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JANAK DULARI DEVI & ANR.

v.

KAPILDEO RAI & ANR.

(Civil Appeal No. 4422 of 2002)

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APRIL 15, 2011

**[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]**

*Transfer of Property Act, 1882 – ss. 8 and 54 – Sale of immovable property – Passing of title – Suit for specific performance by purchaser seeking decree for a direction to vendor to deliver the registration receipt in regard to sale deed by receiving the balance consideration – Vendor alleging that the purchaser did not pay any part of the consideration and as such he cancelled the sale deed and sold the property to the subsequent purchaser – Trial court decreed the suit in favour of the purchaser holding that the purchaser had proved payment of part sale price to vendor and on execution of sale deed by the seller, title passed to the purchaser – First appellate court as also the High Court dismissed the suit – On appeal, held: Intention of the parties was that title would not pass until the consideration was not paid – As the consideration was not paid, the sale in favour of the purchaser did not come into effect and the title remained with the vendor and the sale deed was a dead letter – Thus, the subsequent sale in favour of the subsequent purchaser was valid – Vendor retained the power of repudiating the sale for non-payment of the sale price within a reasonable time and after lawful repudiation, the purchaser was not entitled to claim performance.*

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*Property laws – Practice of exchanging equivalents- ‘ta khubzul badlain’ – Prevalent in the State of Bihar – Explained.*

**It was the appellant’s case that second respondent-owner of the property executed a sale deed in respect of**

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the suit property in the appellant's favour for a consideration of Rs.22,000/-; that the appellants paid Rs.17,000/- to the second respondent, at the time of execution and registration of sale deed; and that the second respondent retained the registration receipt of the sale deed, agreeing to deliver it to the appellants against payment of the balance sale consideration. Subsequently, the second respondent avoided receiving the balance of Rs.5000/- and failed to deliver the registration receipt as also denied the receipt of Rs.17,000/-. The appellants filed a suit for specific performance against the second respondent. They sought a decree for a direction to the second respondent to deliver the registration receipt relating to the sale deed by receiving the balance sale consideration of Rs.5000/-. The second respondent contended that as the appellants failed to pay the sale consideration, he cancelled the said sale deed and sold the property to the first respondent for a consideration of Rs.19,000/- and also delivered possession of the property. Thereafter, the first respondent was impleaded as the second defendant in the suit. The trial court decreed the suit holding that the appellants had proved the payment of part sale price of Rs.17000/- to second respondent; that on the execution of the sale deed by the second respondent, title passed to the appellants and the appellants were entitled to declaration of title and recovery of possession. The first respondent filed an appeal. The first appellate court allowed the same holding that the appellants had failed to prove payment of Rs.17,000/- and that as a result thereof, the second respondent was justified in cancelling the sale deed and selling the property to the first respondent. The appellants then filed a second appeal and the same was dismissed. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

**A HELD: 1.1 The first appellate court after analyzing the evidence held that the evidence was contrary to the pleadings that a sum of Rs.17,000/- was paid to the defendant at the residence of the first plaintiff, that thereafter, they went to the Sub-Registrar's office and got the sale deed written by the scribe-PW5, and that thereafter, the second respondent executed the sale deed and got it registered; and therefore, liable to be rejected. When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply. The first appellate court also referred to the recitals in the sale deed and the manner of the execution of the sale deed and concluded that no part of the sale consideration had been paid. This finding of fact recorded by the first appellate court that the appellants had not established the payment of Rs.17000/-, after consideration of the entire evidence, upheld by the High Court in second appeal, does not call for interference, in an appeal under Article 136 of the Constitution in the absence of any valid ground for interference. [Para 7] [107-B-G]**

**D 1.2 Where the intention of the parties is that passing of title would depend upon the passing of consideration, evidence is admissible for the purpose of contradicting the recital in the deed acknowledging the receipt of consideration. [Para 8] [107-H; 108-A-B]**

