

(2006) 03 KAR CK 0059

In the Karnataka High Court

Case No : Regular First Appeal No. 328 of 2002

N.K. Giriraja Shetty represented by P.A. Holder D.
Narasimharaja Setty

APPELLANT

Vs

N.K. Parthasarathy Setty, N. Chandrashekara Setty, N.K.
Lakshminarayana Setty (since deceased by LRs. Smt.
Chandrakanthamma Setty, L. Nagaraj Setty and Lakshmi)

RESPONDENT

Date of Decision : 09-03-2006

Acts Referred:

Evidence Act, 1872 — Section 20 (2), 20 (4), 68, 73
Specific Relief Act, 1963 — Section 16, 9

Citation : AIR 2006 Kar 180 : (2006) 3 CivCC 139 : (2006) ILR (Kar) 1692 :
(2006) 3 KarLJ 1 : (2006) 2 KCCR 99 SN

Hon'ble Judges : Subhash B. Adj, J;S.R. Bannurmah, J

Bench : Division Bench

Advocate : Tarakaram and Prakash T. Hebbar, for the Appellant; K. Shivaji Rao,
for R-2, S.B. Mukkannappa, for R-2 and R-3(1-3), Bijali Shamendra Singh,
Shyam Koundinya, A.S. and Vinay Paul and T.K. Advs. for R-1, for the Respondent

Final Decision : Dismissed

Judgement

1. This is plaintiffs appeal questioning the judgment and decree in O.S. No. 93/1992, on the file of the II Additional Civil Judge (Sr.Dn.), Bangalore Rural District dated 19th November 2001, decreeing the suit partly and directing defendant Nos. 1 to 3 to execute a registered sale deed in favour of the plaintiff conveying right, title, interest and possession of their properties by receiving the balance consideration to the extent of their share and on failure to execute the sale deed, the plaintiff is at liberty to get the Court Commissioner appointed to execute the sale deed and registered through Court as per the agreement on behalf of the defendants-1 to 3 and dismissed the suit against the defendants-4 to 6.

2. The parties will be referred to, as to their status in the trial court.

3. Case of the plaintiff is, that the defendants are close relatives of the plaintiff and they own the lands bearing Sy. Nos. 19, 18/2 and 110/2, measuring 9 acres 19 guntas, 1 acre 12 guntas and 2 acres 7 guntas respectively. The land bearing Sy. Nos. 19 and 18/2 are situated at Byadarahally Village, Kasaba Hobli, Nelamangala Taluk and land bearing Sy. No. 110/2 is situated at Mylariahally, Kasaba Hobli, Nelamangala Taluk. The land bearing Sy. No. 19 consists of Phot Kharab of 18 guntas, residential building and one pit measuring 1 acre 18 guntas and also 33 guntas of land, which has come to the share of the plaintiffs father late K.S. Narasimhaiah Setty. The actual measurement of the lands available after excluding the 33 guntas of plaintiff's land, phot kharab, pit, etc., in Sy. No. 19, 18/2 and 110/2 is 8 acres 37 guntas. Defendants intended to alienate their lands in Sy.No. 19, 18/2 and 110/2 and persuaded the plaintiff to purchase the said lands belonging to them. Plaintiff agreed to purchase the lands at a price fixed at Rs. 40,000/- per acre with a clear understanding amongst the parties that the said price is fixed as per exact measurement of the lands available for sale. On 24.11.1989, the defendants executed an agreement of sale in favour of the plaintiff, agreeing to sell their lands in the aforesaid Sy. Nos. 19, 18/2 and 110/2 and received a sum of Rs. 10,000/- from the plaintiff as part payment of the sale consideration. It is stated that thereafter the defendants demanded further advance of Rs. 50,000/- towards the agreed sale price and on 27.10.1990 to this effect, they executed an endorsement on the agreement of sale, acknowledging the receipt of Rs. 50,000/- as advance towards the sale price. It is contended that as the fourth defendant was not available immediately to sign the said endorsement, he had not put his signature on the same. It is the case of the plaintiff that the defendants received a total sum of Rs. 60,000/- from the plaintiff as part payment towards the agreed price. The plaintiff contended that though he was ready and willing to pay the balance sale consideration as per actual measurement of the lands agreed to be sold by the defendants under the terms and conditions of the agreement of sale and obtain a registered sale deed from the defendants at his cost, but the defendants postponed the sale on one or the other pretext In the month of January 1991, plaintiff came to know that the defendants were making attempt to deal with the property and as such he issued a notice dated 30th January 1991 to the defendants calling upon them to execute a registered sale deed in his favour by receiving the balance of sale consideration as per the actual measurement available. Defendants-1 to 3 replied to the notice expressing their inability to execute sale deed, on account of non-cooperation of the defendants-4 to 6. It is further case of the plaintiff that the fourth defendant also by letter dated 10.2.1991 replied to the notice of the plaintiff. It is the case of plaintiff that as defendants failed to execute the sale deed and attempted to sell the lands in favour of others, he was constrained to file suit in O.S. No. 39/1991 on the file of the learned Munsiff, Nelamangala for permanent injunction and that he had the benefit of temporary injunction restraining the defendants from alienating the suit schedule properties.

4. It is the case of the plaintiff that the defendants contested O.S. No. 39/1991 on untenable grounds and In view of the defence taken by the defendants in O.S. No. 39/1991 and the time for enforcing the contract against the defendants under the agreement of sale dated 24.11.1989 was fast approaching to an end, the plaintiff was constrained to file the present suit for specific performance against the defendants to execute the registered sale deed in his favour, conveying right, title, interest and possession of the schedule lands by receiving the balance of sale consideration before the Sub-Registrar, Nelamangala as per the actual measurement of the lands and on failure of the defendants to do so, requested the court below to order execution of registered sale deed in his favour through the court

5. The defendants-1 and 2 filed the written statement conceding the case of the plaintiff and admitted that they did not try to evade the execution of sale deed and they did not interfere with the plaintiffs right However, they stated that on account of non-cooperation of some of the defendants, they were unable to fix up a date for execution of registered sale deed and on account of unavoidable circumstances, they could not execute registered sale deed and requested the court to decree the suit without levying cost on the defendants. Defendant No. 3 also filed separate written statement and admitted the claim of the plaintiff on the similar terms on par with defendants-1 and 2.

