

(2004) 12 AP CK 0092
In the Andhra Pradesh High Court
Case No : AS No's. 209 and 353 of 1994

Gomi Bai and Others

APPELLANT

Vs

Uma Rastogi and Another

RESPONDENT

Date of Decision : 29-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, Order 7 Rule 2, Order 8 Rule 5(3)
Evidence Act, 1872 — Section 102
Specific Relief Act, 1963 — Section 15, 19, 20, 22(1)
Transfer of Property Act, 1882 — Section 54

Citation : (2005) 2 ALD 631

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : K. Subrahmanya Reddy, for C.V. Rajeeva Reddy, in AS No. 209 of 1994, Vilas V. Afzulpurkar, in AS No. 353 of 1994, for the Appellant; K. Subrahmanya Reddy, for C.V. Rajeeva Reddy, for Respondent Nos. 1 to 4 and 6 to 8 in AS No. 353 of 1994, Vilas V. Afzulpurkar, in AS No. 209 of 2004, B. Sudershan Reddy, in AS No. 209 of 1994 and M. Ramakrishna Reddy, in AS No. 353 of 1994, for the Respondent

Judgement

V.V.S. Rao, J.

I. Introduction

1. The two appeals arise out of the common judgment and decree dated 19.11.1993, in O.S. No. 209 of 1983 on the file of the Court of Principal Subordinate Judge, Ranga Reddy District, at Saroornagar. These appeals were heard together and are being disposed of by this common judgment.

2. Smt. Uma Rastogi (hereafter called, the appellant) filed the suit being O.S.No. 209 of 1983 for specific performance of agreement of sale of immovable property entered into on 2.3.1971 with Defendants 1 to 4 (hereafter called, the respondents). The Trial Court held in her favour on the question of validity of oral agreement of sale. It, however, granted alternative relief of compensation as

prayed by the appellant. Aggrieved by the judgment and decree in holding that the appellant proved the agreement and also awarding compensation to her, Defendants 1, 3, 4, 6 and 8 filed A.S. No. 209 of 1994. Aggrieved by judgment and decree in awarding only compensation and denying decree for specific performance of agreement, plaintiff filed A.S. No. 353 of 1994. The suit schedule land consists of agricultural land admeasuring Acs. 10.35 guntas in S.No. 19 of Khajaguda Village, Rajendranagar Mandal, Ranga Reddy District which de facto is part of Hyderabad. For the sake of convenience, parties are referred to by their status in A.S.No. 353 of 1994.

II. Pleadings of the parties in brief (i) The case of the appellant

3. The appellant in her plaint pleaded that her husband Sushilchandra Rastogi entered into oral agreement of sale of suit schedule property with Defendants 1 to 3 on 2.3.1971 for a total consideration of Rs. 10,000/-. The appellant also paid a sum of Rs. 3,000/- whereafter she was put in possession of the suit schedule land. The balance of Rs. 7,000/- paid by the appellant to respondents in the year 1972. It was agreed between the parties that the vendors would execute sale deeds in favour of Mr. Rastogi or his nominee after obtaining requisite permission from revenue authorities and authorities under the Urban Land (Ceiling and Regulation) Act, 1976 (ULC Act). The suit schedule land is adjacent to lands owned by plaintiff where the appellant has been carrying on agricultural operations by raising rain-fed crops. The appellant dug three borewells in the suit land without any result and therefore, she dug a open well up to 60 feet depth in 1972 and constructed a pumphouse and servant quarters. Besides this, she dug 700 pits of 4" x 4" in an area of Acs.4.00 for raising grape plantation duly providing water channels from the well and raised fencing with stone pillars and barbed wire. The appellant also provided pipelines to take water from the well in the suit land to the adjacent land owned by the appellant where she was growing vegetables from 1973 onwards. Electrical connection was also obtained for motor pump set. The appellant spent an amount of Rs. 20,000/-for said development of land.

4. In 1972 husband of plaintiff nominated M/s.Bralco Metal Industries Private Limited to obtain sale deed as he has association with the said company and the land was intended to be developed jointly. After receiving balance of Rs. 7,000/- in May, 1972, Defendants 1 to 4 got prepared a draft sale deed in favour of nominee of the appellant. But the same could not be registered in view of the provisions of A.P. Agricultural Lands (Prohibition of Alienation) Ordinance, 1972. The defendants assured that the sale transaction would be completed after getting clearance from the Government. Later A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 (Land Reforms Act) came into force with effect from 1.1.1973 followed by enactment of ULC Act. Therefore, registration of sale deed got delayed. But, the appellant continued agricultural operations. As the sale deed could not be registered, M/s.Bralco Metal Industries withdrew from the transaction and Mr. Rasthogi nominated appellant to obtain sale deed. Hence, she

filed affidavit before Urban Land Ceiling (ULC) authorities.

5. The Respondents 1 to 3 obtained permission dated 17.2.1982 from ULC authorities, but later developed evil intention to resile from contract and started interfering with the possession of the plaintiff. The appellant received notice from Special Officer and Competent Authority on 31.3.1982 in connection with the proceedings relating to sanction of permission to respondents to alienate suit schedule lands to others. Therefore, the appellant, having paid sale consideration, and has been always ready and willing to perform her part of contract. She also stated that she undertakes to pay once again a sum of Rs. 10,000/- if the Court comes to the conclusion that the sale consideration has not been paid. While praying for a decree for specific performance of oral agreement of sale, dated 2.3.1971, the appellant alternatively prayed the Trial Court to pass decree in a sum of Rs. 70,000/- with interest at 12% per annum.

(ii) Defence of the Defendants 1 to 4

6. Fourth respondent herein, who is Defendant No. 4, is General Power of Attorney (GPA) holder of Respondents 1 to 3. He filed written statement on his behalf. He denied the oral agreement between Mr. Rastogi and Defendants 1 to 4 and also denied the receipt of sale consideration of Rs. 10,000/-. It is however averred that suit schedule land was sold to fifth respondent under sale deeds dated 8.11.1982 and 9.11.1982 and that till the said sale, the land was never cultivated at any time earlier. All other allegations made by appellant that she dug bore wells and a well, dug pits for laying grape plants, provided water channels, fenced the area of fencing and constructed servant quarters and pump house are denied. The respondents also denied the allegation that appellant spent Rs. 65,000/- for the development of land and that she was in possession of the land. They further asserted that they applied and got electricity connection in March 1981. The GPA apart from filing written statement on his behalf, also filed a detailed written statement on behalf of Defendants I to 3 making similar allegations.

7. The suit was filed originally on the file of the Court of Munsif Magistrate (West and South), Ranga Reddy District, being O.S. No. 45 of 1982. When the suit came up for trial, learned Munsif Magistrate returned the plaint for want of pecuniary jurisdiction. Thereafter the appellant presented the suit before the Court of Principal Subordinate Judge on 19.11.1982. While the matter was pending before the said Court the appellant amended plaint seeking alternative relief of damages, and impleading subsequent purchaser of the land, fifth respondent herein, as defendant by reason of orders of the learned Judge in I.A. No. 301 of 1983 dated 8.9.1983. When the suit was pending second defendant/second respondent died and his legal representatives were brought on record as Defendants 6 to 8.

(iii) Case of fifth respondent

8. Fifth respondent, Mrs. Harvinder Kaur, filed a separate written statement

opposing the suit. In her written statement she stated that when she purchased the property and got sale deeds there was no suit pending. She entered into agreement for purchase of suit schedule property on 13.3.1982 for a sum of Rs. 90,000/- and paid Rs. 24,000/- as advance. Respondents 1 to 4 executed a notarized agreement and made an application to ULC authorities stating that the land being agricultural land the provisions of ULC Act are not attracted. The Competent Authority issued a notice vide Memo dated 20.3.1982 and conducted enquiry on 31.3.1982. The appellant who appeared before the Competent Authority was aware of the purchase of the land by fifth respondent and therefore she is precluded from questioning the transaction in the suit. The fifth defendant also alleged that she is in physical possession of the land, that she has fenced the land, installed electrical motor to the well situated in suit land and has been raising crops like wheat, tomatoes, beans, jawar. She also alleged that she planted 5,000 saplings of eucalyptus in the suit land. She is bona fide purchaser for a valuable consideration and that suit is barred by limitation, which is liable to be dismissed.

III. Trial Court judgment

(i) Issues before Trial Court

9. In the light of the pleadings of the parties, the learned Subordinate Judge, who tried the suit framed the following issues.

1. Whether the alleged agreement of sale is true and correct?
2. If so, whether the plaintiff was put in possession of suit land in part performance of alleged agreement?
3. Whether Court fee paid is sufficient?
4. Whether the suit is barred by the period of limitation?
5. Whether the plaintiff is entitled to the specific performance of agreement of sale as prayed?
6. If not, whether the plaintiff is entitled to Rs. 90,000/- with interest as claimed?
7. To what relief?

The appellant examined herself as P.W.1, her husband as P.W.2 besides examining P.Ws.3 to 5. She marked Exs.A.1 to A.32, including revenue receipts issued by pathwari as Exs.A.8 to A.18 and photographs Exs.A.22 to A.26. On behalf of Defendants 1 to 3, D.Ws 1 and 2 were examined and fifth defendant examined her husband R.P. Singh as D.W.3. Defendants marked Exs.B.1 to B.43. During the course of the trial the Trial Court also marked Exs.X.1 to X.7 from the file of the Office of Special Officer and Competent Authority.

(ii) Findings of the Trial Court

10. On consideration of the oral and documentary evidence, the Trial Court

recorded a finding that the oral agreement pleaded by the appellant is true and valid and that sale consideration of Rs. 10,000/- was paid to Respondents 1 to 3 as alleged. It was also found by the Trial Judge that appellant is not a party to the agreement and she is nominee of her husband and that appellant was put in possession of the land pursuant to oral agreement of sale. Dealing with the case of fifth respondent, learned Subordinate Judge recorded a finding that fifth defendant is not bona fide purchaser for value and that sale deeds executed by Respondents 1 to 4 being Exs.B.20 to B.22 pursuant to agreement of sale Ex.B.18 are hit by prior agreement of sale and that there is no proper delivery of possession to fifth defendant.

11. The Trial Court, however, thought it fit by awarding compensation as damages to the appellant equities can be worked out to both parties and the interest of both parties can be protected. Accordingly, having regard to the evidence of appellant as P.W.1, the Court below awarded a sum of Rs. 23,900/- with interest at 12% per annum from the date of suit till the date of realization with costs.

IV. Submissions

(i) Submissions of learned Counsel for appellant

12. Sri Vilas Afzulpurkar, learned Counsel for the appellant in A.S.No. 353 of 1994 and the learned Counsel for respondent in A.S. No. 209 of 1994, Ms. Uma Rastogi, submits that the appellant filed the suit as "representative of interest" of her husband and therefore suit by her as nominee is maintainable as per Section 15 of the Specific Relief Act, 1963. The respondents/ defendants did not deny the factum of nomination and the lower Court having found oral agreement between Defendants 1 to 3 and Mr. Rastogi as valid and true ought to have decreed the enforcement of specific performance of oral contract of sale. According to the learned Counsel, defendants/vendors have not effectively rebutted the case of the appellant and as pleaded in the written statement have not even spoken to by one of the defendants especially when D.W.1 admittedly is not personally aware whether there was agreement between appellant and Defendants 1 to 3. He would also submit that respondent/Defendants 1 to 4, themselves recognised the appellant as a nominee of original vendee, acted upon such recognition by applying to various authorities for necessary permission under ULC Act and therefore they cannot resile from the oral agreement. The appellant was put in possession by reason of which she was in possession from 2.3.1971 to 12.3.1982 when she was forcibly evicted by fifth respondent. There was no delay on the part of the appellant and fifth defendant not being a bona fide purchaser and having notice of earlier contract, cannot be extended the benefit of equity. Therefore, he would urge that the Trial Court committed error in granting alternative relief of compensation without granting decree for specific performance. Learned Counsel has also placed reliance on various decisions of High Courts as well as Supreme Court, passage from "Fry" on "Specific Performance" and "Law of Contract" by "Pollock and Mulla".

