
(2005) 02 AP CK 0014

In the Andhra Pradesh High Court

Case No : Second Appeal No. 482 of 1991

K. Ahmed Alli Sab (died) per LR.s. and Others

APPELLANT

Vs

Desai Abdul Gani Desai

RESPONDENT

Date of Decision : 10-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1), Order 41 Rule 27(2), 100
Evidence Act, 1872 — Section 33
Specific Relief Act, 1963 — Section 16, 20, 20(2)

Citation : AIR 2005 AP 374 : (2005) 3 ALD 31 : (2005) 2 ALT 676

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : Ganta Suryanarayana, for the Appellant; K. Soma Konda Reddy, for the Respondent

Final Decision : Allowed

Judgement

V. Eswaraiah, J.—The appellants are the defendants in a suit filed by the sole respondent/plaintiff in O. S. No. 106 of 1982 on the file of the Subordinate Judge, Adoni for specific performance of the agreement of sale, dated 26-6-1978 marked as Ex. A-1 said to have been executed by the deceased-first appellant in favour of the sole plaintiff for the sale of the land of four acres out of Ac. 44-65 cents in Sy. No. 40-C.

2. The first appellant died during the pendency of second appeal and his legal representatives were brought on record as appellants 10 to 13. The appellants 2 and 3 are the brothers of the first appellant and the appellants 4 to 9 are the purchasers of the suit schedule land.

3. For the sake of convenience, the parties will be referred to as arrayed in the Original Suit.

4. The O. S. No. 106 of 1982 filed by the plaintiff/respondent was dismissed by

the judgment and decree, dated 10-4-1987. Aggrieved by the same, the plaintiff filed A. S. No. 28 of 1987 which was allowed by the lower appellate Court by its judgment and decree, dated 17-8-1991 setting aside the judgment and decree of the trial Court and decreed the suit.

5. Aggrieved by the said judgment and decree of the lower Appellate Court, the defendants filed the instant Second Appeal.

6. At the out set, the learned counsel for the plaintiff submitted that the questions of law raised in the second appeal are not at all substantial questions of law and this Court has not framed any substantial questions of law at the time of admission of the Second Appeal and the same was simply admitted and therefore, it is not open to the Court to decide the Second Appeal on any questions of law framed by the defendants.

7. In support of his contention, the learned counsel for the plaintiff relied on the judgment of the Apex Court in the case of Thiagarajan and others v. Sri Venugopalaswamy B, Koil and Ors. 1. 2004 (4) ALD 8 :2004 (4) ALT 272, In the said case, the High Court while admitting the appeal, framed certain substantial questions of law. But disposed of the appeal was on the points of law framed by it at the time of final hearing, ignoring the substantial questions of law framed by it at the time of admission of second appeal. The same was found fault with by the Apex Court. Under those circumstances, the Apex Court held that the fresh set of the questions framed by the High Court at the time of final hearing cannot be termed to be a substantial question of law in contrast to mere question of law as contemplated u/s 100 C. P. C. and therefore disposing of the Second Appeal on the points of law framed by it, at the time of final hearing other than the substantial questions of law framed at the time of admission is bad in law.

8. On the other hand, the learned counsel appearing for the defendants relied on the judgment of the Apex Court in the case of Muthu Gounder v. Ammayee Ammal AIR 2002 SC 2482. The Apex Court after extracting Section 100 of C.P.C. held that the High Court can entertain a Second Appeal only if it is satisfied that the case involves a substantial question of law, an obligation is cast on the appellant to state precisely the substantial question of law involved in the case in the Memorandum of Second Appeal and if the High Court is satisfied that a substantial question of law is involved in the Second Appeal it is required to formulate that question. The appeal has to be heard on that question though the respondent is permitted to argue that no such question is involved in the case. Nonetheless, the High Court has power to hear the appeal on any other substantial question of law not formulated by it provided it is satisfied that the case involves such other substantial question and in that event it has to record reasons.

9. In view of the said preliminary objections raised by the plaintiff, the substantial questions of law formulated by the defendants at the time of admission of second appeal are extracted hereunder:

(i) Whether the plaintiff is entitled for specific relief without depositing the sale consideration into Court before filing the suit?

(ii) Whether the lower Appellate Court has not committed any mistake, in not sending the disputed document

Ex. A-1 for the opinion of the Handwriting Expert in the peculiar circumstances of the case?

(iii) Whether the plaintiff has proved his prior possession in the suit land as recited in Ex. A-1 where the trial Court held that it is a forged document?

10. As the Court formulated no substantial question of law at the time of admission, I have permitted the learned counsel appearing for both parties to advance arguments on the aforesaid substantial questions of law and on the following points that have been framed by this Court at the time of final hearing:

(i) Whether the plaintiff was ready and willing to perform the essential terms of contract at all material times?

(ii) Whether the terms of the agreement of sale give the 1st defendant an unfair advantage, to deny the decree of specific performance in favour of the plaintiff, even assuming without admitting that agreement of sale is a genuine document?

