
(2003) 09 AP CK 0074
In the Andhra Pradesh High Court
Case No : Second Appeal No. 349 of 1990

Malamma	Vs	APPELLANT
Permanand		RESPONDENT

Date of Decision : 23-09-2003

Acts Referred:

Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 — Section 3, 3(3), 3(5)
Civil Procedure Code, 1908 (CPC) — Section 110
Specific Relief Act, 1963 — Section 16, 19
Transfer of Property Act, 1882 — Section 53A

Citation : (2004) 1 ALT 537

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : J.C. Francis, for the Appellant; Gouri Shanker Sanghi, for the Respondent

Final Decision : Allowed

Judgement

C.Y. Somayajulu, J.—Defendant in O.S.No. 1212 of 1978 on the file of the court of the IX Assistant Judge, City Civil Court, Hyderabad, is the appellant in this second appeal. For the sake of convenience, the parties would hereinafter be referred to as they are arrayed in the trial court.

2. The suit is filed for specific performance of Ex.A-1 agreement of sale, executed by the defendant in favour of the plaintiff in respect of the property specified in the schedule appended to the plaint, which would hereinafter be referred to as the "suit property". The case of the plaintiff is that the defendant let out the suit property to him on a monthly rent of Rs. 150/-, and subsequently, the defendant had on 2-8-1977 agreed to sell the same to him for Rs. 10,000/- and received Rs. 7,000/- from him on that day and executed Ex.A-1 agreement in his favour, as per the terms of which he has to pay the balance amount of Rs. 3,000/- at the time of registration of the sale deed, and can continue in possession of the suit property without paying rent, as purchaser in possession in part performance of

the agreement of sale, and in spite of repeated requests, defendant neither received the balance sale consideration nor executed the sale deed. The case of the defendant is that she never, nor could have, entered into an agreement to sell the suit property to the plaintiff, as she is not the absolute owner thereof, and since it belongs to her and her six daughters, and that the plaintiff, in order to avoid the payment of rent to her, and to serve as a defence in the petition for eviction filed by her against the plaintiff and his uncle Satyanarayana who as the joint tenants in respect of the suit property must have brought Ex.A-1 into existence and since Ex.A-1 is a forged document plaintiff is not entitled to any relief from her.

3. Basing on the pleadings, the Trial Court framed as many as seven issues for trial. In support of his case plaintiff examined his father as P.W.1 and the attestors to Ex.A-1 agreement as P.Ws.3 and 4 and his paternal uncle Satyanarayana as P.W.2 and marked Exs.A-1 to A-9 on his behalf defendant examined herself as D.W.1 and her son-in-law as D.W.2 but did not adduce any documentary evidence. The Trial Court decreed the suit; which was confirmed by the lower appellate court in A.S.No. 5 of 1987 by the judgment under appeal. Hence, this second appeal. Earlier this appeal was heard by a learned single Judge, who by his judgment dated 21-3-2002 set aside the judgments of both the courts below and remitted the case for reconsideration on the question whether clauses in Ex.A-1 gave an unfair advantage to any one of the parties, and "whether discretion of Specific Relief has to be exercised under the peculiar circumstances of the terms of the contract". Aggrieved thereby plaintiff preferred Civil Appeal No. 7121 of 2002 to the Supreme Court. By its judgment dated 28-10-2002 the Supreme Court set aside the judgment of the learned single Judge and remitted the appeal to this court for deciding it fully and finally here itself. That is how this appeal came before me.

