
(2006) 12 AP CK 0035
In the Andhra Pradesh High Court
Case No : AS No. 373 of 1997

Mummidi Raghavendra Rao and Others	APPELLANT
Vs	
Malladi Gollamma and Others	RESPONDENT

Date of Decision : 06-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Transfer of Property Act, 1882 — Section 53A

Citation : (2007) 2 ALD 713 : (2007) 2 ALT 647

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : M. Balasubrahmanyam, for M.S.R. Subrahmanyam, for the Appellant; C. Subba Rao, for the Respondent

Final Decision : Allowed

Judgement

V. Eswaraiah, J.—Appellants are the plaintiffs; and the respondents are the defendants in O.S. No. 130 of 1990 on the file of the Principal Subordinate Judge, Kakinada, filed for declaration of plaintiffs' title to the plaint schedule property; for possession of the same after evicting the 1st defendant there from; and for recovery of Rs. 23,490/- towards past profits for the years, 1986-87, 1987-88 and 1988-89; for future profits; and for costs, and the same was dismissed by judgment and decree, dated 31-10-1996, with an observation that the plaintiffs are at liberty to receive the balance sale consideration due under Ex.B. 1-agreement of sale subject to their executing the sale deed in performance of the said agreement of sale. Aggrieved thereby, the present appeal suit has been filed by the plaintiffs.

2. Parties are hereinafter referred to as they are arrayed in the trial Court.

3. Plaintiffs 1 to 3 and the 2nd defendant are the sons; Plaintiffs 5, 6 and 3rd defendant are the daughters; and the 4th plaintiff is the wife of late Veera Raghavulu. 1st defendant is the holder of Ex.B. 1-agreement executed by late Veeraraghavulu and the Plaintiffs 1 and 3; and the 4th defendant is the sister of

the 4th plaintiff. It is stated that the Plaintiffs 1 to 3, the 2nd defendant, and their father are the owners of the plaint schedule property and when they required money the Plaintiffs 1, 3 and their father late Veeraraghavulu agreed to sell the property for a sum of Rs. 43,000/- in favour of the 1st defendant through a mediator-Bhaskararaju but the said Bhaskararaju played fraud on the plaintiffs" back in collusion with the 1st defendant. However, as per the understanding of the said agreement, the lands are to be delivered at the time of registration of the sale deed but contrary to the terms of the said Ex.B. 1-agreement the 1st defendant could not obtain the sale deed and the sale agreement was cancelled within two months. As the plaintiffs could not repay the said amount of Rs. 5,000/- to the 1st defendant it was agreed upon that the 1st defendant should take the income of the said land, and appropriate the same for adjusting the amounts due to her and accordingly one V. Tatarao was allowed to cultivate the said land on an yearly rental of 58 bags of paddy during 1974-75, and 1975-76 and to pay away the said rent to the 1st defendant and accordingly the said Tatarao cultivated the said land and paid the rent of 58 bags of paddy per year to the 1st defendant towards adjustment of the said Rs. 5,000/-but the 1st defendant represented that due to failure of crops the rents were not properly paid by the said Tatarao and she sustained loss and therefore, she asked the said Tatarao to continue to cultivate and pay the rent and accordingly the said Tatarao continued to pay the same for subsequent years i.e., 1976-77 and 1977-78 as well and thereafter the said Tatarao vacated the land after harvesting the first crop and the Plaintiffs 1 and 2, and their father and brothers took over possession of the plaint schedule land and raised second crop during the year, 1979 and harvested the same. It is stated that the 1st defendant failed to account for the income on the land paid from time to time by the said Tatarao and therefore, a dispute was raised by the father of the plaintiffs before the mediators for the settlement of accounts but without settling the same the 1st defendant began to instigate the said Tatarao to trespass into the land and cause troubles to the father of the plaintiffs even though they have no right or any authority to be in possession of the said land. Thereupon, the father of the plaintiffs filed O.S. No. 783 of 1979 on the file of the District Munsif, Kakinada, for grant of permanent injunction restraining the 1st defendant and the said Tatarao from interfering with their possession and enjoyment of the plaint schedule property and temporary injunction was granted and the said suit was transferred and re-numbered as O.S. No. 406 of 1983 on the file of the Subordinate Judge, Kakinada, and later temporary injunction was vacated under Ex.B. 1. The 1st defendant also filed a suit in O.S. No. 33 of 1980 on the file of the Subordinate Judge, Kakinada, for grant of temporary injunction contending that he was in possession of the said property and thereafter the father of the plaintiffs died on 5-10-1980. It is stated that the suit in O.S. No. 406 of 1983 was dismissed for default and on an application to restore the same it was restored and thereafter the said suit was withdrawn with a permission to file a comprehensive suit for declaration of title and recovery of possession and the present suit has been filed. It is further stated by the plaintiffs that with regard

