indications on the record that as a result of cross-examination his testimony was likely to be seriously shaken or his good faith or credit to be successfully impeached. The Court may also adopt a rule not to act upon such testimony unless it is materially corroborated or is supported by the surrounding circumstances. If after applying that rule of caution, the Court decides to rely upon the statement of a witness who was examined in chief, but who died before cross-examination, the decision of the Court in this respect would not suffer from any infirmity.”*

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<sup>8</sup> 1969 SCC OnLine Del 134

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**96.** In view of the settled position of law as clearly expounded by *H.R. Khanna, J.* in his instructive judgment in re: *Krishan Dayal (supra)* this Court deems it proper to examine the other facts before coming to a conclusion whether to rely upon the statement of late Kamala Prasad.

**97.** Ravi Prasad also deposed before the Court as late Kamala Prasad's witness. In his evidence in affidavit he stated that during November 1999, the Appellant called his father and obtained certain signatures and some thumb impressions in blank papers. He also stated that he was also asked to sign in such papers stating that these were the acknowledgement of payment of rent and his father was also paid some amount which he had paid to a liquor vender. Ravi Prasad also stated that his signature was obtained in the blank paper when he was a minor. Ravi Prasad also took the stand that Exhibit-1 and 2 are manufactured documents. He stated that he knew that his father had not sold the schedule 'A' property nor had he taken any advance as a consideration. On 22.02.2011 Ravi Prasad authenticated and confirmed his evidence in affidavit. Ravi Prasad however could not be cross examined as he passed way in the year 2011.

**98.** After the death of late Kamala Prasad the present Respondents substituted him. Respondent No.1 examined herself as a witness. She filed her evidence in affidavit in which

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she took a plea that the suit premises was recorded in the name of her father-in-law's late Ram Das Ram and late Ram Ram Phal Ram. She took a specific plea in her evidence in affidavit to the following effect:

*“9. That in the month November, 1999 the plaintiff had come to meet my husband and he told my husband to put some thumb impression on blank papers and handed my husband some amount. The plaintiff told my husband that he has come to pay the rent and he asked by husband to give the thumb impression as a token of rent receipt. My husband during the drunken state gave some thumb impression on the Blank sheets. My husband used to sign on the documents whenever he used to do any transaction and he never used to sign in Devnagri. As such I state that Exhibit-1 and Exhibit-2 which are false and fabricated documents which the plaintiff took during the drunken state. I have seen the documents i.e. Exhibit-1 (a) collectively and exhibit-1 (b) collectively, after seeing the same I am confident enough to state that the signature and thumb impression appearing are not of my husband. However, assuming but not admitting if the thumb impression and signatures are of my husband then the same were obtained on blank papers by means of fraudulent act of the plaintiff, when my husband was in drunken state. When plaintiff obtained the signatures and thumb impression, the plaintiff said that he was taking the same in lieu of rent receipt. My husband accepted some amount in lieu of the rent from the plaintiff and instead of using the said money for house hold goods he used the same to clear his dues in the liquor shop and buy liquor. I am confident enough to state that my husband and other members of my family have not got a single paise for the suit property. My husband had no right title to sell/transfer the suit property as other members and legal heirs and successors of late Ram Das Ram Ram Phal Ram, myself and my children have claim over the suit property. The suit property which the plaintiff wants to grab through a fraudulent document was/is not his sole property, as admitted*

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*above the suit property is still recorded in the name of late Ram Das Ram and Late Ram Phal Ram.”*

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**13.** *That my husband was an illiterate person nor could he read and write in English and Devnagri but he could put his signature. I have seen a copy of Exhibit 1 and 2 and was read over the contents and I am sure and confident that the documents are false. I am also confident that the signature appearing on Exhibit 1 and 2 are not of my husband nor the signature is that of my son Late Ravi Prasad. The document are manufactured document for the purpose of this case.*

**14.** *That the statement that Ravi Prasad also signed on Exhibit 1 is also false as during 1999 my eldest son said Ravi Prasad was a minor. The document given by Shri Rajeev Prasad is false and fabricated document and same has not been written and signed by Shri Rajeev Prasad.*

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**16.** *That my husband and my elder son used to consume heavy amount alcohol which was the cause of their death. I also state that plaintiff has taken advantage of my husband being drunk and accordingly he has taken the thumb impression on the blank sheet for which the plaintiff is liable to prosecuted.*

