
(2007) 01 AP CK 0036

In the Andhra Pradesh High Court

Case No : AS No"s. 1320 and 1321 of 1991

Ponna Kotayya and Others

APPELLANT

Vs

Ponna Peda Kotilingam and Others

RESPONDENT

Date of Decision : 25-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Madhya Bharat Land Revenue and Tenancy Act, 1950 — Section 70(8)
Transfer of Property Act, 1882 — Section 12, 53A, 6, 8

Citation : (2007) 4 ALD 828 : (2007) 5 ALT 289

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : A. Satyaprasad, for the Appellant; Ravindranath, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The unsuccessful parties in OS No. 100 of 1982 and OS No. 84 of 1982 on the file of the Court of Subordinate Judge, Narsapur, preferred these appeals, AS Nos. 1320 of 1991 and 1321 of 1991 respectively on the file of this Court.

2. The appellants herein are the plaintiffs in OS No. 84 of 1982 and the defendants in OS No. 100 of 1982. In view of the memo filed on 15-4-1988 before the learned Subordinate Judge aforesaid, both the suits, OS No. 84 of 1982 and OS No. 100 of 1982 were clubbed and evidence was recorded in OS No. 100 of 1982 and both the suits were disposed of by a common judgment. The suit filed by the appellants-plaintiffs for declaration that they are in possession of the plaint schedule lands and for consequential relief of permanent injunction or alternatively for a decree of Rs. 24,545-75ps., with subsequent interest @ 18% p.a., the principal relief of declaration and injunction had been negatived but on the ground of equity refund had been ordered. The other suit, OS No. 100 of 1982 filed by the respondent for recovery of possession had been decreed. Aggrieved by the said decrees and judgments referred to supra, these

appeals are preferred by the plaintiffs in OS No. 84 of 1982 and the defendants in OS No. 100 of 1982.

3. Contentions of Sri Satyaprasad : Sri Satyaprasad, the learned Counsel representing the appellants in both these appeals had taken this Court through the oral and documentary evidence available on record and would maintain that in the facts and circumstances, inasmuch as the father had alienated the property for the purpose of discharging the family debts as kartha of the family the same is binding on both the major sons and minor sons of the family and hence inasmuch as the said agreement of sale being binding on all the family members, suit for permanent injunction is maintainable, since the fact that these parties are in possession of the properties, the same is not in serious controversy. The learned Counsel would also maintain that for the applicability of Section 53-A of Transfer of Property Act, 1882 necessarily possession need not be delivered as on the date of agreement of sale. The Counsel would also maintain the fact that possession had been delivered is not in serious dispute, though it is at a subsequent point of time and the very fact that a suit for possession is filed would go to show that these parties are in actual possession and enjoyment of the plaint schedule property. The learned Counsel would also point out that the dispute relating to the house had also been raised but however the same had been negatived and though several contentions were advanced relating to the very genuineness of the agreement of sale, raising a plea of forgery, the learned Judge recorded positive findings relating to the agreement of sale in question Ex. B2 and having arrived at such a conclusion the learned Judge erred in not granting the relief of permanent injunction and ordering only refund. The learned Counsel also had taken this Court through the oral evidence available on record. The Counsel also would contend that a notice for partition dated 2-6-1982 was given and the contents of the notice if carefully scrutinized, would not specify the agreement of sale. The very fact that all the parties to the suit filed for recovery of possession would go to show that notice is only collusive one and hence adverse inference may have to be drawn. The learned Counsel explained in detail the ingredients to be satisfied for the applicability of Section 53-A of the Transfer of Property Act, 1882 and also had explained the binding nature of the agreement of sale in question on the other coparceners under the general principles of Hindu Law and in fact placed reliance on certain decisions to substantiate his contentions.

4. Contentions of Sri Ravindranath : Sri Ravindranath, the learned Counsel representing respondents in both these appeals has taken this Court through the contents of agreement of sale dated 7-1-1973 Ex. B2 and would point out that from the very nature of the recitals of the agreement of sale and also the blanks without attestation and the nature of signatures, the document is highly a suspicious one. The learned Counsel would also submit that in facts and circumstances of the case even the very order of refund of the amount is totally unjustified and hence the parties rightly thought of preferring cross-objections. The learned Counsel pointed out several grounds raised in the cross-objections

and would comment that in the light of the suspicious circumstances, several infirmities as can be seen in Ex. B2 even ordering refund cannot be justified. The learned Counsel while further making elaborate submissions had pointed out that the payment of Rs. 1,000/- and Rs. 6,200/- alone had been admitted and the other amounts are in controversy. The learned Counsel would also contend that there is no endorsement made on the agreement of sale relating to the said payments. The learned Counsel would also submit that at the time of notice Ex. B1 both the brothers were alive and there is no demand or there was no occasion as such initiated for the regular execution of sale deed as such. The learned Counsel also would point out that even as per recitals in Ex. B2, it is clear that it is not a possessory agreement of sale and the admitted case is that no possession as such had been delivered on the date of agreement of sale. The Counsel would also point out that there is no clear recital relating to the applicability of amount for discharge of debts or whether these debts are pressing debts of a joint family. Hence in such circumstances, the legal necessity as such cannot be inferred. While elaborating his submissions, the learned Counsel would also point out that the relevant dates with regard to the institution of the suits and the dates of death of the parties. The learned Counsel would maintain that a simple suit for declaration that the plaintiffs are in possession and for consequential relief of permanent injunction on the strength of an agreement of sale without praying for the relief of specific performance, as such, cannot be maintained. The learned Counsel relied on certain decision to substantiate these contentions. The Counsel also would submit that even as per the recitals in Ex. B2 father alone executed Ex. B2 and the major sons and minors though had been referred to in the recitals, none had signed and none were parties to the transaction. In such circumstances, inasmuch as Section 53-A of the Transfer of Property Act 1882 is not applicable to the facts and circumstances of the case. When the relief of perpetual injunction to be negatived, it is just and proper to grant the relief of recovery of possession and in view of the same OS No. 100 of 1982 had been rightly decreed. The learned Counsel would also point out to the relevant portion of the evidence and also the documentary evidence adduced by the parties and placed reliance on several decisions to substantiate his submissions. The learned Counsel concluded that even if the ground of equity to be taken inasmuch as refund had been ordered, these are not fit matters to be interfered with and hence the appeals are liable to be dismissed.

5. Heard the Counsel on record. Perused the respective pleadings of the parties, issues, which were settled and also the oral and documentary evidence available on record and the findings recorded by the learned Judge.

6. Inasmuch as both the suit are closely connected and the relief in one suit being dependent on the relief in the other suit, both these appeals are being disposed of by this common judgment.

Points for consideration:

7. In the light of the rival contentions, which had been advanced by the Counsel on record, the following points arise for consideration in these appeals:

- (1) Whether the findings recorded by the learned Judge in relation to Ex. B2 to be confirmed or to be disturbed in the facts and circumstances of the case?
- (2) Whether the agreement of sale dated 7-1-1973 be said to have been executed for joint family and legal necessity by the father-manager of the joint family in the facts and circumstances of the case?
- (3) Whether the appellants can claim protection of Section 53-A of Transfer of Property Act, 1882 in the facts and circumstances of the case?
- (4) Whether the refund of amount ordered by the learned Judge to be confirmed or to be disturbed especially in the light of the cross-objections preferred by the respondents?
- (5) If so, to what relief the parties would be entitled to?

8. Point No. 1 : As already referred to supra, the plaintiffs in OS No. 84 of 1982 and the defendants in OS No. 100 of 1982 preferred the respective appeals. For the purpose of convenience, the parties would be referred to as "plaintiffs" and "defendants" as shown in OS No. 100 of 1982 whereunder the evidence was recorded. Both the brothers, fathers of the respective parties contesting these litigations are no more.