**F Bishundeo Narain Rai vs. Anmol Devi and Ors. 1998 (7) SCC 498; 1998 (1) Suppl. SCR 66; Kaliaperumal vs. Rajagopal and Anr. 2009 (4) SCC 193; 2009 (2) SCR 814 – referred to.**

**H 1.3 Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear**

intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him), title in the property would not pass to the purchaser. [Para 10] [110-C-E]

1.4 As per the practice prevalent in Bihar known as '*ta khubzul badlain*' (that is, title to the property passing to the purchaser only when there is "*exchange of equivalents*"), where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but the Registration Receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the Registration Receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the Sub-Registrar) authorizing the holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed,

A as also the possession. If the payment is not made as  
 agreed, the vendor could repudiate the sale and refuse  
 to deliver the registration receipt/registered document, as  
 the case may be, which is in his custody, and proceed  
 to deal with the property as he deems fit, by ignoring the  
 B rescinded sale. [Para 11] [110-F-H; 111-A-D]

C 1.5 The effect of such transactions in Bihar is even  
 though the duly executed and registered sale deed may  
 recite that the sale consideration has been paid, title has  
 been transferred and possession has been delivered to  
 the purchaser, the actual transfer of title and delivery of  
 possession is postponed from the time of execution of  
 the sale deed to the time of exchange of the registration  
 receipt for the consideration, that is *ta khubzul badlain*.  
 D [Para 12] [115-C-D]

E *Bishundeo Narain Rai vs. Anmol Devi and Ors.* 1998 (7)  
 SCC 498; 1998 (1) Suppl. SCR 66; *Sarjug Saran Singh vs.*  
*Ramcharitar Singh* 1968 BLJR 74; *Shiva Narayan Sah vs.*  
*Baidya Nath Prasad Tiwary* AIR 1973 Patna 386; *Baldeo*  
*Singh vs. Dwarika Singh* AIR 1978 Patna 97; *Md. Murtaza*  
*Hussain vs. Abdul Rahman* AIR 1949 Pat. 364; *Motilal Sahu*  
*vs. Ugrah Narain Sahu* AIR 1950 Patna 288; *Panchoo Sahu*  
*v. Janki Mandar* AIR 1952 Pat. 263 – referred to.

F 1.6 The first appellate court recorded a finding of fact  
 that the appellants had not paid the consideration of  
 Rs.22,000/- at the time of execution and registration of the  
 sale deed. This finding of fact (accepted by the High Court  
 in second appeal) has been recorded after exhaustive  
 consideration of the oral evidence and is not open to  
 G challenge. The trial court, the first appellate court and the  
 High Court have concurrently found that though the sale  
 deed recited that possession of the property was  
 delivered to the purchasers, the possession was not in  
 fact delivered and continued with the vendor (second  
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respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed, that the vendor had received the entire price of Rs.22,000/- from the purchasers (that is Rs.17,000/- before execution of the sale deed and Rs.5000/- at the time of exchange of registration receipt) and had transferred all his rights therein and that on such sale the vendor has not retained any title and that the vendor has relinquished and transferred the possession of the property to the purchasers, will not be of any assistance to the appellants to contend that the title has passed to them or part consideration was paid. It is an admitted fact that the registration receipt was retained by the vendor to be exchanged later in consideration of the sale price. It is also admitted that possession was not delivered though the deed recited that possession was delivered. The sale was categorically repudiated by the second respondent on 18.3.1988 by cancelling the sale deed. There is no evidence that the appellants offered the sale price of Rs.22,000/- to the second respondent before the repudiation. The only possible inference is that the intention of the parties was that title would not pass until the consideration was not paid; and as the consideration was not paid, the sale in favour of the appellants did not come into effect and the title remained with the vendor and the sale deed was a dead letter. Consequently, the subsequent sale in favour of the first respondent was valid. [Para 13] [115-E-H; 116-A-E]

1.7 On execution and registration of the sale deed in favour of appellants, title did not pass to the purchaser and possession was not delivered. Therefore, as a consequence the vendor retained the power of repudiating the sale for non-payment of the sale price within a reasonable time. As the finding is that no part of