**17.** *That the fact that the suit property is still recorded in the name of Ram Das Ram Ram Phal Ram and even assuming but not admitting my husband has stated that the suit property is a partitioned property this is not correct as no documents has been furnished by the plaintiffs and my husband showing that the suit property is the partitioned property. Assuming but not admitting that the suit property is a partitioned property in that event also the plaintiff cannot file the present suit by virtue of Exhibit 1 and 2 as the property in question has not been recorded in his name and he could not have signed Exhibit 1 and 2, if it is proved that the signatures therein are genuine signature of my husband.”*

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99. The evidence of Respondent No.1 which seeks to take a stand contrary to the written statement filed by late Kamala Prasad in which he had categorically admitted his ownership of the suit property through a family partition cannot be relied upon or accepted. However, like late Kamala Prasad, Respondent No.1 also took the two alternative pleas of forgery and undue advantage taken by the Appellant of late Kamala Prasad's drunken stupor and having Exhibit-1 executed by him. As held earlier both these pleas were required to be proved by the Respondents. The Appellant cross-examined the Respondent No.1 regarding her evidence in affidavit. In cross-examination she admitted that she had not filed any document either from the hospital or from the police station in the Court to prove that her husband was an excessive drunkard. She also admitted that she had not filed any complaint either before the Court, in the police station or before the Panchayat alleging that the Appellant had taken thumb impression of her husband in blank papers. To a suggestion put in cross-examination the Respondent No.1 stated that she could not say whether her husband had at any time reported to the police, to the Court or to the Panchayat that the Appellant had taken his thumb impressions on blank papers by practicing fraud. She also admitted that she had not filed any document in the Court to prove that her husband used to sign in '*Devnagiri*'. Respondent No.1 admitted that she had never seen Exhibit-1 or 2 before. She could not say or identify the thumb

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impressions and the signatures appearing on Exhibit-1 or 2. She could not also say or identify as to whether the said documents bear the signature of her son and the thumb impression and signature of her husband. She admitted that:

*“It is true that because I had never seen Exhibit 1 and 2 as such I cannot say as to whether the same are false or fabricated documents. I therefore, cannot say whether my husband had put his thumb impressions on the said documents. Neither me nor my husband ever filed any complaint before the police, to the Panchayat or in the Court stating that Exhibit 1 and 2 are false and fabricated and that the same do not bear the thumb impressions of my husband.”*

**100.** The Respondents also examined one Kamlesh Kumar and filed his evidence in affidavit. He stated that he had been staying in Singtam since 1986 and knew the family of the Defendant. He stated that late Kamala Prasad and his son used to consume heavy amount of alcohol. He also stated that late Kamala Prasad used to borrow money from him and other people from Singtam to buy alcohol. Kamlesh Kumar stated that before late Kamala Prasad expired he used to always see him drunk and people used to take advantage of him Kamlesh Kumar also stated that because of his alcoholism late Kamala Prasad never participated in the family affairs and he used to sign any document if he was offered alcohol and the same was his son late Ravi Prasad's nature. In cross-examination Kamlesh Kumar admitted that he had no evidence to prove that late Kamala Prasad used to

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consume heavy alcohol. No other evidence was produced by the Respondents.

**101.** Although oral evidence was led by the Respondents to show that Late Kamala Prasad used to consume alcohol from the above it is evident that the Respondents have failed to prove forgery of Exhibit-1 or the alternative plea that the Appellant had taken undue advantage of late Kamala Prasad's drunken stupor and got Exhibit-1 executed by him without his free consent. The evidence of the Appellant, Ram Prasad and Jitendra Singh with Exhibit-1 does probabalise that Exhibit-1 was executed by late Kamala Prasad. The learned District Judge would also come to the conclusion that Exhibit-1 was executed by late Kamala Prasad. None of the Appellants witness asserts that the contents of Exhibit-1 is in the handwriting of late Kamala Prasad. There is no evidence on record that the handwriting on Exhibit-1 is of late Kamala Prasad. To complicate the issue further in the written statement filed by the Appellant to the counter claim of late Kamala Prasad as well as the Respondent No.1 he denies that late Kamala Prasad was the owner of the suit property. On an application filed before this Court being C.M. Appl. No.250 of 2015 by the Respondents in the present proceedings this Court vide order dated 27.06.2016 would direct the Registry to send the original Exhibit-1 to a handwriting expert and submit a report. Exhibit-1 in the original (two pages) were sent for