9. The averments made in the plaint by the plaintiffs are as hereunder:

The plaintiffs 2 to 4 are the sons of the first plaintiff. The plaint schedule property is the joint family property of the plaintiffs. The second plaintiff shifted to Attali in 1972 and has been carrying on his own rice business and has nothing to do with the first plaintiffs business. The third plaintiff was employed in the Electrical Department in Tirumala Tirupati Devasthanam at Tirupati. When the plaintiffs 2 and 3 were living away and when the 4th plaintiff was a minor the defendant prevailed upon the plaintiff to sell the plaint schedule property. The first plaintiff did not agree to sell the property as his major sons were not present and without their consent he would not like to sell the same and there was no legal necessity for the first plaintiff. However, as the defendant stated that the first plaintiff alone might execute an agreement of sale and the sale transaction could be cancelled in case the plaintiffs 2 and 3 did not agree, the first plaintiff alone executed the agreement of sale on 6-1-1973 and took Rs. 1,000/- as advance. As per the terms of the agreement the defendant should pay the balance of sale consideration within three months. In case of default by the plaintiffs they should give up Rs. 500/- from out of the sale consideration. In case of default by the defendant, he should pay 12% interest on the balance of sale consideration and the property should be delivered at the time of registration of sale deed. The above conditions of the agreement of sale were enforceable only if the plaintiffs 2 and 3 would agree. Subsequently the defendant did not pay the amount. However, he discharged a promissory note dated 11-1-1971 in favour of Gade

Narayana Rao on 22-11-1973. The defendant has not paid any more amount towards sale consideration. At that time the crop in the plaint schedule land was cut and removed by the plaintiffs. The defendant committed default in performing his part of the contract. On that ground and also as the other plaintiffs were not willing to part with the plaint schedule land, the first plaintiff told the defendant that he would not execute a sale deed. The defendant agreed for cancellation of the agreement. However, the defendant requested the first plaintiff to allow him to enjoy the property for three years i.e., from 1974 sarwa crop to 15-5-1977. The defendant also requested that the advance of Rs. 1,000/- and the amount of Rs. 6,200/- paid on 22-11-1973 by the defendant to Gade Narayana Rao might be appropriated from out of the income derived from the plaint schedule land. Thereby the defendant agreed not to claim any more amount and also not to claim any interest. He agreed to deliver possession of the property before 15-5-1977. The said agreement took place in the presence of U. Subba Rao, G. Krishna Murthy and others. Possession of the land was delivered under the above mentioned agreement of sale dated 6-1-1973. The defendant is only a licensee. After the expiry of the period, the defendant did not vacate. The plaintiffs have been demanding the defendant to vacate and deliver possession of the property after cancellation of the agreement of sale executed by the first plaintiff alone. The defendant has postponed on some pretext or the other. The plaintiffs 1, 3 and 4 have demanded the defendant in the presence of U. Subbarao, G. Krishnamurthy and D.V. Krishna Rao to deliver possession of the land to the plaintiffs. Before them, the defendant admitted that he would vacate the land but did not do so. The agreement of sale obtained by the defendant from the first plaintiff is clearly barred by time. The defendant has no right to remain in possession of the land. He cannot claim protection u/s 53-A of the Transfer of Property Act as possession was not delivered to him under agreement of sale dated 6-1-1973. The agreement of sale dated 6-1-1973 was cancelled. The second plaintiff issued a notice on 2-6-1982 to the other plaintiffs and the defendant demanding partition of the plaint schedule land and other joint family properties. After receiving the notice, the plaintiffs 1, 3 and 4 and the defendant did not choose to give any reply. However, the defendant issued a notice on 13-7-1982 and filed OS No. 84 of 1982 on 14-7-1982 requesting for permanent injunction and alternatively for refund of the amount. The agreement relied upon by the defendant was not the actual agreement executed by the first plaintiff. The first plaintiff executed agreement of sale on stamps of denominations of Rs. 5/-, Rs. 1/- and Rs. 1/- and the date of execution was 7-1-1973 but not 6-1-1973. The names of the sons of the second plaintiff and the 4th plaintiff were not included in the original sale agreement executed by the first plaintiff. Till receipt of plaint copy in OS No. 84 of 1982 and Photostat of the agreement of sale set up by the defendant, the first plaintiff was not aware that the original agreement of sale dated 6-1-1973 was replaced by a forged agreement of sale. The defendant, without any basis, filed OS No. 84 of 1982 and obtained ex-parte injunction promising the plaintiffs that he would vacate the plaint schedule land. Though the defendant is entitled to remain in possession of the plaint schedule

land as a licensee till 15-5-1977, he is only a trespasser after 15-5-1977 and he is not entitled to remain in possession. The defendant has to account for the crops he realized from 1977 sarwa onwards till delivery of possession. The plaint schedule land is a fertile land and yields 25 bags of paddy per acre for each of the sarwa and dalwa crops.

10. The first defendant filed written statement wherein it was pleaded that in the affidavit filed in support of the plaintiffs petition for appointment of a Receiver it was stated that the first plaintiff estimated the profits at Rs. 30,000/-. The relief of accounting has not been properly valued. The plaint is liable to be returned, as proper Court fee has not been paid. The relationship between the parties is true. It is not true to say that the second plaintiff went to Attili for carrying on business. He was sent to Attili to expand the joint family business by opening a branch there as he had good contacts at Attili, which is his father-in-law's place. In addition to carrying on the joint family business, the second plaintiff opened a rice shop also at Attili. It is not true to allege that the defendant prevailed upon the first plaintiff to sell the plaint schedule land to him against the wishes of the plaintiffs or that there was no legal necessity for the first plaintiff to sell the same. It is not true to allege that the defendant agreed to purchase the plaint schedule land subject to ratification by the plaintiffs 2 and 3. It is not true to say that the first plaintiff alone executed an agreement of sale on 6-1-1973 after taking an advance of Rs. 1,000/-. By 1973 the family of the plaintiffs was indebted to several persons including State Bank of India, Palakole Branch for running their joint family business in cloth and Sri Ganeswara Silk Factory. So the first plaintiff, as manager of the joint family of the plaintiffs, put the plaint schedule land to sale in order to discharge family debts and debts connected with joint family business and also to expand the joint family business. The defendant offered to purchase the plaint schedule land for Rs. 24,084/-. The first plaintiff as manager of the joint family executed an agreement of sale on 7-1-1973 after taking an advance of Rs. 1,000/- from the defendant. The plaint allegation that the first plaintiff executed the agreement of sale on 6-1-1973 after taking an advance of Rs. 1,000/- is false. The alleged sale agreement dated 6-1-1973 is a myth. The further allegations in Para 5 of the plaint making reference to the alleged agreement of sale dated 6-1-1973 are false. There was no question of the defendant failing to perform his part of the contract under the alleged agreement dated 6-1-1973 and there was no question of willingness of the defendants 2 to 4 to execute a sale deed in pursuance thereof. The allegation in the plaint that the defendant agreed to cancel the agreement dated 6-1-1973 and requested the first plaintiff to allow him to enjoy the land for three years is false. The defendant purchased the suit land under an agreement of sale dated 7-1-1973. He has been in continuous and uninterrupted possession of the land till today. At the time of the agreement of sale on 7-1-1973 an advance of Rs. 1,000/- was paid to the first plaintiff, towards discharge of a debt due to State Bank of India, Palakole Branch and incurred for the business of the plaintiffs' joint family run in the name of Sri Ganeswara Silk Factory, Dagguluru, the