6. Defendant No. 4 filed separate written statement denying the execution of the agreement interalia contending that, after the death of fourth defendant's father there was difference of opinion amongst the members of the family and as such the fourth defendant and his brothers decided to effect a partition of the family properties. Accordingly, the fourth defendant's eldest brother Sri. N.K. Krishnaiah Setty, fourth defendant's second brother Sri. N.K. Venkatarathnaiah Setty's wife Smt. A.V. Vanajakshamma, the plaintiff and defendants-4 to 6 effected partition amongst themselves by a registered partition deed dated 29.8.1974 and each one was allotted the share in the family properties and were put in separate possession. The properties allotted to fourth defendant are land bearing Sy. No. 110/2 measuring 2 acres 7 guntas situated at Mylanahalli village, Kasaba Hobli, Nelamangala Taluk and out of land bearing Sy. No. 19 measuring 10 guntas dry land, 0.03 guntas garden land situated at Byadarahalli village, Kasaba Hobli, Nelamangala taluk. Fourth defendant further stated that he is in possession and enjoyment of the said lands as absolute owner right from the date of partition and stated that the original registered partition deed is in the custody of N.K. Krishnaiah Setty, eldest brother of the fourth defendant He stated that total extent of land in Sy.No. 19, is 9 acres 19 guntas and the total extent of Sy.No. 18/2 is 1 acre 12 guntas and total extent of Sy.No. 110/2 is 2 acres 7 guntas. After the partition, defendants and his brothers are not in cordial terms. Fourth defendant denied the agreement dated 24.11.1989 and alleged that with effect from registered partition deed, he is in exclusive possession of the lands fallen to his share. Similarly his other brothers are cultivating separately, that the alleged agreement dated 24.11.1989 is a "sham document"

created for the purpose of defeating his valuable rights in land bearing Sy.Nos. 19 and 110/2, that he had never received any amount under the alleged agreement. He further alleged that defendants-1, 2 and 3 are colluding with the plaintiff to knock off his valuable property as he is not in cordial terms with them and further alleged that the plaintiff was aware that the land fallen to the share of this defendant is a very valuable property; that defendant is economically very sound and there was no need for him to sell his lands. He also denied the allegation of the plaintiff, that this defendant is postponing the execution of the sale deed with an ulterior motive and stated that when this defendant has not agreed to sell the property, question of postponing the execution of sale deed or ready and willingness of plaintiff does not arise and denied that this defendant is trying to deal with the property. However, this defendant admitted that the plaintiff had filed a suit in O.S. No. 39/1991 and admitted that he has filed the written statement in the said suit. It is also his case that Sy.No. 110/2 measuring 2 acres 7 guntas is converted for non-agricultural purpose and the value of the land is more than Rs. 3 lakhs per acre. The market value of Sy.No. 19 is Rs. 2 lakhs per acre and market value of the garden land is Rs. 3 lakhs per acre as on the date of alleged agreement. He specifically alleged that the description, extent and boundary of the lands as mentioned in the schedule are not correct and no cause of action arises for filing the suit.

7. Defendants-5 and 6 in their written statement, have denied the alleged agreement dated 24.11.1989, price of the land at Rs. 40,000/- per acre and also receipt of Rs. 60,000/-. They stated that the plaintiff is exploiting the situation for various reasons known to him and defendants-1 and 2, who are sons of N.K. Krishnaiah Setty and third defendant, who is the son of N.K. Rathnaiah Setty are acting under the dictates of the plaintiff. The plaintiff and the defendants-1 and 3 have colluded to see that these defendants are deprived of their valuable properties. It is stated that N.K. Krishnaiah Setty died intestate leaving behind defendants-1 and 2 and three daughters, who get equal share. Similarly, N.K. Rnthrmiah Setty died intestate leaving behind two daughters and another son, who are not parties to the suit, who got equal share along with third defendant. Fifth defendant has got two sons, first son is aged 21 years and second son is 16 years and sixth defendant has got one son aged about 21 years and a daughter and alleged that under the rectification deed, the fifth respondent got 33 guntas of land in Sy.No. 19 and 1 acre 12 guntas in Sy.No. 18/2. Sixth defendant got his share to the extent of 2 acres 11 guntas of dry land and 33 guntas of garden land in Sy.No. 19 and alleged that the lands are ancestral lands, and their children have share and they are not party to agreement and that there was no necessity for these defendants to sell the lands belonging to their heirs, and that there are farm-houses in the lands. The sixth defendant does not own any portion of land in Sy.No. 110/2 and that the plaintiff has come forward with a false story that these defendants have agreed to sell their lands. These defendants denied the execution of the agreement and also receipt of the advance amount of Rs. 10,000/- and claimed that they are in exclusive

possession of the land and the market price of the land in the year 1989 was more than Rs. 3 lakhs per acre. They also denied the execution of endorsement dated 27.10.1990 and receipt of Rs. 50,000/- and alleged that the agreement is a fabricated and forged document and that the plaintiff is exploiting the fiduciary capacity of these defendants in order to have a wrongful gain by creating fabricated, forged agreement, to deprive their lands. It is alleged by these defendants that notice issued by the plaintiff has been acknowledged and these defendants had approached the plaintiff only to know, as to why such notice was caused when they have not received any consideration. On these allegations and others, defendants-5 and 6 resisted the suit.

8. The trial court on the basis of these pleadings framed following four issues and two additional issues and recorded evidence of PWs-1 to 4 in whose evidence Exs.P1 to P22 are marked and on the defendants' side, the trial court recorded the evidence of DW-1 to DW-4 and Exs.D1 to D4 are marked:-

1. Whether the plaintiff proves that the defendants executed an agreement to sale on 24.11.1989 with him agreeing to sell the plaintiff schedule property at the rate of Rs. 40,000/- per acre and received Rs. 10,000/- as advance?
2. Whether the plaintiff proves that the defendants received further advance of Rs. 50,000/- on 27.10.90?
3. Whether the plaintiff proves that he is entitled to specific performance of the contract?
4. What order or decree?