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Forensic Examination to the Regional Forensic Science Laboratory (RFSL), Sikkim Saramsa, Ranipool. An opinion dated 20.07.2016 has been placed on record where the Scientific Officer-cum-Assistant Chemical Examiner, Government of Sikkim, question document division, RFSL, Sikkim has opined that interse examination of the writings therein which were marked as Q1, Q2 and Q3 reveals consistency in handwriting characteristics indicating that they were written by one and the same person. It was also opined that the last three lines of Exhibit-1 giving the options to the Appellant to take legal proceedings on the failure of late Kamala Prasad in registering a sale deed and further the right to the suit property was incorporated subsequently. However, the date and time could not be determined. It was also stated in the opinion that when observed under stereo binocular microscope it was found that the colour and lustre of the said writing was found to be different, their alignments of the writings compressed (squeezed) and smaller in size due to limited space available and that the writings therein shows slower speed of writing then his usual writing habit. The terminal letter of that portion of Exhibit-1 overlapped the finger impression. The Respondents would not seek expert opinion as to whether Exhibit-1 was in the handwriting of late Kamala Prasad or whether the signature or the thumb impression thereon was his.

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**102.** This Court shall now proceed to examine the issue as to whether Exhibit-1 is a valid document and enforceable in law.

**103.** As held above the evidence on record does probabalise that Exhibit-1 was executed by late Kamala Prasad. The Appellant asserts that Exhibit-1 is an agreement to sell by which he became the owner of the suit property. Exhibit-1 is not a sale deed or a title deed. The mere execution of Exhibit-1 would not make the Appellant the owner of the suit property as he claims. Section 54 of the Transfer of Property Act, 1882 states that “*sale*” is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. It also provides that such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, can be made only by a registered instrument. Admittedly Exhibit-1 is also not a registered deed. If it is to be considered as an agreement certain requirements are required to be fulfilled. An agreement is always bilateral. Therefore, merely probabalising the execution of Exhibit-1 by late Kamala Prasad would not suffice. It was incumbent upon the Appellant to prove that he had also agreed to pay the consideration and abide by the terms and conditions of Exhibit-1. This Court, while examining the issue of maintainability of the said suit and specific performance of Exhibit-1 has come to the conclusion that the readiness and willingness of the Appellant was conditional and therefore

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specific performance of Exhibit-1 could not be granted in favour of the Appellant. Exhibit-1 reflects that the consideration amount for the sale of the suit property was ₹3,21,000/- (Rupees three lakhs twenty one thousand) only out of which an amount of ₹5,501/- (Rupees five thousand five hundred one) only was acknowledged as advance received by late Kamala Prasad. Thus an amount of ₹3,15,499/- (Rupees three lakhs fifteen thousand four hundred ninety nine) only was required to be paid by the Appellant as per Exhibit-1. To make Exhibit-1 bilateral the Appellant ought to have been ready and willing to pay the balance amount of ₹3,15,499/- (Rupees three lakhs fifteen thousand four hundred ninety nine) only to late Kamala Prasad. However, as held before, this was never the intention of the Appellant and the Appellant would seek adjustment of various amounts totaling to ₹58,501/- (Rupees fifty eight thousand five hundred one) only not forming part of Exhibit-1 and be ready and willing to pay only ₹2,62,499/- (Rupees two lakhs sixty two thousand four hundred ninety nine) only to late Kamala Prasad towards consideration value. There was not even a pleading that the said amounts sought to be adjusted had been agreed upon by late Kamala Prasad.