defendant paid Rs. 4,000/-, Rs. 4,000/-, Rs. 3,000/- and Rs. 768-26 on 26-3-1973, 13-4-1973, 28-4-1973 and 9-12-1973 respectively. The defendant paid Rs. 1,500/- and Rs. 6,200/- respectively on 20-11-1973 and 22-11-1973 towards discharge of a debt due under a promissory note to G. Narayanarao of Kavitam. The defendant paid Rs. 326-49 on 21-12-1973 to Palakole Co-operative Agricultural and Industrial Society Limited under receipt No. 17 in book No. 49 towards discharge of overdue manure loan taken by the first defendant for manuring the joint family lands. During the month of December, 1973 the defendant paid Rs. 1,350/- towards discharge of debt due to Karumuri Rama Gopala Subramanyam of Palakole which was incurred under a katha for the business of the plaintiffs' joint family. The defendant paid Rs. 500/- on 30-1-1973 to the first plaintiff for defraying joint family expenses. In December 1973, the defendant paid to the first plaintiff Rs. 100/- for paying electricity bill and electricity reconnection charges. Again in the same month the defendant paid to the first plaintiff Rs. 1,338-25 and Rs. 461-75 respectively towards balance of sale consideration and towards interest stipulated in the agreement of sale dated 7-1-1973. Thus, the defendant discharged the debts of the plaintiffs' joint family to the tune of Rs. 21,145-75 and paid the remaining amount out of the sale consideration in cash to the first plaintiff making up a total of Rs. 24,545-75. The contrary allegations regarding the demands in the plaint are expressly denied. The alleged mediation referred to in Para 7 of the plaint was a myth. U. Subbarao, G. Krishnamurthy and D.V. Krishnarao and close associates of the plaintiffs. They might have been pressed into service to defeat the rights of the defendant and to give a colour of reality to the alleged sale agreement dated 6-1-1973. The defendant is in possession of the plaint schedule land by virtue of the sale agreement dated 7-1-1973. He is entitled to protection u/s 53-A of the Transfer of Property Act. The possession of the defendant is in his own right but not as a licensee in the plaint. The notice dated 2-6-1982 was issued by the second plaintiff with the connivance and active co-operation of the other plaintiffs with a view to defeat the lawful rights of the defendant. The contentions now advanced in the plaint were not advanced in the said notice. The theory of execution of a sale agreement on 6-1-1973 and refusal by the plaintiffs 2 and 3 to execute a sale deed in pursuance of the said agreement and permission to the defendant to continue in possession or a period of three years is an afterthought. The agreement of sale dated 7-1-1973 is true, valid and binding on the plaintiffs. It is not true to allege that the alleged agreement of sale dated 6-1-1973 was tampered. The defendant is not liable to pay any mesne profits and render account for the crops realized from 1977 sarwa onwards. The yield of paddy stated in the plaint is excessive. The plaint schedule land does not yield more than 10 bags of paddy per acre. The defendant filed O.S. No. 84/82 and obtained injunction order because the plaintiffs threatened to dispossess the defendant from the suit land though he paid the entire sale consideration and is in possession of the land by virtue of the agreement dated 7-1-1973. The plaintiffs are not entitled to recover possession or any other relief, as there is no cause of action for the suit. The defendant requested for dismissal of the suit with

compensatory costs u/s 35-A CPC.

11. After the filing of the suit, the first plaintiff died. The plaintiffs 5 to 9 being his legal representatives have been added as per order dated 18-3-1986 in I.A. No. 216/ 86. The first defendant also died after the filing of the written statement. His legal representatives have been added as defendants 2 to 8 as per order dated 5-6-1989 in I.A. No. 157/89. Consequently the plaintiffs, with leave of the Court granted on 28-6-1989 in IA No. 494/89, alleged in the plaint by way of amendment that the defendants 2 to 8 became entitled to the movable and immovable properties of the deceased first defendant as per Hindu Succession Act and are in possession of the same. The defendants 2 to 8 have not filed any additional written statement. Ultimately the issues were recasted in the said suit as hereunder:

- (1) Whether the plaintiffs having estimated the past mesne profits at Rs. 30,000/- in I.A. No. 1100/82 are entitled to value the relief of accounting at Rs. 3,000/- only and whether the suit is properly valued and the Court fee paid is correct?
- (2) Whether the suit is not maintainable in law?
- (3) Whether the sale agreement dated 6-1-1973 set up by the plaintiffs is true?
- (4) Whether the first plaintiff, as father-manager of the joint family of the plaintiffs, executed an agreement of sale on 7-10-1973 for joint family benefit and legal necessity and put the first defendant in possession of the plaint schedule property?
- (5) Whether the first defendant performed his part of the contract?
- (6) Whether the defendants are not entitled to protection u/s 53-A of the Transfer of Property Act?
- (7) Whether the suit has to be jointly tried with OS No. 84/82 on the file of this Court?
- (8) Whether the first defendant gave up his contract?
- (9) Whether the first defendant agreed to be in permissive possession only till 15-5-1977 and the cancellation of the agreement was true and valid?
- (10) Whether the first defendant is a trespasser?
- (11) Whether the plaintiffs are entitled to past or future profits and, if so, what amounts of past or future profits they are entitled to?
- (12) Whether past mesne profits can be claimed by a mere relief of accounting?
- (13) Whether the plaintiffs are entitled to recover possession of the plaint schedule property?
- (14) To what relief?

12. Subsequently the respective stand taken by the parties appears to be the same in OS No. 84 of 1982 but however for better appreciation it may be appropriate to have a glance on the pleadings as well. It was pleaded in the plaint by the appellants hereunder:

13. The first plaintiff is the brother of the first defendant. The defendants 2 to 4 are sons of the first defendant. All the defendants constitute a joint family. The joint family of the defendants owns Ganeswara Silk Factory at Dagguluru. They have also cloth business. By 1973 the joint family consisting of the defendants became indebted to several persons including State Bank of India, Palakole Branch for running their family business of cloth and the said silk factory. The first defendant is the manager of the joint family of the defendants. The joint family of the defendants was under a pressure from the creditors for immediate repayment of debts. Under those circumstances, the entire joint family wanted to dispose of some land for discharging debts. The first defendant, acting as manager of the joint family and with the consent of the other members of the joint family, offered for sale of Acs : 2-23 cents of land covered by R.S. No. 159 situated in Dagguluru Village, more particularly described in the plaint schedule. The first plaintiff offered to purchase the land for Rs. 24,084/- for which the defendants agreed. On 7-1-1973 the plaintiff paid Rs. 1,000/- under an agreement of sale signed by the first defendant as manager of the joint family though in the document it was recited as if it was executed by all the defendants and their minor children. The agreement of sale dated 7-1-1973 having been executed by the manager of the joint family binds all the defendants and their children as it was for legal necessity and benefit of the estate of the joint family. As per the sale agreement dated 7-1-1973 immediately after the harvest of sarwa and dalwa crops, possession of the plaint schedule land was given and ever since the first plaintiff has been in enjoyment of the same as of right and has been paying all the taxes personally and through his sons Ponna Basavanna who looking after the agricultural operations of the first plaintiffs lands. The first plaintiff is in continuous and uninterrupted possession of the plaint schedule land till today. Out of the sale consideration amount, an amount of Rs. 1,000/- was paid to the first defendant at the time of the agreement of sale. Towards discharge of the debt due to the State Bank of India, Palakole Branch and incurred for the benefit of the joint family business run in the name of Sri Ganeswara Silk Factory, Dagguluru, the first plaintiff paid Rs. 4,000/-, Rs. 4,000/-, Rs. 3,000/- and Rs. 768-26 respectively on 26-3-1973, 13-4-1973, 28-4-1973 and 9-5-1973. The counterfoils of paying slips issued by the State Bank of India, Palakole Branch have been filed along with the plaint. The first plaintiff Rs. 1,500/- and Rs. 6,200/- on 20-11-1973 and 22-11-1973 respectively towards discharge of promissory note debt due to Gade Narayanarao of Kavitam which was incurred for discharge of family debts and for running family business of the defendants. That promissory note was executed by the defendants 1 and 2. The first plaintiff paid Rs. 327-49 on 21-12-1973 to Palakole Co-operative Agricultural and Industries Society Limited under receipt No. 17 of book No. 49