(ii) Submissions on behalf of Defendants 1 to 4

13. Learned Senior Counsel, Sri K. Subrahmanya Reddy appearing for Defendants 1 to 4 and Defendants 6 to 8 argued that there is no oral agreement and oral sale and that there is nothing to show that there was a valid nomination and plaintiff not being a party to the alleged agreement cannot file the suit. Therefore, the suit is not maintainable. There is no privity of contract between appellant and owners of the land which can be enforced in a suit for specific performance. He would urge that alleged oral agreement was between husband of the appellant and owners of the land. The husband nominated M/s.Bralco Metal Industries as his nominee and therefore for second time vendee cannot exercise his right to nominate the appellant for obtaining sale deed. Lastly, he would submit that relief of specific performance being discretionary, the Court must decline to grant such decree having regard to long delay from the date of alleged oral agreement of sale and disposal of the suit. According to Senior Counsel, the subsequent events are relevant in exercise of discretion u/s 20 of the Specific Relief Act. Learned Senior Counsel has drawn support from various authorities he cited during his arguments.

(iii) Submissions on behalf of fifth respondent

14. Fifth respondent is subsequent purchaser of suit schedule land. At one point of time a subsequent purchaser can persuade the Court not to enforce specific performance of contract of sale if such subsequent transferee purchased the property bona fide for true value and without notice of prior contract. Subsequent purchaser could only take defense on those lines and it was not permissible for such subsequent transferee to raise question of validity of the agreement of sale and other related issues. In Jugraj Singh and another Vs. Labh Singh and others, , the Supreme Court laid down that the subsequent purchaser can only plead defense u/s 19(b) of the Specific Relief Act and cannot challenge the agreement. The relevant observations are as under:

That plea is specifically available to the vendor/defendant. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the plaintiff. They are bona fide purchasers for valuable consideration. Though they are necessary parties to the suit, since any decree obtained by the plaintiff would be binding on the subsequent purchasers, the plea that the plaintiff must always be ready and willing to perform his part of the contract must be available only to the vendor or his legal representatives, but not to the subsequent purchasers. The High Court, therefore, was right in rejecting the petitioners' contention and rightly did not accept the plea. We do not find any ground warranting interference.

15. In subsequent judgment three-Judge Bench of the Supreme Court in Ram Awadh (Dead) by Lrs. and Others Vs. Achhaibar Dubey and Another, , considered the question of grounds available to subsequent purchaser and while overruling

the decision of the two-Judge Bench of the Supreme Court in Jugraj Singh v. Raj Singh (*supra*) laid down as under:

The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof, A Court may not, therefore grant to a plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one defendant and not to another. It is open to any defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh case is erroneous.

16. Therefore, it may be taken as well settled that subsequent purchaser is entitled in law to raise all grounds on questions of fact as well as law. Taking strength and sustenance from the subsequent judgment of the Supreme Court on this question, learned Senior Counsel for fifth respondent Sri K. Ramakrishna Reddy made the submissions. He argued as follows. The appellant/plaintiff is not a party to the contract and therefore she cannot file a suit for breach of contract as per Section 4 read with Section 15 of the Specific Relief Act. There is no agreement between appellant and respondents and appellant failed to prove oral agreement between her husband and vendors. In case of oral contract terms of such contract are to be set down in the plaint. The appellant has not complied with the requirement, nor did she comply with the requirements as per Form Nos. 47 and 48 of First Schedule of Code of Civil Procedure, 1908 (CPC) and that the appellant failed to issue any notice of demand to vendors before filing suit. Therefore, the suit is liable to be dismissed. The appellant did not prove existence of oral contract by bringing in valid evidence as required under law. There are many inconsistencies in the pleadings of the appellant and her evidence and that of her husband as P.Ws.1 and 2 is not trustworthy. The evidence of others they brought as P.Ws.3 to 5, is mere hearsay evidence and does not in any manner support the evidence of P.Ws.1 and 2 who are vitally interested in the case. In the absence of any proof of existence of oral agreement suit itself is not maintainable and is liable to be dismissed. Fifth defendant has properly pleaded and proved that she is a bona fide purchaser for value without notice of earlier agreement. The appellant has not even pleaded in the plaint after impleading fifth defendant alleging that fifth defendant is not a bona fide purchaser and therefore mere non-advertence of the same in the written statement of the fifth defendant is not fatal to her case. The fifth defendant under agreement of sale Ex.B.18 got sale deeds registered under Exs.B.20 to B.22 on which date the suit was not pending and therefore in case of oral agreement it should always be presumed that subsequent purchaser has no notice of agreement in respect of which there was no litigation pending. The possession of the appellant as alleged has not been proved. Alleged admissions

extracted from D.W.3, husband of fifth respondent, cannot be looked into in the absence of any pleadings by the parties. Therefore, specific performance of oral agreement should be denied to the appellant. The learned Senior Counsel would also urge that appeal would not lie against mere findings and therefore it is permissible for the respondents to raise all grounds that were raised before the Trial Court and challenge any findings which are against them. Lastly, he would urge that the discretion in favour of the appellant ought not to be exercised because of inconsistent stand she has taken in pleadings and evidence.

V. Points for determination before this Court

- i. Whether the oral agreement of sale pleaded by the appellant is true and valid?
- ii. Whether appellant has proved the oral agreement of sale as pleaded and whether there is privity of contract between appellant and Respondents 1 to 4?
- iii. Whether fifth respondent is not a bona fide purchaser for value without notice of the prior contract of sale?
- iv. Whether the appellant is entitled for decree of specific performance of agreement of sale?
- v. Whether the appellant is entitled for a decree for money towards damages and refund of money allegedly paid by her?

VI. In Re Points (i) and (ii)

(i) Whether the oral agreement of sale pleaded by the appellant is true and valid? and,

(ii) Whether appellant has proved the oral agreement of sale as pleaded and whether there is privity of contract between appellant and Respondents 1 to 4?

18. The existence of binding agreement of sale between plaintiff and vendors is seriously disputed. Heavy burden therefore lies on the plaintiff that vendors executed agreement of sale on settled terms with her or that she is the nominee of her husband to get the sale deed registered in her favour. Therefore, it is necessary to notice case of appellant as pleaded in the plaint. The appellant straightaway filed suit without issuing notice of demand for registered sale deed. Therefore, pleadings in the plaint are to be analysed to notice the specific case of the appellant. In Paragraph 2 of the plaint the appellant alleged as under:

2. The plaintiff submits that the Defendants 1 to 3 are the owners of agricultural land measuring Ac. 10.32 guntas, in Survey No. 19 situated in the village of Khajaguda, Rajendra Nagar Taluk, Ranga Reddy District, hereinafter called the suit schedule property. The late husband of the 1st defendant and Defendants 2 and 3 have entered into an oral agreement of the sale with the plaintiff's husband agreeing to sell the suit schedule property to him or to his nominee for a total consideration of Rs. 10,000/- (Rupees ten thousand only) on 2nd March, 1971. In pursuance of the said agreement the late husband of the 1st defendant

and Defendants 2 and 3 received a sum of Rs. 3,000/- in cash from the plaintiff and put the plaintiff in possession of the suit schedule property on the same day. It was agreed between the parties that the defendants had to obtain necessary and requisite permission from the revenue and ceiling authorities for completing the sale transactions and register the regular sale deed in favour of the plaintiff or her nominee or nominees.

19. The appellant amended the plaint by inserting Paragraphs 5(a), 6(a), 8(a). In Paragraph 8(a) she asked for alternative relief of return of a sum of Rs. 10,000/- allegedly paid towards sale consideration and for damages. In Paragraph 5(a) she pleaded nomination by original vendee who is none other than her husband P.W.2. Her case as disclosed in Paragraph 5(a) is as under:

5(a) The plaintiff submits that originally, it is the husband of the plaintiff who had entered into the agreement of the sale with the late husband of the first defendant and the Defendants 2 and 3 on 2.3.1971. He was entitled to obtain the sale deed in his name or in the name of his nominee. In the year 1972 he had nominated M/s.Bralco Metal Industries Pvt. Ltd., to obtain the sale deed as he had associations with the said company and the land was intended to be developed jointly with their efforts. However, since the sale deed was not executed as contemplated in the year 1972, as per the draft sale deed prepared, the said company withdrew its intention to purchase the suit property and therefore, the husband of the plaintiff nominated this plaintiff to obtain the sale deed relating to the suit property. It was for this reason that at the time when the permission under the Urban Land (Ceiling and Regulation) Act, was sought, this plaintiff had only given the affidavit giving the details as to the agreement of sale relating to the suit property. The plaintiff has therefore, as a nominee of her husband stepped into the rights of her husband with respect to the agreement of sale and therefore, she is entitled to file this suit to claim a specific performance of the contract.

20. The above two paragraphs reveal the following, (a) Husband of first respondent and Respondents 2 and 3 who are owners of suit schedule land entered into agreement of sale with husband of the appellant agreeing to sell the land to vendee or his nominee for a total consideration of Rs. 10,000/- on 2.3.1971; (b) Pursuant to such agreement the vendors received a sum of Rs. 3,000/- in cash from the appellant and put the appellant in possession of the suit schedule property; (c) The vendors agreed to execute registered sale deed in favour of the appellant or her nominee after obtaining necessary permission from revenue and ULC authorities; (d) It is husband of appellant who entered into agreement on 2.3.1971 and was entitled to obtain sale deed in his name or in the name of his nominee. In 1972 the husband of appellant nominated M/s.Bralco Metal Industries Limited to obtain sale deed, but the same could not be executed as said company withdrew its intention to purchase the property; (e) The husband of the appellant therefore nominated appellant to obtain sale deed. The appellant as nominee of her husband stepped into the rights of her husband

with respect to agreement of sale and ownership filed suit for specific performance of contract.

21. In the pleadings it is also urged that the respondents got prepared draft sale deed in favour of the nominee of the appellant (See Para 4 of the plaint) in May 1972 and that the said draft was prepared in the handwriting of third defendant. The same, however, could not be executed in view of changes in law. The appellant also alleged that she alone paid entire sale consideration of Rs. 10,000/-and though she was ready and willing to perform her part of contract, the vendors postponed the execution of sale deed in her favour and shown disinclination to complete transaction and started negotiating with third parties. When she received notice to that effect from ULC authorities, she filed suit.

22. In a suit for specific performance, plaintiff has to properly plead and prove existence of contract, the terms of contract and other requirements of law. The terms of the contract should be terms which are settled between plaintiff and defendant and they should not be vague or inconsistent. In the case of oral contract, the terms of the contract assume more importance and therefore it would be proper for the plaintiff to set out all the terms of such contract in the plaint itself. In the absence of such terms, especially in the cases of oral contract, it would not be possible for the parties to the suit as well as the Court to appreciate rival contentions. Indeed, as per Form Nos. 47 and 48 of First Schedule to CPC, in suit for specific performance plaintiff has not only aver that he/she is ready and willing to perform his/her part of contract, but he/she made demand on the vendors to complete vendors part of the contract. A reference may be made to Ouseph Varghese Vs. Joseph Aley and Others, , Abdul Khader Rowther v. Sara Bai, 1989(43) ELT797(SC) , and Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, .