- A the sale price was paid, the claim of appellants that they offered to pay Rs.5000/-, even if accepted to be true would mean proving their readiness to pay only a part of the price and not the entire sale price. As the appellants have failed to prove that they tendered the price of Rs.22,000/
- B - before repudiation and cancellation on 18.3.1988, the sale deed in favour of appellants did not convey any title to them and after lawful repudiation, they were not entitled to claim performance. [Para 14] [116-F-H; 117-A]

**Case Law Reference:**

- |   |                        |              |         |
|---|------------------------|--------------|---------|
| C | 1998 (1) Suppl. SCR 66 | Referred to. | Para 8  |
|   | 2009 (2) SCR 814       | Referred to. | Para 9  |
|   | 1968 BLJR 74           | Referred to. | Para 11 |
| D | AIR 1973 Patna 386     | Referred to. | Para 11 |
|   | AIR 1978 Patna 97      | Referred to. | Para 11 |
|   | AIR 1949 Pat. 364      | Referred to. | Para 11 |
| E | AIR 1950 Patna 288     | Referred to. | Para 11 |
|   | AIR 1952 Pat. 263      | Referred to. | Para 11 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4422 of 2002.

- F From the Judgment & Order dated 3.1.2002 of the High Court of Judicature at Patna in Second Appeal No. 63 of 1998.

- G K.B. Sinha, Kawaljit Kochar, Kusum Chaudhary for the Appellants.

A. Raghunath, Nikhil Goel (for K.J. John & Co.) for the Respondents.

The Judgment of the Court was delivered by

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**R.V.RAVEENDRAN, J.** 1. Plaintiffs in a suit for specific performance, aggrieved by the judgment and decree of the Patna High Court dated 3.1.2002 dismissing his second appeal against the decision of the first appellate court dated 16.12.1997 dismissing their suit (in reversal of the judgment and decree of the trial court dated 27.8.1990 decreeing the suit) have filed this appeal by special leave.

2. The case of the appellants in brief is as under : The second respondent was the owner of the suit property. The second respondent executed a sale deed dated 22.2.1988 (registered on 7.3.1988) in respect of the suit property in favour of the appellants, for a consideration of Rs.22000/-; that Rs.17,000 was paid by the appellants to the second respondent, at the time of execution and registration of sale deed; that the balance of Rs.5000 was to be paid subsequently, when the vendor requested for the said payment; that the second respondent retained the registration receipt in regard to the sale deed, agreeing to deliver it to the appellants against payment of the balance sale consideration; that on execution of the sale deed, by the second respondent, his right, title and interest in the suit property passed to the appellants and possession of the land sold was also delivered to them; that subsequently the second respondent avoided receiving the balance of Rs.5000 and failed to deliver the registration receipt; that the appellants issued a legal notice calling upon the second respondent to deliver the registration receipt so that they could collect the original registered sale deed, but the second respondent send a reply denying the receipt of Rs.17000 and stating that the entire consideration was due; and that therefore, it became necessary for the appellants to file the suit. The appellants sought a decree for a direction to the second respondent to deliver the registration receipt relating to the sale deed dated 22.2.1988 by receiving the balance sale consideration of Rs.5000 and that in case the second respondent had already obtained the original sale deed from

A the office of the Sub-Registrar, then for a direction to deliver the same to the appellant. The said suit was valued at Rs.5000.