(iii) Whether the lower appellate Court erred in receiving the additional evidence Exs. A-17 to A-21?

(iv) Whether the findings of the lower appellate Court are perverse and contrary to the evidence?

11. I am of the view that the substantial questions of law that have been formulated in the grounds of appeal and the aforesaid four points, involve substantial questions of law to be determined under the Second Appeal. Accordingly, both the counsel were permitted to advance elaborate arguments on the said issues.

12. As per plaint averments, the first defendant was the absolute owner of 4 acres of land out of total extent of Ac. 44-65 cents in Sy. No. 40/60 situated at Chinna Thumbalam village bounded by East - the land of Raja Ahammad, West - land of Mangala Narasimhulu and Khaja Hussain, North - Land in occupation of Ubbar Ayyanna and South - T. S. P. Channel. The defendants 2 and 3 are the brothers of the first defendant who are the joint pattedars of the said land. Though, the said land had fallen exclusively to the share of first defendant, there has been no mutation of patta in his favour. The first defendant entered into Ex. A-1 agreement of sale on 26-6-1978 with the plaintiff to sell the said land for Rs. 16,000/-. The plaintiff had been in possession and enjoyment of the said land already, as a tenant of first defendant. Out of the sale consideration, the first defendant had received Rs. 2,000/- as advance and he has agreed to receive the balance amount of Rs. 14,000/- with interest @ 12% per annum. No time was stipulated for payment of balance amount. It was agreed that on payment of

balance amount, the first defendant should execute a registered sale deed in favour of the plaintiff at the plaintiff's cost. After expiry of one year, the first defendant obtained a promissory note for Rs. 1680/- representing the interest. The plaintiff was ready and willing to pay the balance sale consideration with accrued interest to the first defendant and wanted him to execute a sale deed in or about first week of September, 1982, but the first defendant evaded to do so. The plaintiff learnt that the first defendant executed two sale deeds in respect of two acres each of the suit land in favour of the defendants 4 to 9 on 19-10-1982 which are marked as Exs. A-2 and A-3 with a view to defeat the plaintiff's right under the agreement of sale. The defendants 2 and 3 also joined in execution of the sale deeds along with the first defendant, being the joint pattedars, though they have no interest in the said land. The defendants 4 to 9 are residents of Kallukunta village and being the close relations of the plaintiff are aware of the plaintiff's possession and enjoyment of the land as purchaser under the agreement of sale. They along with other defendants, have colluded together and have brought into existence the two sale deeds in their favour. The transaction of the said two sale deeds i.e., Exs. A-2 and A-3 are void and unenforceable in law. The plaintiff continued to be in possession of the said land even after the said two sale deeds. The recitals regarding the delivery of possession of the land in favour of the defendants 4 to 9 are false and fictitious. The plaintiff issued a lawyer's notice, dated 30-11-1982 under Ex. A-4 to the defendants 1 to 9 requiring the first defendant to receive the balance sale consideration from the plaintiff and execute the registered sale deed in his favour as per Ex. A-1 and the defendants 4 to 9 were also warned not to interfere with the peaceful possession and enjoyment of the suit schedule property. The defendants refused to receive the said notices. The returned envelopes are marked as Exs. A-5 to A-13. Accordingly, the suit for specific performance was filed alleging that the cause of action arose on the date of execution of Ex. A-1 sale deed (sic. agreement), dated 26-6-1978 and when the plaintiff approached the first defendant in the first week of September, 1982, who evaded to receive the same and on 19-10-1982 when the defendants 1 to 3 executed sale deeds Exs. A-2 and A-3 in favour of the defendants 4 to 9 and on 30-11-1982 when the plaintiff sent lawyer's notice to the defendants. Accordingly, the suit for specific performance was filed to pass a decree for specific performance of the agreement of sale- Ex. A-1, dt. 26-6-1978 directing the first defendant to execute a registered sale deed in respect of the landed property in favour of the plaintiff at plaintiff's cost and if the first defendant fails to do so, the same may be got executed through Court.

13. The first defendant filed a written statement stating that the defendants 2 and 3 being joint owners along with first defendant executed the sale deeds in favour of the defendants 4 to 9 but not as the joint pattedars. All the allegations made in the plaint about the execution of Ex. A-1-agreement of sale and the receipt of initial advance of Rs. 2,000/- and the execution of promissory note towards interest were denied. It is specifically stated that Ex. A-1-sale deed (sic. agreement) is a forged document and the signature appended on it is not that of