ADDITIONAL ISSUES:

1. Whether the plaintiff proves that he was and has been always ready and willing to perform his part of the contract?
2. Whether the plaintiff proves that he was always ready and willing to perform his part of the contract?

9. The trial court on appreciation of evidence of the parties, dismissed the suit as against defendant Nos. 4 to 6, however, decreed the suit against defendant Nos. 1 to 3 as defendant Nos. 1 to 3 had admitted the agreement of sale and had also admitted that they are willing to execute the sale deed. It is in this context, the trial court had decreed the suit as against the defendants-1 to 3. The plaintiff aggrieved by the dismissal of the suit as against defendant Nos. 4 to 6 has called in question the judgment and decree of the trial court in this appeal.

10. We have heard learned Senior Counsel Sri. Tarakaram for plaintiff and learned Counsel for 4th defendant and Sri. S.B. Mukkannappa, learned Counsel for defendants-5 and 6.

11. The learned Senior Counsel appearing for the appellant submitted that, the plaintiff has proved the agreement and the same is enforceable and that the

plaintiff is always ready and willing to perform his part of contract and that no hardship will be caused to the defendants-4 to 6 if the suit is decreed for specific performance of the contract. In support of these contentions, he relied on the evidence of PW-1 to FW-3 and DW-3 and DW-4 and submitted that, the plaintiff has proved the agreement of sale dated 24.11.1989 produced at Ex.P2 by pointing out, that land bearing Sy. No. 19, Sy. No. 18/2 and Sy.No. 110/2 were agreed to be sold to the plaintiff by the defendants on sale consideration of Rs. 40,000/- per acre and an amount of Rs. 10,000/- Is received as advance amount on the date of agreement and all the defendants have signed the said agreement, he further pointed out, from Ex.P2 that on 27.10,1990, further sum of Rs. 50,000/- was paid to the defendants and to this effect, an endorsement is written on the said agreement, which is signed by defendant No. 1 and defendant No. 5. He also relied on Ex.D5 to show that immediately on the next date of the agreement, the advance amount of Rs. 10,000/- paid to the defendants was deposited in the account of defendant No. 3 and defendant No. 5 in Sree Bhagyalakshmi Finance, a registered finance company. In this connection, he took us through the plaint averments to point out that advance amount of Rs. 60,000/- has been paid in pursuance of agreement of sale and submitted that, at the time of making further payment of Rs. 50,000/-, fourth defendant was not available, as such, his signature is not taken on the endorsement. To clarify the extent of land agreed to be sold under the agreement, he referred para-2 of the plaint, and submitted that the extent of land agreed to be purchased is 8 acres 37 guntas after excluding the plaintiff's share, Further, he relied on EX.P20 - written statement filed by defendant No. 4 in O.S. No. 39/1991, suit filed by the plaintiff in which the defendant No. 4, at para-8 of his written statement has admitted that his signature has been obtained on a blank paper for the purpose of creating a document to knock off the properties. He also relied on the order sheet of the Land Tribunal, Nelamangala produced at Bx.D4 to point out that no proceedings before the Land Tribunal were pending after 24.8.1981. He referred to Ex.D4 to show that the stand taken by the defendants that a dispute was pending before the Land Tribunal as on the date of agreement and the signatures of the defendants were obtained for the said purpose is false. Learned Senior Counsel also relied on Ex.P10 - a notice issued by plaintiff calling upon the defendants to execute the registered sale deed in his favour within 15 days by accepting the balance of sale consideration. He also pointed out that the notices sent to defendants-5 and 6 are returned as per postal endorsements at Exs.P14 and P15. He also took us through the reply filed by defendant No. 1 admitting the agreement and also agreeing to execute the registered sale deed. He also pointed out from Ex.P13 - a reply given by defendant No. 1, that defendant No. 1 could not execute the registered sale deed as the other defendants were not co-operating. Learned Senior Counsel in addition to referring to these documents, also relied on the evidence of PW-1, who is the son and Power of Attorney of the plaintiff, to point out that, the signatures of defendant Nos. 1 to 6 were identified and pointed out that the payment of Rs. 60,000/- as advance amount is made under the

agreement. The learned Senior Counsel relied on the evidence of PW-2 and PW-3 the witness and scribe of the agreement of sale to prove the agreement and pointed out that PW-2 and PW-3 were present at the time of agreement and have attested the agreement and admitted payment of amount of Rs. 10,000/- and later payment of Rs. 50,000/- in the hands of defendant No. 5. Further, the learned Senior Counsel referred to the evidence of DW-3, who is defendant No. 3, to point out that he has admitted the execution of the agreement and receipt of payment of Rs. 60,000/-. He also pointed out the admission of defendant No. 3 in reply to the notice at Bx.P13, and further submitted that DW-4, who is defendant No. 2, has also admitted the agreement and also money paid in the hands of defendant No. 5.

12. On the basis of this evidence, learned Senior Counsel firstly contended that the execution of agreement has been proved beyond reasonable doubt as the signatures of the defendants on the agreement have been identified by PW-1, PW-2 and PW-3, who have affixed the signature, and have admitted the execution of the agreement and the receipt of amount of Rs. 10,000/- and Rs. 50,000/- by defendant No. 5. He further submitted that, the defendant No. 4, at para-8 of his written statement filed in O.S. No. 39/1991 at para-8 marked as Ex.P20 has admitted, that he has signed the blank papers. With the admission of the defendant No. 4 and the evidence of PWs-1, 2 and 4 and DWs-3 and 4, the plaintiff has proved the agreement and has also proved the payment of Rs. 10,000/- and Rs. 50,000/- in the hands of defendant No. 5.

13. As regards to the extent of land agreed to be sold under the agreement, he pointed out that though the partition took place as per Ex.DI on 29.8.1974, the defendants together executed agreement of sale to sell their share of the properties and this is clear from the plaint averment at paragraph-2 wherein the plaintiff has specifically stated that the total extent of the land available for sale under the agreement is 8 acres 37 guntas after excluding 33 guntas being the share of plaintiff, that is the land fallen to the share of defendants-1 to 6 in respect of survey numbers mentioned in the said agreement.