3. The second respondent filed his written statement. He alleged that he had agreed to sell the property as he urgently required the money for celebrating the marriage of his daughter; that he executed and registered the sale deed on 22.2.1988; that the appellant did not pay any part of the consideration and the allegation that he had paid Rs.17000 towards the sale price at the time of execution of sale deed was false; that the appellants had played a fraud upon him by stating in the deed that Rs.17000 was already paid towards the sale price and making him to sign the sale deed without reading the deed; that when he demanded the sale price, as the appellants stated that the sale consideration would be paid later, he retained the registration receipt and did not deliver possession; that it was the intention of parties that title in the property should pass to the appellants and possession should be delivered, only on payment of the consideration of Rs.22000 by the appellants; that as the appellants failed to pay the sale consideration, he cancelled the said sale deed dated 22.2.1988 on 18.3.1988 and sold the property to the first respondent on 29.8.1988 for a consideration of Rs.19000 and also delivered possession of the property to the first respondent and ever since then the first respondent is in possession of the suit property. He contended that as the title and possession remained with him even after execution and registration of the sale deed in favour of the appellants, and as the sale price was not paid, he was justified in canceling/rescinding the sale and the appellants were not entitled to any relief.

4. The subsequent purchaser (first respondent herein) was thereafter impleaded as the second defendant in the suit. The court framed appropriate issues as to whether a sale deed executed on 22.2.1988 was for consideration; whether Rs.17000 was paid by the appellants towards the sale price

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at the time of execution of the sale deed; whether the appellants had tendered the balance of Rs.5000 to the second respondent; whether the sale deed was cancelled on 18.3.1988; whether the second respondent had any right to execute a sale deed dated 29.8.1988 in favour of the first respondent; whether the appellants were entitled to receive the original sale deed dated 22.2.1988; whether the suit as framed was maintainable and appellants had valid cause of action for the suit; and whether the suit was barred by limitation. The appellant examined seven witnesses and the defendant examined six witnesses. Both sides marked several documents.

5. The trial court by judgment dated 27.8.1990 decreed the suit with costs subject to payment of court fee by the appellants, on Rs.22000. The trial court held that the appellants had proved the payment of part sale price of Rs.17000 to second respondent; that on the execution of the sale deed by the second respondent, title passed to the appellants and the appellants were entitled to declaration of title and recovery of possession. Feeling aggrieved the first respondent filed an appeal. The first appellate court, by judgment and decree dated 16.12.1997, allowed the appeal and dismissed the suit. It held that the plaintiffs/appellants had failed to prove payment of Rs.17000 or of any part of the consideration; that as no part of the sale price was paid and as the Registration Receipt and possession were retained by the second respondent, the intention of parties was that title should not pass to the appellants until payment was made; and that as a consequence of non-payment of the price, the second respondent was justified in cancelling the sale deed and selling the property to the first respondent. The second appeal filed by the appellant, was dismissed by the High Court by the impugned judgment dated 3.1.2002, affirming the finding of facts recorded by the first appellate court. The said judgment is challenged in this appeal by special leave.

- A 6. On the contentions urged, the following questions arise for consideration in this appeal :
- (i) Whether the appellants had paid Rs.17000/- towards sale price to second respondent?
- B
- (ii) Whether title to the property passed to the appellants on execution of the sale deed?
  - (iii) Whether the second respondent-vendor was justified in cancelling/ repudiating the sale on the ground that the sale consideration was not paid?
- C
- (iv) Whether the appellants are entitled to the relief claimed in the suit?

