

C S Lalitha Vs. Sreemathi

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Court : Karnataka

Decided On : Sep-25-2021

Judge : H.P.Sandesh

Appeal No. : RFA 1582/2005

Appellant : C S Lalitha

Respondent : Sreemathi

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE25H DAY OF SEPTEMBER, 2021 BEFORE THE HON'BLE MR. JUSTICE H.P. SANDESH R.F.A.NO.1583/2005 (SP) C/W. R.F.A.NO.1582/2005 (INJ) IN R.F.A.NO.1583/2005 (SP): BETWEEN: C.S.LALITHA AGED ABOUT65YEARS W/O C.SURYANARAYANA SETTY R/AT NO.47, 1ST FLOOR71T CROSS, 5TH BLOCK RAJAJINAGAR BENGALURU-560 010. APPELLANT [BY SRI C.M.NAGABHUSHANA, ADVOCATE FOR SRI P.PRASANNA KUMAR, ADVOCATE]. AND:

1. . T.V.GOVINDARAJ S/O N.VENKATARAMANA SETTY SINCE DEAD BY HIS LRs. (a) T.G.SHAKUNTALA AGED ABOUT70YEARS W/O LATE T.V.GOVINDARAJ R/AT NO.57, 4TH MAIN GANGANAGAR EXTENSION BENGALURU-560 032. (b) T.G.SRINIVAS AGED ABOUT45YEARS2S/O LATE T.V.GOVINDARAJ R/AT NO.57, 4TH MAIN GANGANAGAR EXTENSION

BENGALURU-560 032. (c) KALPANA SUDHAKAR AGED ABOUT 52 YEARS D/O LATE T.V.GOVINDARAJ R/AT ARJUN SAGAR RESIDENCY NO.819/3, 13TH CROSS 7TH BLOCK WEST, NEAR JSS CIRCLE ON KANAKAPURA ROAD, JAYANAGAR BENGALURU-560 070. (AMENDED VIDE COURT

ORDER

DATED 04.01.2016) 2 . SREEMATHI AGED ABOUT 52 YEARS W/O V.M.VEERABHADRAPPA R/AT NO.16, 11TH CROSS MALLESWARAM BENGALURU-560 003. ... RESPONDENTS [BY SRI G.PAPI REDDY, ADVOCATE FOR R1(b); SRI P.KRISHNAPPA, ADVOCATE FOR R2; R1(a) AND R1(c) ARE SERVED]. THIS R.F.A. IS FILED UNDER SECTION 96 READ WITH

ORDER

41 RULE 1 OF THE CPC AGAINST THE

JUDGMENT

AND DECREE DATED 13.09.2005 PASSED IN O.S.NO.352/1987 ON THE FILE OF THE I ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU CITY (CCH-2), DISMISSING THE SUIT FOR SPECIFIC PERFORMANCE. IN R.F.A.NO.1582/2005 (INJ): BETWEEN: C.S.LALITHA AGED ABOUT 65 YEARS W/O C. SURYANARAYANA SETTY 3R/AT NO.47, 1ST FLOOR 71T CROSS, 5TH BLOCK RAJAJINAGAR BENGALURU-560 010. APPELLANT [BY SRI C.M.NAGABHUSHANA, ADVOCATE FOR SRI P.PRASANNA KUMAR, ADVOCATE]. AND: SREEMATHI AGED ABOUT 52 YEARS W/O V.M.VEERABHADRAPPA R/AT NO.16, 11TH CROSS MALLESWARAM BENGALURU-560 003. ... RESPONDENT [BY SRI P.KRISHNAPPA, ADVOCATE]. THIS R.F.A. IS FILED UNDER SECTION 96 READ WITH

ORDER

41 RULE 1 OF THE CPC AGAINST THE

JUDGMENT

AND DECREE DATED 13.09.2005 PASSED IN O.S.NO.2934/1987 ON THE FILE OF THE I ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU CITY (CCH-2), DECREETING THE SUIT FOR PERMANENT INJUNCTION.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR

JUDGMENT

ON 0209.2021 THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

JUDGMENT

The appeal in R.F.A.No.1583/2005 is filed by the plaintiff in O.S.No.352/1987 against the dismissal of the suit for specific performance and the appeal in R.F.A.No.1582/2005 is filed by the defendant in O.S.No.2934/1987 decreeing the suit for permanent injunction vide common judgment dated 13.09.2005 4 on the file of the I Additional City Civil and Sessions Judge, Bengaluru City (CCH. No.2).

2. The factual matrix of the suit in O.S.No.2934/1987 is that the plaintiff has purchased the property from T.V. Govindaraj, who is defendant No.1 in O.S.No.352/1987 vide sale deed dated 17.12.1986 and she has been put in possession over the suit schedule property and the defendant No.1 is interfering with the possession of the suit schedule property. The defendant-C.S. Lalitha in the written statement is claiming that, she has entered into an agreement of sale dated 10.05.1982 and in part performance of the contract, she has been put in possession of the suit schedule property, she has paid the sale consideration of Rs.40,000/- out of Rs.50,000/- and she has put up the construction in the suit schedule property. Based on these pleadings, the trial Court has framed the following issues in O.S.No.2934/1987: 1. Whether the plaintiff is in lawful possession and enjoyment of the suit schedule property?. 5 2. Does she further prove that the defendant is tried to interfere with her peaceful possession and enjoyment of the property on 3.7.87?.

3. Whether the plaintiff is entitled for the relief of permanent injunction?.

4. What order?. What decree?..

3. The plaintiff-C.S.Lalitha in O.S.No.352/1987 contend that the defendant-T.V.Govindaraj had entered into an agreement of sale dated 10.05.1982 and plaintiffs mother and first defendants mother are sisters and first defendant is the permanent resident of Hubli. The first defendant is an allottee of the plaint

schedule property by the then CITB and she was put in possession of the same under the possession certificate dated 20.06.1975. In terms of the sale agreement, she has paid the amount of Rs.40,000/- out of the total sale consideration of Rs.50,000/- on the date of the agreement. Because there was a non-alienation condition for the period of 10 years, the property was to be conveyed in favour of plaintiff only after the expiry of the said period i.e., after 25.07.1985. The first defendant delivered all original documents of title relating to the suit property. The first defendant delivered the possession of the 6 suit schedule property as the part performance of the agreement to sell.

4. In pursuance to the agreement, the plaintiff got a plan for construction of a building in the said site and submitted the same for licence also to BCC on 29.11.1982, as the said application was not rejected within a period of 30 days, it was deemed to have been granted and accordingly, she has put up a construction in the suit site measuring about 5 squares. In the first week of November, 1982, the first defendant visited the plaintiffs house and demanded additional sum of Rs.15,000/- and when the plaintiff expressed her unwillingness to increase the price, the first defendant with an intention to coerce the plaintiff to pay some additional price, filed O.S.No.3418/1982 for permanent injunction against the plaintiffs husband. In the said suit, the plaintiffs husband contended that he is nothing to do with the site and the question of his interfering with defendants possession did not arise, as the first defendant was not in possession of the site, but the plaintiff was in possession in pursuance of the agreement of sale. 7