to the possession proceedings u/s 145 Cr.P.C. were initiated and the 1st defendant managed to enter into possession by initiating proceedings u/s 145 Cr.P.C., with the help of the police and therefore as the defendant was found in possession of the plaint schedule property there was no other go except to file the suit for declaration of title and recovery of possession alleging that the 1st defendant trespassed into the said property and illegally continued in possession.

4. It is the case of the 1st defendant that Ex.B. 1-agreement of sale, dated 28-3-1974, was executed in his favour agreeing to sell the property for a sum of Rs. 43,000/- by the father of the Plaintiffs 1 to 3, 5 and 6 and Defendants 2 and 3 along with the Plaintiffs 1 and 3, and pursuant to the sale agreement he has paid an advance amount of Rs. 5,000/- to them on the date of the sale agreement and as per the agreement, the 1st defendant has to pay a sum of Rs. 5,000/- to them by 30-4-1974 on which date possession has to be given to the 1st defendant and the executants of the said agreement undertook to discharge the debts due to Panthulugaru and Gunupudi Subbarao and to obtain the document relating to the said property after discharging the loan due to them and further undertook to discharge the other debts from out of the remaining sale consideration and the agreed rate of the said agricultural lands was @ Rs. 4,778/- per acre and after discharging the dues the parties have agreed for adjustment of the total sale consideration and if there is any excess amount it has to be paid to the plaintiffs and if there is any such amount it is to be adjusted towards sale consideration.

5. It is stated that as per the request of the plaintiffs, the 1st defendant deposited a sum of Rs.15,000/- in the account of their Advocate, D. Somasekhar, in the Indian Bank, Kakinada, and the defendant took possession of the said lands on 13-4-1974 itself. It is stated that the said Bhaskararaju has not committed any fraud and all the other allegations are not correct and the 1st defendant paid Rs. 5,000/- on the date of the agreement of sale and thereafter deposited Rs.15,000/- in the bank account of the plaintiffs' Advocate-Somasekhar on 13-4-1974 and in fact, an endorsement to that effect was also made by the said Veeraraghavulu and the Plaintiffs 1 and 3 and the said Bhaskararaju, and therefore there was no collusion in making the said endorsement as alleged by the Plaintiffs 1 and 3, and their father wilfully executed the agreement of sale. The other contentions that the agreement was cancelled; and that the plaintiffs wanted to pay back the advance amount of Rs. 5,000/- from out of the rental income of the said land by giving the said lands for cultivation in favour of the said Tatarao; and that the said Tatarao cultivated the said lands and paid the rents to the 1st defendant, and that the said Tatarao vacated after cultivating the first crop of 1979; and that the plaintiff has taken the possession are all denied. It is stated that the 1st defendant alone has been in continuous possession and enjoyment of the said land as the owner thereof in pursuance of the sale agreement. Therefore, she could not account for to the plaintiffs or to anyone. The 1st defendant never undertook to account for the plaintiffs as alleged in the plaint averments. It is further stated that neither the