the first defendant and the contents mentioned therein are all false and the first defendant was taken by surprise when he saw for the first time about the execution of the said document. The said Ex. A-1 is a concocted and forged document and the plaintiff is put to strict proof of its contents and the signature on it. The father of the plaintiff viz. Hussain Desai had similarly concocted and has brought into existence another forged document alleged to have been executed by the first defendant which was produced in O. S. No. 312 of 1980 on the file of the Principal District Munsif, Adoni in which the said Court came to the conclusion that the said document was forged one and the signature appended on it is not that of the first defendant and in the same way his son who is the plaintiff herein concocted and brought into existence the forged document which was not at all executed by the first defendant at any point of time. The plaintiff, his father, his brothers and other members of the family are powerful in the village, but somehow or other to subdue the first defendant and his brothers and to grab over their landed property which is available in their village, they wanted to create scare and fear in the minds of defendants 1 to 3 to knock away the property. The defendants 2 and 3 are also having equal right and interest along with first defendant in the suit schedule property as absolute owners. The plaintiff is called upon to prove that there was a partition in the plaint schedule property that has fallen to the share of the first defendant. It is also stated that the plaintiff never called upon the defendants to execute the sale deed in the first week of September, 1982. The entire story is concocted by the plaintiff. It is stated that the plaintiff and his father are seasoned litigants. The defendants 1 to 3 being the absolute joint owners of the entire suit schedule property in Sy. No. 40-C to an extent of 4 acres as on 19-10-1982 under Exs. A-2 and A-3 and the possession of the suit property was also given after receiving the consideration by the plaintiff to the defendants 4 to 9. The defendants have taken possession and they carried out the agricultural operations.

14. A written statement was also filed on behalf of the defendants 4 to 9 denying all the averments. They stated that they are the bona fide purchasers of the suit schedule property under Exs. B-1 to B-3 with considerations without any knowledge or prior notice about the alleged agreement said to have been executed by the first defendant in favour of the plaintiff. They purchased the lands on 19-10-1982 under Exs. A-2 and A-3. After purchase they have carried out the agricultural operations, ploughed the same and raised groundnut crop. But, for the first time, on 5-1-1983 when they received Court summons, they came to know about the alleged agreement referred to in the plaint. After enquiry, the defendants 1 to 3 came to know that it is a concocted and forged document and the first defendant never executed Ex. A-1 agreement in favour of the plaintiff. It is further stated that they have already got lands near the plaint schedule land and they have been seeing the plaint schedule land being in possession and enjoyment of defendants 1 to 3 and the said lands were being cultivated by them by hiring the coolies on 19-10-1982. Either on 19-10-1982 or subsequently or before that date, the plaintiff was never in possession of the suit

property. The defendants 1 to 3 alone were in possession of the said suit land. It is stated that everybody in the village knows about the sale transaction. The Village Officers, plaintiff and his father and every member of his family knows about the sale of the said land in favour of the defendants 4 to 9 and there was no objection about the same at any point of time. The plaintiff filed the said suit after concocting the forged document Ex. A-1-agreement of sale. The plaintiff, his brother and his father are seasoned litigants and they are powerful and influential persons in the village. The defendants 4 to 9 are the bona fide purchasers for a valid consideration and they have no notice about the alleged Ex. A-1-agreement of sale. Therefore, the suit filed by the plaintiff is vexatious one and the plaintiff is not entitled to any decree for specific performance on the alleged agreement of sale-Ex. A-1 as the defendants 4 to 9 are the absolute owners of the plaint schedule property.

15. On the aforesaid pleadings, the trial Court framed the following issues for trial:

- (i) Whether the first defendant executed the suit agreement on 26.6-1978?
- (ii) Whether the defendants 4 to 9 are the bona fide purchasers of suit property for valid consideration?
- (iii) Whether the plaintiff is entitled for specific performance of the suit agreement?
- (iv) Whether defendants 2 and 3 are owners of the suit property and alleged agreement by first defendant is not binding on them?
- (v) To what relief?

16. After considering the oral and documentary evidence, the trial Court held all the issues in favour of the defendants holding that the defendants 1 to 3 are co-owners of the suit schedule property and the first defendant himself cannot convey the entire property and Ex. A-1-agreement of sale is not proved and the defendants 4 to 9 are the bona fide purchasers of the suit land under Exs. A-2 and A-3 and the plaintiff is not entitled for any decree of specific performance.

17. It is the contention of the plaintiff before the lower appellate Court that the execution of Ex. A-1-agreement of sale is proved by examining the attestor and the scribe and the said property had fallen to the share of D-1 (under Ex. A-1) and therefore, the reasoning of the lower (appellate) Court that the execution of the said agreement is not proved, is incorrect. It is further stated that the defendants 1 to 3 are not the joint owners. But, however, even if they are the joint owners of 44 acres in the same survey number, which is more than the suit schedule property, the said document cannot be invalid, even if the division is not believed. It is stated that the trial Court has not correctly appreciated the oral and documentary evidence and the defendants 4 to 9 are not the bona fide purchasers and they were aware about Ex. A-1 agreement of sale and possession of the plaintiff as lessee and as a purchaser.

18. On the aforesaid contentions, the lower appellate Court considered the following points;

- (i) Whether Ex. A-1 agreement of sale is true?
- (ii) Whether defendants 4 to 9 are bona fide purchasers for value and without notice of the suit agreement?
- (iii) Whether Ex. A-1 agreement is valid and binding on the defendants?
- (iv) To what relief?