4. The point for consideration is whether the plaintiff is entitled to specific performance of Ex.A-1 agreement?

5. The main contention of the learned counsel for the defendant is that both the courts below erred in not keeping in view Section 19(c) of the Specific Relief Act, which lays down that in a suit for specific performance, the plaintiff should not only aver but should also prove his readiness and willingness to perform his part of contract, and contends that in this case though plaintiff averred in the plaint that he is ready to perform his part of contract, since he failed to go into the witness box, to swear that he is always ready and willing to perform his part of the contract, and offer himself for cross examination by the defendant, and thereby failed to establish his readiness and willingness to perform his part of the contract, both the courts below instead of holding so by drawing an adverse inference for his failure to go into the witness box, erroneously decreed the suit. He relied on Manjunath Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, and Vidhyadhar Vs. Manikrao and Another, and A.C. Arulappan v. Ahalya Naik 2001 (6) ALT 26 (SC) in support of his said contention. His next contention

is that since specific performance is an equitable relief, Courts should refuse to exercise such discretion in favour of a person who would get an unfair advantage over the other side, and contends that since the evidence on record shows that the value of the suit property is more than Rs. 1,00,000/-, defendant would not have entered into an agreement to sell the same for Rs. 10,000/-, that too when there was no necessity for her to sell the property for a price lower than the market price, and contends that the courts below merely on surmises and conjunctures, without properly appreciating the evidence on record, held Ex.A-1 to be true and genuine. He contends that this court can, in a Second Appeal, go into the question whether the concurrent findings of the courts below are perverse or are given on acceptable evidence, by placing reliance on *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, , *Kanai Lal Garari and Others Vs. Murari Ganguly and Others*, , *M. Bagi Reddy and another Vs. T. Krishna Reddy and others*, , *Gurubilli Sreeramulu and others Vs. Joga Verrodu and others*, , *Bulasala Subbaravamma (died) per LRs. Vs. Saparam Venkata Subbamma*, and *State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs.*, . The contention of the learned counsel for the plaintiff is that concurrent findings of fact on the genuineness of Ex.A-1 need no-interference in the second appeal, as it is based on the evidence of the father of the plaintiff and the attestors to Ex.A-1, who withstood the test of cross-examination. It is his contention that since defendant failed to adduce evidence to rebut the evidence of P.Ws.1 3 and 4 regarding the genuineness of Ex.A-1, the courts below finding Ex.A-1 to be true cannot be said to be erroneous. Relying on *Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others*, , *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others*, , *M. Venkatasubbaiah v. M. Subbamma 1956 AP 195*, and *Bijoy Kumar Karnani Vs. Lahori Ram Prasher*, he contends that plaintiff's absence from witness box is not a ground for drawing an adverse inference against him, because he established his readiness and willingness to perform his part of the agreement through other evidence. Relying on *Boramma v. Krishna Gowda and Ors. 2000 (7) SC 80 Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others*, and *Gazi Saduddin v. State of Maharashtra 2003 (6) SC 34* he contends that plaintiff, in order to prove his readiness and willingness, need not tender or deposit the amount due from him as per the terms of the contract, into court. It is his contention that merely because the expert to whom Ex.A-1 was sent for opinion stated that the thumb impression in Ex.A-1 is smudged, Ex.A-1 cannot be disbelieved in view of the direct evidence of P.Ws.1, 3 and 4 relating to its execution. Relying on *Javaharmal A. Rajpurohit v. Asad Khan Abdul Karim Pathan 2001 (5) SC 642* and *Vontimitta Krishnaiah Chetty (Died) by Lrs. v. C. Subbarayappa (died) by Lrs. 2001 (4) ALT 344 : 2002 . (2) ALD Suppl 160*, he contends that reliable direct evidence cannot be rejected on the ground of hypothetical expert evidence.