14. As regards to payment of advance amount, the learned Senior Counsel submitted that the defendant No. 5 received the amount on 24.11.1989 on behalf of other defendants and this is supported by evidence of FWs-1 to 4 and admission of DWs-3 and 4, who have spoken about the payment of Rs. 60,000/- in the hands of fifth defendant. By referring to these evidence, he submitted that plaintiff has proved the payment of advance amount

15. Learned Counsel representing the defendant No. 4 submitted:

That the alleged agreement of sale is fabricated and forged; the defendant No. 4 has not signed the said agreement; that the agreement is unenforceable as it is not certain as to the extent of lands sought to be sold; and is not certain as to the total sale consideration. He also contended that in view of the evidence of the PW-1 and the defendant Nos. 2 and 3, who are examined as DWs-3 and 4, it

is clear that the agreement is unascertainable and unenforceable in law.

16. He also contended that the plaintiff is not examined in this case and in his place, his Power of Attorney has been examined. As such, the evidence of PW-1 cannot be relied, to prove the agreement, he relied on the law laid down by the Apex Court in the case of Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Limited and Ors. reported in ILR 2005 Kar 729. He further submitted that the plaintiff was never ready and willing to perform his part of contract. He also submitted that, defendant No. 4 has not signed the agreement nor has received the advance amount and submitted that in view of the partition of the joint family property in the year 1974 itself, the question of executing a joint agreement in favour of the plaintiff did not arise nor the defendant No. 5 was authorised to receive any advance amount on behalf of other defendants. He also contended that even otherwise, the grant of decree for specific performance of the contract would cause great hardship to the defendant No. 4.

17. Elaborating his submission, Counsel for the defendant No. 4 referred to Ex.P2 - agreement of sale and pointed out that defendant No. 4 has not signed the endorsement and also submitted that the signature appearing on the main agreement is not the signature of defendant No. 4. Further submitted that Ex.P2 mentions the entire share of defendant No. 4, which includes not only his share but also of his children, who have succeeded to the ancestral property and were major on the date of agreement and further it includes the land of the deceased Venkatamthnaiah Setty, who has left behind wife and other children and who are neither parties nor signatories to the agreement and further, he also submitted that the land mentioned in the agreement includes the land of the plaintiff. Referring to these, he submitted that there is no certainty of the property, which is sought to be sold. He further submitted that when the joint family property are partitioned, the agreement to sell includes the entire property of the family without other heirs being party, which is impermissible or illegal. To elaborate further he relied on Ex.P10 - a notice in which the plaintiff has stated that excluding 33 guntas of his share, the land to the extent of 8 acres 37 guntas is agreed to be sold and further, in the same notice, he calls upon the defendants to execute the sale deed for only 6 acres 1 guntas whereas in para-2 of the plaint, plaintiff states that the extent of land to be sold is 8 acres 37 guntas. The extent mentioned in the plaint, agreement and Ex.P10 are mutually contradicting and on the other hand, the agreements show different extents. He also referred to the evidence of PW-1 to show that there is no definite extent mentioned either in the agreement or in the plaint or in the notice or in the evidence of FW-1 particularly referring to the total consideration as stated by PW-1 as Rs. 4,85,000/-, which works out to be for 12 acres 5 guntas. On the basis of these materials produced by the plaintiff, himself, he submitted that the plaintiff is not sure as to the what extent of land is agreed to be sold and submitted that agreement is vague as to the extent of land. On these materials, he submitted that the agreement is unascertainable and vague.

18. Further elaborating contentions, learned Counsel for the defendant No. 4 submitted that the evidence of PWs-1, 2, 3 and DWs-3 and 4 relied on by the plaintiff does not prove the execution of agreement of sale, and also does not prove the payment of advance amount of Rs. 60,000/-. Further, it also does not prove the extent of land sought to be sold and the total sale consideration,

19. As regards ready and willingness of plaintiff is concerned, he submitted that the plaintiff is neither ready nor willing to perform his part of contract, he submitted that agreement stipulated three months' time to complete the contract and there was no obligation on the part of defendants to extend the period, however, plaintiff neither performs his part of contract nor shows his readiness, in turn, issued notice at Ex.P10 after the expiry of three months time and even after issue of Ex.P10 - notice, plaintiff files suit for permanent injunction instead of seeking specific performance of contract Based on these grounds, he submitted that the plaintiff was never ready and willing to perform his part of contract

20. He also submitted that he had converted the land bearing Sy.No. 110/2 for non-agricultural purpose, its valuation is more than Rs. 3 lakhs and other land at Rs. 2 lakh per acre even on the date of agreement and further it would cause great hardship to him and his family, if the decree is passed. On these submissions, learned Counsel for the defendant No. 4 submitted that the plaintiff is not entitled for a decree for specific performance and sought for dismissal of the appeal with cost

21. The Counsel appearing for defendant Nos. 5 and 6 also relied on the submission of the learned Counsel for the defendant No. 4. In addition to this, he also submitted that the defendant Nos. 5 and 6 have not executed the agreement of sale. He also disputed the receipt of advance amount of Rs. 10,000/- and also further advance amount of Rs. 50,000/-. He also disputed that the advance amount of Rs. 10,000/- was deposited as per Ex.D5 and submitted that it is not the advance amount alleged to have been paid by the plaintiff, there is no nexus between the said deposit and the alleged advance amount alleged to have been paid by the plaintiff. He also submitted that the Joint family property is partitioned way back in 1974 and each of them have separated and enjoying the property separately with a distinct boundaries in terms of Ex.D1. He also submitted that the agreement alleged to have been executed by the defendants is not enforceable as it is not only vague but the persons interested in the land have not signed the agreement He also disputed his signature on the agreement On these submissions, he requested for dismissal of the appeal

22. The learned Senior Counsel appearing for the plaintiff in reply submitted that the agreement is not vague or unenforceable, and submitted that there is no ambiguity in the agreement and terms are clear and enforceable. In support of his submission, learned Senior Counsel for the plaintiff relied on the decisions reported in Sanwarmal Goenka Vs. Soumyendra Chandra Gooptu, to show that the agreement is enforceable. He also relied on the decisions reported In

Ponnuswami Goundan and Another Vs. Kalyanasundara Ayyar and Others, , AIR 1972 Calcutta 12 Head Note K3" and he also relied on the provisions of Sections 68 and 73 of the Evidence Act to show that the agreement is certain, ascertainable and enforceable. Learned Senior Counsel also relied on the paragraphs from "FRY on Specific Performance" to submit that, even in case of uncertainty, if the contract is capable of understanding, it could be as enforced/ the Court has power to ascertain the terms of the contract. In this regard, he relied on paragraphs-334, 340, 341, 343 and 344. He also relied on the "CHITTY on Contracts" particularly paragraphs-112 and 115 and BROOKS Legal Maxims" in connection with his contention of enforceability of the contract.