23. In Ouseph Varghese v. Joseph Aley (supra), the Trial Court decreed the suit for specific performance. But the High Court disbelieved the oral agreement, but granted decree for enforcement of specific performance in respect of one item. In the appeal by plaintiff before Supreme Court it was pleaded by defendants that the oral agreement is not proved as pleaded. The Apex Court observed that the burden of proving existence of agreement is on the plaintiff and in the case of oral agreement the task of the plaintiff is difficult Considering the earlier decision in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another, , the Supreme Court laid down that in a suit for specific performance it is incumbent on the plaintiff to not only set out agreement in all details but must also plead that vendee had applied to vendor to perform the agreement. In Paragraph 9 of the judgment (SCC) it was laid down as under:

... It may be noted that the agreement pleaded by the defendant is wholly different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not at any stage accept the agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff is said to have been entered into at the time of the execution of Ex.P.1 whereas the agreement

put forward by the defendant is one that is said to have been arrived at just before the filing of the suit. The two are totally different agreements. The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code. In a suit for specific performance, it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Pt. Prem Raj v. D.L.F. Housing and Construction (P) Ltd* (supra) that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation, the suit is not maintainable.

24. In *Abdul Khadir Rowther v. P.K. Sara Bai* (supra), after referring to *Ouseph Varghese v. Joseph Aley* (supra), the Supreme Court laid down as under:

... While it was the definite case of the plaintiff that the documents in question passed neither possession nor title from the plaintiff to the defendant and no consideration was paid thereunder, the Trial Court rejected that contention and accepted the contention of the defendant that possession and title passed under the documents and the stipulated consideration had been fully paid to the plaintiff. These findings were not challenged by the plaintiff in answer to the defendants' appeal in the High Court. His sole contention in defence of the impugned judgment was that the Trial Court rightly held that the plaintiff was entitled to a decree for specific performance of the covenant for reconveyance. It is thus clear that this is a case where the plaintiff seeks specific performance of a contract stated to be evidenced by an allegedly sham document which did not come into effect. His plaint does not contain the requisite pleadings necessary to obtain a decree for specific performance. This equitable remedy recognised by the Specific Relief Act cannot be had on the basis of such pleadings and evidence.

25. In *Manjunath Anandappa v. Tammanasa* (supra) adverting to Form Nos. 47 ad 48 of first schedule to CPC it was observed :

Forms 47 and 48 of the Appendix A of the CPC prescribe the manner in which such averments are required to be made by the plaintiff. Indisputedly, the plaintiff has not made any averment to that effect. He, as noticed hereinbefore, merely contended that he called upon Defendant No. 2 to bring Defendant No. 1 to execute a registered sale deed. Apart from the fact that the date of the purported demand has not been disclosed, admittedly no such demand was made upon Defendant No. 1. We may notice, at this juncture, that the plaintiff in his evidence admitted that Defendant No. 1 had revoked the power of attorney

granted in favour of Defendant No. 2. In his deposition, he merely stated that such revocation took place after the agreement for sale was executed. If he was aware of the fact that the power of attorney executed in favour of Defendant No. 2 was revoked, the question of any demand by him upon the Defendant No. 2 to bring the Defendant No. 1 for execution of the agreement for sale would not arise at all. Furthermore, indisputably the said power of attorney was not a registered one. Defendant No. 2, therefore, could not execute a registered deed of sale in his favour. The demand, if any for execution of the deed of sale in terms of the agreement of sale could have been, thus, made only upon the Defendant No. 1, the owner of the property. The balance consideration of Rs. 10,000/- also could have tendered only to Defendant No. 1. As indicated hereinabove, the purported notice was issued only on 8.8.1984, that is, much after the expiry of period of three years, within which the agreement of sale was required to be acted upon.

26. In this appeal, the appellant did not set out the terms of oral agreement in plaint nor did she make a demand on the respondents/vendors to execute sale deed before filing the suit. What all she alleged in the plaint is that she paid advance amount of Rs. 3,000/- and the balance amount of Rs. 7,000/- to the vendors, that agreement was obtained by her husband that she was put in possession, that she was nominated by her husband. The other terms of the contract settled between the parties as required u/s 54 of the Transfer of Property Act are not even referred to except the sale consideration and the extent of the land. On the one hand, appellant pleads that her husband obtained agreement and on the other hand she pleads that the respondents agreed to execute sale deed in her favour. At some other place, she pleads that her husband nominated her to get the sale deed registered in her favour. The stand is quite inconsistent. In the written statement, the respondents denied any oral agreement of sale and therefore the burden was very heavy on the plaintiff to prove the case as pleaded. As she came to the Court with inconsistent pleas and did not take steps for properly amending the plaint though she amended introducing the theory of nomination it has to be concluded that existence of oral agreement is doubtful.

Whether the plaintiff proved existence of oral agreement?

27. The appellant examined herself as P.W.1 besides examining her husband as P.W.2. She also brought P.Ws.3 to 5 besides marking Exs.A.1 to A.32 and summoned original file from the Office of the Special Officer and Competent Authority ULC, Hyderabad. The documents from the said file were marked as Exs.X.1 to X.7. The appellant stand in the pleadings is inconsistent. She alleges that there was an oral agreement of sale between her husband and Respondents 1 to 3 and that her husband nominated her to perform vendee's part of the contract to obtain sale deed. In the same breathe as extracted hereinabove in the pleadings she alleged that the vendors received an amount of Rs. 3,000/- from her, put her in possession of the suit schedule property and promised to

execute regular sale deed in her favour or her nominees. As rightly pointed out by the learned Counsel for fifth respondent, the appellant pleaded an oral agreement between her husband and Respondents 1 to 3 as well as an oral agreement between her and Respondents 1 to 3. Notwithstanding the fact that the terms of such alleged agreement of sale do not find place in the plaint, her evidence as main witness and corroborating evidence she let in, requires close scrutiny. As P.W.1 she was examined in chief on 2.2.1988, 1.3.1988, 14.6.1988 and 26.7.1988. On 2.2.1988 she stated as under:

I am the plaintiff in this suit. I filed the suit for specific performance of agreement. Husband of D1, D2 and D3 have orally agreed with me and my husband to sell the suit schedule property for a consideration of Rs. 10,000/-. We paid Rs. 3,000/- in cash on 2.3.1971 to them at their residence. They put us in possession of the suit property on the same day on which we paid Rs. 3,000/- to them. Then we got the land surveyed for finding out the water resource and dug three bore wells, but there was no sufficient water.

We got dug a open well in the year 1972 and also paid the balance of Rs. 7,000/- to the defendants in the month of 1972. Ex.A.1 is the draft sale deed which is in the handwriting of the Defendant No. 3. It was drafted in favour of my husband. We got the well connected with electricity, pump-set was also fixed and from 1972 onwards we started raising rain-fed crops. I have 4 acres of land adjacent to the suit schedule property. I am growing grapes in my adjacent land.

28. One need not strain much to appreciate what she states in her evidence.

She deposed that Respondents 1 to 3 orally agreed with her and her husband to sell suit schedule property for Rs. 10,000/- and they paid Rs. 3,000/- on 2.3.1971 and that respondents put them in possession of the suit property. According to her in 1972 they paid balance of Rs. 7,000/- when Ex.A.1 sale deed was prepared in favour of her husband. She did not produce any receipt for the payment of Rs. 3,000/- nor did she produce the receipt for Rs. 7,000/-. This, she explains stating that there were good relations between her family and Respondents 1 to 4 and therefore she did not obtain receipt for the cash she paid on the date of oral agreement in 1972. Be that as it is, when she was recalled for continuation of chief examination on 1.3.1988 she deposed that Ex.A.1 draft sale deed was prepared by third defendant in the name of M/s.Bralco Metal Industries Private Limited. In her further chief examination she spoke about the respondents applying for ULC authorities for permission to sell the land in favour of the appellant showing her as intending purchaser. On 26.7.1988 she was made to say that she is willing to pay further sum of Rs. 10,000/- as sale consideration if the Court comes to the conclusion that she has not paid the sale consideration as pleaded and deposed by her. In the cross-examination she was not able to say on which day the advance was paid and stated that she got about Rs. 10,000/- by selling grapes from her gardens. Finally, she also admitted in her cross-examination that after paying Rs. 3,000/- to the respondents they have not discussed anything with the respondents/ vendors.

29. The evidence of P.W.2 (husband of P.W.1) is drastically contradictory to that of P.W.1. He states that it is he who agreed to purchase the suit property and it is he who paid Rs. 3,000/- on 2.3.1971. He also stated that the vendors helped him to get the land adjacent to suit land in 1966 and that the suit land was handed over to them when they fenced the land and dug 700 pits for grape-plants. He also admitted that Ex.A.1 is in the name of M/s.Bralco Industries as he nominated the said company. He also not able to say the "day" on which the alleged oral agreement was entered into and further deposed that as the vendors are good friends he did not obtain receipt. The evidence of P.W.1 and P.W.2 on the question of existence of oral agreement and on the proof of such oral agreement, is improbable for reasons more than one. First, insofar as the vendors entering into oral agreement, P.W.1 says that such agreement exists between her and vendors, whereas P.W.2 also makes a similar statement on oath. It is improbable to assume that in respect of same suit schedule land, the Respondents 1 to 4 who are admittedly friends of P.Ws.1 and 2 would enter into two agreements and took advance amount of Rs. 3,000/- from the wife as well as husband. Secondly, P.W.1 admits that in 1981 she lent an amount of Rs. 5,000/- to the vendors and obtained receipt based on which she filed a suit against them. P.W.2 also says that he had occasion to give Rs. 5,000/- to second defendant for which he obtained receipt and filed O.S.No. 1230 of 1984 against second defendant. Be that as it is, in 1981 when there were cordial relations between the parties, P.Ws.1 and 2 obtained receipt for Rs. 5,000/- and filed suit based on that receipt. One fails to understand as to how they did not obtain the receipt for Rs. 3,000/- on the date of oral agreement and Rs. 7,000/- in 1972 when Ex.A.1 draft deed was prepared. One should not lose sight of the fact that the amount allegedly paid by P.W.1 and P.W.2 in 1971 and 1972 is of more value than the amount of Rs. 5,000/- paid in 1981. Thirdly, according to P.W.1, on 2.3.1971 she and her husband went to the house of vendors and apart from payment of sale consideration, they did not discuss anything on that day. In the pleadings as well as in the evidence of P.W.1 and P.W.2, they state that the sale deed could not be registered because of ULC permission. This is very insignificant in the light of statement of P.W.1 in her cross examination on 23.1.1990 to the effect that "she does not know whether any permission from ULC authorities was required or not for the purpose of registration".