6. The specific case of the plaintiff is that he is the tenant of the suit property, of which the defendant is the owner whereas the case of the defendant is that she

is not the absolute owner of the suit property, and that Satyanaraya (P.W.2), who is paternal uncle of the plaintiff, having taken the suit property on lease, had, by making a false representation that plaintiff is his son, inducted him (Plaintiff) into possession of the suit property as his joint tenant. In view of the above contentions the courts below should have first considered whether the plaintiff is the tenant or the joint tenant of the suit property along with Satyanarayana (P.W.2). Instead of doing so both the courts below focussed their attention on the question whether the defendant is the owner of the suit property or not which is wholly irrelevant and unnecessary in a suit for specific performance by the purchaser, because it is well known that in a suit for specific performance by the purchaser against the vendor, vendor cannot take a defence that the agreement cannot be enforced against him because he is not the owner of the property agreed to be sold by him. See C.V. Muni Samappa Vs. Kolala Gurunanjappa (dead) and Others, , Balu Swamy Aiyar v. Lakshmana Aiyar AIR 1921 Mad. 172, Abdul Hakeem Khan Vs. Abdul Mannan Khadri, and Deenanath Vs. Chunnilal, Be that as it may, both the courts below held that the defendant is the owner of the suit property on the basis of allegations made by the defendant in the plaint and other proceedings, initiated by her subsequent to the institution of this suit, without keeping in view the fact that title to immovable property cannot be decided on the basis of admissions, and that documents which came into existence subsequent to the institution of the suit, cannot be relied on for deciding an issue in the suit.

7. The evidence of P.W.2 that on the next day of his surrender of the tenancy in respect of the suit property the same was let out to plaintiff cannot be believed or accepted in view of Section 3 of A.P. Buildings (Lease, Rent and eviction) Control Act, 1960 which contemplates a notice of vacancy being given by the landlord to the authorized officer, and also in view of the injunction contained in Sub-section (5) of the said Section 3 that the landlord shall not let the building to a tenant or occupy it himself before the expiry of the period of fifteen days specified in Sub-section (3) of that Section.

8. The evidence of P.W.2, paternal uncle of the plaintiff, and brother of P.W.1 is that he was inducted into the suit property as a tenant by Balaram, husband of the defendant, and that he was in the possession of the suit property, as tenant, till 1968 and that Balaram let out the suit property to P.W.1 on the next day of his vacating the suit property. During cross examination on behalf of the defendants, he denied the suggestion that he did not vacate the suit property, and is continuing in possession thereof, and that he having introduced the plaintiff as his son had requested for inclusion of the name of plaintiff also as his co-tenant, and that rent receipts were issued in the names of himself and the plaintiff. P.W.1 the father of the plaintiff, admitted that P.W.2 is his elder brother. It is pertinent to note that it is not the case of the plaintiff, nor is it the evidence of P.Ws.1 and 2, that plaintiff was not passing receipts whenever rent is paid. So plaintiff must be in possession of the receipts passed by the defendant when rent for the suit property was paid to her. Those receipts would be the best piece of

evidence to show whether plaintiff is the sole tenant, as contended by the plaintiff, or if plaintiff and P.W.2 are the joint tenants, as contended by the defendant. But, for the reasons best known to him, plaintiff failed to produce the rent receipts which would have thrown a flood of light on the question whether the plaintiff is the sole tenant or is a joint tenant with P.W.2 in respect of the suit property. In the circumstances of the case, it is very relevant to decide who actually is the tenant in respect of the suit property. Failure to produce those rent receipts entitles an adverse inference being drawn against the plaintiff in view of the ratio in *Gopal Krishnaji v. Mohd. Haji Latif* AIR 1968 SC 1430.