5. After filing of the written statement, the Trial Court dismissed the application filed in the said suit for injunction and ultimately, the suit also came to be dismissed. In spite of the same, the plaintiff requested the first defendant to conclude the contract by registering the sale deed, the first defendant failed to execute the sale deed and also gave the notice in the newspaper on 25.09.1985 about her rights in the suit property. Though the first defendant promised the plaintiff to complete the sale after getting a sale deed in his favour from BDA, did not comply with his promise. The plaintiff learnt that the first defendant is trying to sell the suit site to others and the plaintiff has been ready and willing to perform her part of the contract i.e., to pay balance consideration of Rs.10,000/-, informed

the first defendant and demanded specific performance. The plaintiff, after filing the suit, amended the plaint inserting that defendant had sold the property on 17.12.1986 in favour of the second defendant. The second defendant knew that there was an agreement to sell in favour of the plaintiff, had purchased the property knowing fully well the said agreement transaction. 8

6. The first defendant in the written statement has denied the very sale agreement and contended that the sale agreement is concocted by forging the signature of the first defendant. The first defendant admits the relationship with the plaintiff as a direct cousin. It is contended that plaintiffs brother by name I.N. Hebsur and H. Basavaraj had close connection with the first defendant in running a paint factory at Hubli, under the name and style Karnataka Paints and Allied Products. The first defendant is managing the factory as the Managing Partner and the plaintiffs brother were looking after accounts and marketing. It is contended that relationship was strained between the defendant and plaintiffs brothers since 1980. The plaintiffs husband by name C. Suryanarayana Setty, who was working as an Executive Engineer in the PWD Department used to be in touch with the affairs of the factory in assisting the plaintiffs brother H. Basavaraj. The plaintiff and her husband are well acquainted with the signature of the defendant in such business transaction. Hence, they have concocted the alleged agreement to sell taking advantage of the strained relationship between them. The first defendant is in possession of the suit schedule 9 property from the date of allotment and till he sold the same in favour of the second defendant on 17.12.1986.

7. It is further averred that as there was an attempt by the plaintiffs husband to interfere with the possession of the first defendant in respect of the suit schedule property, he had to file a suit in O.S.No.3418/1982 and obtained an order of temporary injunction. He had also lodged the complaint before the competent authority, when the plaintiff and her husband attempted to put up construction in the suit site, as the defendant has not received any communication from the competent authority within 30 days from the date of submitting the application, he has constructed temporary sheds for the purpose of storing building materials. Along with the said sheds, the first defendant has put the second defendant in possession of the suit property after he sold the same. The possession of the

defendant is not disturbed in O.S.No.3418/1982. The plaintiff has suppressed the material fact and the suit was dismissed for non-prosecution since, he could not attend the Court when the suit was set down for evidence. 10

8. The second defendant also filed the written statement stating that she is in possession of the suit schedule property in terms of the sale deed and she had also filed the suit in O.S.No.2934/1987 and had obtained an order of temporary injunction. In spite of an order of temporary injunction, the plaintiff, by the high influence from the husband, has managed to dispossess the second defendant. Hence, the second defendant has filed an application for disobedience of temporary injunction which is pending enquiry. Hence, the second defendant prayed the Court to dismiss the suit contending that the plaintiff is not entitled for any relief.

9. Based on the pleadings, the Trial Court has framed the following issues and additional issues in O.S.No.352/1987: 1. Does plaintiff proves that the 1st defendant agreed to sell the suit property in consideration of Rs.50,000/-?. 11

2. Does plaintiff further proves that he paid Rs.40,000/- as advance amount towards the sale agreement of the suit property?.

3. Does plaintiff proves that he was and he is ever ready to perform his part of contract?. 4. Does defendant 2 proves that she is the bonafide purchaser of suit property for value?.

5. What order or decree?.. Additional Issues: 6. Whether the plaintiff proves that she is in possession of the suit schedule property on the basis of sale agreement dated 10.05.1982 in part performance of the contract as per averment in para-6 of the plaint?.

7. Whether defendants 1 & 2 prove that the sale agreement dated 10.05.1982 is concocted and fabricated document and not a genuine one as averred in para 5 of the written statement of defendant No.1?.

8. Whether defendants 1 & 2 prove that 1st defendant put 2nd defendant in possession of the suit property under the sale deed dated 17.12.1986?..

10. Both the suits are clubbed together and common evidence has been recorded. The plaintiff in O.S.No.352/1987 examined her husband as P.W.1 and also examined two 12 witnesses as P.Ws.2 and 3 and got marked the documents as Exs.P1 to P54. The first defendant in O.S.No.352/1987 examined himself as D.W.1 but did not subject himself for cross- examination. The second defendant examined her daughter as D.W.2 and no documents are marked in support of her contention.

11. The Trial Court, after completion of the evidence and hearing the arguments of both the respective counsels, dismissed the suit in O.S.No.352/1987 answering issue Nos.1 to 3 in negative, in coming to the conclusion that the plaintiff failed to prove the execution of the sale agreement and payment of sale consideration of Rs.40,000/- and plaintiff was ever ready to perform her part of contract and answered issue No.4 as affirmative, in coming to the conclusion that the second defendant is the bonafide purchaser of the suit property.

12. The Trial Court also, while answering additional issues, comes to the conclusion that the plaintiff is not in possession of the suit schedule property on the basis of the sale agreement dated 10.05.1982 and comes to the conclusion that defendant Nos.1 and 2 have proved the fact that sale agreement 13 dated 10.05.1982 is concocted and a fabricated document and the first defendant put the second defendant in possession of the suit property. Hence, Regular First Appeal No.1583/2005 is filed before this Court.

13. The main contention of the learned counsel for the appellant-plaintiff in R.F.A.No.1583/2005 is that, it is not in dispute that suit schedule property is allotted in favour of the first defendant-T.V.Govindaraj in the year 1971 and executed lease-cum-sale in favour of the first defendant. It is the main contention of the learned counsel for the appellant-plaintiff that the trial Judge has failed to appreciate the evidence of P.W.1, about Ex.P2, passing of part consideration, delivery of possession of suit site in favour of plaintiff, delivery of originals of suit site vide Ex.P3/allotment order, Ex.P6-Possession Certificate, Ex.P7-Receipt by Assistant Commissioner, Exs.P8 and P9-Khatha certificates, Exs.P10-Tax Clearance Certificate, Ex.P12-Endorsement by BCC.

14. The counsel also would vehemently contend that the trial Judge has failed to appreciate the suit filed by the first defendant in O.S.No.3418/1982 and its dismissal, vide 14 documentary evidence Exs.P29, P44 to 46, produced by the parties. But, the Trial Court has given more importance taking into consideration the plea of the first defendant about his business with brothers of the plaintiff in running a paint business and a partnership firm. The Trial Court, failed to take note of the fact that, though the first defendant has filed the affidavit and examined himself as D.W.1, he did not tender himself for cross-examination and ought to have invoked Section 138 of the Evidence Act. The affidavit evidence of D.W.1 became nullity and a non-est and the said evidence was not available for appreciation by the Trial Court. In spite of the same, the contention of the first defendant was taken while considering the case on merits. The findings of the Trial Court in respect of issue Nos.1 and 2 and also additional issue No.7 are perverse in the absence of evidence of D.W.1, who took the defence that the sale agreement is concocted and did not tender himself for cross-examination and his evidence has to be eschewed in the eye of law. In spite of it, the Trial Court comes to the conclusion that the document at Ex.P2 came into existence in a suspicious circumstance. He further contends that the trial Judge also grossly erred in holding that P.Ws.2 and 3 are relatives of P.W.1 15 and they have travelled to Hubli from Bengaluru to sign Ex.P2 without any basis.