plaintiffs nor the said Tatarao cultivated the said lands but the defendant was only in continuous possession and enjoyment of the said land pursuant to the sale agreement-Ex.B. 1, but she never trespassed into the said land as alleged but she is in legal possession pursuant to the agreement of sale. It is further stated that the said Veeraraghavulu alone filed O.S. No. 783 of 1979 on the file of the Principal District Munsif, Kakinada, against the 1st defendant and the said Tatarao, with false allegations seeking permanent injunction and other incidental relief and obtained interim injunction in I.A. No. 2053 of 1979 and the said temporary injunction application was contested by filing I.A. No. 2067 of 1979 and after contest, the said temporary injunction was vacated against which the said Veeraraghavulu filed C.M.A. Nos. 22 and 23 of 1980 but during the pendency of the said C.M.As., the said Veeraraghavulu died and the plaintiff got them impleaded but they did not prosecute the said appeal and accordingly, the C.M.As. were dismissed. It is stated that in fact the 1st defendant filed O.S. No. 33 of 1980 against the plaintiffs and the Defendants 2 and 3 on the file of the II Additional Subordinate Judge, Kakinada, and obtained a temporary injunction restraining them from interfering with the peaceful possession and enjoyment of the 1st defendant. Later on both the suits i.e., O.S. No. 33 of 1980 and O.S. No. 783 of 1979 were transferred and re-numbered as O.S. No. 403 of 1987 on the file of the Subordinate Court, Kakinada and the said O.S. No. 403 of 1983 was dismissed for default and O.S. No. 33 of 1983 was decreed ex parte. O.S. No. 403 of 1983 was restored vide order in I.A. No. 2777 of 1989 and I.A. No. 1389 of 1987 on 29-9-1989 permitting the plaintiffs to withdraw the said suit to file a fresh suit. With regard to the proceedings u/s 145 Cr.P.C, it is stated that the defendants never trespassed into the land and he has been in possession of the land pursuant to the agreement of sale only. The 1st defendant further stated that he has improved the said lands and the plaintiffs with an ulterior motive did not execute the sale deed in her favour and she has spent about Rs. 25,000/- for improving the said lands by bringing Ac.4-00 into cultivation and therefore the plaintiffs are estopped from questioning the sale agreement in favour of the 1st defendant and her rights over the plaint schedule properties in view of their contention and previous litigation and hence, the suit is liable to be dismissed. It is further stated that the defendant need not pay any amounts towards the past profits of Rs. 23,419/- as claimed by the plaintiffs and the question of paying the future mesne profits also does not arise.

On the above pleadings the relevant issues that have been framed are:

1. Whether Ex.B. 1-agreement of sale dated 28-6-1984 in favour of the defendant is true, valid and subsisting?
2. Whether the suit is barred by the principles of res judicata?
3. Whether the plaintiffs are entitled for declaration as prayed for?
4. Whether the trespass pleaded by the plaintiff is true?
5. Whether the plaintiffs are entitled to profits for any of the years, if so to what

account?

6. Whether the plaintiff is entitled to possession?

7. To what relief?

6. The 3rd plaintiff was examined as P.W. 1 and the plaintiffs' uncle i.e., their father's brother was examined as P.W. 2, and P.Ws. 3 to 5 were examined with regard to the alleged Will said to have been executed by the 4th plaintiff in favour of the 4th defendant which is not necessary to the controversy involved in the suit and marked Exs. A1 to A. 3.

7. The 1st defendant was examined as D.W. 1 and one Surnarayana, Clerk, who is the scribe of Ex. B2 endorsement, was examined as D.W. 2 and marked Exs. B1 to B. 50.