9. One of the contentions raised by the learned counsel for the plaintiff is that since the defendant did not produce the office copy of the reply notice sent by her to Ex.A-4 notice got issued by the plaintiff, in spite of a specific averment in the plaint that defendant did not send a reply to Ex.A-4 notice, it has to be taken that defendant did not send a reply to Ex.A-4 notice, and contends that non-sending of a reply to Ex.A-4 notice got issued by the plaintiff is a strong circumstance to establish the truth of Ex.A-1, I am not able to accept the said contention because defendant, in her written statement, asserted that she sent a reply to the notice got issued by the plaintiff and that it was received by the counsel for the plaintiff, who issued the said notice to her, and that plaintiff falsely alleged in the plaint that she did not send a reply to the notice sent to her. In fact, the written statement states that the office copy and acknowledgment are filed therewith. But they are not brought on record. Be that as it may, in my opinion non-production of office copy of the reply notice and its acknowledgment, by the defendant, would not be of any consequence, because P.W.1 admitted in his chief examination that defendant sent a reply to Ex.A-4 notice with false allegations. This statement of P.W.1 establishes that the plaintiff made a false averment in the plaint with regard to the reply by the defendant to Ex.A-4 notice got issued by him. Strangely plaintiff who received the reply notice instead of producing the same into court, is seeking an inference being drawn against the defendant for non production of the office copy, which is but secondary evidence. Reply received by the plaintiff is the original. It is well known that secondary evidence cannot be adduced when primary evidence is available. So if any inference has to be drawn it should be against the plaintiff, who failed to produce the original document, but not against the defendant who has secondary evidence with her. Since relief of specific performance is an equitable relief, plaintiff who does not come to court with clean hands, or who makes false allegations in the plaint, or gives false evidence, would not be granted such relief. So, even if Ex.A-1 is true, since the plaintiff knowingly and deliberately made a false statement in the plaint that defendant did not send a reply to Ex.A-4 notice sent by him, he would not be entitled to the equitable relief of specific performance. This important point was not kept in view by both the courts below.

10. It is no doubt true that in view of the ratio in *Javaharmal A. Rajpurohit* (17 supra) and *Vontimitta Krishnaiah Chetty* (18 supra) cases, if evidence of witness

connected with the execution of a document is reliable, their evidence cannot be rejected merely on the basis of the opinion of the expert. In this case, P.Ws.1, 3 and 4 are examined to speak about the execution of Ex.A-1 by the defendant. If their evidence is acceptable to court, it cannot be ignored merely because expert evidence opinion is against the tenor of their evidence in view of the ratio in the above decision relied on by the learned counsel for the plaintiff. Here it should be stated that Ex.A-1 is type written in English. Defendant is an illiterate marks woman. Both the courts below failed to keep this vital fact in view, and also the well known rule that when a document is in a language not known to the executant, and when the executant denies its execution, the person relying on such document should adduce evidence to show that the contents of the document were read over and explained to the executant, or that the executant was made aware of the contents thereof, before he or she affixed his or her signature or thumb mark thereto. Since it is not averred in the plaint that plaintiff entered into an agreement with the defendant through the assistance or the help of his father, the evidence of P.W.1, the father of the plaintiff, that he was present at the time of Ex.A-1 cannot be accepted. P.W.2, admittedly, was not present at the time of execution of Ex.A-1. The evidence of P.Ws.3 and 4, who are the attestors to Ex.A-1 and who were not examined in court but were examined on commission, does not show that contents of Ex.A-1 were read over and explained to the defendant before she affixed her thumb mark thereto. During cross examination P.W.3 stated as follows:

"I know Satyanarayana who was the brother of P.W.1 who was the tenant previously of same mulgi. I do not know whether the P.W.1 obtained lease from Balram. I do not remember the municipal numbers of the suit mulgi.That document was not read out. I do not know details in the Exs.A-1, A-2 and A-3. But I know that there it was regarding about the sale of the mulgies."

P.W.4 stated as follows during cross examination:

"I was called by P.W.1 at the time of execution of Exs.A-1, A-2, and A-3. When I was reached the place of execution I do not know who were present. Documents were typed one before I reached there. I do not know that they have written in the documents..."

It is thus clear from the evidence of P.Ws.3 and 4 that the contents of Ex.A-1 were not read over and explained to the defendant. The evidence on record does not show as to who prepared Ex.A-1, and significantly it does not disclose the name of the person that typed it. From a reading of Ex.A-1 it is easy to see that it was prepared by a person with legal knowledge, probably by a lawyer, because Clause-9 thereof reads:

"The second party was already in possession of the said mulgi hereby agreed to be sold, as the tenant thereof. No onwards the possession of the second party to the said mulgi will be that of the owner in part performance of this agreement of sale and not as the tenant and the first party what (sic) not be entitled to claim

and demand any rent from the eviction (sic) of the second party from the said mulgi. The rent account is settled till this date and now no rent is payable by the second party to the first party in respect of said mulgi."