15. The counsel would vehemently contend that the finding given by the Trial Court is uncalled for and even gone to the extent of comparing the signature of the defendant, who did not stepped into the witness box and denied his signature, except filing the affidavit and acted like an expert. The counsel also would vehemently contend that, when the first defendant took the defence that the said document does not belong to him and the document at Ex.P2 is a concocted document, the person who asserts the same has to prove by sending it to the Handwriting Expert. Instead, the Trial Court comes to the conclusion that the plaintiff, ought to have sent the said document to the Handwriting Expert. Hence, the Trial Court has committed an error.

16. The counsel also would vehemently contend that when the original documents are delivered in favour of the plaintiff at the time of the sale agreement and the

possession was delivered and he had put up construction and placed the material before the Court, in the absence of any evidence of 16 defendant Nos.1 and 2 that they have put up the construction, the Tribunal ought not to have granted the relief of injunction in favour of the second defendant, in coming to the conclusion that possession was not delivered in favour of the plaintiff and the first defendant put the second defendant into possession. The very approach of the Trial Court in considering both the suits is erroneous and hence, it requires interference of this Court.

17. The learned counsel for the appellant-plaintiff in R.F.A.No.1583/2005 in his argument also vehemently contend that, in order to prove Ex.P2, two witnesses were examined and Ex.P40 is also produced to show that a plan was obtained from the concerned authority. In spite of there being a no reason to disbelieve the evidence of the plaintiff, the Trial Court committed an error in dismissing the suit for specific performance and granting the relief in favour of the second defendant, in coming to the conclusion that the second defendant is in possession of the suit schedule property.

18. The counsel, in support of his argument, relied upon the judgment of the Apex Court in VIDHYADHAR V. MANIKRAO AND ANOTHER reported in (1999) 3 SCC57317 and brought to notice of this Court paragraph No.17, wherein the Apex Court discussed with regard to where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and the same was followed in several judgments. The Allahabad High Court in Arjun Singh v. Virendra Nath held that, if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box. It is further observed that, the witness, who has been examined before the Court himself had no personal knowledge of the terms settled between defendant No.2

and the plaintiff, the transaction was not settled in his presence nor was any payment made in his presence, nor for that matter, was he a scribe or marginal witness of that sale deed. Given in this situation, defendant 18 No.1 has raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration of part payment thereof. In such circumstances, the evidence of the witness cannot be considered.

19. The counsel also relied upon the judgment of the Apex Court in TULSI AND OTHERS VS. CHANDRIKA PRASAD AND OTHERS reported in (2006) 8 SCC322 and brought to notice of this Court paragraph No.25 with regard to need for the parties to examine themselves when need arises. Appellant No.1 averring that certain amount not tendered to either her or her husband, need for appellant to have examined herself. The counsel referring this judgment would vehemently contend that though the first defendant took the defence that he had not executed the sale agreement, but he did not subject himself for cross-examination.

20. The counsel also relied upon the judgment of the Apex Court in PRAKASH CHANDRA VS. NARAYAN reported in (2012) 5 SCC403 and brought to the notice of this Court paragraph No.17, wherein the Apex Court while dealing with the matter for the relief of granting specific performance, the Court 19 has to look into whether it will cause hardship to the defendant within the meaning of clause (b) of sub-section (2) of Section 20 of the Specific Relief Act, 1963, being a question of fact, the First Appellate Court without framing such an issue ought not to have reversed the finding of the Trial Court while concurring with it on all other issues with regard to the appellants entitlement to relief for specific performance of contract.

21. The counsel also relied upon the judgment of the Apex Court in CHENNADI JALAPATHI REDDY VS. BADDAM PRATAPA REDDY (DEAD) THR LRS. & ANR. in CIVIL APPEAL NOS.7818-7819 OF 2009 dated 27.08.2019 and brought to the notice of this Court paragraph Nos.4, 5, 6 and 8, wherein the Apex Court has held that it is well settled law that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive evidence and the same should not be a sole evidence and Court may seek independent and reliable

corroboration in the facts of a given case. The counsel referring this judgment would vehemently contend that, when the first defendant took the defence that the sale agreement is concocted, he did not subject himself for 20 cross-examination and he ought to have sent the document to the Handwriting Expert and instead, the Trial Court made an observation against the plaintiff that plaintiff has not sent the document to the Handwriting Expert and proceeded in an erroneous approach.

22. The counsel also relied upon the unreported judgment of this Court in R.F.A.NO.885 OF2006dated 23.03.2020 in SRI. V. RAMACHANDRAPPA VS. SRI H. KRISHNAPPA AND ANOTHER.

23. The counsel also relied upon the judgment of the Apex Court in MAN KAUR (DEAD) BY LRS. VS. HARTAR SINGH SANGHA reported in (2010) 10 SCC512 The counsel relying upon this judgment would contend that where a party to the suit does not appear in witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that case set up by him is not correct.

24. The counsel also relied upon the judgment of the Apex Court in NARAYANAMMA AND ANOTHER VS. 21 GOVINDAPPA AND OTHERS reported in (2019) 19 SCC42and brought to the notice of this Court paragraph Nos.14, 15 and 20, wherein the Apex Court has discussed the judgment in Kedar Nath Motani vs. Prahlad Rai reported in (1960) 1 SCR861and also discussed the judgment in Holman v. Johnson reported in (1775) 1 COWP341 wherein also discussed with regard to the principles of public policy. In paragraph No.15, the Apex Court has also discussed the judgment in Kedar Nath Motanis case and held that a strict view, of course, must be taken of the plaintiffs conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.

25. The counsel referring these judgments would vehemently contend that in a case for specific performance, the 22 Trial Court in an erroneous approach committed an illegality in appreciating the evidence available on record.

26. The learned counsel for defendant-respondent No.1(b) in his argument vehemently contend that the property was allotted by BDA on 11.06.1975 and possession was also delivered. In pursuance of the same, lease-cum sale agreement was also executed on 25.07.1975. But, the alleged sale agreement was executed on 10.05.1982 within a period of 10 years, as there was a bar under Rule 14 of the BDA Allotment Rules, 1984. The counsel would vehemently contend that the first defendant is also the partner of the business run by the brothers of the plaintiff and they were running factory from the year 1976. Taking advantage of the relationship between the parties and also the business, the alleged document came into existence. The first defendant was the managing partner and their relationship was strained in the year 1980.

27. The counsel also brought to the notice of this Court that P.W.1, who is the Power of Attorney holder of the plaintiff is an Engineer and P.W.2, who is an attesting witness to Ex.P2 is a Contractor and the Trial Court has taken note of the relationship 23 between the P.W.1 and also the attesting witnesses. The other witness, who has been examined as P.W.3 is also the brother of the plaintiff. When such being the case, the Trial Court has rightly come to the conclusion that the document at Ex.P2 came into existence in a suspicious circumstance.

28. The counsel would vehemently contend that, Ex.P2 is a disputed document and the schedule is shown as a vacant site. He would further contend that the agreement holder cannot seek any sanction of plan and the said document is created for the purpose of the case. The counsel also would submit that the first defendant had filed the suit against the husband of the plaintiff in O.S.No.3418/1982 and in the said suit, the first defendant has contended that he is no way concerned and hence, the wife of the first defendant was impleaded in the said suit as a party to the proceedings. The counsel would submit that they have not produced the agreement before the said Court. The counsel also would contend that the question is whether the plaintiff has been permitted to put up

construction and no such permission was given to put up any construction. The counsel would further submit that, no notice was issued 24 before filing the suit but, only notice was given in the newspaper stating that he has already entered into an agreement of sale and he has been possession.