**104.** That apart in the first contemporaneous document relied upon by the Appellant i.e. notice dated 23.03.2003 (Exhibit-3) the following adjustments were sought. ₹5,501/- (Rupees five

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thousand five hundred one) only as advance. Further amount of ₹2000/- (Rupees two thousand) only alleged to have been received by late Kamala Prasad. An amount of ₹13,000/- (Rupees thirteen thousand) only on account consumable goods taken by him from the Appellants shop which was to be considered as advance amount too as per the Appellant. Besides the aforesaid it was also asserted in the said notice that the Appellant had incurred an amount of ₹1,00,000/- (Rupees one lakh) only for improvement of the condition of the wooden house in furtherance of the contract. However, in the plaint some of those amounts changed. In the plaint it was pleaded that besides the ₹5,501/- (Rupees five thousand five hundred one) only paid as advance a further amount of ₹2000/- (Rupees two thousand) only was taken by late Kamala Prasad however, without any further details. It was asserted that a further amount of ₹3,203/- (Rupees three thousand two hundred three) only in cash against consideration value was also taken by late Kamala Prasad. The Appellant now asserted that including the amount of ₹3,203/- (Rupees three thousand two hundred three) only he spent ₹25,000/- (Rupees twenty five thousand) only on account of transportation fare, house repairing etc. The Appellant would also plead that late Kamala Prasad did not pay ₹25,000/- (Rupees twenty five thousand) only towards license fee from March, 2001 and also mesne profit till January, 2004 which altogether amounted to ₹58,501/- (Rupees fifty eight thousand

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five hundred one) only which was required to be adjusted and that the Appellant was ready and willing pay only an amount of ₹2,62,499/- (Rupees two lakhs sixty two thousand four hundred ninety nine) only from the total consideration value payable. The evidence of Jitendra Prasad merely states that late Kamala Prasad again took ₹2000/- (Rupees two thousand) only on 13.03.2000 towards consideration value without specifying that the consideration was towards advance for the agreement entered between the Appellant and late Kamala Prasad due to which Exhibit-1 was executed.

**105.** Thus it is unequivocally certain that there was in fact no “*agreement*” between the Appellant and late Kamala Prasad in terms of Exhibit-1. Exhibit-1 even if executed by late Kamala Prasad was not enforceable in law in the facts of the present case because the Appellant failed to agree and abide by its terms. Exhibit-1 may have been executed by late Kamala Prasad but the said document was neither a sale deed nor a contract of sale. The Appellant’s failure to assert or prove that the Appellant was in agreement with the terms and conditions of Exhibit-1 which admittedly was signed only by late Kamala Prasad make it evident that the said Exhibit-1 was not an agreement to sell or that there was any oral agreement to sell between the Appellant and late Kamala Prasad. Mere willingness and desire to acquire an immovable property is not enough. There must be willingness

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on the part of the Appellant to purchase the same for the consideration on which the late Kamala Prasad is said to be willing to sell the same for.

**106.** The learned District Judge would hold that a conjoint reading of the evidence produced by the Appellant makes it amply clear that Exhibit-1 was executed by late Kamala Prasad. However, the learned District Judge would come to the conclusion that Exhibit-1 was neither valid nor enforceable. The learned District Judge would come to the conclusion that late Kamala Prasad did not have absolute right in the said property being a Hindu governed either by the Mitakshara or the Dayabagha School of Hindu Law on conjectures and surmises.

**107.** Whether the Defendant was a Hindu governed by any particular school of Hindu law is a question of fact to be determined by evidence and evidence alone. On examination of the plaint as well as the written statements it is seen that neither the Appellant nor late Kamala Prasad as the sole Defendant had pleaded that the sole Defendant was a Hindu governed by either the Mitakshara School or the Dayabagha School. The affidavit in support of the evidence of late Kamala Prasad as well as Respondent No.1 merely states that they were Hindu by faith. The Respondents who substituted late Kamala Prasad after his death as Defendants stepped into his shoes. Even the

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Respondents did not so plead. In fact by specific orders of the learned District Judge the Respondents were precluded from taking a stand in conflict with the stand taken by late Kamala Prasad and therefore, when late Kamala Prasad had in the written statement categorically admitted the fact that he was the owner of the suit property after a family partition the question of examining the partition as well as whether the Mitakshara or the Dayabagha Schools of Hindu Law would govern such partition and the effect thereof on mere conjectures and surmises by the learned District Judge was uncalled for. More so when late Kamala Prasad, the Respondent No.1 or Kamlesh Kumar had not even stated that late Kamala Prasad or the Respondent No.1 were Hindus.