30. The documentary evidence relied on by the learned Counsel for the appellant to support her case may now be noticed. Ex.A.1, Exs.X.1 to X.7 are pressed into service by the appellant to prove the oral agreement. Learned Counsel for the appellant vehemently submits that the oral agreement was in favour of P.W.2. He initially nominated M/s.Bralco Metal Industries Limited in 1972 and when the said company withdrew from the transaction P.W.2 nominated the appellant to obtain sale deed from the vendors. He also submits that the factum of existence of agreement between appellant and the vendors was admitted by the owners themselves in Exs.X.1 to X.7. Learned Counsel for the respondents, however, refuted these submissions and contend that these documents do not support the

contention of the appellant and that they disprove the case of the appellant. Ex.A.1 is a draft sale deed allegedly drafted by third defendant, Humumal Hotchand. He is not examined nor fourth defendant who was GPA holder for Defendants 1 to 3 confronted with this when he was in the box as D.W.1. A reading of Ex.A.1, draft sale deed shows that it is written on whitepapers. It is draft like any other regular sale deed. It contemplates a sale between three vendors, who are husband of first defendant and Defendants 2 and 3 in the suit. It is conveyance proposed in favour of M/s.Bralco Industries and according to Ex.A.1 the sale consideration of Rs. 10,000/- was paid on the day when said Ex.A.1 was drafted by third defendant. The absence of any statement to the effect that Defendants 1 to 3 entered into oral agreement of sale with P.W.2, that he nominated M/s.Bralco Industries and that the amount of sale consideration of Rs. 10,000/- was paid on the date when Ex.A.1 was drafted, would certainly disprove the case of the appellant. Indeed, in the considered opinion of this Court, Ex.A.1 without anything else is totally against the plaintiff's case. To reiterate as per Ex.A.1 unregistered sale deed Defendants 1 to 3 agreed to sell the land in favour of M/s.Bralco Industries and received an amount of Rs. 10,000/- sale consideration on the date when Ex.A.1 was drafted. All other things which are now contended are conspicuous by their absence in Ex.A.1. Ex.A.1, therefore, is not of any help to the appellant either with regard to existence of oral agreement of sale or with regard to payment of sale consideration. The appellant, however, would like this Court to draw an inference that there was an oral agreement in favour of P.W.2, that P.W.2 nominated the appellant for the purpose of performing vendors part of the contract, that the vendors themselves recognised the appellant as nominee of the original vendors and that the owners changed their mind after Special Officer of ULC granted Ex.X.6 permission. In view of these submissions, it is necessary to closely examine Exs.X.1 to X.7.

31. Ex.X.1 is a letter addressed by second defendant, Thanwardas Hotchand to the Special Officer in October 1981. By Ex.X.1 he requested for issue of no objection certificate for sale of agricultural land. He also enclosed his affidavit to the effect that he intends to sell agricultural land in S.No. 19 at Khajaguda. Another affidavit of the appellant was also enclosed to the effect that she intends to purchase the land for agricultural purpose situated at Khajaguda. These two affidavits are marked as Exs.X.2 and X.3. After sometime, it appears that the appellant filed an affidavit, Ex.X.4, dated 17.2.1982 stating that she agreed to purchase the suit schedule land from the owners in 1972 for the purpose of commencing agriculture and that Revachand, Thanwardas and Hukumal handed over land to her for carrying agriculture. She also averred that she dug three borewells in vain and therefore she dug open well in order to raise grape garden besides constructing fencing with stone pillars and barbed wire, servant quarters and pump house. In Ex.X.4, she makes an interesting statement which reads as under:

...But, I was shocked to know when due to Land Ceiling Act 1 of 1973, the owners advised me not to carry on further agriculture operations till they were

certain that the said land would not fall beyond the ceiling limits of the lands held by them.

I had therefore, no alternative, except to suspend the agricultural operations that had planned to undertake on the whole area of the land. However, I used to cultivate vegetables like tomatoes, bhindies and beans etc., and the rain-fed crops and fodder etc., in the said land from 1973 onwards.

Now, the owners are ready to transfer the said land. It is, therefore, just and necessary that sanction for the sale of the said land in my favour please be accorded to resume investment in cultivation of grape vines etc.

32. After the above exercise, the Special Officer, it is admitted, did not issue no objection certificate. Subsequently, the Special Officer, inspected the land on 17.2.1982 (the same day when Ex.X.4 was submitted by the appellant). The file from the Office of the Special Officer, ULC was summoned and inspection notes of the Special Officer was marked as Ex.X.5. The same reads as under:

Inspected S.No. 19 measuring Ac. 10.32 gts. of Khajaguda (v). Sri Suseel Chandra Rastogi, the husband of Mrs. Uma Rastogi was present. In the Master Plan, this land is earmarked for conservative purpose, wherein only agriculture, horticulture etc., is permissible. It appears that the landowners entered into an agreement with Smt.Uma Rastogi, W/o.Sri Suseel Chandra Rastogi much earlier to the commencement of the A.P. Vacant Lands in Urban Area (Prohibition of Alienation) Act, 1972. The agreement holder tried to dig borewells at two or three points, but the attempts failed. An open well was dug and it is receiving copious supply of water.

It is stated that for a few years vegetable crops were raised with the help of the water from the open well. Pits for planting grapes over an extent of Ac.4.00 were also dug prior to the Act. Stone pillars for fencing were also got fixed. It is represented that the plantation was not done as the agreement holder feared that further expenditure without getting the land transferred in her name might be risky.

Government in their Memorandum No. 1064/ UC.I/78-1, dated 15.11.1978 have clarified at Para 5(1) that where the required percentage of cultivation could not be shown for one good reason for the other such as on account of long standing litigation, the condition of 50% cultivation may be relaxed after the Special Officer is satisfied on personal inspection, the need for such relaxation.

As stated above there is a open well in the land. Vegetable crops were cultivated for a few years. The purchaser intends to raise a grape garden.

The certificate may be issued relaxing the condition of cultivation subject to the condition that the purchaser uses the land for agriculture purposes only and that she would not subdivide it and use it for non-agriculture purposes.

33. As directed by Special Officer, Ex.X.6 permission was given duly filling up

prescribed cyclostyled form. But, presumably as directed by the Special Officer, there was a condition typed below the certificate. The same is extracted in full duly showing the condition imposed (in italics).

Office of the Special Officer and Competent Authority, Urban Land Ceilings, 11-5-399, Red Hills, Hyderabad. U.L.C.D.Dis.No. C5/160/81, dated 17.2.1982

CERTIFICATE

Sub:--Urban Land (Ceiling and Regulation) Act, 1976 - Hyderabad Urban Agglomeration - Issue of certificate in respect of lands which are outside the Municipal limits and used mainly for agricultural purpose.

Ref:--Application of Sri Deepak Rupani, G.P.A. of Smt. Gomi Bai, Thanwerdas Hotchand and Hukumal Hotchand

_____ Sri Deepak Rupani, S/o. Thanwerdas Hotchand, G.P.A. holder of Smt. Gomi Bai, W/o. late Sri Rewachand Hotchand, (2) Thanwerdas Hotchand, S/o. late Hotchand, and (3) Hukumal Hotchand, S/o. late Hotchand, have requested for issue of a certificate stating that the following lands are agricultural lands.

----- Sl.No. Survey Nos. Extent Acs. Gts.
Village ----- 1. 19 Ac. 10.32 Gts.
Khajaguda(V) Rajendranagar Tq. (Tent acres and thirty two guntas only)

----- This is to certify that the lands mentioned above are situated outside the Municipal limits and within the peripheral limits of agglomeration and recorded in the Land Revenue Records "as agriculture" and presently being used for agricultural purpose is not urban land as defined u/s 2(o) of the Act 33 of 1976 as long as the land continues to be used for agricultural and not put for any other purpose.

This certificate is valid provided the petitioners sell the above mentioned lands to Smt.Uma Rastogi, W/o. Sri Sushil Chandra Rastogi, r/o.9-4-36/215, Salarjung Colony, Hyderabad, for agriculture purpose only she would not subdivide it and use it for non-agriculture purposes.

Special Officer and Competent Authority, Urban Land Ceiling Hyderabad

To

Sri Deepak Rupani, G.P.A. Holder of Smt. Gomi Bai, Thanwardas Hotchand Hukumal Hotchand, R/o.10-3-14, Humayun Nagar, Hyderabad.

Copy to the Registrar, R.R. Dist. He is requested not to entertain any registration for non-agriculture purpose

34. Ex.X.7 is a communication from D.W.1 as G.P.A. of Defendants 1 to 3 to the Special Officer (ULC) in which he made a request to revise the permission vide Ex.X.6 to enable him to transfer the suit schedule land to fifth respondent In this communication, he informed that earlier he could not enter into agreement with appellant that now he entered into agreement with fifth respondent to sell the

land duly receiving part payment of the consideration and handed over possession to fifth respondent. It is not denied before this Court that after receiving this, the Special Officer issued notice to the appellant on 20.3.1982 whereafter the appellant filed the suit before Court.

35. After careful consideration of these X-series documents, this Court is of considered opinion that these documents do not strengthen the case of the appellant. First, except self-serving affidavit of the appellant marked as Ex.X.4 in the other documents either husband of first defendant, who filed Ex.X.1 or fourth defendant who gave Ex.X.7 as well as Exs.X.2, X.3, X.5, X.6, nowhere the documents conclusively state that there was concluded contract of sale between the parties. What all these documents show is that the parties agreed to enter into agreement of sale. Indeed, Ex.X.1, affidavit of third defendant, and Ex.X.2, affidavit of appellant make it abundantly clear that parties intended to enter into contract of sale.

36. Secondly, the ULC Act is mainly intended to impose ceiling on holding urban vacant land and it does not in any manner prohibit a person to own agricultural land in urban agglomeration as long as such land is used for agricultural purpose. Indeed, when a person wants to sell urban vacant land, if the land is in excess of ceiling area, such sale is not permitted. In case, the land is within ceiling area, Section 26 of the ULC Act requires the owner to give a notice of transfer by way of sale, mortgage, gift, lease etc., of intention to transfer to the Competent Authority. It is then for the Competent Authority to exercise option within sixty days to purchase the land. To regulate the procedure u/s 26 of the Act, Government of India in Ministry of Works and Housing issued guidelines which have been brought out in the form of compendium. [Compendium of Urban Land (Ceiling and Regulation) Act, 1976 and Gist of guidelines, GOI, (2nd Edn.,) 1977]. The relevant guidelines are at Pages 70 to 79. Except in the matter of sale of urban vacant land which is within ceiling area, the guidelines do not require an affidavit by vendor and prospective transferee. When a land governed by the provisions of ULC Act is within the ceiling area, the law requires that the intending purchaser should also be a person who does not own vacant land in excess of the ceiling area. That is the reason why an affidavit from prospective transferee is insisted upon. In the case of agricultural land what all a person is required is to obtain a certificate u/s 2(o) to the effect that the land situated in urban agglomeration is not a vacant land as defined in Section 2(o) of the ULC Act. Indeed, there is no prohibition in the Act to transfer by way of sale, mortgage, gift or lease the land situated in urban agglomeration which is mainly used for the purpose of agriculture. Therefore, there was no necessity for Respondents 1 to 4 to file an affidavit and mere request for certificate u/s 2(o) of the ULC Act that it is agricultural land would have been sanctioned. Indeed, the form prescribed for issuing certificate that it is agricultural land (Ex.X.6) extracted above, would show that no such requirement is necessary nor it is competent for the Special Officer to impose a condition. Therefore, legal sanctity to the condition appearing in Ex.X.6 which is in favour of the appellant, cannot

be attached to such condition.

37. There is yet another reason to treat Exs.X.1 to X.6 as irrelevant for the purpose of this case. In the written statement filed by fourth defendant, the owners of the land have given an explanation for this. According to them, in October, 1981, the appellant informed Defendants 2 and 4 about her telephone talk with third defendant in U.S.A., who allegedly expressed his willingness to sell the land to the appellant and that the appellant further informed that she would use her influence in the Office of Urban Land Ceiling in getting the certificate that it is agricultural land and therefore they applied. They also alleged that the appellant had influence in the Office of Special Officer (ULC) and therefore she thought that she can blackmail the owners. Believing the appellant they handed over papers to be filed with Special Officer, ULC authorities and that in the application they never agreed that they entered into agreement of sale with the appellant. The fourth defendant who was examined as D.W.1 also deposed that he filed an affidavit before the ULC authorities and that did not show the name of the appellant as intending purchaser. He further deposed that the appellant assured him that she would get exemption as per application, but she obtained exemption in her name and that they filed Ex.X.7 application for permission to sell the land to fifth respondent.