29. The counsel would further contend that the stamp paper has not been purchased either in the name of the seller or in the name of the purchaser but, the same is purchased in the name of one Basavaraju, brother of the plaintiff. Hence, it is clear that the sale agreement was concocted. The first defendant has not agreed to sell the property and the document itself is doubtful. Hence, the Trial Court has rightly appreciated both oral and documentary evidence placed on record. The counsel would also submit that the evidence of P.Ws.1 to 3 is contrary to each other. The agreement was not produced inspite of the order and no consideration was paid. The P.W.2 in the evidence says that the document came into existence in the house of the brother of the first defendant. P.W.3 says that the agreement was signed in the house of the first defendant and there are contradictions in the evidence of P.Ws.2 and 3. Further, P.W.3 is not the signatory to the said document. 25

30. The learned counsel for respondent No.1(b) in support of his argument relied upon the judgment of the Apex Court in MAYAWANTI VS. KAUSHALYA DEVI reported in (1990) 3 SCC1 and brought to the notice of this Court paragraph No.8 of the judgment wherein, the Apex Court held that in a case of specific performance, it is settled law and indeed it cannot be doubted that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The counsel referring this judgment would contend that, Rule 14 of the BDA Allotment Rules, 1984 is clear that the property cannot be alienated during lease-cum-sale agreement.

31. The counsel also relied upon the judgment in SARASWATHI AMMAL VS. V.C. LINGAM reported in I.L.R261993 KAR427 and brought to notice of this Court paragraph No.31, wherein this Court has held that while exercising the discretion under Section 20 of the Specific Relief Act, Court should see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff and the Court is not bound to grant specific performance merely because it is lawful to do so. The burden of proving the readiness and willingness to perform his part of the contract is entirely on the plaintiff and he cannot succeed in his claim for a decree for specific performance, by establishing that the vendor-defendant was avoiding to perform the contract; defendant's failure to perform his part of the contract is the cause for the suit; but, to succeed in the suit, plaintiff has to prove his readiness and willingness. The readiness involves proof of capacity to perform, which in turn requires proof of his financial ability at the relevant point of time. The willingness to perform the contract is not a mere desire; it should be a genuine willingness, to be proved like any other fact; circumstances may justify an inference that the assertion of the plaintiff as to his willingness is a mere verbal assertion and as a fact, his conduct may disclose that he was really interested in procrastination, because, delay was to his advantage; in many cases, a person who agreed to purchase a property of which he is already in possession, may not be anxious at all to complete the contract, either because, he had no ready cash with him, or may consider it expedient not to part with the money, so that he can have the continued benefit of the money as well as the enjoyment of the property.

32. The counsel also relied upon the judgment in SMT. PARVATHAMMA AND OTHERS VS. SMT. UMA AND OTHERS reported in 2010 SCC ONLINE KAR5075 and brought to notice of this Court paragraph No.33 wherein, it is held that whether the appellant being a willing party to the illegal agreement of sale, could negate the same and seek the aid of the Court in questioning the impugned judgment, the question may not be relevant as the appellant or the concerned respondent cannot rely upon the same as it was void ab initio.

33. The counsel also relied upon the judgment in MAN KAUR (DEAD) BY LRS. VS. HARTAR SINGH SANGHA reported in (2010) 10 SCC512 wherein the Apex Court relying upon the judgment in Janki Vashdeo Bhojwani v. Industrial Bank Ltd.

reported in (2005) 2 SCC217 in paragraph No.18 of that judgment held that the word acts used in Rule 2 of Order 3 of CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the Court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

34. The Apex Court in MAN KAURS case in paragraph No.18 of the judgment has held as to who should give evidence in regard to matters involving personal knowledge and the attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transaction or dealings of the principal, of which principal alone has personal knowledge.

35. The counsel also relied upon the judgment of this Court in Y.R. MAHADEV VS. K. DAYALAN reported in 1997 SCC ONLINE KAR130 and brought to the notice of this Court paragraph No.22 wherein, this Court has discussed with regard to the suit agreement, Ex.P1 is a void agreement and further that even otherwise it rendered itself as infructuous with the issue of notification as at Ex.D1. Therefore, I do not find any error in passing the impugned judgment and decree.

36. The counsel also relied upon the judgment in SHIVANNA VS. SMT. JAYAMMA AND OTHERS reported in 2010 (3) KLJ625 and brought to the notice of this Court paragraph No.13 of the judgment, wherein it is held that as the executant had no legal right to bequeath the property and in view of the bar contained under the BDA Rules and Regulations, if the Will is taken out of consideration, then what remains is the undisputed fact of the plaintiffs along with other heirs of Puttamadamma being the legal representatives, who can seek eviction of the defendant from the suit schedule property.

37. The counsel relying upon these judgments would vehemently contend that, first of all, the first defendant has no any right to execute the sale agreement as there is a bar under the BDA Rules and Regulations, as he was not the absolute owner and also contends that the plaintiff has failed to prove the 30 very execution

of the document. Under the circumstances, the plaintiff is not entitled for any decree.

38. The learned counsel appearing for respondent No.2 in his argument vehemently contends that, in terms of Ex.P3, the first defendant was only a lessee and the plaintiff was aware of the same. Hence, the question of delivering the possession in favour of the plaintiff does not arise, as he was only a lessee. P.W.1 does not state anything with regard to the amount paid but, claims that he wants to verify from his wife regarding the payment. When such admission is elicited during the course of cross-examination, it is clear that the sale consideration was not paid. The counsel also submits that, no document for having paid the advance amount was placed before the Trial Court and no time limit is mentioned in the agreement. The document of stamp paper under which the sale agreement came into existence does not contain the seal and date of issuance of stamp paper. Further, there is no signature in Ex.P2 in page No.1. The alleged public notice was issued before expiry of lease period in terms of Ex.P13. 31

39. The learned counsel for respondent No.2 also reiterates the fact that the evidence of P.Ws.1 and 2 is contrary to each other and they have deposed in different version with regard to the place of execution of the document at Ex.P2. The first defendant has contended that he had put up the construction. But, the plaintiff contends that he had put up the construction. However no material is placed before the Court and the possession was not delivered on the date of the agreement.

40. The counsel would also vehemently contend that Rule 14 of the BDA Allotment Rules, 1984 provides a bar to alienate any property and only it confers the right for construction or improvement of the property and the lessee cannot transfer any property. The Trial Court has compared the signature i.e., both admitted and disputed and found variation in the same and rightly comes to the conclusion that the signature is not that of the first defendant. The counsel also would vehemently contend that the purchaser had no knowledge about the earlier sale transaction and he is a bonafide purchaser. After obtaining the absolute sale deed from BDA, he had purchased 32 the property in good faith. Hence, there cannot be a decree

in favour of the plaintiff.

41. The learned counsel appearing for respondent No.2 relies upon the judgment of the Apex Court relied upon by defendant No.1 in MAYAWANTI VS. KAUSHALYA DEVI reported in 1990 (3) SCC1 and brought to the notice of this Court paragraph No.8 of the judgment wherein, the Apex Court held that in a case of specific performance, it is settled law and indeed it cannot be doubted that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract.

42. The counsel also relied upon the judgment in PARAKUNNAN VEETILL JOSEPHS SON MATHEW VS. NEDUMBARA KURUVILAS SON AND OTHERS reported in AIR 1987 SC2328 and brought to the notice of this Court paragraph No.14, wherein the Apex Court has discussed with regard to Section 20 of the Specific Relief Act, 1903 and further held that the Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

43. The counsel also relied upon the judgment in A.C. ARULAPPAN VS. SMT. AHALYA NAIK reported in 2001 AIR SCW3046 and brought to the notice of this Court paragraph No.7, wherein the Apex Court has held that the jurisdiction to decree specific relief is discretionary and the Court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the Court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner.