**108.** The learned District Judge held that the suit filed by the Appellant was not maintainable on presuming a defect in the title of late Kamala Prasad, the original sole Defendant over the suit property. While holding that late Kamala Prasad had a defect in title to the suit property the learned District Judge would ignore two earlier orders passed by the same Court. Order dated 23.04.2012 would decide the objection raised by the Appellant as well as the petition filed by the Respondent No.2 under Order 1 Rule 3 read with Section 94 and 151 Code of Civil Procedure, 1908 (CPC) and hold that a legal representative of a deceased defendant cannot take the plea in a pending suit,

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inconsistent with the plea taken by the deceased defendant in his written statement. Holding so the learned District Judge would direct that the Respondents shall not file any written statement that raises a contrary view but shall continue the suit on the same cause of action without setting up a new or inconsistent plea. A written statement was however, filed by the Respondents on 28.05.2012. On 20.06.2012 the Appellant would file his reply. On 07.08.2017 the learned District Judge would hear the Appellant as well as the Respondents on the admissibility of the written statement filed by the Respondents. The learned District Judge would rely upon the order passed earlier on 23.04.2012 and disallow certain portions of the written statement being a new and inconsistent plea contrary to the one taken by late Kamala Prasad and permit the filing of the written statement after deletion of the said portions quoted below:

*Paragraph 7 - "7. It is submitted that as far as the knowledge of the answering defendant goes the suit property originally belongs to M/s Ram Das Ram Ram Phal Ram. The defendants have no personal knowledge of the partition and hence same is denied. The answering defendant was married to the original defendant during 1976 and so far the knowledge of the defendant goes the suit property is a joint property."*

*Paragraph 14 - "14. It is submitted that the defendants are still the co-owner of the suit property and as such they are not required to quit and vacate the suit property in any manner whatsoever and can ever be treated as a trespasser. On the contrary the tenant can never challenge the title of the land lord however defective it may be. The statement of granting permission, license and forcible possession are nothing but false statements and denied by the defendant."*

*And entire paragraph 23 "23. That the defendant apart from the above averment made in the Written Statement and counter claim beg to further file her additional written statement and state that original defendant (since deceased) and the late Ravi Kumar Prasad did not have right title and interest over the suit property nor they had any*

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*salable rights and thus the suit property is throughout recorded in the name of M/s. Ram Das Ram Ram Phal Ram.” .....*

**109.** In effect the two orders dated on 23.04.2012 and 07.08.2017 passed by the learned District Judge would preclude the Respondents from taking a stand in conflict to the admission that late Kamala Prasad had taken in his written statement that he was in fact the owner of the suit property acquired through family partition.

**110.** The order dated 23.04.2012 passed by the learned District Judge would be passed after examining the law and the judgments of the Supreme Court. In re: **Vidyawati v. Man Mohan & Ors.**<sup>9</sup> the Supreme Court would hold:

**“3.** *It is seen that the petitioner's claim of right, title and interest entirely rests on the will said to have been executed by Champawati in favour of the first defendant and herself. It is now admitted across the Bar that the first defendant had life interest created under the will executed by Champawati. Therefore, the said interest is coterminous with his demise. Whether the petitioner has independent right, title and interest dehors the claim of the first defendant is a matter to be gone into at a later proceeding. It is true that when the petitioner was impleaded as a party-defendant, all rights under Order 22, Rule 4(2), and defences available to the deceased defendant became available to her. In addition, if the petitioner had any independent right, title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest, to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the court below has taken rightly.*

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<sup>9</sup> (1995) 5 SCC 431

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**2.** *It is contended for the petitioner that both the plaintiff-first defendant and the petitioner's claims are founded on the will executed by Champawati, where the first defendant had right and interest for life and the petitioner had right thereafter and as such she could raise the plea which Brijmohan Kapoor could have raised in his written statement. The courts below were not right in refusing to permit the petitioner to file additional written statement. In support thereof, the petitioner placed strong reliance on the judgment of this Court in Bal Kishan v. Om Parkash [(1986) 4 SCC 155 : AIR 1986 SC 1952] .*

**4.** *This Court in Bal Kishan v. Om Parkash [(1972) 2 SCC 461 : (1973) 1 SCR 850] has said thus:*

*“The sub-rule (2) of Rule 4 of Order 22 authorises the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent.”*