23. The learned Senior Counsel also submitted that the plaintiff is and was ready and willing to perform his part of contract and in this connection, he referred to Ex.P10 - a notice calling upon the defendants to execute the registered sale deed by mentioning that plaintiff is ready and willing to perform his part of contract As regards to denial of signature by the defendant Nos. 4 to 6, he submitted that this Court can verify the signature of the parties. Further submitted that there is no discrepancy in the terms of the contract and submitted that the Court has power to ascertain the intention of the parties and also ascertain the terms of the contract and submitted that the contract is enforceable and the plaintiff is entitled for decree of specific performance. The learned Senior Counsel referring to the decisions referred to above, submitted that, from the Ex.P2, P10, plaint and evidence of PW- 1, the terms of the contract are ascertainable. He further submitted that the decision reported in ILR 2005 Kar 729 (supra) has no application to the facts of this case as the PW-1 is not only Power of Attorney Holder of plaintiff but he is also son of plaintiff and was present at the time of the agreement

24. In the light of the submissions made by the learned Senior Counsel appearing for plaintiff and the Counsel appearing for the defendants-4, 5 and 6, the following points arise for consideration:

- 1) Whether the plaintiff has proved the agreement of sale?
- 2) Whether the defendants show that the terms of agreement are uncertain, vague and not enforceable?
- 3) Whether the plaintiff has proved that he is ready and willing to perform his part of the contract?
- 4) Whether the defendants have proved that grant of decree for specific performance of the contract would cause hardship to the defendants-4 to 6?

25. In the light of rival submissions, it is useful to refer to Ex.D1, which is the partition deed dated 29.8.1974, In which the joint family properties of the plaintiff and defendants were divided by metes and bounds. The plaintiff got Sy. No. 32/1 measuring 2 acres and 33 guntas in Sy. No. 19. Father of the defendants-1 and 2 Krishnaiah Setty got 2 acres 2 1/2 guntas in Sy. No. 34 and

33 guntas in Sy. No. 19. Similarly, the wife of Venkatarathnaiah Setty Smt. Vanajakshamma - mother of third defendant got 2 acres 21/2 guntas in Sy. No. 34 and 33 guntas in Sy. No. 19. Defendant No. 4 got 2 acres 7 guntas in Sy. No. 110/2 and 10 guntas of Kushki land and 33 guntas of irrigated land in Sy. No. 19. Defendant No. 5 got 2 acres 10 guntas of dry land in Sy. No. 19 and 23 guntas of Irrigated land in Sy. No. 19. Defendant No. 6 got 2 acres 11 guntas of dry land in Sy. No. 19 and 33 guntas of irrigated land in Sy.No. 19, These lands were divided by metes and bounds and each one of them were put in possession of their respective share, To this effect, the defendant Nos. 4, 5 and 6 have stated that there was a partition of the joint family properties and each one got separate share by metes and bounds. In para-4 of the written statement of the defendant No. 4, has referred to the partition as well as separate possession of the lands fallen to his share and in para-8; lie has referred to Sy.No. 18/2 fallen to the share of defendant No. 5 exclusively. Even the defendant Nos. 5 and 6 in their written statement in paragraph-2 have referred to the partition of the joint family properties by metes end bounds and their exclusive possession. They have also stated that they are in exclusive possession of respective shares. PW-1, who was examined on behalf of the plaintiff as a Power of Attorney and also the son of plaintiff, has admitted the partition of the joint family properties in his evidence and the existence of the farm houses in the lands. Even DWs-3 and 4, who are defendant Nos. 3 and 2 have not disputed the partition and separate possession of the joint family properties.

26. When the joint family properties are divided by metes and bounds in the year 1974 itself and parties were enjoying the property separately, the plaintiff has not explained as to why defendants-1 to 6 jointly executed the alleged agreement of sale dated 24.11.1989 i.e., nearly after lapse of 15 years. It is in this context, it is useful to refer the agreement of sale also, which is marked as Ex.P2. In the agreement of sale, nowhere it is mentioned as to the extent of respective shares of the defendants. In turn, the entire Sy.No. 19 is shown as 9 acres 19 guntas and Sy.No. 18/2 is shown as 1 acre 12 guntas and Sy.No. 110/2 is shown as 2 acres 7 guntas. Admittedly, Sy.No. 19 has fallen to the share of all the members of the joint family and Sy.No. 110/2 has exclusively fallen to the share of defendant No. 4. Sy.No. 18/2, which was not shown in the partition deed, is allotted to defendant No. 5. In this context, it creates serious doubt as to whether all the parties have joined together to sell the property In favour of the plaintiff. Particularly the lands mentioned in Ex.P2 includes the land of the plaintiff. Further, the said agreement is alleged to have been executed by defendants-1 to 6. However, the mother of defendant No. 3 Smt. Vanajakshamma, to whom 33 guntas of land in Sy. No. 19 is allotted, is not even party to the said agreement But her portion of the land is also included in the said Ex.P2, Ex.P2 does not specify the respective share nor shows as to what extent each one of them have agreed to sell nor it shows that, what is the consideration is to be paid to respective vendors under Ex.P2. In fact, Sy.No. 110/2 in entirety belongs to defendant No. 4. He has got major children and who

have got share in the property have not signed the agreement No explanation is forthcoming in the evidence of plaintiff as to why the agreement does not specify the respective shares, and as to why defendant No. 3's mother and other heirs have not signed, there is no explanation why plaintiff's share is also included in the agreement.