38. The case of the respondents/owners is probable for two reasons. First, the appellant herself admits in Ex.X.4 that the owners requested her not to go to the land on account of land ceiling laws and also for the reason that in Ex.X.6 an unwarranted condition was inserted by Office of the Special Officer (ULC) for granting certificate u/s 2(o) of the Act that it is agricultural land. As already held either under the provisions of ULC Act or various guidelines issued by Government of India when a person wants to retain the land as agricultural land and seeks a certificate to that effect, he need not obtain any permission nor such certificate should contain the name of the prospective transferee as distinguished from a situation arising u/s 26 of the ULC Act. Further, Ex.X.7, D.W.1 categorically stated that earlier they intended to enter into agreement, but later they have entered into agreement with fifth respondent. Therefore, this Court is not able to accept the submissions made on behalf of the appellant with regard to Exs.X.1 to X.7.

39. The submission of the learned Counsel for the appellant is that in the absence of rebuttal by the defendants with regard to plaint allegations, the Court may conclude that the plaint case of oral agreement is proved. He placed reliance on the decision of the Supreme Court in Vidhyadhar Vs. Manikrao and Another, . The submission has to be rejected for two reasons. As per Order VIII Rule 5(3) of CPC if the defendant has not filed any pleadings opposing the suit, the Court in its discretion may require the plaintiff to prove a fact. Further as per Section 102 of the Indian Evidence Act, 1872, the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side. When the plaintiff pleads existence of oral agreement in her and/or her

husband's favour, and also pleads payment of Rs. 10,000/- by them, it is she who has to prove to the satisfaction of the Court about the existence of these facts. If no evidence is let in by the defendants, the appellant would fail in the suit, if she is not diligent to bring acceptable, cogent and convincing evidence on record. Secondly, *Vidhyadhar v. Mankikrao* (supra) is of no assistance to the appellant. When the burden of proof lies on the plaintiff and such burden is not discharged initially, for non-appearance of the defendant or non-production of rebuttal evidence by the defendant adverse inference as contemplated u/s 102 of the Evidence Act cannot be drawn by the Court. The same would amount to allowing the suit claim wholly and solely on weakness by the defendants' case rather than strength of the plaintiff's case. In this regard, a reference may be made to the following observations made by this Court in *V. Srisailam Vs. V. Krishna Murthy and Others*, .

Evidence means and includes all statements which the Court permits to be made by witnesses in relation to matters of fact and enquiry. It may be oral evidence or documentary evidence produced for inspection of the Court. Any fact from which either by itself or in connection with other facts, the existence, non-existence, nature of extent of any right, liability, or disability, asserted or denied in any suit or proceeding necessarily follows is expressed by the phrase "facts in issue". (See Section 3 of the Indian Evidence Act, 1872). As per Section 101 of the Evidence Act a person who desires the Court to give judgment as to any legal right or liability depending on the existence of facts, must prove that those facts exist and the burden of proof lies on such person and he would fail if no evidence at all was given on either side. u/s 114 of the Evidence Act the Court is entitled to presume the existence of any fact and as per illustration (h) a person who refuses to answer a question, an inference can be drawn that if he had given answer it would be unfavourable to him. When the Court raises adverse inference these provisions of the evidence law have to be kept in mind.

40. For yet another reason also the submission cannot be accepted. Ex.A.1, the draft sale deed, on which heavy reliance is placed was admittedly drafted by third defendant/third respondent and Ex.X.1 application was made by second defendant. This is also relied on by the appellant. In such an event, especially when her case is based on oral evidence and payment without receipt, she ought to have summoned Defendants 2 and 3. In *Vidhyadhar v. Mankikrao* (supra) it was held that where a party to the suit does not appear as a witness to state his own case, and does not offer himself to be cross-examined, a presumption would arise that the case set up by him is not correct. This principle, however, has no application in this case. As noticed, existence of oral agreement, payment of sale consideration and the due performance of vendees part of the contract are all matters of evidence and not presumption. The doctrine of presumption cannot always partake the fundamental principles of evidence. A reference may be made to the decision in *Krishna Kumar v. Kayastha Pathashala*, AIR 1966 All. 570, wherein it was laid down:

Whether or not an adverse inference from the non-production of the best evidence by a person on whom the burden of proving a fact lies should be drawn is not, however, a matter of an inflexible rule but is dependent upon the circumstances of each individual case. In inferring the existence or non-existence of a certain fact from the omission of a party to produce a particular evidence, the Court follows the same mental process which is followed and is implicit in all inferences. The question always is whether the existence of a fact or a state of thing makes the existence of another fact or state of things so likely that it may be presumed to exist; and even in deciding whether an inference adverse to a party should be drawn from the non-production of a particular evidence or type of evidence the Court really answers the above question. Naturally the answer must vary according to the circumstances. The nature of the fact required to be proved and its importance in the controversy; the usual and commonly recognised mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned have all to be taken into account. And it is only when all these matters have been duly considered that an adverse inference may be drawn.

41. A perusal of the evidence of D.W.1, especially the cross-examination would indicate that D.W.1 who spoke on behalf of other defendants categorically denied any oral agreement or receipt of any sale consideration. He deposed nobody was in possession of the suit property on their behalf and denied the suggestion that the plaintiff was in possession of the suit property. D.W.1 was examined to speak about the case on behalf of Defendants 1 to 3 and he categorically stated that he never entered into any oral agreement of sale. Therefore, the submission is rejected.

Whether there is privity of contract between the appellant and the Respondents 1 to 4?

42. This question needs to be considered with regard to the alternative submission made by learned Senior Counsel for Respondents 1 to 4 as well as learned Senior Counsel for fifth respondent. As noticed earlier, the submission that if the allegation of existence of valid oral agreement between P.W.2 (husband of appellant), and Respondents 1 to 4 is true and proved, the appellant/plaintiff has to be non-suited because there is no privity of contract between her and the owners and also for the reason that P.W.2 could not have validly nominated her. A detailed reference has already been made to the pleadings and the evidence of P.Ws.1 and 2 in this regard. Therefore, there is no necessity to traverse that part. It is well settled that only a party to the contract can enforce the contract. Sections 37 to 67 in Chapter-IV of the Indian Contract Act, 1872 deal with the performance of contracts. Section 37 lays down that the parties to a contract must perform their respective promises and that promises bind the representatives of the promisor in case of death of such promisor before performance, unless contrary intention appears from the contract. Insofar as the specific performance of contract, Section 15 of the Specific Relief Act is relevant

and reads as under:

15. Who may obtain specific performance :--Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by,--

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(h) when the promoters of a company have, before its incorporation entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

43. In relation to, for instance, an agreement of sale or contract of sale of immovable property, in terms of Section 15 either party to an agreement of sale or their representative in interest of either party to the contract are entitled to enforce specific performance of contract. Clauses (c) and (h) also describe the persons in various situations who are entitled to obtain specific performance. The proviso to Section 15(b) describes the contracts, the interest in respect of which cannot be assigned by other party of the contract. Insofar as this case is concerned, emphasis is placed on Sections 15(a) and 15(b). In the absence of any valid assignment of interest in the contract of sale, a person cannot seek

specific performance of contract from a Court of law. The question whether a third party to a contract of sale of immovable property or otherwise can enforce contract is subject-matter of umpteen number of Court cases. The Counsel opposing each other have relied on various decisions in support of their contentions. A reference to some of them would be suffice.

44. In *Subbu v. Arunachalam Chettiar* AIR 1930 Mad. 382 (FB), a Full Bench of Madras High Court considered the question regarding right of stranger to enforce a contract. It was held therein:

The point of law has been fully discussed by the learned Judge and he has considered all the important authorities. It is not disputed as a general rule of law that only those who are parties to a contract can sue on it. The Privy Council decision in *Jamna Das v. Ramavtar Pande* (1911) 34 All. 63 : 13 I.C. 304 : 39 I.A.7 (PC) and in *Nanku Prasad Singh v. Kamta Prasad Singh* AIR 1923 PC 54, are conclusive that the reservation of part of the purchase money to pay a previous mortgagee does not of itself create a trust in favour of that previous mortgagee nor can the prior mortgage make the purchaser personally liable. The case of such a reservation in a mortgage is indistinguishable from its reservation in a sale deed. This decision was given on 1st May this year. In view of this decision of Beasley, J., which was confirmed in appeal we think we may take it as settled law in Madras that a stranger to a contract cannot without more sue to enforce it.

45. In *Veeramma v. Appayya* AIR 1957 AP 965, this Court while pointing out two exceptions to the general rule laid down that persons not parties to the original contract cannot sue for enforcement of the contract. The Court referred to various English decisions as well as earlier view of Madras High Court and summarised the principles as under:

The result of the foregoing discussion is that I am bound by authority to hold that a person not a party to a contract cannot sue on the contract unless the case comes within one of the recognised exceptions. One such exception is where the contract creates a trust in favour of a stranger. Persons not parties to partitions or family arrangements claiming benefits provided for them in such transactions really come under the category of beneficiaries and the arrangements conferring benefits on them are in the nature of trust. The fact that third persons benefited under a contract are near relations of the parties to the contract will not per se enable the former to sue on the contract but would be a circumstance indicative of a trust, per Rankin, C.J., in *Krishna Lal Sadhu and Another Vs. Mt. Promila Bala Dasi*, .

46. In the above decision of this Court, a reference was also made to the decision of Judicial Committee in AIR 1947 8 (Privy Council) , wherein it was held that where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement he may sue in his own right to enforce it.

47. In *M.C. Chacko Vs. The State Bank of Travancore, Trivandrum*, , the

appellant's, father, K.C. Chacko, executed letters of guarantee in favour of Kottayam Bank agreeing to pay the amounts due by High Land Bank under overdraft arrangement and also agreed to hold himself liable for the amounts due to Kottayam Bank on the overdraft arrangement. The State Bank of Travancore as successor of Kottayam Bank filed a suit impleading Chacko as Manager of the High Land Bank along with others as well as his father, who executed letters of guarantee. The bank claimed a charge over the properties gifted by father to mother, daughter and sisters of Chacko. Pending suit, father died and his son, daughter and wife defended the suit as legal representatives. The Trial Court decreed the suit against principal debtor and also Chacko limiting his liability to the property received by him from his father under a gift deed, and rejected the claim of the bank against father of Chacko as time barred and for that reason it is not enforceable against heirs and legal representatives. The High Court confirmed the decree. Bank filed cross-objections which were dismissed by High Court. Before the Supreme Court inter alia the question was whether the charge is enforceable by the respondent bank which was not a party to the deed of partition. The Apex Court allowed appeal dismissing the suit of the bank against Chacko. It is apt to quote the following observations from judgment of Apex Court:

The Kottayam Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a party of the family arrangement may enforce the covenant. In *Krishna Lal Sadhu and Another Vs. Mt. Promila Bala Dasi*, , Rankin, C.J.; observed:

"Clause (d) of Section 2 of the Contract Act widens the definition of "consideration" so as to enable a party to a contract to enforce the same in India in certain cases in which the English Law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of "promisor" and "promisee"."

Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: *Dunlop Pneumatic Tyre Co. v. Selfridge and Co.* 1915 AC 847. It has, however, been recognised that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case *Khwaja Muhammad Khan v. Husaini Begam* (1910) 37 I A 152. In a later case *Jamna Das v. Ram Autar* (1911) 39 I A 7, the Judicial Committee

pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

48. As held by the Supreme Court a stranger or a third party to the contract can enforce the terms of the contract only when he is a beneficiary under the terms of the contract or when he is a beneficiary under the terms of the contract or when the contract is part of a family arrangement which confers a benefit on the suitor and, a third party cannot sue for specific performance of contract of sale. Learned Counsel for the appellant does not dispute the legal position. However, placing reliance on the commentary at pgs.761-762 of Law of Specific Relief (Vol.1) by Professor G.C.V. Subba Rao, he would contend that apart from the two exceptions pointed out by the Supreme Court in *M.C. Chacko v. State Bank of Travancore* (supra) there could be other instances when a third party can specifically enforce the performance of contract of sale. According to the learned Counsel, a "representative of interest" is entitled to obtain specific performance of contract of sale u/s 15(b) of the Specific Relief Act read with Section 40 of the Indian Contract Act, including assignee of the right under an agreement. In support of the submission, has placed reliance on *Sakalaguna Nayudu v. Chinna Munuswami Nayakar* AIR 1928 PC 174, *C. Doraiswamy Mudali Vs. Thangavelu Mudaliar and Others*, *Ghulam Mohammad v. Lakha Singh* AIR 1935 Lah 181 (2), *Ram Baran Prosad and Another Vs. Ram Mohit Hazra and Another*, , *Rambaran Prosad Vs. Ram Mohit Hazra and Others*, , *M.C. Chacko v. State Bank of Travancore* (supra), *M/s. R.K. Associates Vs. V. Channapa and Others*, and *T.M. Balakrishna Mudaliar Vs. M. Satyanarayana Rao and others*, .

49. In *Sakalaguna Nayudu v. Chinna Munuswami Nayakar* the facts are these. One Venkata Subrahmanya Ayyar on his behalf and on behalf of minor son sold Siyatti Village to Venkatapathi Naidu (father of defendants) for sale consideration of Rs. 10,000/-. On the same day parties executed "counterpart agreement" by which it was provided that Venkatapathi should re-convey the village to the vendor after thirty years in case vendor wished to have the village again upon paying sale consideration. Subsequently, the vendor was declared insolvent who died leaving his minor son Krishnasami. By a deed dated 12.5.1910 Krishnasami sold the village to the plaintiff. The said deed contain not only conveyance, but assignment of Krishnasami's right to the benefit of counterpart agreement. In the insolvency proceedings, the Official Assignee of Madras as assignee or estate of Venkata Subrahmanya Ayyar conveyed the right, title and interest of the insolvent in the house and the village to Krishnasami. The plaintiff as assignee of Krishnasami filed the suit to obtain a direction from the Court to the defendants to execute a conveyance of the property in favour of the plaintiff. The Judicial Committee considered whether the benefit of contract had been effectually assigned to the plaintiff. As a question of fact it was found that the benefit of the contract had become vested in the plaintiff before institution of the suit and

therefore he was entitled to call upon the defendants, the sons and heirs of Venkatapati for conveyance of the property. The Privy Council also came to the conclusion that counterpart was complete contract in itself and that it must be deemed as executed in favour of both father and son and that the benefit of the contract should be assigned.

50. In *Doraiswamy Mudaliar v. Thangavelu Mudaliar* (supra) and *Ghulam Mohammad v. Lakha Singh* (supra) it was held that there was a valid assignment of right under the contract and therefore the suit by third party was maintainable and that the right to specific performance is a transferable right. In *Ram Baran Prasad v. Ram Mohit* (supra) the Supreme Court referred to Section 27(b) of the Specific Relief Act, 1877 which is in pari materia with Section 19 as well as Sections 37 and 40 of the Contract Act and observed as under:

In substance these statutory provisions lay down that subject to certain exceptions which are not material in this case, a contract in the absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including assignees and transferees. In the present case, there is nothing in the language of the pre-emption clause or the other clauses of the award to suggest that the parties had any contrary intention. On the other hand, a reference to the other clauses of the award shows that the parties intended that the obligations and benefit of the contract should go to the assignees or successors-in-interest.

51. *Ram Baran Prasad v. Ram Mohit* (supra) is a case of preemption right and subsequent purchaser was held to have same right under pre-emption clause as was his vendor. In *T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao* (supra) the Supreme Court laid down that the benefits of contract of repurchase are assignable unless the contract provides contra. The relevant observations are as under:

The Privy Council in *Sakalaguna v. Munnuswami* 1928 PC 17, has held that the benefit of a contract of repurchase which did not show that it was intended only for the benefit of the parties contracting, could be assigned and such contract is enforceable. *Beaumont C.J.* in *Vishweshwar Narsabhatta Gaddada Vs. Durgappa Irappa Bhatkar*, held that both under the common law as well as u/s 23(b) of the Specific Relief Act, 1877, an option given to repurchase the property sold would prima facie be assignable, though it might also be so worded as to show that it was to be personal to the grantee and not assignable. On the particular facts of that case, it was held that the contract was assignable. In *Sinnakaruppa Gounder Vs. M. Karuppuswami Gounder and Another*, it was held(atp.508):

"In our view, generally speaking, the benefits of a contract of repurchase must be assignable, unless the terms of the contract are such as to show that the right of repurchase is personal to the vendor. In the latter case it will be for the person who pleads that the contract is not enforceable, to show that the intention of the parties thereto was that it was to be enforced only by the persons named therein

and not by the assignee."

52. The principles of law appear to be very well settled. Ordinarily, the parties to the contract are alone entitled to enforce the specific performance of the contract subject to fulfilling statutory conditions both substantially and procedurally. This general principle has two exceptions, namely, beneficiaries under a trust and/or family arrangement, though are strangers and third parties to such trust and family arrangement, can enforce specific performance of contract. Further, as per Sections 37 and 40 of the Contract Act as well as u/s 15(b) of the Specific Relief Act a third party to the contract can approach the Court for enforcing the contract. Their plea can be accepted only when they properly plead and prove that they are representatives of the promisor in case of death; and/or that they are representatives employed by competent person to perform the contract, and/or that they are assignees of the contract.

53. Section 37 of the Contract Act uses the phrase "...representatives of the promisor in case of death of such promisor". Section 40 of the Contract Act uses the phrase "...promisor or his representatives may employ competent person to perform it". Whereas, Section 15(b) of the Specific Relief Act uses phrase "...representative in interest", "assignee of the interest". The Statutes use these terms and phrases without any precision. These terms take the meaning from the context and factual matrix. At first blush, the provisions suggest that a representative in interest is a person who without any further document acquires such status after death of promisor. The provisions also suggest that a person becomes representative of another person on the latter specifically employing former as latter's representative. In the case of assignee there should be explicit assignment of right of a party to the contract to a third person.

54. General Clauses Act, 1897 also does not define the term "representative in interest" or "legal representative". Indian Succession Act, 1925 also does not define these terms. In Code of Civil Procedure, 1908 the term "legal representative" is defined by Clause (11) of Section 2 as to mean "a person, who in law represents the estate of a deceased person and includes any person, who intermeddles with the estate of the deceased". It further explains that where a party sues or is sued in representative character, the party on whom the estate devolves on the death of the party so suing or sues is also legal representative. When the meaning of a word or phrase used in a Statute is not defined in General Clauses Act or not defined by the concerned Statute itself, it is permissible to refer to definition of the term or phrase in dictionaries or other judicial decisions which defined such term or phrase or a Law Lexicon (See *Samatha Vs. State of A.P. and Others*,) - [This decision is reversed by the Supreme Court in *Samatha Vs. State of A.P. and Others*, , but the aspect of the matter referred to hereinabove was not subject-matter of the Supreme Court judgment]. Hence, a reference may be made to legal dictionaries. The term "legal representative" is defined in Black's Law Dictionary (sixth edition, p. 896)

as under:

The term in its broadest sense, means one who stands in place of, and represents the interests of another. A person who oversees the legal affairs of another. Examples include the executor or administrator of an estate and a Court appointed guardian of a minor or incompetent person.

Term "legal representative", which is almost always held to be synonymous with term "personal representative", means, in accident cases, member of family entitled to benefits under wrongful death statute.

55. The term "Representative" is defined in Words and Phrases (Permanent Edition: West Publishing Co.) at Page 57 as under:

The primary and ordinary meaning of the words "representatives" or "legal representatives" or "personal representatives", when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper Court.

56. The term "Representative in interest" is defined in Words and Phrases (Permanent Edition, 2002 - Annual Pocket Part) at Page 51, as under:

When used in conjunction with statutory definition of mortgagor as including any person claiming under mortgagor or having his right, the phrase "representative in interest" refers to those holding subordinately and not adversely to mortgagor and connotes an interest consistent with and not in opposition to that of mortgagor.

57. In Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another, , in the context of Fatal Accidents Act, 1855 and Motor Vehicles Act, 1939, the Supreme Court laid down that "legal representative" ordinarily means a person who in law represents the estate of a deceased person or a person on whom estate devolves on the death of an individual. In Custodian of Branches of Banco National Ultramarino Vs. Nalini Bai Naique, , the Supreme Court explained the term "legal representative" in the following terms:

"Legal representative" as defined in CPC which was admittedly applicable to the proceedings in the suit, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide, it is not confined to legal heirs only instead it stipulates a person who may or may not be heir, competent to inherit the property of the deceased but he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". If there are many heirs, those in possession bona fide, without there being any fraud or collusion, are also entitled to

represent the estate of the deceased.

58. The term "representative in interest" and the "assignee under a contract of sale" are two different concepts. The appellant herein cannot be treated as "representative in interest" in its true meaning. A representative in interest or a legal representative means a person who represents the estate of a deceased and who can either sue or be sued as in relation such deceased person. When the suit was filed, the appellant's husband who was allegedly an agreement holder was alive and therefore the appellant cannot be legal representative or representative in interest of the husband of the appellant.

59. In *Mool Chand Vs. Ram Phool and Another*, , with reference to Section 15 of the Specific Relief Act the Allahabad High Court explained as under:

Section 15 of the Specific Relief Act provides for persons who may obtain specific performance. Clauses (a) and (b) which are material for the purposes of instant appeal provide that the specific performance of a contract may be obtained by (a) any party thereof, or (b) the representative in interest or the principal of any party thereof. There is proviso to Clause (b) but that is not relevant for the present purpose. It would appear, therefore that specific performance may be obtained inter alia, by a party to the contract or by any representative in interest or the principal of any party thereto. Representatives in interest would be an alienee, transferee or legal representatives after death, (executor or administrator) or an assignee in insolvency. The undisclosed principal" of the agent in whose favour contract is made may also obtain specific performance of a contract

60. The learned Judge in the above decision also referred to *Prem Sukh Gulgulia and Another Vs. Habib Ullah and Others*, and observed:

In *Prem Sukh Gulgulia and Another Vs. Habib Ullah and Others*, a Division Bench held that the necessary parties in a suit for specific performance to a contract for sale are the parties to contract or if they are dead, their legal representatives, as also a person who had purchased the property from the vendor after the contract. In that case A contracted to sell to B certain property which A intended to purchase at a Court sale. A suit by B for the specific performance of a sale against C on the ground that he was the Benamidar of his vendor at the Court sale was held to be barred u/s 66(1) of the CPC because B must be regarded as claiming through its vendor A, the beneficial owner. The view taken was: where the property stands in the name of a person other than the vendor and the suit for specific performance is brought by the purchaser, that person may be joined as defendant as a proper party on an allegation that he is the Benamidar of the vendor but if he appears and contends that he is not the Benamidar of the vendor the proper procedure would be to discharge him from the suit leaving it to the plaintiff in the suit for specific performance to institute a suit against him after he had got the conveyance in the execution of the decree for specific performance against his vendor. This is on the principle that the scope of a suit

for specific performance of a contract for sale ought not to be enlarged and the suit turned also into a title suit between one or either of the parties to the contract and a stranger to the contract.