19. On the aforesaid points, the lower appellate Court held that the trial Court has not given any valid reasons for disbelieving the testimony of P. Ws. 2 and 3 and the evidence of P. W. 5 who is Ex-Village Karnam, also lends corroboration to the contention of the plaintiff regarding the sale agreement executed by the first defendant in favour of the plaintiff and the evidence adduced is sufficient to come to the conclusion that Ex. A-1 is true and valid. The lower appellate Court further held that the defendants 2 and 3 have no right in the suit, but however, the defendants 1 to 3 have chosen to execute the sale deeds Exs. A-2 and A-3 in favour of the defendants 4 to 9. The lower appellate Court further held that the defendants 1 to 3 have chosen to contend that they have not partitioned their properties and the suit land is still owned by them jointly and they sold the same jointly in favour of the defendants 4 to 9 under Exs. A-2 and A-3, cannot be accepted and the defendants 2 and 3 have no right in the suit land by the date of execution of Ex. A-1 agreement. As Ex. A-1 is proved to be true and valid, the first defendant alone is the exclusive owner and possessor of the suit property. It is stated that if really the defendants 1 to 3 have not partitioned their property including the land in Survey No. 40-C and if really they continued to be joint owners of the said land, it does not stand to reason that the second appellant would not have been a party for the execution of such sale deeds in favour of different persons as mentioned in Ex. A-14-Encumbrance Certificate. The lower appellate Court during the pendency of the appeal, allowed I. A. No. 531 of 1987 filed by the plaintiff to receive the additional evidence i.e., copy of orders of the Land Reforms Tribunal, Adoni, dated 31-3-1977 as Ex. A-17, office copy of the lawyer's notice, dated 16-10-1982 as Ex. A-18, the registered covers containing Ex. A-18 notices and the returned envelopes under Exs. A-19 to A-21. It is stated that as per Ex. A-17, the defendants 1 to 3 had submitted a separate declaration under the Land Ceiling Act regarding the lands owned and possessed by them and the orders were accordingly passed by the Land Reforms Tribunal fixing up the excess land said to be owned and possessed by them and directing them to surrender such excess land. Ex. A-17 shows that the properties were already partitioned between the defendants 1 to 3 and they were not in joint possession and enjoyment of any land including present suit land. Accordingly, it was held that it is incorrect to state that the defendants 1 to 3 did not partition their properties including the suit property.

20. The learned counsel appearing for the defendants submitted that the

production of additional evidence before the lower appellate Court under Exs. A-17 to A-21 without examining any of the witnesses is illegal. The receipt of the said additional evidence is also contrary to Order 41 Rule 27, C. P. C., which is extracted as follows:

27. Production of additional evidence in Appellate Court--

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not Within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

21. It is not the case of the plaintiff that the said additional evidence was sought to be filed during the course of trial and the trial Court refused to admit the same. It is also not the case of the plaintiff that in spite of his due diligence, he was not able to adduce the said evidence during the course of trial and that the said documents are not within his knowledge or could not have been filed by him before the trial Court.

22. As per Order 41 Rule 27 (1) (b) of C.P.C. if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause it can receive the additional evidence.

23. As per Order 41 Rule 27(2) of C. P. C. whenever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reason for its admission.

24. It is brought to my notice that the lower appellate Court simply allowed the interlocutory application filed to receive the additional evidence without examining anybody and to pronounce the judgment, it cannot be said that the said additional evidence is required to be adduced. Simply I. A. No. 531 of 1987 was allowed for receiving of additional evidence on behalf of the plaintiff. Therefore, I am of the opinion that none of the provisions of Order 41 Rule 27 C.

P. C. are complied with requiring the receipt the additional evidence.

25. It is pertinent to note that all the Exs. A-17 to A-21 were available during the course of trial and no reason has been stated as to why the said documents have not been filed during the course of trial. Even a perusal of record, shows that there is no material to come to the conclusion that this particular property had fallen to the share of the first defendant alone. A perusal of Ex. A-17 shows that it is nowhere stated that the suit schedule property had fallen to the share of first defendant. Therefore, I am of the view that the finding of the lower appellate Court that the suit schedule property had fallen to the share of first defendant, is perverse and based on without any admitted and cogent evidence.