Persons with legal knowledge only would know that a tenant, in order to have the benefit of Section 53-A of the Transfer of Property Act, should establish that he was put in possession of the property agreed to be sold to him, in part performance of the contract, and his mere continuance as tenant, after agreement to purchase the demised premises, would not entitle him to claim the benefit of Section 53-A of Transfer of Property Act. Therefore, it is easy to see that the above clause is incorporated only with a view to see that plaintiff should have the benefit of Section 53-A of Transfer of Property Act. The reason for introduction of the above extracted Clause 9 in Ex.A-1 is not stated by P.W.1. Here it has to be stated that incorporation of Clause 9 extracted above could not have been agreed by the defendant and is also against ordinary course of human conduct, because no ordinary prudent seller would agree for incorporation of such a clause, when the sale consideration agreed is said to be Rs. 10,000/- and Rs. 7,000/- is said to have been paid as advance and when Rs. 3,000/- which is about 1/3rd of the agreed sale consideration remaining to be paid was agreed to be received at the time of registration of sale deed. That apart if Ex.A-1 is true and genuine defendant to whom about 1/3rd of the sale consideration is due and payable would be anxious to receive the same by registering the document. No useful purpose would be served by the defendant postponing the execution and registration of the sale deed, with a clause like Clause 9 thereof, which debars her from claiming rent from the plaintiff is ready and willing to perform his part of the contract, but defendant was postponing receipt of the balance sale consideration and registration of the sale deed, cannot be believed or accepted, as, such an attitude, in the circumstances stated above, is against the ordinary course of human conduct, and since with a clause like Clause 9 it is the plaintiff, but not the defendant that would stand to gain by postponing the execution and registration of the sale deed.

11. Here it is relevant to note that defendant, as D.W.1, stated that P.W.2 was the tenant of her husband in respect of the suit property and after the death of her husband, P.W.2 used to pay rents to her and that he introduced the plaintiff as his son and so she permitted both of them to carry on business in the suit property jointly, and used to pass receipts in their joint names, and since they were not paying rents, she filed a petition for their eviction before the Rent Controller and that the said petition was dismissed for default, and so she filed another eviction petition against them. P.W.1 also admitted that R.C.No. 562 of 1977 was filed by the defendant seeking eviction of P.W.2 and plaintiff. For the reasons best known to the parties neither of them filed a copy of R.C.No. 562 of 1977 and so the date of filing of the said R.C. is not known. But it is clear that the said eviction petition was numbered in 1977, the same year in which Ex.A-1 was executed. If Ex.A-1 is prior to R.C. No. 562 of 1977 and if really Ex.A-1 was executed by her, defendant would not have instituted R.C.No. 562 of 1977. If

Ex.A-1 is subsequent to R.C.No. 562 of 1977 as an ordinary prudent owner of the property agreed to be sold defendant would not have agreed for incorporation of a clause like Clause 9 extracted above. A reference to pendency of R.C.No. 562 of 1977 would definitely have been made in Ex.A-1. That apart as an ordinary prudent tenant plaintiff, or P.W.1 on behalf of plaintiff, would have insisted on a clause relating to withdrawal of R.C.No. 562 of 1977 being mentioned in Ex.A-1. Thus, absence of a reference to R.C.No. 562 of 1977 in Ex.A-1, and the filing of R.C.No. 562 of 1977 by defendant creates suspicion on the genuineness of Ex.A-1.