61. The appellant initially filed plaint alleging that the vendors received advance amount of Rs. 3,000/-, entered into oral agreement of sale with her and put her in possession. She also made a vague allegation that the agreement was in favour of appellant as well as P.W.2. However, subsequently the plaint was amended and an allegation was made that the owners entered into oral agreement of sale with P.W.2, who initially nominated M/s.Bralco Industries Limited and sometime thereafter nominated the appellant. After referring to Ex.A.1 this Court has already held that the alleged nomination by P.W.2 of M/s.Bralco Industries Limited stands disproved by Ex.A.1 draft sale deed itself. Be that as it is, when the vendors deny the oral agreement as well as receipt of any money from P.W.1 or P.W.2, there ought to be strong evidence to accept the plaint case that P.W.2 nominated P.W.1 for the purpose of performing the remaining part of the contract. Indeed, P.W.1 gave evidence as if the oral agreement is in her favour. P.W.2 deposed that he nominated M/s.Bralco Industries Limited for receiving sale deed and spoke as if the oral agreement was in favour of P.Ws.1 and 2. He did not depose that when M/s.Bralco Company resiled, he nominated plaintiff/appellant for obtaining sale deed. In the absence of any such proof of nomination especially from P.W.2, who was allegedly the vendee under oral agreement of sale, it is not possible to accept the case of the appellant that her husband nominated her nor it is the case of the appellant that the rights of P.W.2 are assigned to her under a deed of assignment. As already pointed out, the suit was not preceded by any notice as contemplated by Forms Nos. 47 and 48 of Schedule-I of CPC and having regard to inconsistent pleadings and glaring discrepancies in the evidence of P.Ws. 1 and 2, it is not possible to accept the case of the appellant that there is valid nomination in her favour.

62. The appellant is not a legal representative or representative in interest of P.W.2, nor she can be said to have been validly nominated and therefore it must be held that there is no privity of contract between the appellant and Respondents 1 to 4. The appellant being stranger is not entitled to file suit for specific performance of agreement of sale.

63. Yet another aspect of the matter is the question of possession. It is vehemently contended by the appellant's Counsel that the appellant has been in possession of suit schedule land from the date of agreement till she was forcibly dispossessed by fifth defendant in March, 1982. Therefore, the learned Counsel would submit that an inference has to be drawn of existence of oral agreement of sale. The submission is misconceived. When a person comes to the Court alleging oral agreement of sale also alleging that he/she had been put in possession pursuant to such oral agreement, the proof of possession independently from the proof of oral agreement of sale may give rise to a different cause of action, but certainly not for specific performance of contract of

sale. Further, when the oral agreement of sale is disbelieved, assuming that the person has proved possession, the Court cannot draw an inference of the existence of the oral agreement of sale by proof of possession. As held by the Supreme Court in *Mayawanti Vs. Kaushalya Devi*, , and *Brij Mohan and Others Vs. Sugra Begum and Others*, , a person seeking specific performance of contract of sale must prove the existence of valid and enforceable contract and definite and clear terms of contract. The jurisdiction to direct the defendants to specifically perform their part of contract is itself based on valid and enforceable contract. In the absence of any such contract, it is futile for anyone to contend to draw an inference as to the existence of contract from a mere possession.

64. The appellant as P.W.1 admitted in her cross-examination that she has not filed any pahanies or any other documentary proof to show that she has been cultivating the suit land. The evidence of P.Ws.3 to 5 is hearsay evidence and they deposed "as per information given by appellant". The inspection report by the Special Officer (ULC) which is marked as Ex.X.5 also records whatever P.W.2 brought to the notice of the Officer. Further, in Ex.X.4 (relevant portion is extracted above) the appellant admitted that respondents asked her not to go to the land nor take up any agricultural operations. Yet another strong circumstance which belies assertion of possession is Ex.A.21 which is Advocate Commissioner's Report. This Court, therefore, is not able to accept the submission that the appellant had been in possession of the land. Further, in any view of the matter, as rightly pointed out by the learned Senior Counsel for contesting respondents, fifth respondent entered into agreement and obtained sale deeds Exs.B.18 and B.20 and B.22 when there was no Court order in force. Except the evidence of P.Ws. 1 and 2, there is no evidence before this Court to come to the conclusion that the appellant was in possession of the property immediately before filing suit.

65. In summation on points (i) and (ii) this Court holds that the oral agreement pleaded by the appellant either in her favour or in favour of her husband is not proved and there is no privity of contract between appellant and Respondents 1 to 4 giving cause of action to file suit for specific performance of agreement of sale. The appellant cannot be said to be in possession of the property immediately before filing the suit or thereabout and any assumption as to possession would not confer any jurisdiction on the Civil Court to direct specific performance of contract of sale of immovable property unless the agreement is itself proved in accordance with law.

VII. In Re Point No. (iii)

Whether fifth respondent is not a bona fide purchaser for value without notice of the prior contract of sale?

66. The learned Counsel for the appellant submits that fifth respondent is not entitled to seek any benefit of Section 19(b) of the Specific Relief Act. He would urge that though the fifth respondent pleaded in her written statement that she

is a bona fide purchaser for valuable consideration, she failed to plead and prove that she is a bona fide purchaser for valuable consideration without notice of prior oral agreement of sale by Respondents 1 to 3 with the appellant. According to the learned Counsel, D.W.3, who is none other than husband of fifth defendant/fifth respondent made the statements in his evidence which show that the fifth respondent knowing fully well about the oral agreement purchased the property in collusion with the owners. Therefore, he pleaded not to deny enforcement of specific performance of oral agreement of sale in favour of the appellant. He placed reliance on the decisions of the Privy Council, decisions of Supreme Court as well as High Courts. These are, AIR 1946 97 (Privy Council) C; Marina Appa Rao and Others Vs. Marina Veeranna, , Yella Reddi v. Subbi Reddi AIR 1954 AP 20, Damacharla Venkata Seshiah Vs. Damacharla Venkayya and Others, , Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others, , and R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, .

67. Learned Counsel for fifth respondent, per contra, submits that after impleading fifth respondent on 16.6.1983 as subsequent purchaser of the suit schedule property, the appellant did not take any steps to make proper and necessary pleadings/ allegations in the plaint alleging that fifth respondent is not a bona fide purchaser without notice and therefore any amount of evidence brought on record cannot be looked into. He would also urge that on the date of execution of agreement of sale Ex.B.18 on 12.3.1982 no suit was pending and therefore the appellant should be denied specific performance of contract. He relied on the decision of the Supreme Court in Smt. Chander Kali Bai and Others Vs. Shri Jagdish Singh Thakur and Another, .

68. In all the decisions relied on by the learned Counsel for the appellant, the legal position was explained to the effect that a subsequent purchaser of the immovable property can defeat the claim of the plaintiff for enforcement of specific performance of contract only when such subsequent purchaser proves that he/she is a bona fide purchaser for true value and that he/she had no notice of prior contract of sale in favour of the plaintiff. Though in some of the decisions cited by the learned Counsel for the appellant it was passingly referred to the question of burden of proof, all the decisions cited are indeed not directly on the point. Be that as it is, it is now well settled that the plaintiff has to implead subsequent purchaser as defendant to the suit and has to plead that subsequent purchaser is not bona fide purchaser for value, that such subsequent purchaser had notice of the contract of sale of immovable property in favour of plaintiff and also seek a decree directing the original vendors as well as subsequent purchaser to execute sale deed in favour of the plaintiff. To that extent, initial burden is on the plaintiff to come and depose that the subsequent purchaser is not entitled for the benefit u/s 19(b) of the Specific Relief Act. It is then the onus shifts to the subsequent purchaser and to prove the negative. It would be sufficient for such subsequent owner to come and say in the witness box that he/ she had no notice of prior contract and that the property was purchased for valuable consideration

in good faith.

69. In *R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others*, , the Supreme Court dealing with this point, after referring to Section 19 of the Specific Relief Act, made the following observations:

As can be seen from Sections 19(a) and (b) extracted above specific performance of a contract can be enforced against (a) either party thereto; and (b) any person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Section 19(b) protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence, the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty.

70. The other decisions cited by the learned Counsel for the appellant, in effect, laid down the same principle as above and therefore it is not necessary to multiply the decisions. But, on the question of burden of proof, a reference may be made to some of the decisions on the point. These are -*Kirtarath Rai v. Sripat Rai*, AIR 1928 All. 307, *Ramchander v. Bibi Asgar* AIR 1957 Pat 224, *Vomisetti Papa Rao v. J. Venkataramana* 1970 (2) An.WR 280, *Durga Prasad and Another Vs. Smt. Lilawati and Another*, , *K. Subbayamma v. S. Chimpirayya* 1976 (1) An.WR 438, and *Ram Niwas (Dead) Through Lrs. Vs. Smt. Bano and Others*, .

71. In *Kirtarath Rai v. Sripat Rai* (supra), a Division Bench of the Allahabad High Court dealing with Section 27 of the Specific Relief Act, 1877, made the following observations:

There is, however, an exception in favour of a transferee for value who has paid his money in good faith and without notice of the plaintiff's contract. From the language of this section it is clear that any person who wishes to bring himself within the exception must in the first instance show that he is entitled to that exception. I expressed the same view in my dissenting judgment in first Appeal No. 183 of 1919, decided on 25th May, 1923, where I quoted cases of all the High Courts in support of that view. Out of these I may only refer to the case of *Naubat Rai v. Dhaunkal Singh* (1916) 38 All. 184 : 32 IC 953 : 14 ALJ 111, Since then these rulings have been followed in several other cases. In this view of the matter it is correct to say that the burden of proving want of notice, in the first instance, lies on the defendant transferee. But this he can do by merely denying the fact on oath, and, therefore, the question of burden of proof loses much of its importance.

72. In *Durga Prasad v. Lilawati* (supra), the Patna High Court held that the initial burden is always on the vendee (subsequent purchaser) to show that he had no knowledge of the agreement, the vendee has only to discharge the burden by

leading negative evidence and that such evidence can only consist of his own statement denying the fact that he had no knowledge of the same. It was further held that as soon as the vendee denies notice, the burden is discharged and then the burden shifts to plaintiff to prove that the vendee had notice of the earlier agreement.

73. In *Vomisetti Papa Rao v. J. Venkataramana* (supra), a Division Bench of this Court considered Section 27(b) of the Specific Relief Act, 1877, which came to be re-enacted as Section 19(2) of the present Act. This Court while reiterating that burden is on the transferee to show that he is a bona fide purchaser for value without notice made the following observations with regard to nature of proof.

...But he relied upon a decision of the Madras High Court in *In Re: Subban Samban*, , about which reference has already been made above to show that it is very difficult and at times may be impossible to prove a negative and in a case like this more attention has to be paid to the positive case of the plaintiff than to the bare denial made by the defendant. The 3rd defendant had denied in his evidence that he had notice of the prior agreement of sale. The Sub-Judge accepted his evidence. He should therefore be taken to have discharged his initial burden. It is not always possible to adduce positive evidence to prove a negative. In a case like this where the plaintiff adduced some evidence to prove the knowledge of the prior agreement of sale to the subsequent purchaser and it is not acceptable and that coupled with the denial of the subsequent purchaser goes a long way to establish his case about his ignorance of the prior agreement of sale. If there are some circumstances from which it can be said that the purchaser must have had knowledge of the prior agreement of sale, it may be for the purchaser to show that in spite of the existence of those circumstances in fact he was not aware of the prior agreement of sale.