26. It is required to notice here the evidence available on record. A perusal of Ex. A-1 shows that the first defendant received the suit property from his forefathers and the suit property is in his possession and it was given on lease to the plaintiff and the suit property is agreed to be sold on 26-6-1978 on which day an amount of Rs. 2,000/- was paid as advance and the land which was already in his possession, delivered the possession to the plaintiff. The balance of consideration of Rs. 14,000/- will be paid as per the convenience of the plaintiff and the defendant agreed to register the said land in favour of the plaintiff. The balance of consideration shall bear 12% interest. The property will be enjoyed by the plaintiff till the same is registered. As there was no stamp available, it was written on the white paper. In Ex. A-4, dated 30-11 -1982 a lawyer's notice issued by the plaintiff to the defendants, it is stated that Ex. A-1 stipulates no time for payment of balance amount and after expiry of one year of Ex. A-1, the first defendant obtained a promissory note from the plaintiff for a sum of Rs. 1680/- representing the interest and the plaintiff shall pay balance amount with accrued interest in or about first week of September, 1982 and the first defendant evaded to receive the same and the defendants 1 to 3 have sold the same in favour of the defendants 4 to 9 and the said transactions Exs. A-2 and A-3 are void and unenforceable as the defendants 4 to 9 have the knowledge about the recitals of Ex. A-1. Accordingly, the plaintiff called upon the first defendant to receive the balance sale consideration and execute the registered sale deed in his favour within three days from the date of receipt of notice, failing which he will be constrained to file a suit for specific performance. The defendants 4 to 9 were also warned not to interfere with the possession of the plaintiff in the suit schedule land. Ex. A-15 is copy of the depositions in the earlier suit filed by the father of the plaintiff in O. S. No. 312 of 1980. The lower appellate Court relied on the depositions of the defendants in O. S. No. 312 of 1980 filed by the father of the plaintiff in which the Court declared that the agreement of sale said to have been executed by the first defendant was found to be a forged one. All the parties in O. S. No. 312 of 1980 are not the same parties and the plaintiff was different and the subject matter of the property in that suit was also different from that of the suit schedule property herein.

27. Therefore, the question that falls for consideration is as to whether the

receipt of documentary evidence in O. S. No. 312 of 1980, as if, it is admitted evidence in the present suit, is relevant and admissible u/s 33 of the Indian Evidence Act.

28. As per Section 33 of the Indian Evidence Act, the evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead, or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;

Provided --

That the proceeding was between the same parties or their representatives-in-interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

29. Admittedly, the proceedings in the present case are different from that of the earlier suit. No doubt, the earlier suit was also filed based on the similar agreement which was found to be forged and concocted one and the depositions in the said suit cannot be received as evidence in this case, in view of Section 33 of the Indian Evidence Act.

30. As per Section 33 of the Indian Evidence Act, no doubt the evidence of the defendants is relevant in the subsequent judicial proceeding in some circumstances that when the witness is dead, or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party, or his presence cannot be obtained without an amount of delay or expense.

31. In the instant case, when the defendants are disputing about the contention of the plaintiff as regards the division of joint properties and when the parties to the present suit are not the same and when the subject matter of the suit property is also not the same, I am of the opinion that the finding of the lower appellate Court in holding that the suit schedule property is a separate and divided property that has fallen to the share of the first defendant based on his deposition in some other suit, is illegal and unsustainable.

32. The next question that arises for consideration is whether the plaintiff proved the genuineness of Ex. A-1.

33. To prove the genuineness of Ex. A-1, the plaintiff, examined himself as P. W. 1. He stated that he is the resident of Kallukunta village where the defendants 4 to 9 are also residing. It is stated that he was already enjoying the suit schedule

property under Ex. A-1 as a lessee and his possession was continued under agreement-Ex. A-1. He paid Rs. 2,000/- on the date of the agreement and agreed to pay the balance sale consideration amount of Rs. 14,000/- later but no date was fixed; but, however he has to pay the interest @ 12% per annum. After a lapse of one year, he has executed promissory note towards the interest for a sum of Rs. 1680/-. After lapse of two years, he demanded to execute a registered sale deed in his favour at his cost and he was ready and willing to perform his part of contract but the defendants failed to co-operate with him and the defendants 1 to 3 executed the sale deeds Exs. A-2 and A-3 in favour of the defendants 4 to 9. It is stated that 15 years back, the defendants 1 to 3 have partitioned their properties. His deposition was recorded after five years of the filing of the suit. In his cross-examination, he has stated that there is no written lease for the alleged lease in his favour and he was not present at the time of partition of the properties between the defendants 1 to 3 and he does not know about the details of the partition. Defendants 1 to 3 jointly executed the sale deeds in favour of the defendants 4 to 9 and he does not know whether the land in question jointly belongs to the defendants 1 to 3 and it is not specifically mentioned in Ex. A-1 that the suit land fell to the share of first defendant in the alleged partition and he is an illiterate and does not know what is written in Ex. A-1. It is also pertinent to note that in his cross-examination he has stated as follows: "It is not true to suggest that they are not aware of Ex. A-1 which is a forged agreement" P. W. 2 scribed the Ex. A-1. His father and brothers are enjoying 10 acres of land and he also owns another Ac. 01-70 cents of land purchased by him and it is incorrect to say that he has no capacity to purchase the said land. It is stated that first defendant is a rich person and he got number of houses and lands at Kosigi village. But, he did not see the lands owned by him at Raichur. Since the first defendant sustained loss in business, this agreement was prepared in their village. First defendant wanted to sell away his property and offered him to purchase the property. The first defendant also sold some lands at that time to some other ryots and those persons have purchased the lands by paying entire sale consideration and got the registered sale deeds and some of them have paid part of sale transactions. But, he did not know their names. He has admitted that his father filed O. S. No. 312 of 1980 on the file of the District Munsif, Adoni seeking specific performance, but he does not know whether in the said suit, the suit agreement was held to be a forged one. It is also suggested that the plaintiff and his father were terrible people. It is admitted that some cases were filed against them for taking out water illegally and high-handedly and he was also fined in one of the cases. It is stated that the plaintiff, his father, attestors and the scribe colluded together and concocted Ex. A-1 to make a false agreement of sale. The suggestion that no promissory note was obtained from (sic. by) the first defendant towards the alleged interest under Ex. A-1 is denied. It was stated that he got executed Ex. A-1 one year after the agreement of sale Ex. A-1 that was also scribed at their village.