**Re: Question (i)**

- D 7. In the plaint, the specific plea of the plaintiffs-appellants in regard to payment of Rs.17000 was that it was initially agreed that the consideration would not be paid at the time of execution and registration of the sale deed, but would be paid
- E later, against exchange with the Registration Receipt; that the appellants paid Rs.17000 to the second respondent at the time of registration of the sale deed; and that though the appellants were ready to pay the balance of Rs.5000, the second respondent stated that he would take the said amount when he
- F needed it in exchange of the registration receipt. But the evidence led by the appellants was contrary to the pleadings. PW3 (the attesting witness to the sale deed), PW4, PW6 (first plaintiff) and PW7 (husband of the first plaintiff) deposed that a sum of Rs.17,000 was paid to the defendant at the residence of the first plaintiff, that thereafter they went to the Sub-Registrar's office at Arrah and got the sale deed written by the scribe - PW5, and that thereafter, the second respondent executed the sale deed and got it registered. The sale deed dated 22.7.1988 also recited that Rs.17000 was received by
- G the vendor prior to the execution of the sale deed and the balance of Rs.5000 was to be paid at the time of transfer of
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Registration Receipt. The first appellate court after analyzing the evidence held that the evidence was contrary to the pleadings and therefore liable to be rejected. When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply. The first appellate court also found that there was no endorsement in the sale deed by the Sub-Registrar about payment of Rs.17000 in his presence, nor any separate receipt existed to show the payment of Rs.17000 prior to the preparation and the execution of the sale deed. The first appellate court believed the evidence of DW1 (attesting witness to the sale deed) and DW4 (the second respondent) that they did not go to the residence of the first appellant on 22.2.1988, but had gone directly to the Sub-Registrar's office; that by then the sale deed had already been got written by the first appellant's husband; that the sale deed was not read over to them; that the second respondent was informed that the sale price would be paid subsequently at the village and that sale could be completed and possession be delivered on payment and exchange of the Registration Receipt. The first appellate court also noted that the appellants alleged that there were two independent witnesses present at the relevant time, namely Dharmanand Pandey and Bindeshwar Pandey, but neither of them was examined. The first appellate court also referred to the recitals in the sale deed and the manner of the execution of the sale deed and concluded that no part of the sale consideration had been paid. This finding of fact recorded by the first appellate court, that the appellants had not established the payment of Rs.17000, after consideration of the entire evidence, affirmed by the High Court in second appeal, does not call for interference, in an appeal under Article 136 of the Constitution in the absence of any valid ground for interference.

Re: Questions (ii) and (iii)

8. Where the intention of the parties is that passing of title

A would depend upon the passing of consideration, evidence is  
admissible for the purpose of contradicting the recital in the  
deed acknowledging the receipt of consideration. In *Bishundeo*  
*Narain Rai vs. Anmol Devi & Ors.* [1998 (7) SCC 498], this  
Court had occasion to consider the question as to when the  
ownership and title in a property will pass to the transferee,  
under a deed of conveyance. This Court observed :

C “Section 8 of the Transfer of Property Act declares that on  
a transfer of property all the interests which the transferor  
has or is having at that time, capable of passing in the  
property and in the legal incidence thereof, pass on such  
a transfer unless a different intention is expressed or  
necessarily implied. A combined reading of Section 8 and  
Section 54 of the Transfer of Property Act suggests that  
though on execution and registration of a sale deed, the  
ownership and all interests in the property pass to the  
transferee, yet that would be on terms and conditions  
embodied in the deed indicating the intention of the parties.  
It follows that on execution and registration of a sale deed,  
the ownership title and all interests in the property pass to  
the purchaser unless a different intention is either  
expressed or necessarily implied which has to be proved  
by the party asserting that title has not passed on  
registration of the sale deed. Such intention can be  
gathered by intrinsic evidence, namely, from the averments  
in the sale deed itself or by other attending circumstances  
subject, of course, to the provisions of Section 92 of the  
Evidence Act, 1872.”

G 9. In *Kaliaperumal vs. Rajagopal & Anr.* [2009 (4) SCC  
193], this Court again considered the issue and held:

H “It is now well settled that payment of entire price is not a  
condition precedent for completion of the sale by passing  
of title, as Section 54 of Transfer of Property Act, 1882  
 (“the Act”, for short) defines ‘sale’ as a transfer of  
ownership in exchange for a price paid or promised or part

paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act.

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Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

D

The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by section 92 of Evidence Act. x x x x There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to hold, possess and enjoy the scheduled properties from the date of sale, neither the possession of the properties nor the

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A title deeds were delivered to the purchaser either on the  
date of sale or thereafter. It is admitted that possession  
of the suit properties purported to have been sold under  
the sale deed was never delivered to the appellant and  
continued to be with the respondents. In fact, the appellant,  
B therefore, sought a decree for possession of the suit  
properties from the respondents with mesne profits. If really  
the intention of the parties was that the title to the  
properties should pass to the appellant on execution of the  
deed and its registration, the possession of the suit  
C properties would have been delivered to the appellant."