44. The counsel also relied upon the judgment of this Court in Y.R. MAHADEV VS. K. DAYALAN reported in 1997 (4) KAR. L.J.

264 and brought to the notice of this Court paragraph Nos.19 to 21, wherein this Court has held that whether the respondent could enter into an agreement of sale as per Ex.P1 agreeing to sell the suit land in the name and favour of the appellant. It is clear from the 1982 Rules as well as 1984 Rules that during the period of

lease, the status of the lessee 34 was that of a tenant and that under the lease-cum-sale agreement he was continuing only as a tenant by paying lease amount to the Bangalore Development Authority in the name of the respondent as at Ex.P10 in the instant case, the right of the respondent was only to hold of the subject site in that capacity as lessee or a tenant and he had no marketable title either to alienate or encumber in any manner whatsoever other than what is provided for under Rule 14(2)(a)(iii) that too for the limited purpose of construction of building on the site. It is also observed in paragraph No.20 that it is crystal clear that there is a total bar under the above Rule as against the lessee or the purchaser as that of the respondent herein not to alienate the site within a period of 10 years of lease period.

45. The counsel also relied upon the judgment in JAGAN NATH VS. JAGDISH RAI AND OTHERS reported in AIR 1998 SC2028 wherein the Apex Court held that defendant alleged to have entered into agreement to sell property, with plaintiff subsequent agreement to sell by defendant in respect of same property. The evidence on record establishing that subsequent purchaser was bonafide purchaser for value without notice of 35 earlier agreement with plaintiff, held would not be entitled to relief of specific performance against subsequent purchaser.

46. The counsel also relied upon the judgment in AJIT SAVANT MAJAGAVI VS. STATE OF KARNATAKA reported in AIR 1997 SC3255 and brought to notice of this Court the principles laid down in the judgment with regard to Section 73 of Evidence Act, signature-proof, comparison of signature by Court, permissibility. Section 73 does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the 36 admitted signature as this power is clearly available under Section 73.

47. The learned counsel appearing for the appellant- plaintiff in reply to the argument of the learned counsel for the respondents-defendant Nos.1 and 2 would vehemently contend that Section 61 of the Karnataka Land Revenue Act imposes restriction on transfer of land of which the tenant has become occupant. He would further contend that there is no dispute with regard to the principles laid down in the judgments referred (supra) by the learned counsel for respondents-defendant Nos.1 and 2. But, in the case on hand, though the defendant No.1 took the defence that the sale agreement was concocted, he has not stepped into the witness box. Under the circumstances, the judgments which have been relied upon by the defendants are not applicable to the case on hand.

48. Having heard the learned counsel for the appellant and also learned counsel appearing for respondent Nos.1 and 2, the points that would arise for consideration of this Court are: (i) Whether the Trial Court has committed an error in coming to the conclusion that the 37 plaintiff has failed to prove the very execution of the sale agreement by the defendant No.1 in terms of Ex.P2?. (ii) Whether the Trial Court has committed an error in coming to the conclusion that no sale consideration has been paid in favour of defendant No.1 in terms of the sale agreement Ex.P2?. (iii) Whether the Trial Court has committed an error in coming to the conclusion that the plaintiff was not always ready and willing to perform his part of contract?. (iv) Whether the Trial Court has committed an error in coming to the conclusion that the plaintiff has not been in possession of the suit schedule property in terms of the sale agreement Ex.P2?. (v) Whether the Trial Court has committed an error in dismissing the suit for specific performance, based on the sale agreement Ex.P2?. (vi) What order?. 38 POINT Nos.(i), (ii), (iii) and (v):

49. These points for consideration are interconnected and hence, taken up together for consideration. The main contention of the plaintiff is that the first defendant had executed the sale agreement in favour of the plaintiff in terms of Ex.P2. In terms of the said sale agreement, the sale consideration of Rs.40,000/- was paid and the balance sale consideration was agreed to pay at the time of the registration of the sale deed. The plaintiff was always ready and willing to have the sale deed but the first defendant did not come forward to execute the same. The

first defendant who had appeared through the counsel had filed the written statement contending that he never executed Ex.P2 sale agreement and the same was concocted and forged his signature by the plaintiff who are having acquaintance with the signature of the first defendant. Hence, the issues are framed regarding execution of the sale agreement and also the payment of advance sale consideration and also with regard to the readiness and willingness of the plaintiff to have the sale deed. 39

50. Before considering the oral and documentary evidence available on record, this Court would like to refer to the document at Ex.P2. Ex.P2 - sale agreement is dated 10th May 1982. In terms of the sale agreement, the sale consideration was fixed in a sum of Rs.50,000/- and the first defendant had acknowledged the receipt of the amount in a sum of Rs.40,000/- in presence of the witnesses. On perusal of paragraph 2 of the sale agreement it is clear that the suit schedule property was allotted by the erstwhile Bangalore City Improvement Trust Board and executed the lease-cum-sale agreement and the seller is legally disabled to execute the sale deed. Hence, he has undertaken to execute the regular sale deed after the expiry of the lease period i.e., 25th July 1985. It is also clear that the balance sale consideration of Rs.10,000/- shall be paid at the time of registration of the sale deed. The document also reveals that the seller has delivered the original documents in favour of the plaintiff. In order to prove the very execution of the sale agreement at Ex.P2, the plaintiff did not step into the witness box but executed the Power of Attorney in favour of her husband as per Ex.P1. The Power of Attorney holder who has examined as PW1, in his evidence reiterated the 40 averments of the plaint and got marked the documents at Ex.P1 to P54 and those documents are pertaining to the original documents allegedly delivered in favour of the plaintiff i.e., allotment intimation, demand notice and challan, possession certificate, receipt given by the Assistant Commissioner, katha certificate, tax clearance certificate, notice-cum-challan and an endorsement issued by the City Corporation.

51. It is also the case of the plaintiff that when the plaintiff comes to know about an attempt was made to sell the very same property by the defendants, the paper publication was given in terms of Ex.P13 dated 27th May 1985. It is also an

admitted fact that the first defendant had filed the suit in O.S.No.3418/1982 against PW1 and later impleaded the plaintiff as second defendant. It is the contention of the plaintiff that under the sale agreement, possession was delivered and put up the construction and produced the bills for having spent the amount of Rs.50,000/- towards construction at Ex.P14 to P21 and also a letter submitted to the Sub-Registrar in terms of Ex.P22 and representation was given to the Corporation at Ex.P23 and got acknowledgment in terms of Ex.P24. It is also 41 the claim of the plaintiff that police complaint was given and in turn they had given an acknowledgement stating that it was a civil dispute in terms of Ex.P25. In spite of having knowledge of the fact that the possession of the property was with the plaintiff, the first defendant sold the very same property in favour of the second defendant in terms of sale deed at Ex.P26. The photographs are marked as Ex.P27 and P28 and negatives at Ex.P27(a) and P28(a). It is the evidence of the plaintiff that the first defendant was in financial difficulty and he was agreed to execute the sale deed after the expiry of the lease period and thereafter the plaintiff requested the first defendant to execute the sale deed but the first defendant did not come forward to do so.

52. The suit in O.S.No.3418/1982 was filed by the first defendant and an application for temporary injunction was dismissed in terms of Ex.P29. The plan which was applied before the Corporation seeking the permission for construction is marked as Ex.P30. The photographs are marked at Ex.P31 and P32. Having paid the charges for the photographs, receipt was produced at Ex.P33. For having given the copy of the sale 42 agreement to the Bangalore Development Authority is marked as Ex.P34 and Form No.9 is marked as Ex.P35. Paper cutting regarding the publication of the Court notice is marked as Ex.P36 and a copy of the complaint is marked as Ex.P40 and other documents with regard to the correspondence, order sheet in O.S.No.3418/1982 are marked at Ex.P41 to P54.