34. The scribe of Ex. A-1 is examined as P. W. 2. P. W. 2 stated that P. W. 3 and

one Giddaiah witnessed Ex. A-1. He has stated that without receiving any summons, he came to the Court on the request of the plaintiff to give the evidence and he does not know whether the plaintiff owns any land and he does not know whether the defendants got any land more than the disputed land. No bargain was made before fixing the price and he did not see the land. In the house of P. W. 3, Ex. A-1 was scribed. He has no prior acquaintance with the first defendant except on that day and he did not know where the land is situated. He did not scribe any such document earlier. Ex. A-1 schedule land does not show survey number. Himself, attestors and the plaintiff belong to one group of the village, but he does not know whether the plaintiff and his father are powerful people and feared by one and all in their village.

35. P. W. 3 one of the attestors stated that he is also native of the same village of the plaintiff. He owns 8 acres of land. He stated that Ex. A-1 land also belongs to the first defendant. The first defendant and his brothers are six in number. He did not see them nor he is aware of them personally. In the cross-examination, it is stated that there was no bargain at all at the time of execution of Ex. A-1. First defendant came to their village and collected the rents. He has also sold some other lands, but he did not know the names of the vendors (sic. vendees). He did not know whether the first defendant and his brothers are enjoying 100 acres of land at their village apart from suit schedule property. P. W. 3 further stated that he is also one of the lessees in respect of one acre of land from first defendant, which is adjoining the suit schedule property, but, there is no lease agreement. It is incorrect to say that he is not one of the lessees of first defendant and that no rent receipts are given by first defendant. He also came to the court without issuance of summons by the Court at the request of the plaintiff.

36. P. W. 4 who is said to be the one of the neighbours of the suit schedule property stated that at the request of the plaintiff he came to the court without any summons and that he has no adjoining land by the side of the suit land. He took two acres of land on lease for cultivation. But, there is no lease deed and he is paying Rs. 200/- rent, but he has no receipt for it. It is the case of P. W. 4 that he was also cultivating the land taken on lease and he does not know personally about the division of the properties between the first defendant and his brothers. P. W. 5 a village karanam stated that the alleged suit schedule property bearing Sy. No. 40 belongs to all the three brothers i.e., defendants 1 to 3. He stated about the measurements of the land alone and he has not stated about the execution of Ex. A-1 by the first defendant and he is not a witness to Ex. A-1-agreement. He knows that the suit property was jointly sold to Kallukunta village people i.e., defendants 4 to 9. Therefore, the deposition of P. W. 5 is not at all relevant to prove the genuineness or otherwise of Ex. A-1. He did not speak anything about the execution, attestation and the contents of Ex. A-1.

37. Therefore, the evidence available on record is only the depositions of P. Ws. 1 to 4. Admittedly, it is stated by them that P. Ws. 1 to 4 belong to same group and they also set up a claim that they are the lessees of some of the lands taken

from the first defendant, but there are no rental receipts or the lease agreements.

38. D. W. 1 is resident of Kosigi village. According to the plaintiff's witnesses, the first defendant sustained a loss and he came to the village Kallukunta and executed Ex. A-1. As per the allegations of the plaintiff, the first defendant sustained loss and therefore he wanted to sell away the land. If a person sustains loss and wants to sell away the property, it is difficult to believe that he has agreed to sell the land of 4 acres having received a nominal amount of Rs. 2,000/- without stipulating time to pay the balance amount of Rs. 14,000/- at the convenience of the plaintiff agreeing to receive the interest @ 12% per annum on the balance sale consideration of Rs. 14,000/-.

39. When the signature of the first defendant is seriously disputed under Ex. A-1, I am of the opinion that the oral evidence of P. Ws. 1 to 4 is not enough to come to the conclusion that Ex. A-1 contains the signature of first defendant. There is no dispute with regard to the recitals, contentions, writing, attestation and everything on Ex. A-1 except the signature of first defendant on the said Ex. A-1. When the plaintiff and P. Ws. 2 to 4 belong to the same group, same village and setting up a similar lease deed said to have been given for certain lands leased by the first defendant and without any documentary proof or rent receipts, it is difficult to believe the oral depositions of P. Ws. 1 to 4.