10. Where the sale deed recites that on receipt of the total  
consideration by the vendor, the property was conveyed and  
possession was delivered, the clear intention is that title would  
pass and possession would be delivered only on payment of  
D the entire sale consideration. Therefore, where the sale deed  
recited that on receipt of entire consideration, the vendor was  
conveying the property, but the purchaser admits that he has  
not paid the entire consideration (or if the vendor proves that  
the entire sale consideration was not paid to him, title in the  
E property would not pass to the purchaser.

11. At this stage, we may refer to the practice prevalent in  
Bihar known as '*ta khubzul badlain*' (that is, title to the property  
passing to the purchaser only when there is "*exchange of  
F equivalents*"). As per this practice, where a sale deed recites  
that entire sale consideration has been paid and possession  
has been delivered, but the Registration Receipt is retained by  
the vendor and possession of the property is also retained by  
the vendor, as the agreed consideration (either full or a part)  
G is not received, irrespective of the recitals in the sale deed, the  
title would not pass to the purchaser, till payment of the entire  
consideration to the vendor and the Registration Receipt is  
obtained by the purchaser in exchange. In such cases, on the  
sale deed being executed and registered, the registration  
H receipt (which is issued by the Sub-Registrar) authorizing the

holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed, as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. The prevalence of this practice in Bihar is noticed and recognized in several reported decisions - the decision of this Court in *Bishundeo Narain Rai* (supra) and the decisions of the Patna High Court in *Sarjug Saran Singh vs. Ramcharitar Singh* (1968 BLJR 74), *Shiva Narayan Sah vs. Baidya Nath Prasad Tiwary* (AIR 1973 Patna 386), *Baldeo Singh vs. Dwarika Singh* (AIR 1978 Patna 97), which explain the practice of *ta khubzul badlain*, after relying upon the principles laid down in the earlier decisions of that court in *Md. Murtaza Hussain vs. Abdul Rahman* (AIR 1949 Pat. 364), *Motilal Sahu vs. Ugrah Narain Sahu* (AIR 1950 Patna 288), and *Panchoo Sahu v. Janki Mandar* (AIR 1952 Pat. 263),

11.1) In *Bishundeo Narain Rai* (supra), this Court held :

"It appears that in the State of Bihar a practice is prevalent that when whole or part of sale consideration is due or any other obligation is undertaken by the vendee, then on execution and registration of the sale deed by the vendor, title to the property, subject matter of sale, does not pass 'ta Khubzul Badlain', that is, until there is 'exchange of equivalent' and in such a case registration receipt is

A retained by the vendor, which on payment of consideration  
 due or on fulfillment of the obligation by the vendee is  
 endorsed in his favour or if the sale deed has already been  
 received by the vendor then the sale deed is delivered to  
 the vendee. Even so, this only shows that such agreement  
 B are common in that part of the country but it is essentially  
 a matter of intention of the parties which has to be gathered  
 from the document itself but if the document is ambiguous  
 then from the attending circumstances, subject to the  
 provisions of Section 92 of the Evidence Act.”

C *(emphasis supplied)*

(11.2) In *Sarjug Saran Singh* (supra) after referring to the  
 recitals in a sale deed that the vendor had delivered possession  
 to the vendee as absolute owner, it was observed :

D “It was admitted by the plaintiffs themselves that the  
 aforesaid recital is incorrect, both as regards the receipt  
 of the consideration money and as regards putting the  
 vendee in possession of the property. The registration  
 receipt remained with the executants, namely, defendants  
 E 1 and 2, and the plaintiffs alleged that on a subsequent  
 date, when they offered to pay the consideration money  
 and to take the registration receipt from defendants 1 and  
 2 (*Ta kalzul badlain* exchange of equivalents), they, under  
 F the instigation of the other defendants refused to part with  
 the receipt and sold the property to the other defendants.”