27. In connection with Ex.P2, it is necessary to refer the evidences of PWs-1 to 3 and DWs-3 and 4, who support the case of the plaintiff. Before we look into the evidence of plaintiff, it is useful to refer to the decision reported in Mayawanti Vs. Kaushalya Devi, . The Apex Court while interpreting Section 9 of the Specific Relief Act, has observed that there must be a valid and binding contract between the parties, in respect of which the parties should be consensus ad idem and this burden of proof lies on the plaintiff seeking specific performance of the contract In order to make contract enforceable, it requires defined share, consideration of sale price. Learned Counsel drew our attention to paras-18, 19, 21 and 22 of the judgment. Para-18 reads thus:

The specific performance of a contract w the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement Negotiations thereafter would also be material if the agreement is rescinded.

From the observations of the Apex Court, the burden is on the plaintiff to prove the agreement and enforceability of the agreement If the terms are uncertain and the parties are not ad idem, then there can be no specific performance, as it would not constitute a valid contract

There is yet another reason for holding that the agreement of sale is unenforceable, as there is absolutely no clear and certain evidence of proof of the agreement In such circumstances, the plaintiff is not entitled for relief of specific performance, which is discretionary relief and in this context, it is useful to refer to a judgment reported in Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others, :

(1) To relief for specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. The circumstances referred to in Sub-sections (2) to (4) of Section 20 in regard to exercise of discretion for granting a decree for specific performance are not exhaustive. In a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain. While normally it is permissible

to grant relief on the basis of what emerges from the evidence - even if not pleaded, provided there is no prejudice to the opposite party, such a principle is not applied in suits relating to specific performance. Where the defendant denies the contract as alleged and the evidence proves a contract, but different from that alleged by the plaintiff, the court should refuse to exercise discretion for grant of decree for specific performance.

28. In this case, plaintiff is not examined, in turn, the plaintiff's son PW-1 has been examined as Power of Attorney of the plaintiff. Admittedly, PW-1 is not a signatory to the alleged agreement either as a witness or identifying the alleged signatures of the defendants. In the decision of the Apex Court in the case of JANKI VASHDEO (supra), it is held that Power of Attorney, who is not a party to the alleged agreement of sale and who has no personal knowledge, cannot depose on behalf of the plaintiff nor his evidence will prove the execution of the agreement.

29. It can be seen from the evidence of FWs-1, 2 and 3 and DWs-3 and 4, who have supported the case of the plaintiff to prove Ex.P2 - an agreement of sale. Under Ex.P2, what is agreed to be sold is 9 acres 37 guntas of land and which does not define the shares of the defendants and admittedly, which also includes not only the lands fallen to the share of the plaintiff but also the share of the mother of the defendant No. 3, who is not even party to the agreement. However, in para-2 of the plaint, the extent of land is stated to be only 8 acres 37 guntas and in Ex.P10 - a notice issued by the plaintiff, at one breath, the total extent of land is shown as 9 acres 19 guntas and at another breath it is mentioned that what is agreed is only 8 acres 37 guntas, but, has called upon the defendants to execute a sale deed for 6 acres 1 gunta. When PW-1 was suggested as to the total sale consideration of the land, FW-1 has stated that it is Rs. 4,85,000/- and if Rs. 4,85,000/- is taken as sale consideration, the extent of land at the rate of Rs. 40,000/- per acre would be about 12 acres 5 guntas. Even taking into consideration the evidence of PW-1 and Exs.P2 & P10, the extent of the property sought to be sold is not clear and there is no clear explanation by any of the witnesses examined by the plaintiff. It is not possible to ascertain the extent of the property sold under the agreement. It is also not clear from the evidence in this case as to what exact extent of land is intended to be sold. There is vagueness as to the extent of property sought to be sold under the agreement. There is no other means to ascertain the same.

30. As far as the contention of learned Senior Counsel for the plaintiff, that even in the case of discrepancy or uncertainty in the terms of the contract, the Court has power to ascertain the same, while looking into the intention of the parties. In this regard, the learned Senior Counsel had referred to the decisions reported in Ponnuswami Goundan and Another Vs. Kalyanasundara Ayyar and Others, : AIR 1972 Cal 12 Head Note "C". It is not in dispute that if the terms of the contract are ascertainable from the intention of the parties, the Court has power to enforce the contract. But in this case, the defendants-4 to 6 have categorically

denied the execution of the agreement itself. Further, from the evidence of the plaintiff i.e., FW-1 to PW-3 and DW-3 and DW-4, it is not possible to ascertain the intention of the parties as to what extent the defendants agreed to sell the lands particularly, the mother of the defendant No. 3, who has succeeded to the estate of her husband and her other children and the other heirs of defendant Nos. 4, 5 and 6, who have also succeeded to the properties, are not parties to the agreement and the plaintiff at each stage has made contradicting statement as regard to the extent of land. In these circumstances, even applying the principle laid down by various High Courts and the Supreme Court in the matter of ascertaining the intention of the parties,, in this case, on facts and the evidence lead by the plaintiff, it is not possible to ascertain the intention of the parties. Apart from this, if taking into consideration Ex.P20 - written statement filed by defendant No. 4 in O.S. No. 39/1991, that by itself will not prove the execution of the agreement nor Ex.DS a deposit of Rs. 10,000/- made in the account of defendant No. 5 would prove the execution of the agreement Under these circumstances, the plaintiff himself is not clear as to what is agreed to be purchased by him under the agreement The terms of the agreement ex fade are not clear. As such, the only conclusion that is possible is, that the terms of the contract are unascertainable,

31. Learned Senior Counsel had referred to certain paragraphs from "FRY on specific performance" in support of his contention that the contract is enforceable, even if there is certain discrepancy. It is useful to refer to those paragraphs:

334. "NOTHING is more established in this Court," said Lord Hardwicke, speaking of contracts which the Court will enforce, "tan that every agreement of this kind ought to be certain, fair and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree a specific performance." "I lay it down as a general proposition," said Lord Loughborough (afterwards Earl of Rosslyri), "to which I know no limitation, that all agreements, in order to be executed in this Court, must be certain and defined: secondly, they must be equal and fair, for this Court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires.