towards discharge of overdue manure loan taken by the first defendant for manuring the joint family lands. During December 1973, the first plaintiff paid Rs. 1,350/- towards discharge of a debt due under a katha to Karumuri Rama Gopala Subramanyam of Palakole which was incurred for the joint family business of the defendants. The first plaintiff paid Rs. 500/- on 30-1-1973 to the first defendant for defraying joint family expenses. In December 1973, the first plaintiff paid Rs. 100/- to the first defendant for paying electricity bills and electricity reconnection charges. Again in December 1973 itself, the first plaintiff paid Rs. 1,338-25 towards the balance of sale consideration and Rs. 461-75 towards interest as stipulated in the sale agreement dated 7-1-1973. Thus the first plaintiff discharged debts so the joint family of the defendants to the tune of Rs. 21,145-75 and paid the remaining amount in cash to the first defendant making up a total of Rs. 24,545-75. The first plaintiff is in continuous possession of the plaint schedule land. He has also paid away the entire sale consideration amount. While so, the second defendant got issued a registered notice on 2-6-1982 through his advocate to the plaintiff and the other defendants alleging that the plaint schedule property is the joint family property and calling upon the first plaintiff and other defendants to get the same partitioned and to allot a share to him. The first plaintiff cannot be called upon to part with possession and enjoyment of the plaint schedule land as he paid the entire sale consideration and he was inducted into possession by the manager of the joint family in pursuance of an agreement of sale executed by the first defendant who was the manager of the defendants' joint family. As the first defendant is no other than his brother, the first plaintiff implicitly believed the defendants and paid away the entire sale consideration, but could not obtain a sale deed as all the defendants could not assemble on any particular date and the defendants were all along promising to execute a sale deed at their convenience. Immediately after the receipt of the registered notice issued by the second defendant, the first plaintiff raised a dispute before Ponna Hukkum, Ponna China Hukkum, Challa Nageswararao and Siddani Veerabhadru who all belong to Dagguluru. The defendants 1, 2 and 4 who attended the mediation on behalf of the joint family admitted before the elders that the joint family received the entire sale consideration under the sale agreement dated 7-1-1973 and the fact of inducting the first plaintiff into possession of the plaint schedule land. Those defendants also agreed to execute a sale deed in favour of the first plaintiff. The second defendant also admitted in his notice the possession and enjoyment of the plaint schedule land by the first plaintiff. Since the first plaintiff is in possession and enjoyment of the plaint schedule land, his possession is protected u/s 53-A of the Transfer of Property Act. Either the defendants or any persons claiming under them have no manner of right in the plaint schedule land and are not entitled to disturb the first plaintiff's possession. From about 3 or 4 days, the defendants 1, 2 and 4 have been openly proclaiming in the village that they will take forcible possession of the plaint schedule land. They have been also proclaiming that the third defendant will also join them in forcible dispossession of the first plaintiff from the plaint schedule land. They are also making active preparations in that

regard. It has, therefore, become necessary to file the suit for declaration of possession of the plaintiffs and for a permanent injunction. Alternatively the first plaintiff is entitled to refund of the amount paid by him towards discharge of the debts of the joint family of the defendants and cash paid to them with subsequent interest at 18% as the said amount was paid by him under inducement and fraud played by the defendants. If the defendants claim back the plaint schedule land, they are liable to refund the amount paid by the first plaintiff and they stand in the position of trustees for the amount paid by the first plaintiff. Further the defendants are also liable to refund the money paid by the first plaintiff for breach of contract with a charge over the plaint schedule property. There is no limitation for the alternative relief of refund of money with subsequent interest as the intention of the defendants to commit breach of the contract is made known to the first plaintiff under the notice dated 2-6-1982 got issued by the second defendant. If the defendants have any fraudulent intention to defraud the first plaintiff, it is made known only when the defendants began to proclaim that they will take forcible possession of the land. Hence the suit.

14. The defendants 1, 2 and 4 in the said suit filed written statement with the following averments:

15. Except the relationship, the other allegations in the plaint are denied. The second defendant shifted to Attali in 1972 and was carrying on his own business and had nothing to do with the first defendant's business. So also the third defendant was appointed in clerical departments in Tirumala Tirupati Devasthanam at Tirupati. The plaint allegation that the joint family of the defendants was indebted to several parties including State Bank of India, Palakole for running their family business in cloth under the name of Ganeswara Slik Factory is not correct. There is no joint family as far as the defendants 2 and 3 are concerned. But the plaint schedule land is a joint family property. When the defendants 2 and 3 were away and the fourth defendant was a minor, the first defendant told the first plaintiff that he required some money. The first plaintiff then prevailed upon the first defendant to sell the plaint schedule property to raise the amount. Then the first defendant did not agree as his major sons were not present and he would not sell the land without their consent. The allegation in the plaint that the defendants' family was under pressure in the year 1973 from creditors for immediate repayment of debts and under those circumstances, the joint family of the defendants wanted to dispose of some property for discharging debts is absolutely false to the knowledge of the first plaintiff. There was no legal necessity to sell the property. The first plaintiff prevailed upon the first defendant to sell for himself and on behalf of the fourth defendant who was a minor then and informed him that if the defendants 2 and 3 did not agree, the agreement might be cancelled. Accordingly the first defendant, for himself and on behalf of his minor son fourth defendant, executed an agreement of sale on 6-1-1973 for Rs. 24,084/- and took an advance of Rs. 1,000/-. The description of the property in the plaint schedule is not correct. The plaint allegation that the defendants agreed to sell the plaint schedule land to the first plaintiff for Rs.

24,084/- is not at all correct. It is also not correct to say that on 7-1-1973 the first defendant executed agreement of sale as the joint family manager. The agreement executed by the defendants 1 and 4 on 6-1-1973 did not include the names of defendants 2 and 3 and the minor sons of the second defendant. The agreement dated 7-1-1973 is a forged agreement and does not bind the defendants. The first defendant never executed the suit agreement dated 7-1-1973. The plaint allegation that after the harvest of sarwa and dalwa crops of 1973, possession of the plaint schedule land was given to the first plaintiff is not at all correct. Even under the agreement dated 6-1-1973 possession had to be delivered if all conditions were fulfilled. The defendants 1 and 2 contracted a debt from Gade Narayanarao S/o. Venkatachalam on 11-1-1971 and executed a promissory note for Rs. 8,100/-. The defendants 1 and 2 paid Rs. 1,000/- on 24-7-1971 and Rs. 1,500/- on 20-11-1973 and endorsed on the said promissory note. The first plaintiff paid Rs. 6,200/- on 22-11-1973 in full discharge of promissory note debt and the discharged promissory note was returned to the first plaintiff. By that time as the defendants 2 and 3 did not agree to part with the plaint schedule land, the agreement of sale was cancelled. The plaint allegation that the first plaintiff paid Rs. 4,000/- on 26-3-1973, Rs. 4,000/- on 13-4-1973, another Rs. 3,000/- on 28-4-1973 and Rs. 768-26 on 9-5-1973 out of the sale consideration into State Bank of India on behalf of the defendants is not correct. The first defendant himself got paid all those four amounts through the first plaintiff as the defendants 2 and 3 were away and when the first defendant was sick, but the first defendant did not take return of the counterfoils of the bank slips. Taking advantage of the fact that the first plaintiff is in possession of those slips, he has claimed that he has paid those amounts from out of the alleged sale consideration. Therefore, the first plaintiff cannot claim those amounts. It is also not correct to say that the first plaintiff paid Rs. 1,500/- on 20-11-1973 towards part payment of pronote debt of Gade Narayanarao. That amount was paid by the first defendant. Otherwise, the endorsement would have been that the amount was paid from out of the sale consideration. It is also not correct to allege that the first plaintiff paid Rs. 327-40 on 21-12-1973 to Palakole Co-operative Agricultural and Industrial Society Limited, Pulapalli. The first defendant need not pay to that society. The defendants are not indebted to Karumuri Rama Gopala Subrahmanyam and there was no katha in his shop. The plaint allegation that the defendants are indebted to a tune of Rs. 1,350 is not at all correct. The first plaintiff himself has a katha in the shop. The defendants believed that the amount was paid by the first plaintiff towards his katha debt but it was shown in the plaint as if it had to be paid by the defendants. The further allegations in the plaint that the first plaintiff paid Rs. 500/- on 30-1-1973 to the first defendant for defraying joint family expenses and Rs. 100/- in December 1973, for paying electricity bills is not at all correct. No amounts were paid at all. The plaint allegation that the first plaintiff paid Rs. 1,338-25 in December 1973 towards alleged sale consideration and an amount of Rs. 461-75 towards interest as per the stipulation in the agreement is not at all correct. It is absolutely false to allege that the first plaintiff discharged the joint