The Patna High Court in that decision, upheld the decision of  
 the first appellate court that the intention of the parties was that  
 title should pass only on payment of the consideration and as  
 G admittedly the consideration was not paid, the plaintiffs did not  
 obtain title by virtue of the sale deed, on the following  
 reasoning:

H “It is well settled that the intention of the parties should be  
 ascertained on a construction of a document; and where

there is any patent ambiguity in any recital, aid may be taken from evidence of surrounding circumstances and the conduct of the parties. Mr. Rai for the appellants urged that the first sentence in the recital (quoted above) was complete in itself and that sentence indicated the clear intention of the parties that title should pass at the time of the registration when the executants admitted execution before the Sub-registrar. He specially relied on the words "without any right of cancellation and revocation" occurring in that sentence. But it is well known that in construing a document due weight should be given to all the recitals. Hence the subsequent recitals as regards payment of consideration at the time of exchange of equivalentents and putting the vendee into possession should also be given equal weight. x x x x x The first appellate court was, therefore, justified in observing that, if the intention was that the title should pass at the time of registration, the vendors would have insisted on payment of the consideration money before the Sub-registrar, or immediately thereafter. *The very fact that the registration receipt was kept in their custody and not handed over to the vendee and possession also admittedly remained with them lead to an inference that there was no intention to convey title until the payment of the consideration.*

(emphasis supplied)

(11.3) In *Shiva Narayan Sah* (supra), the Patna High Court, following its earlier decisions, held that when the sale deed stipulates payment of balance price during the *exchange of equivalentents* (balance sale consideration and registration receipt) and mentions only "putting the buyer in possession" without actually delivering possession, even if the sale deed does not expressly postpone passing of the title till discharge of the consideration due and even if more than three fourth of the total price had been paid to the vendor, the title in the property would not pass to the purchaser on execution and the

A registration of the sale deed, but will pass only during the exchange of the equivalentents.

B (11.4) In *Baldeo Singh* (supra), the sale deed recited that the consideration money had been paid and nothing was due from the vendee to whom possession had also been delivered. But the plaintiffs admitted that neither the consideration money was paid by them nor possession was delivered by them at the time of execution and registration of the sale deed. After referring to the earlier decisions of that Court the High Court held :

C “On the basis of the aforesaid decision it can be said that it is almost settled that the question whether title passes on mere execution and registration of a deed or only on payment of consideration depends upon the intention of the parties, to be gathered from the deed. It has also been held that though the sale deed may recite that the consideration has been paid, but there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that, in fact, the consideration was not paid; this will not be barred by Section 92 of the Evidence Act. In the present case, there is no dispute so far as the second aspect is concerned. The sale deed in question recites that consideration money has been paid and there is nothing due from the vendee to whom the possession has also been delivered. But, the plaintiffs admit that neither the consideration money was paid nor possession delivered to them at the time of the execution and registration of the aforesaid deed. .... In my opinion, the plaintiffs did not acquire title on mere execution and registration of the sale deed.

G “In the instant case, the defendant first set has not taken the stand that he had repudiated the contract even before 10-1-1963 when the deed of cancellation was executed. If the amount is tendered by the defaulter after such repudiation, it is of no, consequence. *A vendor cannot be*

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*expected to wait indefinitely to enable the vendee to perform his part, and he is at liberty in such a situation to sell the property to another person. In my opinion, in cases where the tender or payment of the consideration money is made by the vendee before the vendor repudiates the contract, the vendee will acquire a valid title over the properties covered by the deed in question.*"

(emphasis supplied)

12. We have referred to several decisions of the Patna High Court in detail to demonstrate the existence of the established practice of *exchanging equivalents (ta khubzul badlain)*. The effect of such transactions in Bihar is even though the duly executed and registered sale deed may recite that the sale consideration has been paid, title has been transferred and possession has been delivered to the purchaser, the actual transfer of title and delivery of possession is postponed from the time of execution of the sale deed to the time of exchange of the registration receipt for the consideration, that is *ta khubzul badlain*.