53. In the cross-examination, it is elicited that his wife and the first defendant are cousins and also his wife has four brothers and all are in Hubli. It is elicited that his brothers-in-law and Govindaraju had formed a firm under the name Karnataka Paints and Alloyed Company in the year 1963 but again says that he does not remember the year. It is also elicited that the first defendant had filed a suit in

O.S.No.3418/1982. Regarding payment of sale consideration is concerned, it is elicited that his wife is a house wife and he has to verify whether there are documents to show that on the date of the agreement, his wife had an amount of Rs.40,000/-. It is also elicited that during the course of his employment, he has not reported to his employer in respect of the sale agreement. It is elicited that his brother-in-law-Basavaraju purchased the 43 stamp paper for suit agreement and got it typed but he has not signed the said agreement. He admits that the witnesses of Ex.P2 came later. On the date of the sale agreement they were aware that it was only a sale-cum-lease agreement which was executed by the BDA. PW1 also admits that on the date of the agreement, the first defendant was doing business in Koppikar Road, Hubli. The first defendant was doing the business in paints, electrical, scooter scheme business and sites. The plaintiff admits that he had not issued any notice to the defendants calling upon them to execute the sale deed as per the agreement but he says that because the first defendant is his relative, he had not given the notice. He also did not enquire as to whether the first defendant has taken any sale deed from BDA after the expiry of the lease period. He admits that both the witnesses are from Bengaluru. It is suggested that the first defendant came to know about Ex.P1 only for the first time when the wife of the plaintiff filed a written statement in O.S.No.3418/1982. During the pendency of the suit, after the expiry of the lease period the plaintiff did not issue notice to the first defendant or filed any suit. It is suggested that they have stolen the title deeds from the house of the first defendant at the 44 time of settlement of the dispute between him and his brother. The same was denied. It is further suggested that the second defendant was not aware of the sale agreement and the same was denied. It is suggested that Ex.P2 is not executed by the first defendant and the same has been forged and the same has been denied.

54. The plaintiff was examined PW2 who is the attesting witness and in his evidence he reiterates the evidence of PW1 regarding the execution of the sale agreement and having paid the advance amount of Rs.40,000/- and at the time of attesting the document at Ex.P2 is concerned, one Gopala Reddy was also present and he also attested Ex.P2 and he was subjected to the cross-examination. In the cross-examination, he admits that he was having acquaintance with PW1 since PW1 was working as an Assistant Executive Engineer in PWD. It

is his evidence that PW1 requested him to come over to his brother-in-laws house and when he visited the said house he came to know about the said transaction. He admits that on 10th May 1982, he himself, PW1 and his friend Gopala Reddy had been to the house of brother-in-law of PW1. He cannot say who has signed first on 45 the agreement among himself and Gopala Reddy. He admits that during the year 1982, PW1 was working as Technical Assistant in PWD at Bengaluru. The agreement was signed in between 2 to 4 p.m. and he was not aware of the conversation taken place between the parties and both of them were sitting in the hall and conversation was took place in another room. It is suggested that he cannot say how the person in whose house he had been on that day became brother-in-law of PW1.

55. The other witness is PW3 who is the brother of the plaintiff and he also reiterates the evidence of PW1 and PW2 with regard to the execution of the sale agreement and payment of sale consideration. In his chief evidence he says that the transaction is taken place between the first defendant and the plaintiff in the house of the first defendant at Hubli and at that time, he was present in the said house and in fact, he himself brought the stamp paper on which suit document was executed and the first defendant was the resident of Hubli at that point of time. It is also his evidence that the plaintiff and her husband, his three brothers, the first defendant and the attestors of the agreement by name Damodhar and Gopal were present at the 46 time of agreement. He says that the first defendant has singed the suit agreement in his presence and also attesting witnesses signed the said document. He was subjected to the cross- examination. He also admits that he himself and his brothers along with the first defendant were running the business at Hubli and he cannot tell when the first defendant got retired from the partnership and he says that probably in the year 1980 the first defendant might have retired. He denies that there was a difference of opinion between him and other partners in the business. The plaintiff is a home manager having no individual income of her own and she might have received the money from her husband who was an engineer. The agreement took place between 2 to 4 p.m. and he cannot tell the exact time. Both the witnesses had come to the house of the first defendant on their own as they were aware of the address of the same. Those witnesses were not aware of the agreement at Ex.P2 till their arrival to the house

of the first defendant. It is suggested that the first defendant has not signed Ex.P2 in the presence of Damodhar and the same was denied. The signature at Ex.P2(a) is not the signature of the first defendant and the same is denied. 47

56. The first defendant who had appeared before the Trial Court by filing a written statement and filed an affidavit in chief reiterating the averments of written statement and not subjected for cross-examination, hence, the evidence of DW1 cannot be looked into and in the eye of law no evidence was placed on behalf of the first defendant. The second defendant who is the purchaser was examined her daughter as DW2. DW2 in her evidence reiterated the contents of the written statement filed by the second defendant that her mother had purchased the property for a sale consideration and possession was delivered on the date of the sale deed. It is contended that the sale agreement has been forged and the signature is not belongs to the first defendant and her mother is a bonafide purchaser of the suit schedule property. She was subjected to the cross-examination. In the cross-examination, she admits that she was a minor at the time of the sale transaction may be pursuing pre- university course. The sheds which she had referred could be seen from the photograph at Ex.P27. She further admits that she did not verify whether those two sheds were constructed by the first defendant. It is elicited that she did not know as to 48 suggest that at the time of execution of the sale deed, all the title deeds are with the plaintiff. She did not obtain a copy of the estimation got obtained by Govindaraj (1st defendant) for the application given to the Corporation for the licence. The first defendant did not disclose about the pendency of the suit in O.S.No.3418/1982 and also did not tell them anything about the orders passed on the interim application in the said suit. It is also elicited that they have not verified that in whose possession the suit schedule property was belongs to. It is elicited that without looking into the documents, she doesnt remember what address has been furnished by the first defendant in the said sale deed.

57. Having considered both the oral and documentary evidence available on record, it is clear that the document at Ex.P2 is a sale agreement and recitals also clear that only there was a lease-cum-sale agreement in favour of the first defendant. The very document at Ex.P2 discloses that the lease period was

subsisting and sale deed could be executed after the expiry of the lease period. The main contention of the plaintiffs counsel before this Court that when the first defendant who is the party 49 to Ex.P2 not subjected for cross-examination, his evidence cannot be looked into. No doubt, the evidence of DW1 cannot be looked into as no evidence is available in the eye of law before the Trial Court. No doubt, the first defendant took the defense in the written statement that the document is forged document. The counsel in support of his contention relied upon the judgment of the Apex Court referred supra in the case of VIDHYADHAR and in particular, in paragraph 17 the Apex Court has held that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and no dispute with regard to the settled principles of law that if the party does not appear, his evidence cannot be accepted. The Apex Court also in the case of TULSI AND OTHERS referred supra in paragraph 25 held that before the Courts below, if the appellant did not examine herself, the respondents categorically averred in the plaint that the mortgage amount was tendered to her as also to her husband. Having regard to the 50 peculiar facts and circumstances of the case, it is also held that she should have examined herself to deny such tender.