family debts. In fact, there are no joint family debts. Except the payment of Rs. 1,000/- under agreement dated 6-1-1973 and Rs. 6,200/- on 22-11-1973, no other payments were made by the first plaintiff as alleged in the plaint. The first defendant told the first plaintiff that the order defendants were not willing to sell the land and the agreement dated 6-1-1973 had to be cancelled. The first plaintiff agreed to cancel the agreement and asked for return of the two amounts of Rs. 1,000/- and Rs. 6,200/- paid respectively under the agreement and to G. Narayanarao. The first defendant told the first plaintiff that the amount was not readily available with him. Hence, both the first plaintiff and, first defendant came to an agreement that the first plaintiff might be allowed to enjoy the property for three years from 1974 sarwa crop to 15-5-1977 and the amount of Rs. 7,200/- might be appropriated from out of the income derived from the plaint schedule land and that the first plaintiff should not claim more than that amount and the property should be delivered back by 15-5-1977. This agreement took place in the presence of G. Krishnamurthy and others. Accordingly, the property was delivered to the first plaintiff by the first defendant in June 1974. The first plaintiff is only a licensee. The plaint allegation that the property was delivered after dalwa crop of 173 is not correct. The allegations in the notice dated 7-6-1982 issued by the second defendant were true. The allegations in the plaint that the first plaintiff paid the entire sale consideration and the first defendant acted as a joint family manager were not correct and were invented for the purpose of this suit. It is false to allege that the first plaintiff paid the entire sale consideration but failed to get a sale deed as all the defendants did not assemble to execute a sale deed. If the sale agreement relied upon by the first plaintiff was true, he would not have waited to get a sale deed executed by the defendants. The plaint allegation that the first plaintiff raised a dispute before the alleged mediators goes to show that the plaintiff No. 1 had no agreement of sale in his favour. The long silence on the part of the first plaintiff would also clearly indicate that the alleged agreement of sale was not subsisting. In fact, the first plaintiff never raised any dispute before the alleged mediators. The allegation in the plaint that the defendants 1 to 4 admitted before the alleged mediators that they received the entire sale consideration under the agreement of sale and the delivery of possession as not at all true. The first plaintiff being a licensee cannot claim the protection u/s 53-A of the Transfer of Property Act. After 15-5-1977 the possession of the first plaintiff amounts to trespass and the provisions of Section 53-A of the Transfer of Property Act do not apply and the first plaintiff is not entitled to any protection under that provision of law. After the expiry of the period i.e., after 15-5-1977, the defendants demanded the first plaintiff to vacate and deliver possession of the land as per the agreement arrived at between them. The first plaintiff has postponed for some reason or the other. The demand was made by the defendants in the presence of Uppu Subbarao, G. Krishnamurthy and Dodda Venkata Krishnarao. The first plaintiff admitted before them that he would vacate and deliver the documents but did not do so. The first defendant implicitly believes the first plaintiff because he is his own brother. Even though the defendants 2 and 3 are residing elsewhere and there was division in

status even in the year 1973, the property was kept joint. The second defendant issued a notice on 2-6-1982 to the first plaintiff and the latter received the same but did not choose to give any reply till 13-7-1982. But he filed this suit on 14-7-1982. The defendants have practically no time left for issuance of any reply. The first plaintiff manipulated and forged the suit agreement by deleting some of the non-judicial stamps after he received the notice. Hence the first plaintiff did not issue any reply notice. The first plaintiff has no right to remain in possession of the suit property after 15-5-1977, as he is only a licensee. The first plaintiff cannot object the defendants from taking possession of the property but in the meanwhile the first plaintiff obtained ex-parte order of injunction against the defendants though he was not entitled to file a suit for injunction. The first plaintiff cannot claim any title to the property. Nor did he get any title even u/s 53-A of the Transfer of Property Act. On mere possession but without any title, the first plaintiff cannot file the suit for injunction. With regard to primary relief, the suit is liable to be dismissed. The suit claim even for the admitted amount of Rs. 7,200/- is clearly barred by time. Hence, the first plaintiff cannot claim any amount by way of refund. As per the agreement arrived at between the first plaintiff and the first defendant, the first plaintiff did not deliver possession of the property. Hence, the defendants are obliged to file a suit for recovery of possession and also for an account with regard to the income derived after 15-5-1977 till delivery.

16. The third defendant filed a memo adopting the written statement of the defendants 1, 2 and 4.

17. As already referred to supra, the first defendant in the suit also died and defendants 2 to 4 were already on record and they were recognized as legal representatives and defendants 5 to 9 the daughters of the first defendant were added as legal representatives as per orders dated 22-12-1987 in IA No. 1455 of 1987 and defendants to 9 had not filed any additional written statement.

The following issues were settled in the said suit:

- (1) Whether the suit agreement is true, valid and binding on the defendants?
- (2) Whether the plaintiff is entitled for the injunction prayed for or the alternative relief?
- (3) To what relief?

18. These are the respective pleadings of the parties and the issues settled in both the suits. The evidence of PWs. 1 and 2 and DWs. 1 to 6 had been recorded and Exs. A1 to A4 and Exs. B1 to B21 were marked. The learned Judge after recording the findings came to the conclusion that in the facts and circumstances of the case, the recovery of possession of the plaint schedule property as prayed for in O.S. No. 100 of 1982 to be granted. But however, refund of the amount of Rs. 24,545-75 together with interest from the date of judgment till the date of deposit into Court with some reliefs had been ordered. The parties were directed

to bear their own costs. PW. 1 is the second plaintiff in OS No. 100 of 1982 who had deposed about the relationship between the parties and also the death of his father and he deposed about the plaint schedule property. PW. 1 further deposed that the suit land is an ancestral property and his father used to live in Dagguluru Village and his father used to carry on business under the name and style of Sri Ganeswara Silk Factory at Dagguluru and he has been living at Attili Village and carrying on rice business and his second brother was working as Works Inspector at Tirumala Tirupati Devasthanam. PW. 1 no doubt had taken a specific stand that his father never offered to sell the plaint schedule land and the defendant is the elder brother of his father and the defendants had got land on the northern side of the plaint schedule land and the extent of land is Ac : 2-33 cents and they had partitioned the joint family properties under registered partnership deed. PW. 1 also deposed that his father informed that the defendant obtained an agreement of sale from 6-1-1973 and his father also informed that the defendants had paid him Rs. 1,000/- under the aforesaid agreement of sale and by the date of agreement of sale dated 6-1-1973, this witness and the third plaintiff were mediators and the fourth plaintiff was minor at that time and in the said agreement of sale dated 6-1-1973 PW. 1 and the third plaintiff had not signed and his father did not inform him or his brother that he had put up the plaint schedule land for sale and his father never asked PW. 1 or his brother PW.2 to execute an agreement of sale in favour of the defendants. This witness also deposed relating to the execution of promissory note in favour of Gade Narayanarao whereunder they borrowed Rs. 6,200/- and this witness further deposed that a dispute raised before the mediators and by the date of the rising of the dispute the suit property was in possession of his father. This witness also deposed that the mediators settled the dispute and they requested the defendants to discharge the promissory debt to Gade Narayanarao and his father for borrowal of Rs. 6,200/- and that the elders said that the first should enjoy the suit land till 15-5-1977. This witness deposed that the signature on the agreement is similar to that of his father's signature. The signatures in the original agreement of sale dated 7-1-1973 are not that of his father and the said agreement of sale is marked as Ex. B2. This witness also deposed that Ex. B2 is not biding and had taken a specific stand that Ex. B2 is a forged document. Ex. A1 is the registration extract of the partition deed dated 9-2-1957 between his father and the brother of his father and this witness also deposed about certain details in the partition deed. This witness further deposed in relation to land revenue receipts Exs. A2 and A3. PW. 1 also further deposed that the defendants sent reply notice after filing OS No. 84 of 1982 and the reply notice was marked as Ex. A4. In the cross-examination, this witness deposed that he cannot give the date and month when his father informed him that he had executed agreement of sale dated 6-1-1973 in favour of the defendants. Several suggestions put to this witness had been denied. This witness also deposed that PW. 1 raised dispute in the presence of mediators; Uppu Subba Rao, D.V. Krishna Rao and G Krishnamurthy relating to the promissory note. Having come to know about the agreement of sale by his father in favour of defendants dated