40. Therefore, I am of the opinion that the trial Court has rightly appreciated the evidence adduced on behalf of the plaintiff and held that there is a bad blood running between the parties and the contentions of the plaintiff that he is a lessee even prior to the agreement is not at all proved and no scrap of paper has been filed before the Court to prove his contention about the prior lease and subsequent enjoyment of the property under Ex. A-1. No scrap of paper has been filed as regards the payment of rent, lease and no evidence has been adduced as regards the enjoyment of suit schedule property either before or after Ex. A-1. No revenue records have been filed as regards the enjoyment of the plaintiff over the suit schedule property, which is said to have been in his possession as a lessee. P. W. 5 the Village Karanam also did not speak anything about the so-called lease under the agreement or about the execution of Ex. A-1 agreement. The trial Court also rightly appreciated the contentions of the rival parties that a person who is said to have incurred loss, would not have accepted or executed an agreement without stipulating the time to receive the balance sale consideration. The scribe has no acquaintance with the first defendant prior to Ex. A-1 and the witnesses have also not stated anything about the delivery of possession or anything about the payment of balance sale consideration. There is no evidence to show that the plaintiff executed a promissory note for payment of interest. Accordingly, the trial Court held that the first defendant did not execute the suit agreement and the plaintiff is not entitled for any decree of specific performance. Therefore, none of the contents of Ex. A-1 can be believed and even according to the recitals of Ex. A-1, the plaintiff was never ready and willing to perform his part of contract.

41. The first defendant in his deposition categorically deposed that the defendants 2 and 3 are his younger brothers and they have jointly purchased the suit land and are jointly cultivating the said land and they never leased out the land to the plaintiff. He never agreed to sell the land to the plaintiff and he never received any advance of Rs. 2,000/- under the alleged agreement of Ex. A-1 and Ex. A-1 is set up by the plaintiff which is a false document and signature on Ex. A-1 does not belong to him. He never leased out these lands to the attestors of Ex. A-1 i.e., P. Ws. 3 and 4 as alleged by them. The plaintiff is inimically disposed towards his family. Plaintiff's father filed a similar suit on a similar forged document, which was dismissed. It is stated that they have not partitioned the land in Sy. No. 40-C. The suit filed by the defendants against the father of the plaintiff in O. S. No. 312 of the 1980 for grant of injunction was decreed in favour of the defendants holding that the document produced by the father of the plaintiff was forged one. The 4th defendant is examined as D. W. 2. He stated that the defendants 4 to 6 purchased land under Ex. A-2 sale deed to an extent of 2 acres for a consideration of Rs. 20,000/- and they do not know anything about the alleged agreement. Ex. A-1 prior to their purchase. From the date of purchase only, they are cultivating. The defendants 1 to 3 alone are the joint owners and they did not partition the said property. D. W. 3 is the 7th defendant who purchased land under Ex. A-3 sale deed along with defendants 8 and 9 in an extent of 2 acres of land for a consideration of Rs. 20,000/-. D. W. 4 is third defendant. He stated that the defendants 1 to 3 are the brothers and they purchased the land jointly in their favour and the said property belongs to all of them jointly. The said property was not partitioned and it was not the exclusive property of first defendant. They have jointly sold the property in favour of the defendants 4 to 9. It is stated that the suit property was only joint property held by them and there was no prior partition.

42. From the aforesaid oral and documentary evidence, the question that arises for consideration is as to whether the signature of first defendant on Ex. A-1-agreement of sale is proved basing on the oral evidence of P. Ws. 1 to 4.

43. As already stated that when there is a serious dispute by the executant i.e., the first defendant that the signature on Ex. A-1 does not belong to him, I am of the opinion that the evidence of P. Ws. 1 to 4 is not sufficient to believe that the signature on Ex. A-1 belongs to the first defendant. A perusal of signatures on Ex. A-1, written statement filed by the first defendant and other proceedings in the suit papers also goes to show that there is a difference in the signature. However, I am of the opinion that the oral depositions of P. Ws. 1 to 4 are contradictory to each other and the statements of P. Ws. 3 and 4 that they are also the lessees of certain lands, is not all proved. Admittedly, they belong to one group and one village and they never saw the first defendant previously and when the first defendant is a native of Kosigi village, it is difficult to believe that he came voluntarily to the village of the plaintiff and without bargaining the land price, he received only Rs. 2,000/- agreeing to receive the balance consideration of Rs. 14,000/- with interest at the convenience of the plaintiff. Such a document

can be set up by any group of persons. The signatures of first defendant with any of his other admitted signatures are not at all proved and is also not confronted with the disputed signature on Ex. A-1 with any of his admitted signatures.

44. Therefore, I am of the view that the question No. 2 raised by the appellants is a substantial question of law and I am also of the opinion that the lower appellate Court committed a mistake in holding that Ex. A-1 is a genuine document without getting any Hand Writing Expert's evidence, in the facts and circumstances of the case.