...

340. An action may be maintained on a contract where, though some term be not ascertained, the Court has the means of ascertaining it, on the principle of the maxim *id outran est quod certum reddi potest* Thus, in a contract for the sate of lands under the Lands Clauses Consolidation Act, in which the sum was not ascertained, the Court decreed the defendants to issue their warrant to the Sheriff to summon a jury to settle the compensation: and the same principle is Illustrated by the cases on the requisite completeness of the subject-matter and price,

341. The necessary completeness of the contract may be considered in respect of

(1) the subject-matter, (ii) the parties to the contract, (iii) the price, and (iv) the other terms.

...

343. Where it is necessary to call in extrinsic evidence, the connection of the subject-matter of the contract, and the thing in respect of which specific performance is sought, must be pleaded and supported by sufficient evidence.

344. It is, however, essential that the description of the subject-matter should be so definite, as that it may be known with certainty what the purchaser imagined himself to be contracting for, and that the Court may be able to ascertain what it is. And so in a case where there was a contract for the letting of "coals, etc.," the statement of the subject-matter was thought by Knight Bruce L.J. insufficient, and specific performance was refused on that amongst other grounds.

From the paragraphs referred to above, it is clear that the agreement or the contract must be certain, fair and just in all its part. It is also necessary that in order to maintain an action on contract though some terms required to be ascertained, the Court has power to ascertain, however, if there is uncertainty as regard to the subject matter, the parties to the contract or the price or other terms, in such an event, the contract becomes unenforceable for want of certainty as to the subject matter, price and parties.

CHITTY ON CONTRACTS

112. Qualifications on the requirement of certainty. It must however be emphasised that the courts seek to uphold bargains wherever possible. The principles governing their approach were explained as follows by Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.*; "Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba tta sunt mteltigenda ut res magis valeai quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law.

BROOMS LEGAL MAXIMS:

An agreement in writing for the sale of a house did not describe the particular house, but it stated that the deeds were in the possession of A. The Court held the agreement sufficiently certain, since it appeared upon the face of the agreement that the house referred to was the house of which the deeds were in the possession of A., and, consequently, the house might easily be ascertained! and *id certum est quod certum reddipotest*.

32. The decision referred to by the learned Senior Counsel for the plaintiff viz. Khivraj Chordia and Others Vs. Esso Standard Eastern Inc., wherein it is observed thus:

In determining objections founded on the alleged uncertainty of a term in a contract the test is not whether the term is in itself certain but whether it is capable of being made certain, *Id certum est quod reddi certum patet* (That is sufficiently certain which can be made certain.)

But in this case, it can be seen from the evidence that the uncertainty in the terms of the contract are not capable of being made certain. When the plaintiff himself is not clear as to the terms of the contract and when the defendants have denied the agreement, the principle enunciated in the said decision is not applicable.

33. In this connection, the other decision referred to by the learned Senior Counsel for the plaintiff is Smt. Shaharyar Bano and Another Vs. Seth Sanwal Das, .

(A)...Mere use of words "entire house" in agreement is immaterial when vendee knew that portion let out to tenants was referred to and understood as a separate house.

As far as this principle is concerned, again it has to be said that the intention of the parties was clear to occupy the house, which is vacant and that said contract was capable of being made certain or understood and in the light of the facts of that case, the Hon"ble Supreme Court while interpreting the words Entire house", which is vacant excluding the portion let out to the tenants. Thus, the said principle is not helpful to ascertain the correct terms of the contract in this case.

34. In this connection, the learned Senior Counsel for the plaintiff has also referred to a decision reported in Rajkishor Mohanty and Another Vs. Banabehari Patnaik and Others, :

(a) Contract Act (1872) Section 29 Contract void for uncertainty - Contract Act (1872), Sections 46 & 49.

Where a written contract for sale of land is silent about the price & the time for performance, the contract is not void for uncertainty, if it is one that can be made certain within the meaning of Section 29. If on evidence it is found that the parties agreed to the payment of a reasonable & fair price & complete the contract within reasonable time the Ct. can imply such terms in the contract & determine what is reasonable price & what is reasonable time.

35. It is true that the contract is not void for uncertainty if it can be made certain within the meaning of Section 29 of the Contract Act. As reiterated earlier and found from the evidence, we are not able to ascertain as to whether the contract in question is required to be enforced in terms of Ex.P2 or in terms of Ex.P10 - a

legal notice or in terms of averments in the plaint or should go by the evidence of PW-1. If this evidence is considered, we find that not only there is ambiguity but uncertainty particularly in relation to the extent of the land is concerned.

36. Similarly, the learned Senior Counsel also referred to another decision reported in P. Rama Pattar Vs. A. Viswanatha Patter, Lakshmi alias Ammu Ammal, V. Anantarama Patter and Parameswaran, minor by guardian, in connection with his submission that the payment of advance amount in the hands of defendant No. 5 is payment made in favour of all the defendants.

If a promissory note is executed by the junior members, it is sufficient if there is consideration for the instrument as a whole for it to be enforceable against all executants, and as it is not necessary in law that the consideration should move to each executant, separately to make the note binding on him, it is equally enforceable against all.

37. As far as this contention is concerned, it can be said that other defendants neither expressly nor impliedly, had authorised the defendant No. 5 to act on their behalf. In this case, the endorsement is signed by all the defendants except defendant No. 4. If it is a case then the defendant No. 5 was authorised to accept the money on behalf of the others and the endorsement ought not to have been by all. Further, it is the specific case of the defendant No. 4 that he had neither authorised defendant No. 5 nor defendant No. 5 was entitled to collect any advance amount on his behalf. These circumstances only indicate that the payment, if any, made to defendant No. 5 cannot be treated as payment to other defendants also. One other circumstance is that, admittedly In 1974 the partition took place and parties divided themselves by metes and bounds and the evidence of the defendant No. 4 is that there was no cordial relation between the parties and further there is no evidence as to why defendant No. 5 received the amount on behalf of other defendants. These circumstances create a serious doubt regarding the payment of advance amount.