7-1-1973, this witness also deposed except his words there is no other evidence that the suit land was in possession of his father. In June 1974, the mediators settled the dispute in the house of the defendants and the same was not written on any paper and the delivery of physical possession of the property in the year 1974 and the defendants enjoyed the plaint schedule property till 19-5-1977. Certain details relating to mediation had been spoken to by this witness. But specific stand was taken that the agreement of sale was cancelled as per the settlement arrived by the mediators but the same was not endorsed on the said agreement of sale. This witness also deposed that he did not mention in Ex. B1 about the settlement before the mediators about the delivery of property and also certain other particulars. This witness further deposed that he does not know in whose custody the agreement of sale is there. This witness had taken specific stand that PW. 1, his father and brothers constituted a Hindu Joint Family. To several of the questions in relation to Ex. B2, this witness expressed his inability to answer and gave certain vague answers. This witness also deposed about the counterfoils Ex. B3, B4, B5 and B6 and also deposed that it is not true to say that the defendant paid the amounts under Exs. B3 to B6 towards sale consideration under Ex. B2. In the lengthy cross-examination, several details relating to relationship had been elicited. This witness also deposed about Ex. B7, the receipt issued by the Palakole Co-operative Agriculture and Industrial Society Limited, Pulapalli, Palakole. This witness also deposed about Exs. B8, B9, B10 and B1. PW. 1 also deposed that the signature under Ex. B2 is that of his father but his father has no confidence in the defendants. PW.2 was examined, who deposed about the dispute and the mediation and this witness also deposed about the plaint schedule property and the second plaintiff disputing that his father executing agreement of sale and also in relation to the discharge of debt and this witness was also cross-examined and suggestions put to this witness were denied.

19. Second defendant in OS No. 100 of 1982 was examined as DW. 1, who deposed about the relationship and further deposed that the second plaintiff went away to Attili his father's place to explain his joint family business and by then his family had business only at Daggulur. This witness also deposed that the first plaintiff executed an agreement of sale, Ex. B2 on his behalf as manager of the joint family and also guardian of one of his minor sons on 7-1-1973 and that he was present and witnessed the first plaintiff affixing his signatures on all the pages of Ex. B2. There is no stipulation in the agreement of sale Ex. B2 that the agreement was subject to ratification by the plaintiffs 2 and 3. This witness also deposed that under what circumstances the first plaintiff as manager of the joint family and guardian of minor son agreed to sell the property. DW. 1 had taken specific stand that there was no agreement of sale on 6-1-1973 and the agreement was only on 7-1-1973. He had given about the details of payments. This witness also deposed that the scribe of Ex. B2 was no more. This witness also deposed about the possession being delivered and Exs. B12 to B21 the receipts relating to payment of taxes for the schedule land. DW. 1 also deposed

that his father filed declaration under the Land Ceiling Act and in the said declaration the plaint schedule land was shown, as if it was purchased by his father and big brother. Exs.B3 to B6 are the counterfoils and the cash paid vouchers. This witness again deposed in relation to Exs. B7 to B11. In the elaborate chief examination this witness had given several particulars relating to the payment of sale consideration and further deposed that Ex. B1 notice does not relate to the execution of sale agreement Ex. B2 dated 6-1-1973. This witness had given several details and other particulars relating to execution of Ex. B2 and also several payments that were made and also the delivery of possession and how they had been enjoying the property in question in detail. The learned Judge in fact specifically recorded certain questions and also recorded the answers given by this witness. Several suggestions made in relation to the payments had been specifically denied and this witness asserted that such payments in fact had been made. DW. 2 is a resident of Daggulur who deposed about the relationship of his family members and also deposed that he knows the suit land and the first defendant was in possession and enjoyment of suit land during his lifetime and after his death, the defendants 2 to 8 are in possession and enjoyment. This witness also deposed about the purchase made by Ponna Veeraswamy, the first defendant from his younger brother on 7-1-1973. Certain details relating to elders settling the matters in the light of the demand made in the partition and other matters had been placed. This witness was cross-examined and certain suggestions put to this witness also had been denied. DW.3 is another witness. This witness also deposed that on 2-6-1982 the first defendant called him, P. Pedda Mukkum, DW. 5 and DW. 2 and informed him that he purchased the suit land about nine years prior thereto but he was not diligent in obtaining registered sale deed because previously at no point of time there was any disputes or misunderstandings between them and the second plaintiff gave a registered notice claiming that he has a share in the property purchased and requested this witness to enquire and find out what was the matter and why notice was issued. They set in Manduva, which was common to the first defendant and the first plaintiff that the plaintiffs 1, 2 and 4 came to that place. The plaintiffs 1, 2 and 4 when asked by them, admitted that it was a fact that land was sold to the first defendant and that after the arrival of the third plaintiff from Tirupathi, they executed the sale deed. After one week the first defendant came to him and said that the sale deed was not registered as agreed upon and asked him what should be done and this witness suggested to consult the elders whom they used to consult and this witness also advised him to consult the Village Karnam, who were elders and then the Village Munsif sent for them. The first plaintiff came to the Village Munsif and the first defendant also came there and the first plaintiff admitted the receipt of consideration. In the cross-examination he had deposed that he came to know of the filing of OS No. 84 of 1982 by the first defendant and certain family details also had been elicited and other particulars had been elicited and this witness was also re-examined and further cross-examined. DW. 4 deposed that he worked as Village Munsif of Daggulur and also deposed that the plaint schedule land was in possession from

1975 to his knowledge and the first defendant had been paying taxes for the plaint schedule land in the name of his son who were employed elsewhere. This witness also deposed about Ex. D12 to D21 tax receipts issued by him. He had also deposed about the other facts how the problem relating to non-execution of sale deed was brought to his notice and how the elders came to his house and informed in relation thereto. This witness was cross-examined at length and several aspects relating to these families had been elicited in the cross-examination. DW. 5 also deposed about his knowledge in relation to the suit land and the possession and the second plaintiff issued the notice demanding partition and other particulars virtually on the same lines. Several suggestions put to him had been specifically denied and the learned Judge recorded certain questions and specific answers in relation thereto. DW. 6 was the Village Karnam of Daggulur and this witness deposed that he can identify his father's handwriting and signature and Ex. B2 was scribed by his father and it bears his signature as scribe. Apart from this aspect of the matter, this witness also deposed in relation to Exs. B12, 13, 14, 15, 16, 17, 19 and 20. This witness was cross-examined and certain answers were elicited and certain suggestions put to this witness had been specifically denied. This is the evidence available on record.

20. The learned Judge while answering the issues referred to supra, appreciated the whole evidence available on record and though pointed out certain simple discrepancies in Ex. B2 taking the close relationship between the parties, certain admissions made by PW. 1 coupled with the clear evidence available on record, the evidence of DWs. 1, 2 and 6 and also the witnesses examined on behalf of the defendants came to the conclusion that the plea taken that the document Ex. B2 is a forged one cannot be sustained. On a careful analysis of the oral and documentary evidence available on record and also the findings recorded in detail in relation thereto by the learned Judge on the aspect of execution of Ex. B2, this Court is of the considered opinion that the said findings do not suffer from any illegality or infirmity whatsoever and accordingly the said findings are hereby confirmed.