12. The contention of the learned counsel for the plaintiff is that merely because the expert stated that the thumb impression found in Ex.A-1 is uncomparable, as it is smudged, that opinion cannot be a ground for holding that Ex.A-1 does not contain the thumb impression of the defendant. Since the opinion of the expert is not brought on record, it cannot be taken into consideration. A Division Bench of this court in *B. Poornaiah v. Union of India* 1967 (2) ALT 141, held that unless the expert who sent the opinion is examined as a witness his opinion cannot be treated as evidence. In this case since the expert is not examined, the opinion sent by him cannot be taken into consideration for deciding this case.

13. While deciding the truth and genuineness of a document, whose execution is denied by the other side, the court has to consider the answers given by the witnesses during cross-examination, and the possibility and probability of their presence at the time of its execution. The various decisions relied on by the learned counsel for the appellant rendered on proof of attestation in respect of documents, which require attestation, have no relevance for deciding this appeal because agreement of sale does not require attestation.

14. A careful reading of the evidence of P.W.1 shows that it is he who is actually carrying on the business in the suit property because during cross-examination he stated that he is the proprietor of the business being carried on by the plaintiff in ready made garments in the suit property and that the name of the plaintiff is not shown in the income tax and sales tax returns and that plaintiff is not submitting sales tax and income tax returns in respect of that business. With regard to execution of Ex.A-1, during cross examination P.W.1 stated as follows:--

"I received money from the plaintiff and handed over it to the defendant. The amount was with the plaintiff. It was not mentioned in the shop account. Defendant asked the plaintiff to purchase stamp papers for preparation of Ex.A-1. Plaintiff purchased them on behalf of defendant. Plaintiff and defendant got Ex.A-2 prepared."

Since the case of the plaintiff is that he entered into Ex.A-1 agreement for the purpose of his business, account books maintained by the plaintiff or P.W.1 should disclose the payment made under Ex.A-1. The account books of the business being carried on the suit property into court, would and should reveal the amount available either with P.W.1 or plaintiff as on the date of Ex.A-1. Since

the evidence of P.W.1 shows plaintiff is not submitting income tax and sale tax returns, and that he is submitting those returns, it is clear that plaintiff is not the person that is transacting business in the suit property, so he is the best person to explain from where he got the money paid under Ex.A-1 and as to from what source he would have paid the remaining money due and payable under Ex.A-1, and from what source of income he paid Rs. 7,000/- under Ex.A-1. Obviously, with a view to avoid cross examination on his capacity to pay the amount mentioned in Ex.A-1 and other circumstances, plaintiff failed to go into the witness box. Though P.W.1 is the father of the plaintiff, since the case of the plaintiff is that he, but not P.W.1 on his behalf, agreed to purchase the suit property under Ex.A-1 and the he, but not P.W.1 paid Rs. 7,000/-under Ex.A-1, P.W.1 cannot be a substitute for the plaintiff to explain the sources from which plaintiff could secure the amount paid under Ex.A-1 and how plaintiff could secure the remaining balance of Rs. 3,000/- and offered to pay it to the defendant. In the above circumstances, I find force in the contention of the learned counsel for the defendant that the courts below were in error in not drawing an inference against the plaintiff for his not going into the witness box. So even if Ex.A-1 is taken to be true, it cannot be said that the plaintiff could establish that he was ready and willing to perform his part of the contract in terms of Ex.A-1. As held by the Supreme Court in Boramma case (14 supra) Section 16(c) of the Specific Relief Act, is a mandatory provision and if the plaintiff is unable to establish his readiness and willingness, he cannot be granted the relief of specific performance.