58. No doubt, the first defendant in his written statement has contended that no sale consideration was passed but he did not appear before the Trial Court and subject for cross-examination. The Apex Court in the case of PRAKASH CHANDRA in paragraph 17 held with regard to exercising the powers under Section 20 of the Specific Relief Act for exercising the discretion. The counsel also relied upon the judgment of the Apex Court in the case of CHENNADI JALAPATHI REDDY referred supra wherein it is held that the Court must be cautious while evaluating expert evidence, which is a weak type of evidence and not substantive in nature. It is a settled principle of law that when the defence has been raised by the party if he does not stepped into the witness box, his evidence cannot be accepted. In the case on hand, though the first defendant was denied the very execution of the document at Ex.P2, he did not subject for the cross-examination hence, his defence cannot be accepted as already referred in the judgment

referred supra. But the fact before the Court is that when the first defendant 51 disputed the very signature at Ex.P2, firstly, the burden is on the plaintiff to prove the execution of the sale agreement. No doubt, PW1 who is the husband of the plaintiff reiterated the averments of the plaint regarding execution of the sale agreement and also the receipt of sale consideration. But in the cross-examination he categorically admits that his wife is a house wife having no income and also he admits that he has to verify whether his wife had any money to pay the sale consideration. It is not his evidence that he has paid the sale consideration out of his income. He categorically admits that the very execution of the sale agreement is not reported to his employer since he was working in the PWD department. He also admits that the two attestors have come from Bengaluru and they have attested the said agreement. But the fact before the Court is that PW2 is also a contractor who was having acquaintance with PW1 and having taking the contract from 1977 known to him prior to the sale agreement. PW2 says that PW1 called him to his brother-in- laws house but not to the house of the first defendant. The other witness PW3 who is the brother of the plaintiff deposes that the sale agreement was taken place in the house of the first defendant itself. Hence, the evidence of PW2 and PW3 regarding 52 the place of execution of the sale agreement itself is contrary to each other. PW2 says that he was called to the house of PW1s brother-in-law and PW3 who is none other than the brother-in- law of PW1 says that the sale agreement was taken place in the house of the first defendant hence, it is very clear that the document of sale agreement had not taken place as contended by PW1 and PW2 as there are contrary evidence in respect of the very said document of sale agreement at Ex.P2 came into existence.

59. It is also to be noted that PW1 not claims that he made the payment of sale consideration but admitted that his wife is a house wife. But PW2 claims that plaintiffs husband may be given the amount to pay the sale consideration to his wife. Hence, there is a contra evidence with regard to the execution of the said document and also the payment of sale consideration. No doubt, the first defendant took the specific defence that he did not execute the sale agreement but not subjected for cross-examination and his evidence has to be eschewed and his defence cannot be accepted. But the fact is that firstly, the plaintiff has to prove

the execution of the sale 53 agreement and in view of the contra evidence of PW2 and PW3, the evidence of PW1 cannot be accepted with regard to the payment of sale consideration as PW1 admits that his wife is a house wife having no income but he says that he has to verify that whether his wife had any amount to pay the sale consideration but nothing is placed on record before the Court to prove that his wife had paid the sale consideration of Rs.40,000/- to pay the same to the first defendant. When the first defendant has not subjected to the cross-examination and this Court has already pointed out that his defence cannot be accepted as held by the Apex Court firstly, the burden is on the plaintiff to prove regarding the execution of the sale agreement and passing of the sale consideration and the same has not been proved by leading cogent evidence and the case of the plaintiff regarding very execution and payment of sale consideration is doubtful.

60. This Court would also like to go through the judgment relied by the defendants No.1 and 2 as referred supra in the case of MAYAWANTI VS. KAUSHALYA DEVI wherein the Apex Court held that there must be a valid and binding 54 contract between the parties in respect of which the parties should be consensus ad idem, the burden of proof on the plaintiff seeking the relief of specific performance and the opposite party may take any defence available in law. But in the case on hand, this Court has already found that there are contrary evidence of PW2 and PW3 with regard to the very execution of the sale agreement and hence, it can be held that the contract between the parties is not on the consensus ad idem and the plaintiff had failed to prove that it is a valid contract and in a case of specific performance, the first defendant may take any defence available under law. The Apex Court also held that in a case of agreement of sale, while granting the relief of specific performance of contract, it is a duty of the Court to see that litigation has not used as an instrument of oppression to have an unfair advantage to the plaintiff. But in the case on hand, it has to be noted that PW2 is a contractor with whom PW1 was having acquaintance in connection with the contract work and apart from that he is not a local witness but he claims that he went to Hubli in connection with PWD work on that day but no material is placed before the Court to prove the said fact. When there is an acquaintance 55 between PW1 and PW2, it is natural that PW2 deposes in support of PW1 since he used to get PWD work from PW1.

61. It is also important to note that PW1 categorically admit that the brothers of the plaintiff and the first defendant are relatives and they were doing partnership business together and the said business was in existence. But it is emerged that the relationship was strained in 1980 till then they were doing business together from the year 1963 as admitted. It is also the contention of the first defendant that the documents were taken from the brief case of the first defendant when they were cordial but in the cross examination of P.W.1 it is suggested that while settling the dispute between the plaintiffs brothers and the first defendant, the documents are taken from the house of the first defendant. The same is contrary to each other. No doubt, in the agreement, it is specifically mentioned that the original documents are given at the time of the agreement. It is also not in dispute that the original documents are in custody of the plaintiff which are marked as Exhibit P series. It is also important to note that the earlier suit was filed by the first defendant in O.S.No.3418/1982. The Trial Court also dismissed 56 the application filed under Order XXXIX Rules 1 and 2 of CPC for relief of temporary injunction taking note that the original documents are in the custody of the defendant, however, passed an order to maintain the status quo. The defence of the first defendant is that the original documents are taken from the brief case but already I have pointed out that in the cross- examination, contra suggestion was made that the same are taken from the house during settlement time. In view of the relationship between the parties, it appears that some money transactions are taken place and the original documents are delved but no accurate material is placed before the Court to comes to a definite conclusion regarding delving of original documents. Admittedly, the suit was dismissed in the year 1986 but the fact is that this Court has already comes to the conclusion that PW2 and PW3 have given the contrary evidence with regard to the very execution of the document and both of them have stated different place for entering into an agreement and hence, it is clear that both were not present at the time of execution of the document at Ex.P2. 57

62. It is also the claim of the plaintiff that the advance sale consideration of Rs.40,000/- was paid in presence of the witnesses, though PW2 claims that amount was paid in his presence but his evidence is treated as contrary to the evidence of PW3. PW3 is not the other attesting witness but he is the brother of

the plaintiff and he also claims that he only purchased the stamp paper. On perusal of the document, no doubt, in his name only the stamp paper was purchased. But he gives his evidence that the sale agreement came into existence in the house of the first defendant itself. As already pointed out that PW2 and PW3 are given the contra evidence, hence, the very execution of the document itself is doubtful. The counsel appearing for the second defendant also relied upon the judgment of this Court in the case of Y.R.MAHADEV referred supra and brought to the notice of this Court to paragraphs 19, 20, 21 with regard to Rule 14(2)(a)(iii) of the Bangalore Development Authority (Allotment of Sites) Rules, 1984 (for short BDA Rules of 1984). In the case on hand, this Court noted that there was a lease-cum-sale agreement in favour of the first defendant and during pendency of lease-cum-sale agreement, there cannot be any alienation and there is a 58 prohibition because only the possession and permission was given to put up the construction and not to create any third party right by making any alienation. No doubt, on perusal of Ex.P2 it is specific that the very execution of the sale deed was postponed since there was a lease-cum-sale agreement. But the fact is that the very execution of Ex.P2 is not proved and the said document is executed under suspicious circumstances. This Court with regard to Rule 14(2) of the BDA Rules of 1984 in the judgment referred below held that if the sale agreement is proved, BDA can collect the fine amount and execute the sale deed and the same will not come in the way of having sale deed but the fact is that Section 43 of the Transfer of Property Act feeding of title comes to the aid of a party, the same is held in the case of S.ANANDA SHETTY VS. MEHABOOB SHERIEFF AND OTHERS reported in 2019(6) KAR. L. J.