13. We may now examine the facts of this case with reference to the said principles. As noticed above the first appellate court has recorded a finding of fact that the appellants had not paid the consideration of Rs.22000 at the time of execution and registration of the sale deed. This finding of fact (accepted by the High Court in second appeal) has been recorded after exhaustive consideration of the oral evidence and is not open to challenge. The trial court, the first appellate court and the High Court have concurrently found that though the sale deed recited that possession of the property was delivered to the purchasers, the possession was not in fact delivered and continued with the vendor (second respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed dated 22.2.1988, that the vendor had received the entire price

A of Rs.22000/- from the purchasers (that is Rs.17000 before  
 execution of the sale deed and Rs.5000 at the time of exchange  
 of registration receipt) and had transferred all his rights therein  
 and that on such sale the vendor has not retained any title and  
 that the vendor has relinquished and transferred the possession  
 B of the property to the purchasers, will not be of any assistance  
 to the appellants to contend that the title has passed to them  
 or part consideration was paid. It is an admitted fact that the  
 registration receipt was retained by the vendor to be exchanged  
 later in consideration of the sale price. It is also admitted that  
 C possession was not delivered though the deed recited that  
 possession was delivered. The sale was categorically  
 repudiated by the second respondent on 18.3.1988 by  
 cancelling the sale deed. There is no evidence that the  
 appellants offered the sale price of Rs.22000/- to the second  
 D respondent before the repudiation. The only possible inference  
 is that the intention of the parties was that title would not pass  
 until the consideration was not paid; and as the consideration  
 was not paid, the sale in favour of the appellants did not come  
 into effect and the title remained with the vendor and the sale  
 deed dated 22.2.1988 was a dead letter. Consequently, the  
 E subsequent sale in favour of the first respondent was valid.

**Re: Question (iv)**

F 14. We are therefore of the view that on execution and  
 registration of the sale deed dated 22.2.1988 in favour of  
 appellants, title did not pass to the purchaser and possession  
 was not delivered. Therefore as a consequence the vendor  
 retained the power of repudiating the sale for non payment of  
 the sale price within a reasonable time. As the finding is that  
 G no part of the sale price was paid, the claim of appellants that  
 they offered to pay Rs.5000/-, even if accepted to be true would  
 mean proving their readiness to pay only a part of the price and  
 not the entire sale price. As the appellants have failed to prove  
 that they tendered the price of Rs.22000/- before repudiation  
 and cancellation on 18.3.1988, the sale deed dated 22.2.1988  
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in favour of appellants did not convey any title to them and after lawful repudiation, they were not entitled to claim performance. A

15. We hasten to add that the practice of *ta khubzul badlain* (of title passing on exchange of equivalent) is prevalent only in Bihar. Normally, the recitals in a sale deed about transfer of title, receipt of consideration and delivery of possession will be evidence of such acts and events; and on the execution and registration of the sale deed, the sale would be complete even if the sale price was not paid, and it will not be possible to cancel the sale deed unilaterally. The exception to this rule is stated in *Kaliaperumal* (supra). The practice of '*ta khubzul badlain*' in Bihar recognizes that a duly executed sale deed will not operate as a transfer *in praesenti* but postpones the actual transfer of title, from the time of execution and registration of the deed, to the time of *exchange of equivalents* that is registration receipt and the sale consideration, if the intention of the parties was that title would pass only on payment of entire sale consideration. As a result, until and unless the duly executed and registered sale deed comes to the possession of the purchaser, or until the right to receive the original sale deed is secured by the purchaser by obtaining the registration receipt, the deed of sale merely remains an agreement to be performed and will not be a completed sale. But in States where such a practice is not prevalent, possession of Registration Receipt by the Vendor, may not, in the absence of other clear evidence, lead to an inference that consideration has not been paid or that title has not passed to the purchaser as recited in the duly executed deed of conveyance. Where the purchaser is from an outstation, the vendor being entrusted with the Registration Receipt, to collect the original sale deed and deliver it to the purchaser, is common. Be that as it may. B C D E F G

16. In view of the above, we hold that there is no merit in this appeal and the appeal is dismissed.

N.J. Appeal dismissed. H