45. As regards the question No. 3 also, I am of the opinion that the said question is also a substantial question of law as the plaintiff has failed to prove his prior possession of the suit schedule property as per the recitals of Ex. A-1 and even subsequent to Ex. A-1 without there being any scrap of paper to prove the possession of the plaintiff in respect of the plaint schedule property either before or after Ex. A-1 either in the capacity of lessee or under agreement Ex. A-1. I am of the opinion that the plaintiff has not at all proved his prior possession in the suit land. That is one of the circumstances to hold that Ex. A-1 is a forged document.

46. Insofar as the question No. 1 raised by the learned counsel for the appellant, no doubt it is not required to deposit the sale consideration into Court before filing the suit. But, u/s 16(c) of the Specific Relief Act, 1963, specific performance of the contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms the performance of which has been prevented or waived by the defendant.

47. No doubt, as per the First Explanation of Clause (c) of Section 16 of the Specific Relief Act, where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court and as per second Explanation, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

48. Therefore, the question that arises for consideration is whether the plaintiff was ready and willing to perform his part of contract at all material times.

49. Even assuming that Ex. A-1 is a true and valid document, the plaintiff has not proved the payment of interest on Rs. 14,000/-. The so-called execution of the promissory note towards interest for one year is not proved. Ex. A-1 agreement of sale is dated-26-6-1978 and the so-called payment of interest by executing promissory note for one year i.e., up to 26-6-1979 is not at all proved. The suit is filed on 31 -12-1982. There is no pleading or proof as regards the payment of interest on the balance sale consideration for the next two years i.e., 1980 and 1981. Nobody stated anything about the readiness and willingness of the plaintiff for payment of balance consideration of Rs. 14,000/- and the

accrued interest thereon. There is no evidence adduced by the plaintiff that he has offered the said money to the defendants and that the defendants refused to receive the same. Therefore, I am of the opinion that the contention of the plaintiff is liable to be rejected on this ground also as the plaintiff is not ready and willing to perform his part of contract, even assuming that Ex. A-1 is a true and valid document.

50. u/s 20(2)(a) of the Specific Relief Act, where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant and therefore I am of the opinion that the plaintiff is not entitled for the decree on this ground also.

51. In the case of Ranganatha Gounder v. Sahadeva Gounder and Ors. AIR 2004 Mad. 520. a Division Bench of Madras High Court relying on several judgments of Apex Court held that:

It is well settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract. Readiness and willingness to perform includes ability to perform. It is incumbent upon the buyer to satisfy the Court that he was ready and willing with the money or had the capacity to pay for the property and that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money. Unless this is established, Section 16(c) of the Specific Relief Act would create a bar to the grant of this discretionary relief."

52. In the instant case, no evidence has been adduced about the readiness and willingness of the plaintiff to perform his part of contract even under the disputed agreement of sale under Ex. A-1.

53. In the case of Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, . while reiterating the earlier judgments of Apex Court held that 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 in a suit for specific performance. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out 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.

54. In the instant case, though the plaintiff stated that he is ready and willing to pay the balance sale consideration, he has not at all adduced any evidence that he has paid interest as per Ex. A-1 and that he was ready with the money by approaching the defendants to execute the sale deed as per Ex. A-1. No such

evidence is forthcoming in the instant case. The mere plea of readiness and willingness to perform a part of contract is enough and that by itself is not sufficient to hold that plaintiff was ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Section 16(c) of the Specific Relief Act makes it clear that mere plea is not sufficient, but it has to be proved.

55. It is not in dispute that except the plea, there is no other evidence on record to prove the same in the instant case. I am, therefore, of the opinion that the plaintiff was not ready and willing to perform his part of contract at all material times. I have taken the same view in the case of Pabba Laxmidevamma and others Vs. Pabba Sekharaiah Goud, .

56. A Division Bench of this Court in the case of Sri P. Purushotham Reddy and Another Vs. Pratap Steels Limited, , held that as the plaintiff therein failed to produce any concrete evidence in support of its assertion that it has the requisite money at its disposal and to pay the same to the defendants, it cannot be said that the plaintiff was ready and willing to perform his part of contract.

57. In the circumstances of the case, there is nothing on record to show that the plaintiff had money to pay the balance consideration before filing of the suit and there is also nothing on record that he has issued a notice or demanded the defendants to receive the balance sale consideration and to execute the sale deed as per Ex. A-1.

58. It is well settled that the readiness and willingness on the part of the plaintiff is a condition precedent to grant relief of specific performance, right from the date of the contract to the date of hearing. There is no evidence on record about financial capacity of the plaintiff to pay the balance consideration. Moreover, the remedy for specific performance is an equitable remedy. The equitable principles are incorporated u/s 20 of the Specific Relief Act, 1963.

59. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the Court. The trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses considered the relevant facts and reached a conclusion. The Appellate Court should not have reversed that decision disregarding these facts and, in my view, the Appellate Court seriously flawed in its decision.

60. In view of the aforesaid substantial questions of law that have been considered, I hold that the respondent/plaintiff is not entitled to a decree of specific performance of the contract.

61. Accordingly, the Second Appeal is allowed. The judgment and decree of the lower Appellate Court is hereby set aside and the suit stands dismissed. There

shall be no order as to costs.