21. Point No. 2 : The evidence available on record had been dealt with in detail while answering point No. 1 and these details need not be repeated again. The execution of Ex. B2 as such cannot be in serious controversy. It is also not in serious controversy between the parties that the property in question is the ancestral property and joint family property and by virtue of partition the first plaintiff and the first defendant in the respective suits had got their separate properties. Hence, the nature of the property is that these are the ancestral properties of the joint family is not in serious dispute. The next question which may have to be decided is that whether in the facts and circumstances it can be said that the father or kartha of the joint family executed Ex. B2 for the sake of discharge of joint family debts and for the legal necessity of the family. The evidence of PW. 1 and DW. 1 is available in this context. It is needless to say that these brothers had left the world and the children of these brothers are fighting this litigation. However, on careful scrutiny of Ex. B2, may be for the reason

that the parties are close relatives, the mode of discharge of debts had not been specified. Ex. B2 also is not attested and the attestor column is kept blank. It is also pertinent to note that specific stand taken by the defendant, is that due to faith, sufficiently for a long time they never demanded execution of registered sale deed. There is some evidence available on record that when a demand for partition was made then some mediation was convened and in pursuance thereof delivery was effected, it is needless to say that Ex. B2 as such is not a possessory agreement of sale. The other major sons had not signed Ex. B2. No doubt it was referred to as though the kartha of the family and the manager of the family is executing the document on behalf of minor son as well. In *Chanumuri Subhaveni and Others Vs. Sappa Srinivasa Rao and Others*, , this Court while dealing with alienation of joint family property and duty of the kartha in the context of the pressing legal necessity it was observed that:

While dealing with legal necessity vis-a-vis the powers of kartha of joint family, be that a father or a manager, compulsion or pressure on the estate, prudence to be exercised, benefit of the estate, proper management, nature of debts, proof in relation thereof, pious obligation and bona fide enquiries also may be the relevant considerations. Facts may be of varied nature and hence any straightjacket formula cannot be prescribed while judging these aspects and ultimately the overall facts and circumstances of the case may have to be appreciated in a partition action of sons challenging such alienations made by the father. Father or kartha of a joint family though has a right to manage should act as a prudent person. On a comparison of the debts, especially in the light of the evidence that there was no pressure from the creditors, no prudent man would resort to selling away almost all the properties to the detriment of the minors of the family.

22. Reliance was also placed on a decision in *Vadla Krishnaiah and Another Vs. Nalli Narasimhareddy*, , wherein coparcenary property and the alienee in possession and the suit for injunction restraining other coparceners from disturbing the possession and the maintainability of suit, it was held that:

Section 53-A of the Transfer of Property Act, relied upon by the learned Counsel for the respondent-plaintiff, cannot be invoked against non-alienee coparceners. Section 53-A does not confer any title on a person who has been put in possession under an agreement of sale. The right, which Section 53-A confers, is available only as a defence to protect possession against the transferor. It imposes a bar on the transferor from enforcing any right other than that expressly provided under the contract. This right cannot be enforced against non-alienee coparceners, who are not parties to an agreement of sale. As has been pointed out by Subba Rao, C.J. in *Achayya v. Venkata Subba Rao* AIR 1957 AP 354 doubtless, the right conveyed under the section can be relied upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield. What the transferee did in this case was to use his right as a sword against the non-

alienee coparceners by seeking a permanent injunction against them from interfering with his possession in any manner. A transferee put in possession pursuant to an agreement of sale even assuming that, in this case, the plaintiff was put in possession under Ex. A1 does not stand in any better position than a transferee put in possession under a registered sale deed.

23. On appreciation of evidence available on record, on the aspect of pressure from the creditors and the legal necessity for sale of the joint family property though some evidence was let-in in this direction, the defendants were unsuccessful in discharging the said burden. Taking into consideration overall facts and circumstances and also close relationship between the parties, the learned Judge recorded certain reasons and came to the conclusion that on the non-alienee co-parceners Ex. B2 is not binding. In the light of the findings in detail, which had been recorded by the learned Judge, this Court is not inclined to disturb the said findings. Though the very execution and the genuineness of Ex. B2 cannot be put into serious controversy, in the light of the ample evidence available in relation thereto, the said findings are confirmed.

24. Issue No. 3 : The facts of these suits appear to be a big novel as already referred to supra, the parties are close relatives and the two branches representing the brothers are fighting the present litigation. The delivery of possession of the property also is not in serious controversy though the exact point of time when the delivery was effected appears to be in dispute. Submissions at length are made by the Counsel representing the appellants in both the suits that the suit for perpetual injunction can be maintained on the strength of possession even as plaintiffs, in the light of Section 53-A of the Transfer of Property Act, 1882. The suit for perpetual injunction filed by the appellants in OS No. 84 of 1982 would suffer with two defects. Ex. B2 the agreement of sale was executed only by the father and the other major son did not join the execution of the said agreement of sale. Even otherwise elaborate submissions were made on the maintainability of the suit for perpetual injunction on the strength of an agreement of sale without praying for specific performance. Incidentally, certain submissions were also made, even otherwise, in the light of the admitted facts the doctrine of part performance cannot be invoked.

25. In Mohd. Jahangir Vs. Mallikharjuna Co-op. Housing Society Ltd., , the learned Judge of this Court held that:

In order to avail the protection of Section 53-A of the Transfer of Property Act, it is necessary that the terms of the contract should be certain. A permanent injunction can be asked for where the legally enforceable "obligation" exists in favour of the plaintiff in respect of possession, which is sought to be protected.

26. The learned Judge also held that:

The respondent having chosen to sue for permanent injunction only, without seeking any relief of specific performance of the agreement of sale, prima facie, may be barred from filing such a suit under Order 2 Rule 2 CPC. In such

circumstances, especially in view of the fact that the relief of injunction is an equitable relief, the same cannot be granted when the plaintiff has not shown his readiness and willingness to perform his part of the contract by seeking specific performance of the agreement of sale.

27. No doubt the facts of this case appear to be different but however reliance was placed on the principles laid down in the said decision. In *K. Venkata Rao and Others Vs. Sunkara Venkata Rao*, , while dealing with similar question, the learned Judge of this Court observed at Paras 6, 7 and 13 as hereunder:

On an earnest consideration of the facts and circumstances in this case, even though there are concurrent findings of fact by both the Court below, I am satisfied that there is much force in the contentions raised by the learned Counsel for the appellants-defendants for interference by this Court. Admittedly, the respondent-plaintiff filed the suit for permanent injunction restraining the appellants-defendants with respect to the suit land on the ground that he has been put in possession of the same in pursuance of the agreement of sale and as such it is lawful and, therefore, he is entitled for injunction and that he should not be disturbed and he should be dispossessed thereof except under due process of law. It is significant to note that he filed the suit for injunction simpliciter. He did not choose to seek the relief of specific performance of the agreement of sale under which he is claiming possession of the suit land. The defendants in their written statement as well as the second defendant in his evidence as DW. 1 have categorically admitted that the suit property was delivered to the plaintiff as part performance of the agreement of sale. Thus, the cause of action for the plaintiffs suit for permanent injunction is founded on the basis of possession under the suit agreement of sale. Therefore, the plaintiff is defending his possession, though as plaintiff u/s 53-A of Transfer of Property Act. Thus, the suit itself is based upon the provisions of Section 53-A of the Transfer of Property Act. For the sake of convenience, I quote the Section 53-A of the Transfer of Property Act, which reads as follows:

53-A Part performance: Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty:

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall

be debarred from enforcing against the transferee and persons claim under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly by the terms of the contract:

Provided that nothing in this section shall effect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof,

The necessary conditions for the application of Section 53-A of Transfer of Property Act are:

- (i) There is a contract to transfer immovable property for consideration;
- (ii) The contract is signed by or on behalf of transferor;
- (iii) The terms can be ascertained with reasonable certainty from the document;
- (iv) The transferee is put in possession or if he is already in possession, continues in possession;
- (v) The transferee has done some act in furtherance of the contract; and
- (vi) The transferee has performed or is willing to perform his part of the contract.