8. Based on the oral and documentary evidence the trial Court held that Ex. B. 1-agreement of sale is true and valid and it was not cancelled as alleged by the plaintiffs and D2 is in possession of the said plaint schedule properties pursuant to the said agreement of sale and the 1st defendant did not trespass into the said lands but she is in possession pursuant to Ex.B. 1-agreement of sale and Ex.B. 2-endorsement, and admittedly the title has not been passed on the defendant and therefore, the plaintiffs are entitled for declaration of title and they are still holding the title over the plaint schedule property. With regard to the recovery of possession the trial Court held that in view of the payment of the sum of Rs. 5,000/- under Ex.B. 1 and Rs. 5,000/- under Ex.B. 2 and in view of the provisions of Section 53-A of the Transfer of Property Act (for brevity, "the Act") and also in view of the injunction granted in favour of the 1st defendant in O.S. No. 33 of 1980, the plaintiffs are not entitled for recovery of possession but they are entitled for recovery of the balance sale consideration alone under Ex.B. 1-agreement of sale and therefore, the plaintiffs are also not entitled to costs and mesne profits and accordingly while dismissing the suit it was observed that the plaintiffs are entitled for recovery of the balance sale consideration due under Ex.B. 1-agreement subject to their executing the sale deed and part performance of the agreement of sale.

The questions that arise for consideration are:

1. Whether the plaintiffs are entitled for declaration of title and consequential relief of recovery of possession?

2. Whether the 1st defendant though not entitled to file the suit for specific performance of agreement of sale as admittedly such a suit was barred by time is entitled to take the defences to protect her possession u/s 53-A of the Act?

9. Plaintiffs also stated that if really the 1st defendant is in possession of the plaint schedule land and that agreement is not cancelled she would have filed a suit within time and would have asked for specific performance of the said agreement of sale. The very fact that she kept quiet and allowed the same time

barred as the same is cancelled immediately the plaintiffs as well as the defendant filed the suits for perpetual injunction to protect their possession. The fact remains that the 1st defendant filed O.S. (SR) No. 832 of 1978 on the file of the Subordinate Judge, Kakinada, for specific performance of the said Ex.B. 1-agreement of sale, dated 28-3-1974, and as the said suit was barred by time the plaint itself was rejected on 7-8-1978 and therefore, an application has been filed to refund the Court fee paid on the plaint which is evident by Ex.B. 3-order.

10. To consider the said questions it is just and necessary to have a glance at the relevant oral and documentary evidence.

11. The 3rd plaintiff who was examined as P.W.I did not dispute the execution of Ex.B. 1-agreement of sale but disputed only with regard to the payment of Rs. 15,000/- under Ex.B. 2-endorsement and also with regard to the delivery of possession in favour of the 1st defendant. It is stated that the said plaint schedule properties are the joint family properties and their father Veerqraghavulu was the Manager of the joint family. During his lifetime there were certain debts which are payable to the creditors. Their family originally owns Ac. 10.00 of land at Patavala Village and out of it Ac.2.00 and odd was transferred in favour of D3 and the suit is filed in respect of Ac. 7.02 cents though Ex.A. 1 -agreement of sale relates to Ac. 7.09 cents. P.W. 1 stated that though they have executed Ex.A. 1-agreement of sale they have not received Rs. 15,000/- under Ex. A2-endorsement and the said Ex.A. 1-agreement and they never intended to sell the said lands. With regard to the deposit of Rs. 15,000/- in the account of the said Somasekhar with the Indian Bank, Kakinada, on 13-4-1974, it is stated that the said Somasekhar is not the Advocate of the plaintiffs but as the dispute arose among the family members he was representing the opposite parties, and D3 never signed on Ex.B. 2-endorsement. It is stated that even Rs. 5,000/- received by them was discharged by leasing out the said lands to Tatarao and the said Tatarao paid the rents of the said lands to the 1st defendant towards repayment of the said amount. It is further stated that he do not know whether DI was always willing to perform her part of Ex.B. 1 and the plaintiffs are not ready and willing to execute the sale deed even if the balance sale consideration is paid.