15. As stated earlier, defendant filed R.C.No. 562 of 1977 for eviction of plaintiff and P.W.2 on the ground of default in payment of rent. Then, would the defendant, as an ordinary prudent landlady, enter into Ex.A-1 agreement, without receiving the arrears of rent due to her? If the rent account was settled, and no rent was due as mentioned in Clause-9 of Ex.A-1 agreement, extracted above, nothing prevented the plaintiff from producing the account books or receipt passed by the defendant, to corroborate that statement because account books maintained in regular course of business would be the best piece of corroborative evidence. Relying on Biltu Ram v. Jainandan Prasad AIR 1968 SC 1430, the Supreme Court in Gopal Krishnaji case (23 supra) held that if a party to a suit withholds the best piece of evidence (account book in that case), which throws light on the issue in controversy, an adverse inference has to be drawn against him, though the onus of proof to establish such issue lies on the other side, but not on him. The effect of the plaintiff and P.W.1 failing to produce the account books, to establish that rent due upto date of Ex.A-1 was paid on the date of Ex.A-1, as mentioned in Clause-9 of Ex.A-1, is also not taken into consideration by both the courts below.

16. It is no doubt true that the plaintiff need not tender or deposit the balance amount due into court to prove his readiness and willingness to perform his part of the contract, as held in Boramma case (14 supra). In this case the plaintiff did not go into the witness box to swear to the fact that he is ready and willing to

perform his part of the contract and that he was having the necessary money payable to the defendant as per the terms of Ex.A-1 and to obtain a registered sale deed. He also failed to produce his account books to establish that fact. In view thereof merely on the basis of the oral evidence of P.W.1, it cannot be said that plaintiff established his readiness and willingness to perform his part of the contract as per the terms of Ex.A-1. Therefore, Beni Chand (10 supra), Shashi Kumar(11 supra), M. Venkata Subbaiah (12 supra) and Bijoy Kumar (13 supra) cases relied on by the learned counsel for the plaintiff are of no help to the plaintiff.

17. The learned counsel for the plaintiff also relied on Satnam Singh v. Sadhu Singh 2001 (8) SC 571 where it is held that the evidence of a witness examined in chief and who could not be produced for cross examination subsequently due to his death, cannot be excluded from consideration. The said decision has no application to the facts of this case because all the witnesses examined by the parties were cross examined by the other said.

18. in Harpool Singh case (9 supra) the Supreme Court held that in case the trial court jumps to certain conclusions virtually on no evidence whatsoever, and if such lackadaisical findings, based on mere surmises and conjunctures, are mechanically approved by the appellate court, and if the High Court withdraws itself into reclusion taking umbrage u/s 110 C.P.C. it would inevitably result in gross miscarriage of justice. Therefore, in cases where both the courts below record a finding without evidence, merely on surmises, this court, in a second appeal, can interfere with such perverse findings. In this case both the courts below without even keeping in view the fact that defendant is a marks woman and that Ex.A-1 is in English language which is not known to her, and without there being any evidence on record to show that the contents of Ex.A-1 were read over and explained to her in telugu, and the fact that the evidence of P.Ws.3 and 4 does not establish due execution of Ex.A-1, and even without keeping in view the fact that defendant had failed R.C.No. 562 of 1977 seeking eviction of the plaintiff and P.W.2 and that defendant had no necessity to enter into Ex.A-1 that too with a clause like Clause 9 therein 1, and the effect of failure of the plaintiff to produce the account books, and the effect of the plaintiff making a false allegation in the plaint regarding the defendant's reply to Ex.A-4 notice, mechanically recorded a finding that Ex.A-1 is true and that plaintiff is ready and willing to perform his part of the contract. So this court can interfere with the said finding recorded on perverse appreciation of evidence in a second appeal.

19. Even assuming that the finding of courts below on the execution of Ex.A-1 cannot be disturbed by this court sitting in second appeal, the failure of the plaintiff going into witness box and the failure to produce account books entitles drawing an inference that the plaintiff was not ready and willing to perform his part of the contract and so he is not entitled to the specific performance of Ex.A-1 agreement. In any event his false statement in the plaint relating to defendant not sending a reply to Ex.A-4 notice should result in dismissal of his

suit. The point is answered accordingly.

20. In view of my finding on the point for consideration, the appeal deserves to be allowed and is accordingly allowed and O.S.No. 1212 of 1978 is dismissed with costs through out.