If the aforesaid conditions are fulfilled, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of that property. As has been pointed out by Subba Rao, C.J., (as he then was) in *Achayya v. Venkata Subba Rao* 1956 AWR 830 : AIR 1957 AP 854, the right conveyed u/s 53-A of Transfer of Property Act can be relied upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he used it as a shield. Further for safeguarding the possession of the transferee under this provision, the transferee should have performed or is willing to perform his part of the contract. It is only then the transferee is entitled to defend his possession of the property, which came into his possession under the agreement of sale. In the instant case, it is no doubt true that there is a written agreement of sale between the parties and the plaintiff was also put in possession of the suit property in part performance of that agreement of sale. The plaintiff pleaded in the plaint that he paid the balance of sale consideration of Rs. 9,295/- through the elders PW2 and Ramsetti Doraiah on 10-12-1978. But the trial Court on an elaborate discussion of the evidence on record held in Para 9 of its judgment that "there is absolutely no reliable evidence to show that the plaintiff has paid the balance of sale consideration to the defendants under the suit agreement. I am of the opinion that the plaintiff has only paid Rs. 1,500/- as advance to the defendants under Ex. A4 and nothing more." The plaintiff did not choose to prefer any appeal against this finding of the trial Court. Hence, this finding of fact of the trial Court went unchallenged before the Appellate Court. Thus, there is a categorical finding of fact that the plaintiff who is transferee

under the agreement of sale failed to perform his part of contract i.e., in paying the balance of sale consideration to the transferors i.e., the appellant herein. Hence, the plaintiff is not entitled to claim protection u/s 53-A of the Transfer of Property Act on the basis of part performance of the contract.

The next point to be considered is regarding the maintainability of the suit filed by the plaintiff for mere injunction without seeking the relief of specific performance of the agreement of sale. The learned Counsel for the respondent-plaintiff vehemently contends that a person who enters into possession lawfully on the basis of agreement of sale can maintain a suit for injunction simpliciter without seeking the relief of specific performance of the agreement of sale. He further contends that it was more so, when, as in the instant case, the plaintiff had issued a notice to the defendant expressing his readiness and willingness to pay the balance of sale consideration. The learned Counsel for the respondent-plaintiff also relied on the decision of Bombay High Court in *Laxman Pandu Khadke v. Pandharinath Purushottam Rane* (referred supra), for the said proposition. The facts in that case were that the plaintiff agreed to purchase the land belonging to the defendant for total sum of Rs. 11,500/- and paid a sum of Rs. 8,500/- as earnest money and the possession of the land was made over by the defendant to the plaintiff by way of part performance of the agreement. The land was agricultural land and one of the terms of the agreement was that the permission for sale of land had to be obtained by the parties from the Collector. The plaintiff filed an application to the revenue authorities for necessary permission for sale of land but on the date fixed for consideration of the application, the plaintiff was present before the revenue authorities but the defendant failed to appear before the said authorities and as a result the revenue authorities had no other alternative but to pass an order to the effect that the application was disposed of. Thereafter, the plaintiff wrote registered letter to the defendant expressing his willingness to pay the balance of amount and to take the conveyance from the defendant. Thereafter, the plaintiff got information that the defendant was intending to transfer the said land to some one else and hence he filed the suit for declaration about his right under the agreement and for injunction restraining the defendant from interfering with his possession without seeking the relief of specific performance of the agreement. Under those circumstances, the learned Single Judge while observing that the plaintiff was ready to perform his part of the contract and the plaintiff's possession is lawful, held that the plaintiff's suit for injunction simpliciter is maintainable. In the instant case, as stated above, the concurrent findings of facts by both the Courts below is that the plaintiff failed to pay the balance of sale consideration as per the agreement of sale, and that the plaintiff's plea in the plaint that he paid the balance of sale consideration before the elders PW2 and another is not established. Hence that decision has no application for the facts in this case. In *Mohd. Jahangir v. Mallikarjuna Co-operative Housing Society Ltd.* represented by its Secretary's case (supra), it has been held by this Court that a suit filed for permanent injunction only without seeking the relief of specific performance of

the agreement of sale is barred under Order 2 Rule 2 of the Civil Procedure Code. I am inclined to follow the decision of this Court especially in view of the fact that the relief of injunction is an equitable relief and the same cannot be granted when the plaintiff has not established his readiness and willingness to perform his part of the contract and failed to seek the relief of specific performance of the agreement of sale. Hence, the plaintiffs suit is not maintainable for the reason that the plaintiff has not sought for the relief of specific performance of the agreement of sale.

28. In the light of the decision referred to supra, a suit for permanent injunction as such, no doubt wherein some declaration that they are in possession had been prayed for cannot be maintained.

29. Reliance was also placed on the decision of the Apex Court in Sri Narayan Bal and others Vs. Sridhar Sutar and others, , wherein at Paras 5 and 6, it was held:

With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore culled are beads of the same string and need be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the Legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated u/s 8, whereunder his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the Joint Hindu Family property may be a male or a female, not necessarily the karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. u/s 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the Court u/s 8 for disposing of the undivided interest of the minor in the joint family property is not required. The Joint Hindu family by itself is a legal entity capable of acting through its karta and other adult members of the family in management of the Joint Hindu Family property. Thus, Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a Joint Hindu Family property is sold/disposed of by the karta involving an undivided interest of the minor in the said Joint Hindu Family property. The question posed at the outset therefore is so answered.

In the instant case the finding recorded by the Courts below is that Jagabandhu,

the eldest male member in the family acted as a Karta in executing the sale and had joined with him the two widows for themselves and as guardians of the minor members of Joint Hindu Family as supporting executants. That act by itself is not indicative of the minors having a divided interest in the Joint Hindu Family property commencing before or at the time of the sale. In this view of the matter. Section 8 of the Act can be of no avail to the appellant's claim to nullify the sale.

30. In *Nathulal Vs. Phoolchand*, , while dealing with the defence of part performance -conditions essential to be satisfied-the Apex Court held that:

The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him is 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 provided by the terms of the contract. Section 70(8) of the M.B. Land Revenue and Tenancy Act creates no bar to defence of part performance.

Reliance was also placed on the decision of the Supreme Court in *Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through Lrs.*, , wherein the Supreme Court while dealing with the part performance and the importance thereof in protecting the possession of transferee and the conditions contemplated by Section 53-A of Transfer of Property Act, 1882, the essential conditions were specified as hereunder:

(1) there must be a contract to transfer for consideration of 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 the contract.

If these conditions are fulfilled then in a given case there is an equity in favour of the proposed transferee who can protect his possession against the proposed transferor even though a registered deed conveying the title is not executed by the proposed transferor. In such a situation the equitable doctrine of part performance provided u/s 53-A comes into play.

31. The condition precedent for the applicability of doctrine of part performance, in relation thereto, strong reliance was also placed in *Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others*, .

32. Here is a case, where Ex. B2 is not a possessory agreement of sale and even as per the admitted facts the possession had been delivered at subsequent point of time though the execution of the very agreement of sale had been denied. This Court already had expressed opinion by recording the findings that there is ample evidence relating to the execution of Ex. B2. In the light of the facts and circumstances of the case, inasmuch as all the essential conditions necessary for the purpose of invoking doctrine of part performance had not been satisfied even on this ground, this Court is of the considered opinion that the relief sought for cannot be granted. Yet another aspect is that the father alone had executed Ex. B2 and the same cannot be said to be binding on the other non-alienating coparceners, essentially in the light of the evidence available on record and also in view of the findings already recorded supra. Hence, the findings recorded in this regard by the learned Judge cannot be found fault and accordingly the said findings are hereby confirmed.

33. Point No. 4 : The respondents herein had filed cross-objections and elaborate submissions were made by the Counsel representing the respondents, pointing out to the grounds raised and further maintained that there is no clear evidence relating to the payments made except the two admitted payments. The oral evidence available on record already had been referred to supra, the close relationship of the parties and also the evidence of DW. 1 and certain admissions made by PW. 1 if taken into consideration, this Court is thoroughly satisfied that the learned Judge came to the correct conclusion in ordering such refund both in law and also on the ground of equity and hence the said findings need no disturbance at the hands of this Court.

34. In the light of the findings recorded above, this Court is of the considered opinion that the learned Judge had appreciated the whole oral and documentary

evidence in proper perspective and recorded proper findings and ultimately granted only limited relief, which need not be disturbed. In the light of the same, inasmuch as the findings are being confirmed, both the appeals and the cross-objections as well being devoid of merits, they shall stand dismissed. Before parting with these matters, it is unfortunate that the branches of two brothers are going on fighting the present litigation, taking into consideration the facts and circumstances of this case, this Court is not inclined to make any order in relation to the costs.