12. P.W. 2 is the brother of Veeraraghavulu who is the scribe of Ex.A. 1-Will, P.W.3 is the attesor of Ex.A. 1-Will, and P.W. 4 is a witness for execution of Ex.A. 1. P.W. 5-one of the villagers, stated that the said Veeraraghavulu alone cultivated the land during his lifetime and thereafter the said Tatarao cultivated the said land and DI took possession of the said lands with the help of the police. Ex.A. 1-Will executed by the 4th plaintiff in favour of the 4th defendant insofar as her share of property is concerned, but that controversy is unnecessary insofar as the controversy involved in the suit as it is an internal dispute among the parties to take appropriate steps for determination of rights under the said Will in appropriate proceedings.

13. The 1st defendant, who was examined as D.W. 1, stated that she agreed to

purchase the entire Ac. 10.00 of land from Veeraraghavulu and accordingly Ex.A. 1-agreement of sale was executed by the said Veeraraghavulu and the Plaintiffs 1 and 3, and she paid Rs. 5,000/- as advance on that day and agreed to pay an amount of Rs. 15,000/- within one month. The amount of Rs. 15,000/- was deposited in the account of the said Somasekhar, Advocate, as the said Veeraraghavulu asked to do so. On deposit of the said Rs. 15,000/- the plaint schedule property was delivered in her favour and Ex.B. 2 is the endorsement in proof of deposit of Rs. 15,000/-. It is stated that Ex.B. 1-agreement of sale was never cancelled and Rs. 5,000/- was never paid under the alleged settlement. It is stated that she has developed the plaint schedule property making it fit for cultivation by spending Rs. 25,000/- and under Ex.B 1-agreement she has to pay Rs. 23,000/- to the plaintiffs and their family members, and she is always ready and willing to pay the said amount. It is stated that she has been cultivating the said land. It is admitted that the said Veeraraghavulu got four sons but only two sons joined the execution of Ex.B. 1-sale transaction and she never issued any notice to the executant of Ex.B.1 expressing her readiness to perform her part of the said agreement demanding them to execute the sale deed. It is stated that there are certain disputes and litigations between the said Veeraraghavulu and husband of D. f3. It is also admitted that the said Somasekhar issued Ex.B. 39 notice, dated 23-8-1979, to the 1st defendant, the said Veeraraghavulu, and the Plaintiffs 1 and 3, stating that after entering into Ex.B. 1-agreement of sale, D1 has kept an amount of Rs. 15,000/- with him for payment to the plaintiffs but the plaintiffs refused to receive the same on the ground that D1 did not comply with the terms of the agreement and therefore the said Somasekhar informed D1 to take back the money but she did not take back the same and accordingly he has informed D1 to take back the said money immediately. It is stated that in spite of the said notice D1 did not take back the said amount of Rs. 15,000/- from the said Somasekhar. It is stated that D1 does not know whether the said amount of Rs. 157000/- deposited in the account of the said Somasekhar is with Somasekhar or whether the said money has been received by Veeraraghavulu. D.W.2, who is the clerk of the said Somasekhar, and scribe of Ex.A.2-endorsement, stated that the executant attested Ex.B. 2-endorsement in his presence. Though it is stated in the chief-examination that he is the scribe of the said endorsement which was dictated by the said Somasekhar and the Plaintiffs 1 and 3, and the said Veeraraghavulu received money from D1 and made endorsement on Ex.A. 1-agreement of sale, but in the cross-examination it is stated that no cash payment was made under Ex.B. 2 but the amount was deposited in the account of the said Somasekhar in the Indian Bank and he does not know who deposited the said money in the Indian Bank and the said deposit was not made in his presence. There was no cordial relationship between the plaintiffs and the said Somasekhar. Therefore, it is just and proper to have a glance at Ex.B. 1-agreement of sale and Ex.B. 2-endorsement made thereof As per Ex.B. 1-agreement of sale, which was executed on 28-3-1974 by Veeraraghavulu, 1st plaintiff and 3rd plaintiff, agreeing to transfer their joint family property admeasuring Ac.9.05 cents for a sum of Rs. 43,000/-, an amount