38. In the light of evidence on record and in view of the decision referred above i.e. Mayawanti Vs. Kaushalya Devi, , there is no consensus ad idem and the plaintiff has failed to discharge this burden of proving the enforceability of the agreement

39. Even from the evidence of PWs-1 to 3, DWs-3 and 4 and Exs.P10 - the notice issued by plaintiff, Ex.DI -partition deed, paragraph-2 of the plaint and Ex.P2 - agreement of sale, it is clear that contract is not certain as to the subject matter of the agreement particularly, Ex.P3 refers to an extent of 9 acres 37 guntas whereas, paragraph-2 of the plaint refers to 8 acres 37 guntas whereas, Ex.P10 - the notice refers to 8 acres 37 guntas and at the same time, it also calls upon the defendants to execute the sale deed for only 6 acres 1 gunta. As regard to the evidence of PW-1, PW-1 states that the total consideration of the sale would be Rs. 4,85,000/-, which means an area about 12 acres 5 guntas. From the evidence of the plaintiff and the documents relied on by him, it is not clear as to

what is the extent of land agreed to be sold. In the light of the above, it is not possible for the Court to ascertain, the terms of the contract for the purpose of enforcement of the same. If the terms are not certain and is not possible to ascertain the same, then the contract becomes unenforceable. In the light of the evidence lead by the plaintiff and also in the light of the plaintiff not entering the witness box, the power of attorney i.e., son of the plaintiff deposing on behalf of the plaintiff and also looking at the relationship between the plaintiff and the defendants, and some of heirs whose share is also included in the agreement though not parties to the agreement, it is clear that the plaintiff has failed to prove the agreement and defendant Nos. 4 to 6 have proved that the contract is vague and unascertainable.

40. Even in case of a valid agreement, the plaintiff is required to establish that he is always ready and willing to perform his part of contract. The ready and willingness requires that the plaintiff must be always ready with the necessary financial resources and must have mental attitude to perform his part of contract. In this case, it is useful to refer the agreement of sale - Ex.P2, under which the sale was required to be executed within three months from the date of agreement. The agreement is dated 24.11.1989. Even assuming that the subsequent payment is made on 27.10.1990, the plaintiff was required to get the sale deed registered within three months from the date of alleged payment of Rs. 50,000/-. Under the agreement, there is no obligation on the part of the defendants to perform any contract except registering the sale deed. As per Ex.P10 - notice dated 30th January 1991, is admittedly after three months. Plaintiff himself calls upon the defendants to execute the registered sale deed in his favour within 15 days. However, he files a suit on 3.3.1991 for grant of decree for permanent injunction restraining the defendants from alienating or creating document or liability in respect of the suit schedule land. He refers to the issue of notice and he also refers to the cause of action accrued to him on 30th January 1991, the day on which he issued the notice as per Ex.P10 . However, plaintiff does not choose to enforce the contract by filing a suit for specific performance. This conduct of the plaintiff shows that he was not ready to get the sale deed registered in his favour. Further, in the evidence of PW-1, as far as financial capacity is concerned, in para-14, he has stated that he is required to pay Rs. 4 lakhs and his father had Rs. 4 lakhs at the time of agreement Further, states that even if that money is not there, they will borrow money from the others and admits that he has no documents to show the availability of Rs. 4 lakhs. This clearly shows that the plaintiff was not ready with the necessary finance even on the date of his evidence on 20th September 1995. Thus, it is clear from the evidence of PW-1 and Ex.P10 and P19 that neither the plaintiff was ready with necessary finance nor he was willing to perform his part of contract As such, from the evidence of the plaintiff, it is dear that the plaintiff was not ready and willing to perform his part of contract u/s 16 of the Specific Relief Act, the vendee is not only required to be always ready and willing to perform his part of contract, but his readiness must be from the date of the

agreement till getting of registered sale deed in his favour.

41. Defendants-4 to 6 have submitted that granting decree of specific performance would cause great hardship to them. The relationship between the plaintiff and the defendants is not disputed. A partition between them, as per Ex.DI, is not in dispute. It is also not disputed that Sy.No. 110/2 entirely belongs to defendant No. 4 and the said land has been converted for non-agricultural purpose. Both DWs-1 and 2 have stated that the value of the land even at the time of agreement was Rs. 3 lakhs per acre. It could be seen from the agreement that the entire land of the defendant No. 4 allotted in partition is included. Similarly, that of defendant No. 5 also. As far as defendants-1 to 3 are concerned only portion of Sy.No. 19 has been included in the agreement of sale. Under these circumstances, it is necessary to consider the evidence of DWs-3 and 4, who supported the plaintiff inasmuch as the land what is allotted to defendants-1 to 3 in the partition, is the portion of land in Sy.No. 19 and other lands allotted to defendant Nos. 1 to 3 is not included. It is also not clear from the evidence of PW-1 as to why all the brothers agreed to sell the land allotted to them under the partition even though their financial position was sound. Further, the mother of the defendant No. 3 and other heirs of defendant Nos. 4 to 6 are not parties to the agreement and admittedly, their portion of the property is also included in the agreement. These circumstances clearly show that if the decree for specific performance is granted, it would cause more hardship to the defendant-4 to 6 and other heirs particularly there being no evidence on record to show that even after selling the lands intentioned the agreement, the defendants-4 to 6 are having the other lands for their livelihood.

42. In addition to this, there is another circumstance, which required to be taken into account that the PW-1 and DWs-3 and 4 have admitted that there are farm-houses in the lands of the plaintiff and defendants and as far as those houses are concerned, there has been no partition. It is not in dispute that no valuation has been made in respect of those houses nor there is any mention in the agreement of sale. If the agreement is enforced, it will cover the houses situated in lands, which are not partitioned. These circumstances show that the grant of decree for specific performance would, cause greater hardship to the defendants-4-to 6.

43. Hence, we find that the plain tiff has failed to prove the agreement. Further defend ants-4 to 6 have shown that the terms of the contract arc unascertainable and plaintiff is not ready and willing to perform his part of contract and more hardship would be caused to them if the agreement is enforced.

44. Looking from any angle, we do not find any good reason to interfere with the findings of the court below.

In the light of the discussion made above, we do not find any reason to interfere with the judgment and decree passed by the trial court and accordingly, the appeal is dismissed.