
(2005) 11 AP CK 0097
In the Andhra Pradesh High Court
Case No : A. No. 285 of 1997

Siniginieedi Hymavathi and Another	Vs	APPELLANT
V. Nageswara Rao and Others		RESPONDENT

Date of Decision : 29-11-2005

Acts Referred:

Stamp Act, 1899 — Section 36, 61
Transfer of Property Act, 1882 — Section 55(6), 83

Citation : (2006) 1 ALD 655

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

Bench : Single Bench

Advocate : P. Srinivas Reddy, for the Appellant; N.V. Suryanarayana Murthy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Introductory Facts:

Defendants 1 and 2 in O.S. No. 129 of 1991 in the file of Subordinate Judge, Tadepallygudem preferred the present appeal as against the decree and judgment dated 31-12-1996. Respondents 1 and 2, the plaintiffs in the suit filed the suit for the relief of specific performance of the contract of agreement of sale directing the appellants herein-Defendants 1 and 2 to execute sale deed in favour of the first plaintiff for the western side Ac. 1.05 cents of plaint schedule property and for eastern side Ac. 1.05 cents of plaint schedule property in favour of the second plaintiff on receipt of the balance of sale consideration after discharging the mortgage debt due to the Muddunur Co-operative Society Limited and arrears of land revenue and also for the relief of permanent injunction and in the alternative for refund of the amount. The learned Judge on the strength of the respective pleadings of the parties, having settled the issues, recorded the evidence of P.Ws.1 to 4, D.Ws.1 and 2 and marked Ex.A1 to A27 and Ex.B1 and ultimately decreed the suit with costs directing Defendants 1 and 2 to execute separate sale deeds in favour of plaintiffs after receiving balance of

sale consideration of Rs.48,250/- from each plaintiff with interest @ 18% per annum from 31-5-1990 to 24-9-1991 and thereafter from 25-9-1991 to 31-12-1996 @ 12% per annum within three months, failing which the plaintiffs are at liberty to get the sale deeds through process of Court and the relief of permanent injunction also was granted. Questioning the same, Defendants 1 and 2 preferred the present appeal.

Submissions of Sri P. Srinivas Reddy:

2. Sri P. Srinivas Reddy, the learned Counsel representing the appellants-Defendants 1 and 2 had taken this Court through the respective pleadings of the parties and the evidence available on record and would contend that the learned Judge had not appreciated the facts and circumstances in the proper perspective and the plaintiffs had not discharged their obligations as stipulated in the terms of the contract. The learned Counsel also would submit that from the facts and circumstances, it is clear that the time is the essence of the contract and a plain reading of recitals of Ex.A1 also would amply establish the same. The learned Counsel also pointed out that even otherwise, from the facts it is clear that the plaintiffs had not been ready and willing to perform their part of the contract and the learned Judge had not made an attempt to record a clear finding in this regard. The learned Counsel also pointed out that Ex.A1 does not contain any recitals of the plaintiffs having been put into possession of the property and this crucial aspect had not been well appreciated by the learned Judge. The learned Counsel also explained the other oral and documentary evidence available on record. The learned Counsel also pointed out that Ex.A5 and A6 are the letters written to third parties and hence, much importance cannot be given to such documents while deciding the aspect whether time is the essence of contract or not. The learned Counsel also pointed out to the contents of Ex.A7 and would contend that these contents would go to show that time in fact, is essence of the contract. The learned Counsel also pointed out that the obligation to discharge debt to the Muddunuru Co-operative Society, one of the terms stipulated in Ex.A.1, also had not been complied with. The learned Counsel also commented on the way in which the plaintiffs got mutations in the revenue records. Ultimately the learned Counsel would conclude that in the light of the specific ground raised in ground No. 11 of the grounds of appeal, it is clear that Ex.A1 is inadmissible or even otherwise, the same is liable for stamp duty and penalty and merely because an exhibit mark had been assigned by the learned Judge, when such objection was not judicially determined the same can be raised as a ground in this appeal and hence, the said objection may have to be considered by this Court.