of Rs. 5,000/- was received in cash towards advance and an amount of Rs. 15,000/- was agreed to be paid by the 1st defendant before 30-4-1974. Veeraraghavulu, 1st plaintiff, and the 3rd plaintiff agreed to deliver the vacant possession on receipt of Rs. 15,000/- on or before 30-4-1974 by making necessary endorsement for receipt of Rs. 15,000/- on the back of Ex.B. 1-agreement of sale. It is further agreed that D1 alone has to pay the revenue cist of the taxes etc., payable to the Government and after receiving the said Rs. 15,000/- they will clear the debts payable to others by adjusting the debts in respect of the said land and the remaining amount of Rs. 23,000/- is also to be paid towards the other binding debts or the said binding debts can be deducted and the 1st defendant has to get the registered sale deed at his cost on or before 30-6-1974.

14. The aforesaid oral and documentary evidence goes to show that admittedly the land belongs to the joint family members of late Veeraraghavulu consisting of Veeraraghavulu, his four sons i.e., the Plaintiffs 1 to 3 and 2nd defendant, and three daughters namely Plaintiffs 5 and 6 and 3rd defendant. Admittedly, the other coparceners of the joint family i.e., 2nd plaintiff and the 2nd defendant did not sign the agreement including the other daughters also. Therefore, it cannot be said that the 2nd plaintiff and the 2nd defendant are bound by the said agreement of sale, as they are not minors. The share of the 2nd plaintiff and the 2nd defendant cannot be sold away by their father and other brothers namely 1st plaintiff and the 3rd plaintiff. However, admittedly there is no dispute with regard to the execution of Ex.B. 1-agreement of sale. Though the plaintiffs have made an attempt to prove that Ex.B. 2-endorsement is not true and valid and the 1st defendant has got managed to get the said endorsement and that the said amount of Rs. 15,000/- is not paid to them, a perusal of Ex.B. 1 goes to show that the said Veeraraghavulu and the Plaintiffs 1 and 3 agreed for the receipt of Rs. 15,000/- within one month and in consonance of Ex.B. 1-agreement only the amount has been deposited in the bank account of the said Somasekhar and in fact, Somasekhar also issued a notice to the plaintiffs to take back the said amount but neither the plaintiffs nor the 1st defendant has taken back the said amount. When once the amount has been paid by the 1st defendant as per the instructions and directions of the Plaintiffs 1 and 3 it cannot be said that the 1st defendant has not paid the said amount and therefore it is for the plaintiffs to recover the said amount from the said Somasekhar or his legal representatives. But insofar as the liability of the 1st defendant is concerned, she has discharged all her fulfilments to pay Rs. 15,000/- on or before 30-4-1974 and therefore, I am of the opinion that the 1st defendant paid an amount of Rs. 5,000/- as well as Rs. 15,000/- pursuant to Ex.A. 1 agreement and Ex.B2-endorsement and therefore, the remaining amount due and payable by the 1st defendant is only Rs. 23,000/-. Absolutely there is no evidence with regard to the payment of Rs. 23,000/- either to the creditors of the plaintiffs or to the plaintiffs. Admittedly, the 1st defendant also never issued any notice for the specific performance of the contract of sale expressing her readiness and

willingness to pay back Rs. 23,000/- calling upon the plaintiffs to execute the sale deed. Therefore, the suit filed in 1978 pursuant to Ex.B. 1-agreement of sale, dated 28-3-1974, was rightly dismissed by the Subordinate Judge, Kakinada, on the ground that no cause of action is surviving and the suit was barred by limitation.