66 and hence, the judgment of Y.R.MAHADEV will not comes to aid of the case of the defendants.

63. It is also settled law that the Court can grant a specific relief if the execution of the sale agreement is proved and no hardship is caused to the defendants. But in the case on 59 hand, the very Ex.P2 came into existence under suspicious circumstances and witnesses who have examined as PW2 and PW3 are also interested witnesses of P.W.1 and given contrary evidence regarding the place of execution of the sale agreement. It is also important to note that while granting a

decree under the Specific Relief Act, the plaintiff always be ready and willing to perform her part of contract under Section 16 (c) of the Specific Relief Act. In the case on hand, it is emerged in the evidence that he had not issued any notice till the filing of the suit by the plaintiff. Apart from that, he did not verify whether there is any absolute sale deed executed in favour of the defendant by BDA. Hence, it is clear that he was not ready and willing to have the sale deed always and if Section 16(c) is not complied, the plaintiff is not entitled for the relief of specific performance.

64. Apart from the fact that this Court had come to the conclusion that there is no any legal contract between the plaintiff and the first defendant, no doubt, the Trial Court had come to the conclusion that the plaintiff has not proved the document by comparing the signature of the plaintiff and the defendant and it is held that the plaintiff did not send the 60 disputed document to the forensic/scientific expert and the said approach of the Trial Court is erroneous. A person who asserts that the document is concocted, has to take steps to send the document to the handwriting expert and the plaintiff cannot prove the same by sending the document and the said approach of the Trail Court is erroneous. Burden is on the person who asserts under Sections 100 and 101 of the Indian Evidence Act to prove the defence and the defendant ought to have sent the document for handwriting expert. It is also important to note that the first defendant was not subjected to the cross-examination to prove his defence and concoction of document. In the case on hand, under the circumstances, the Trial Court ought not to have exercised the powers under Section 73 of the Indian Evidence Act comparing the signature when the defendant himself did not appear and denied his signature before the Court and the Court also cannot act like an expert. No doubt, the counsel appearing for the second respondent relied upon the judgment of AJIT SAVANT MAJAGAVI referred supra, wherein the Apex Court has held that the Court can compare the signature and also discuss with regard to the terms of comparing the signature. It is also held that the Court should not normally ⁶¹ take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has no power to compare the disputed signatures with the admitted signatures, as this power is

clearly available under Section 73 of the Evidence Act. But the fact is that in the case on hand, the first defendant himself did not appear before the Trial Court and disputes the signature though he contended that his signature was forged and the document is concocted, the Court cannot act as an expert and compare the signature.

65. The first defendant's counsel also in his argument regarding readiness and willingness relied upon the judgment of SAWASWATHI AMMAL which has been referred supra and mere having the money itself is not enough and the Court has to look into the conduct of the parties while exercising the discretion. In the case on hand, I have already pointed out that the plaintiff has not given any notice prior to filing of the suit and also not enquired whether the first defendant made an effort to verify whether the defendant had obtained an absolute sale deed 62 from BDA. When the Court is exercising the powers under Section 20 of the Specific Relief Act, it should see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff when the Court is bound to grant specific performance merely because it is lawful to do so.

66. On appreciation of both oral and documentary evidence, this Court comes to the conclusion that first of all, the very sale agreement has not been proved and there is contra evidence with regard to the execution of Ex.P2 and no material is placed on record for having paid the sale consideration under Ex.P2 and the evidence of PW1 also not supports the case of the plaintiff for having paid the amount whether he has paid the amount to his wife to pass on the sale consideration, no material is available. Having considered all these materials available on record, no doubt the Court can draw an adverse inference when the first defendant did not appear before the Court and subject for cross-examination regarding execution of document and also to prove the defence that the document has been concocted and forged. But the very case of the plaintiff has not been proved by placing substantial material for the execution of Ex.P2 and also 63 having paid the advance sale consideration and hence, it is not a fit case to reverse the finding of the Trial Court in coming to the conclusion that the plaintiff has proved the very execution of Ex.P2 and hence, I answer the Point Nos. (i) to (iii) and (v) as Negative. Points No.(iv) and (vi):

67. It is the contention of the plaintiff that on the date of the sale agreement, possession was delivered and in pursuance of the delivery of possession, he had constructed the shed in the suit schedule property. In support of his contention he has also relied upon several documents for having entrusted the work to the contractor and having paid the amount towards the construction charges. The bills are also produced before the Court and it is the contention that the application is given to BDA seeking permission. It is admitted that no such permission was given but plan was got marked before the Court. It is the contention of the plaintiff that when the plan is not approved within the time, it is deemed sanction. In order to prove the factum of construction of the building is concerned, except producing the document, plaintiff did not got examine the person 64 who constructed the shed having received the money and the bills are also not produced for having paid the same. It is the contention of the defendant that he had constructed the shed and DW2 also took the contention that the first defendant himself has constructed a building, neither the first defendant nor the second defendant have produced any documents for having constructed the building. But, not doubt, the shops are in existence as per Ex.P27 and P27(a). DW2 categorically admits that the sheds are in existence in the suit schedule property. When this Court has come to the conclusion that the very document itself is not proved, the question of coming to the conclusion that the possession was delivered under Ex.P2 cannot be accepted. No doubt, DW2 who is the daughter of the second defendant categorically admits that they have not paid the tax subsequent to the purchase of the property under the sale deed. It also appears that the second defendant subsequent to the purchase not developed the property and volunteers that the same is kept vacant. In view of coming to the conclusion that the sale agreement has not been proved and the question of whether the second defendant is the bonafide purchaser or not does not arise. When this Court comes to the conclusion that 65 there is no existence of legal document at Ex.P2, the very contention of the plaintiff that the Court below has committed an error in coming to the conclusion that the plaintiff is not in possession of the suit schedule property in terms of the sale agreement also cannot be accepted. It appears that the very transaction itself is shrouded with suspicious circumstances and this Court also made it clear that it is not a fit case to exercise the discretion under Section 20 of

the Specific Relief Act to grant the relief as sought having taken note of both the oral and documentary evidence available on record.

68. Having considered the material available on record, I am of the opinion that the Court below has not committed any error in granting the relief of permanent injunction in favour of the second defendant allowing the suit filed by him in O.S.No.2934/1987 as there is a sale deed in favour of the second defendant and possession was delivered through the registered sale deed, this Court cannot examine the validity of the sale deed of the second defendant. In view of the conclusion arrived that no legal document at Ex.P2 came into existence with consensus ad idem and when there is no legal document 66 available before the Court and when there is no legal contract between the parties, the question of granting the relief in favour of the plaintiff and reversing the finding of the Trial Court in the suit filed by the defendant does not arise and hence, the Points No.(iv) and (vi) are also answered as negative.

69. In view of the discussions made above, I pass the following:

ORDER

Both the appeals are dismissed. No order as to costs. Sd/- JUDGE ST/SN

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