74. In *K. Subbayamma v. S. Chimpirayya* (supra), is a case in which the subsequent purchaser (appellant) sought recourse to Section 19(b) of the Specific Relief Act, 1963. While holding that such a purchaser must establish the absence of notice as well as payment of consideration without notice this Court explained the legal position thus:

"The law was and is both u/s 27 of the old Specific Relief Act and u/s 19 of the new Specific Relief Act that the onus is on the subsequent purchaser to prove that he is a bona fide purchaser for value without notice of the earlier contract. The defendant must establish both parts of plea viz., absence of notice and payment of consideration without notice. It may be that the onus is ordinarily discharged by the transferee denying on oath knowledge of the plaintiff's contract. But that does not affect the onus of proof. Needless to point out that each case will have to be considered on its own facts to see whether the onus has been discharged by the transferee for it is conceivable that by the transferee for it is conceivable that in some cases a mere denial may not be sufficient. Ordinarily in suits of this type the plaintiff-vendee should first adduce evidence regarding his contract. The defendant-vendor then adduces evidence in rebuttal.

The subsequent purchaser can then lead evidence in support of his purchase. The initial onus is on him to prove that he is a purchaser for consideration and without notice of the earlier contract. After the subsequent purchaser has given such evidence, the plaintiff can adduce evidence in rebuttal. It has been held that this would be the position that even if the plaintiff had stated in the plaint that the subsequent purchaser had notice of the earlier contract.

75. In *Ram Niwas v. Bano* (supra), the Supreme Court considered Section 19(b) of the Specific Relief Act, 1963. After referring to Snell's Equity (13th edition, p.48), ruled that a transferee for value who paid money in good faith and without notice of the original agreement, is excluded from enforcement of specific performance of a contract. The Apex Court also considered the purport of the term "notice" appearing in Section 19(b) of the Act and laid down as under:

The word "notice" should have been used in Issue 10 instead of "knowledge" because Section 19(b) uses the word "notice". From the definition of the expression "a person is said to have notice" in Section 3 of the Transfer of Property Act, it is plain that the word "notice" is of wider import than the word "knowledge". A person may not have actual knowledge of a fact but he may have notice of it having regard to the aforementioned definition and Explanation II thereto. If the purchasers have relied upon the assertion of the vendor or on their own knowledge and abstained from making inquiry into the real nature of the possession of the tenant, they cannot escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act.

76. It is therefore well settled that initial burden is on the subsequent purchaser to prove negative that he/she has no notice of earlier contract of sale and that he/she is a bona fide purchaser for value. For so doing, it would be sufficient for the subsequent owner to come to the witness box and depose that he/she has no notice of prior sale. Then the entire onus is on the plaintiff to properly plead and prove that subsequent purchaser had notice of prior contract of sale that subsequent purchaser is not a bona fide purchaser for value and that such subsequent purchaser is not entitled to priority in equity. The appellant in her plaint did not make any allegation against fifth respondent who was impleaded as fifth defendant by reason of the orders of the Trial Court in I.A. No. 301 of 1983, dated 16.6.1983. There is not even an whisper to that effect. Further, even in the prayer portion of the plaint, no direction is sought to fifth respondent to execute sale deed in favour of the appellant along with Respondents 1 to 4. Therefore, it has to be held that the appellant had not pleaded as required under law to deny equities in favour of fifth respondent. In the absence of such pleading can the appellant rely on evidence on record in this regard? A reference may be made to *Chander Kali v. Jagdish Singh* (supra) wherein it was laid down.

...In such a situation it was not open to them to take a stand at a very late stage of the litigation that the sweetmeat shop was the business of the joint family of the plaintiff - the karta of which was his father and on his death it was the business not of the plaintiff alone but of his entire joint family. The High Court

has rightly rejected this point on this ground. In AIR 1930 57 (Privy Council) (1) it has been pointed out that where a claim has never been made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward. If it could be so, even at the trial stage, undoubtedly such a new question of fact could not be entertained at any appellate stage. This decision has been followed by this Court in Bhagat Singh v. Jaswant Singh AIR 1966 SC 1861.

77. Keeping the above principles with regard to the pleadings and evidence, the submission of the appellant's Counsel may be considered. Fifth respondent examined her husband as D.W.3. He was suggested that he was aware of the oral agreement in favour of the appellant and that the plaintiff spent more than Rs. 80,000/- for development of the property including digging of well. D.W.3 denied the suggestion. He also denied the suggestion that fifth respondent knowing about the earlier transaction paid higher amounts to Respondents 1 to 4 and got the property registered during the pendency of the proceedings. He also stated that the sale deeds were registered prior to the suit. But, before registration and execution of the sale deeds he was aware of O.S.No. 45 of 1982 to which fifth respondent was not a party and it was dismissed. On the basis of these statements of D.W.3, learned Counsel for the appellant contends that fifth respondent and her husband D.W.3 were aware of the oral agreement of sale as well as suit proceedings and therefore specific performance of agreement of sale cannot be denied to the appellant u/s 19(b) of the Specific Performance Act.

78. Learned Counsel for the fifth respondent opposes the submission and contends that when D.W.3 deposed that they are not aware of the oral agreement of sale, onus was entirely on the appellant. As the "appellant has not" even pleaded in her plaint any amount of evidence even by D.W.3, to that effect cannot be looked into. I see force in the submission. As held by various Courts, in a case of this nature, the plaintiff has to necessarily take two important steps; (i) an averment has to be made in the plaint that subsequent purchaser arrayed as defendant has notice of prior agreement and is not a bona fide purchaser for value; (ii) the plaintiff has to pray the Trial Court to enforce specific performance of contract of sale by directing his/her vendors as well as subsequent purchaser to execute sale deed [See Para 7 in Appa Rao v. Veeranna (supra)]. The plaint of the appellant on both these aspects is silent and therefore the evidence of D.W.3 or for that matter the evidence of P.Ws.1 to 5 is of no avail to rescue the appellant from the situation.

79. While on Points 1 and 2 this Court has taken a view that the oral agreement as pleaded has not been proved and therefore consideration on this point may not be of much significance. However, this Court has considered this point at some length having regard to elaborate submissions made by Counsel appearing for opposing parties. This point is accordingly answered in favour of fifth respondent.

VIII. In Re Point No. (iv)

Whether the appellant is entitled for decree of specific performance of agreement of sale?

80. It is the purport of Section 20 of the Specific Relief Act that jurisdiction of the Court to pass a decree for specific performance is discretionary. In every case where agreement is proved, it is not necessary for the Court to grant relief even if it is lawful. On exercise of discretion the Court can always deny specific performance of agreement of sale. This Court on Points 1 to 3 has held against appellant and therefore relief of specific performance of oral agreement of sale has to be denied to the appellant.

81. Learned Senior Counsel for Respondents 1 to 4 Sri K. Subramanya Reddy has strenuously contended that in view of the subsequent events even if the oral agreement of sale dated 2.3.1971 is true, a decree for specific performance cannot be passed. Reliance is placed on the decisions of the Supreme Court in K.S. Vidyanadam and Others Vs. Vairavan, , and V. Muthusami by Lrs. Vs. Angammal and Others, As the findings on Points 1 to 3 are against the appellant, this Court is not inclined to go into the question.

IX. In Re Point No. (v)

Whether the appellant is entitled for a decree for money towards damages and refund of money allegedly paid by her?

82. The appellant alleged that she paid Rs. 3,000/- on the date when the oral agreement was entered into with Respondents 1 to 4 and subsequently, in 1972 when Ex.A.1 was drafted she paid Rs. 7,000/-. She also undertook to pay once again a sum of Rs. 10,000/- if the finding on question of appellant sale consideration is against her. Be that as it is, she also prayed for alternative relief for a money decree in a sum of Rs. 70,000/- with interest at 12% per annum from the date of the suit till the date of realisation. The Trial Court recorded finding that the appellant is entitled to claim a sum of Rs. 20,900/-towards expenditure incurred by her and Rs. 10,000/- paid towards purchase of suit schedule land with interest at 12% per annum from the date of suit till realisation. It is urged that in the absence of any proof that the appellant paid an amount of Rs. 10,000/- to the vendors and in the absence of proof that she was given possession by reason of which she developed the land by incurring expenditure, the lower Court was incorrect in granting decree for payment of money. This is refuted by the learned Counsel for the appellant placing reliance on oral evidence of P.Ws.1 to 5 and Exs.A.8 to A.18, revenue receipts issued by pathwari.

83. The oral agreement as alleged and alleged payment of Rs. 3,000/-on the date of agreement and Rs. 7,000/- subsequently has been disbelieved by this Court while considering other points. In the absence of any receipt evidencing due payment of amount as alleged by the appellant, evidence of P.Ws.1 and 2 - wife and husband respectively, with all inconsistencies and discrepancies in the depositions is scant evidence. The wife says that on the date of agreement it is

she who sold grapes and got money whereas husband also said that it is he who sold grapes from his garden and paid the amount to Defendants 1 to 4. Their explanation that they did not obtain receipt for the amount paid is more than odd, especially when P.Ws.1 and 2 subsequently obtained receipt for Rs. 5,000/- from third defendant and filed suit in 1981. Therefore, this Court holds that the appellant has failed to prove payment of Rs. 3,000/- as well as Rs. 7,000/- to Respondents 1 to 3 and she is not entitled for refund of the money.

84. It is the case of the Respondents 1 to 3 that the appellant who owns land at a short distance from their own land (suit land) requested permission to use the water from the well in the suit land for cultivating the appellant's lands, that they permitted her and that it is Defendants 1 to 4 who dug the well and obtained electrical connection. The factum of pipeline running from the well to the appellant's lands is also observed in Ex.A.21 by the learned Advocate Commissioner during his visit pursuant to warrant of Commissioner in I.A.No. 306 of 1982 which is marked as Ex.A.1. She gave breakup for expenditure when she deposed that she spent Rs. 40,000/- for digging well for pump-set and laying pipes, Rs. 8,000/- for laying fencing with barbed wire and Rs. 7,000/- for construction of servant quarters and Rs. 7,000/- towards electricity connection. The husband of the appellant, P.W.2, also deposed on similar lines who also added that they got 700 pits dug for grapevines. The evidence of P.Ws.1 and 2 on this is sought to be supported by the evidence of P.W.3, P.W.4 and P.W.5. As rightly pointed out by the learned Senior Counsel for fifth respondent, all of them say that they are deposing based on the information given by P.Ws.1 and 2. Therefore, their evidence is of no assistance to test the veracity of the statements made by P.Ws.1 and 2. So to say, the appellant has not proved the allegation that either she or her husband have spent an amount of Rs. 60,000/- on the land. This coupled with the finding on other points for consideration would disentitle the appellant for alternative relief of payment of money as prayed. This point is answered accordingly against the appellant.

X. Conclusion

85. In view of the findings on points framed for consideration, the appeal filed by the plaintiff being AS No. 353 of 1994 is dismissed with costs, and the appeal filed by Defendants 1, 3, 4, 6 and 8 is allowed. As a result of this, the suit being OS No. 209 of 1983 on the file of the Court Principal Subordinate Judge, Ranga Reddy District, at Saroornagar, is dismissed with costs.