15. The suit filed by the 1st defendant for grant of permanent injunction restraining the plaintiffs from interfering with the peaceful possession and enjoyment of the plaint schedule property was decreed ex parte vide Ex.B45-judgment and Ex.B46-decree. I am of the opinion that the said suit was rightly decreed as the possession was delivered by the said Veeraraghavulu and the Plaintiffs 1 and 3, pursuant to Ex.B. 2-endorsement and therefore, the 1st defendant is entitled to protect her possession. As D2 himself was in possession, the suit filed by the plaintiffs for injunction was rightly dismissed which was subsequently restored and the said suit was withdrawn with a liberty to file a comprehensive suit for declaration of title and possession. The 1st defendant has not taken any plea of adverse possession as her possession was only pursuant to Ex.B. 1-agreement of sale and Ex.B. 2-endorsement. Therefore, the trial Court rightly held that the title was not passed to the 1st defendant and the title still continues with the plaintiffs' family and as against the said finding no appeal has been filed by the 1st defendant and therefore I am also of the opinion that the title continues with the plaintiffs and the plaintiffs are entitled for declaration of the title.

16. Insofar as the recovery of possession is concerned, the question that arises for consideration is:

Whether the 1st defendant is entitled for protection of her possession by virtue of Section 53-A of the Act?.

Under Section 53-A of the Act:

Where any person contracts to transfer for consideration any immovable property by a written agreement and the transferee has, in part performance of the contract, taken possession, of the property and continues in possession in part performance of the contract, he has done some act in furtherance of the contract, and the transferee has performed his part of the contract and if the said transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly proceeded by the terms of the contract.

17. Learned Counsel appearing for the plaintiffs submits that as admitted by the 1st defendant she was in continuous possession pursuant to Ex.B. 1-agreement of sale alone and therefore, the 1st defendant can never get any title by reason that she is in possession as she cannot claim any adverse possession and the suit for specific performance of agreement of sale was dismissed and the 1st

defendant never fulfilled her part of performance under Ex.B. 1-agreement of sale and when the trial Court rightly declared the title of the property still continues in favour of the plaintiffs, the consequential relief of recovery of possession also ought to have been granted.

18. On the other hand, the learned Counsel appearing for the 1st defendant submits that as per the law laid down by the Apex Court it is open for the 1st defendant to take a plea in the suit filed by the plaintiffs with regard to the defences available u/s 53-A of the Act though the suit filed by her for specific performance of agreement of sale was dismissed on the ground of the limitation as Section 53-A of the Act does not state anything about the limitation. Merely because the suit filed by her for specific performance is dismissed as barred by limitation, but still it is open for her to take the defences to protect her possession u/s 53-A of the Act as she has performed her part of performance.

19. In support of his contention he relied on a judgment of the Apex Court in Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, , wherein the question that arose for consideration is:

Wherein a suit brought by a transferor for recovery of the possession of the suit property, a defendant-transferee can defend or protect his possession over the suit property obtained in pursuance of a part performance on an agreement to sell u/s 53-A of the Act, even if a suit for specific performance for an agreement of sale has barred by limitation.

20. In answer to the said question the Apex Court held that if the agreement holder u/s 53-A of the Act fulfils the conditions to defend or protect his/her possession u/s 53-A of the Act can protect even if the suit for specific performance of agreement is barred by time subject to fulfilment of the following necessary conditions:

1. there must be a contract to transfer for consideration any immovable property;
- 2 the contract must be in writing, signed by the transferor, or by someone on his behalf;
3. the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
4. the transferee must in part performance of the contract take possession of the property, or of any part thereof;
5. the transferee must have done some act in furtherance of the contract; and
6. the transferee must have performed or be willing to perform his part of contract.

21. The Apex Court further held that law of limitation bars only an action in a Court of law. The Limitation Act does not place any restriction to the agreement holder u/s 53-A of the Act to put forward any defence though the said defence as

a claim made by him may be barred by limitation and cannot be enforced in a Court of law. The defendant-agreement holder in a suit can put forward any defence though the said defence may not be enforceable in a Court of law being barred by limitation. The Limitation Act does not extinguish a defence, but only bars a remedy, since the period of limitation bars a suit for specific performance of contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by the transferor to take a plea in defence of part performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action. The Full Bench of Karnataka High Court in *Narasimhasetty (Deceased) By L.Rs Vs. Padmasetty*, , also held to the same effect earlier to the aforesaid judgment of the Supreme Court.