**5.** *The same view was expressed in Jagdish Chander Chatterjee v. Sri Kishan [(1972) 2 SCC 461 : (1973) 1 SCR 850] wherein this Court said: (SCC pp. 464-65, para 10)*

*“... legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title.”*

**6.** *This being the position in law, the view of the court below is perfectly legal. It is open to the petitioner to implead herself in her independent capacity under Order 1, Rule 10 or retain the right to file independent suit asserting her own right. We do not find any error of*

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*jurisdiction or material irregularity committed in the exercise of jurisdiction by the court below warranting our interference. The SLP is, accordingly, dismissed.”*

**111.** The order dated 23.04.2012 rejecting the Respondents application under Order 1 Rule 3 read with Section 94 and 151 CPC would not be assailed by the Appellant. Even in the cross objection filed in spite of opportunity granted to amend the original counter claim and taken no ground challenging the said order dated 23.04.2012 has been taken although the Respondents could have done so under the provisions of Section 105 CPC. The said application in any event had not even *prima facie* showed that the suit property was not exclusively owned by late Kamala Prasad.

**112.** Thus the learned District Judge had erred in travelling beyond the pleadings and rendering findings based on surmises and conjectures.

**5) To what relief or reliefs, if any, is the plaintiff entitled?**

**8) To what relief or reliefs the defendant is entitled?**

**113.** The learned District Judge would opine that neither the Appellant nor the Respondents are entitled to any relief or the relief prayed for although the learned District Judge had given the option to the Appellant to take appropriate proceedings for the money advanced by him to late Kamala Prasad and to the

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Respondents to seek eviction of the Appellant before the appropriate Court which option in effect would amount to granting reliefs not prayed for to the Appellant as well as the Respondents. In re: **Banarsi and Ors. v. Ram Phal**<sup>10</sup> the Supreme Court would hold:

*“ In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the court unless it has been specifically claimed in the plaint by the plaintiff.”*

**114.** Thus the impugned order to the extent it grants liberty to initiate appropriate proceedings for the money advanced by him to late Kamala Prasad in pursuance of Exhibit-1 against the property left behind him is also not permissible as no specific relief for realization of money advanced has been sought for in the plaint.

**115.** In spite of the specific prayer for eviction and arrears of rent prayed for by the Respondents the learned District Judge declining to examine the issue on the ground that the applicable rent law i.e. Notification No.6326-600-H&W-B dated 14.04.1949 provided for the landlord being permitted to evict the tenant on

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<sup>10</sup> (2003) 9 SCC 606

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due application to the appropriate Court (District Court) and also considering the matter is required to be gone into in detail in appropriate eviction proceedings was also not correct. As held above the provisions of Order VIII Rule 6A CPC was wide enough to examine the counter claim praying for eviction in terms of the said notification as well as for arrears of rent. It was open for the Respondents to file the counter claim which they did. The specific issues relating to the counter claim having been framed and evidence led it was incumbent upon the learned District Judge to pronounce on the said issues. A suit is tried on the issues raised by the parties. In the circumstances the learned District Judge granting liberty to the substituted defendants to initiate eviction proceedings if so advised was also not correct. In re: ***Shiv Kumar Sharma v. Santosh Kumari***<sup>11</sup> the Supreme Court would hold that “A Civil Court does not grant leave to file another suit. If the law permits, the Plaintiff may file another suit but not on the basis of observations made by a superior Court”. In view of the aforesaid it is held that the Appellant as well as the Respondents as substituted legal heirs of late Kamala Prasad were also not entitled to any other reliefs too.

**116.** The conflicting positions taken by the Appellant as well as the Respondents on crucial facts vital to obtain the relief prayed for in such a nonchalant manner with scant respect for truth

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<sup>11</sup> (2007) 8 SCC 600

**R.F.A. No. 02 of 2014**  
**Mahesh Kumar Trivedi v. Smt. Nanda Rani Devi & Ors.**  
**With**  
**C.O. No.2 of 2015**  
**Mahesh Kumar Trivedi v. Smt. Nanda Rani Devi & Ors.**

non suits them. All points of determination stand considered and determined. The Appeal as well as the cross-objection is decided and dismissed.

**( Bhaskar Raj Pradhan )**  
**Judge**  
04.09.2018

Approved for reporting: yes.  
Internet: yes.

to