22. On the other hand, the learned Counsel appearing for the plaintiffs relied on a judgment of the Apex Court in *Mohan Lal (Deceased) through his LRs. Kachru and Ors. v. Mir a Abdul Gaffar and Anr.* AIR 1996 SC 910 : 1996 (2) ALD (SCSN) 7, wherein the facts are more or less similar and in the said case the agreement holder claimed possession of the said land therein pursuant to the agreement of sale dated 8-3-1956 and paid a part consideration of Rs. 500/- and obtained possession and subsequently the said lands were sold in 1960 and the suit filed for the specific performance of agreement of sale by the agreement holder was dismissed and the purchaser of the said land filed a suit for possession which was decreed and the questions that arose for consideration are:

1. Whether the agreement holder was entitled to retain possession of the suit property pursuant to the agreement of sale entered into in 1956?

2. Whether the agreement holder has perfected his title by prescription; and secondly whether the agreement holder is entitled to retain his possession by operation of Section 53-A of the Act?.

23. The Apex Court held that admittedly the agreement holder came in possession pursuant to the agreement of sale and the possession of the agreement holder for more than 12 years is not independent and the adverse possession is not available to the agreement holder and insofar as the entitlement to retain possession u/s 53-A of the Act, it was considered that the agreement does not create title or interest in the property since the agreement had met with the dismissal of the suit, has willingness to perform his part of the contract does not arise. When the agreement holder seeks to avail of Section 53-A of the Act to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity means do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always avoids by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms of covenanted thereunder.

24. In the aforesaid case also only an amount of Rs. 500/- was paid pursuant to the agreement of sale in 1956 and the remaining consideration of Rs. 1,000/- was not paid and accordingly it was held that the agreement holder is not entitled to retain possession u/s 53-A of the Act. I am of the opinion that the said judgment squarely applies to the facts of the case as in die instant case, in fact, no plea has been taken in the written statement with regard to the willingness and readiness to pay the balance sale consideration and she has also not pleaded either about discharging her part of the performance pursuant to Ex.B. 1-agreement of sale. Though Ex.B. 1-agreement of sale prescribes that she shall discharge the debts from out of the remaining amount of Rs. 23,000/-and get the sale deed executed on or before 30-6-1974 no evidence has been adduced with regard to the payment of Rs. 23,000/-either through the plaintiffs or through any creditors of the plaintiffs and admittedly no notice has been ever issued calling upon the plaintiffs to express their readiness and willingness and ask them to execute the sale deed. Therefore, I am of the opinion that the 1st defendant is not entitled for retention of the possession u/s 53-A of the Act. Accordingly, the aforesaid questions are answered in favour of the plaintiffs.

25. In the result, the judgment and decree of the trial Court is set aside and the appeal suit is allowed decreeing the suit declaring the title of the plaint schedule property in favour of the plaintiffs and the Defendants 2 and 3, and they are entitled to recover the possession of the same from the 1st defendant. However, the plaintiffs cannot be allowed unjustly enriched by retaining the sale consideration received from the 1st defendant amounting to Rs. 20,000/-. Accordingly, the plaintiffs shall deposit the said Rs. 20,000/- to the credit of O.S. No. 130 of 1990 on the file of the Principal Subordinate Judge, Kakinada, within six weeks from today and on such deposit the 1st defendant is permitted to withdraw the same. Insofar as the past and future mesne profits are concerned, I am of the opinion that the plaintiffs are not entitled for any mesne profits of the past as an amount of Rs. 20,000/- is paid in their favour, but if the possession is not delivered immediately after the deposit of the said Rs. 20,000/- the plaintiffs are entitled for future mesne profits from the date of the deposit of Rs. 20,000/- till the recovery of the possession. No order as to costs.