Submissions of Sri N.V. Suryanarayana Murthy:

3. Sri N.V. Suryanarayana Murthy, the learned senior Counsel representing Respondents 1 and 2, the plaintiffs in the suit made the following submissions:

The learned Counsel had taken this Court through the findings recorded by the

learned Judge on the strength of the oral and documentary evidence available on record and would contend that in the fact and circumstances of the case, the learned Judge arrived at the correct conclusion that time cannot be treated as essence of contract. The learned Counsel also pointed out to Exs.A5 and A6, the letters and the findings recorded in relation thereto. The learned standing Counsel also further pointed out to the contents of Ex.A1 and also the clear evidence of P.W.1 available on record and the stand taken by D.W.1 and in the light of the respective stand taken by the parties, the learned Counsel would maintain that the findings recorded by the learned Judge are just and proper. The learned Counsel also would submit that the learned Judge exercised the discretion properly while decreeing the suit for specific performance and also while granting the relief of permanent injunction. The learned Senior Counsel ultimately would conclude that the objection relating to the admissibility of Ex.A1, which had been raised for the first time before this Court on the ground that the same is liable for stamp duty and penalty also cannot be sustained in the light of the settled legal position and also in view of the express language employed in Section 36 of the Indian Stamp Act 1899.

4. Heard both the Counsel on record and also perused the pleadings of the parties, the issues and also the additional issues settled and the findings recorded by the learned Judge. In the light of the same, the following points arise for consideration in this appeal:

1. Whether the relief of specific performance granted by the trial Court can be said to be just and proper, in the facts and circumstances of the case?
2. Whether the findings recorded by the learned Judge in relation to time being the essence of contract or not, can be said to be just and proper, in the facts and circumstances of the case?
3. Whether the relief of perpetual injunction granted can be said to be in accordance with law, in the facts and circumstances of the case?
4. If so, to what relief the parties would be entitled to?

Point Nos. 1 to 3:

5. The appellants herein-Defendants 1 and 2 filed the appeal aggrieved by the decree and judgment made in O.S. No. 129 of 1991 on the file of Subordinate Judge, Tadepallygudem dated 31-12-1996. The third respondent in the appeal is the third defendant in the suit. Respondents 1 and 2 in the appeal are the plaintiffs, who had instituted the aforesaid suit. For the purpose of convenience, the parties hereinafter would be referred to as arrayed in the original suit. As already referred to supra, the suit was filed for the relief of specific performance directing Defendants 1 and 2 to execute registered sale deeds of the specified portions referred to supra and incidentally, the relief of permanent injunction also had been prayed for. Before proceeding to further discuss the oral and documentary evidence available on record, for better appreciation of the facts of

the case, it would be appropriate to have a look at the respective pleadings of the parties. The plaintiffs pleaded in the plaint as hereunder:

The 2nd defendant is the daughter of the 1st defendant. Defendants 1 and 2 represented to the plaintiffs in the presence of Baisetti Subbaraya Varaprasad, Ummidi Satyanarayana and Kalavacherla Gopalakrishna that they are the absolute owners of the plaint schedule property and they require money for discharging the debts contracted for the construction of building by the 2nd defendant at Kakinada. They have agreed to sell the schedule property to the plaintiffs. The price was agreed for a consideration of Rs. 1,46,500/-. It is agreed that Western Ac. 1-05 Cents out of the schedule property shall be sold to the 1st plaintiff while the Eastern Ac. 1-05 cents shall be sold to the 2nd plaintiff. The price was agreed for lumpsum without reference to measurements. Plaintiffs 1 and 2 each paid a sum of Rs. 4,000/- as advance to the defendants and Defendants 1 and 2 executed an agreement of sale on 23-3-1990 agreeing to the following terms and conditions and received the sum of Rs. 8,000/- as advance. The agreement was scribed by Kalavacherla Gopalakrishna at Kakinada and attested by Baisetti Subbaraya Varaprasad husband of 2nd defendant and one Ummidi Satyanarayana.

As per the terms agreed to, it is agreed that each of the plaintiffs shall pay Rs. 11,000 by 28-3-1990 and Rs. 10,000/- each by 5-4-1990. Remaining balance of Rs. 96,500/- shall be paid equally by Plaintiffs 1 and 2 at Rs. 48,250/- by each of the plaintiffs by 30-5-1990. On payment of the said amount, Defendants 1 and 2 shall execute separate sale deeds in favour of Plaintiffs 1 and 2 for the extend referred to above. It is specifically agreed that before Plaintiffs 1 and 2 would be asked to obtain the sale deeds, the Defendants 1 and 2 shall discharge the mortgage debt due to Mudunuru Co-op Society and produce documentary evidence to the plaintiffs in token of having discharged the said mortgage. It is also agreed that the original title deed which is said to have been deposited with Mudunuru Co-op Society shall be delivered to the plaintiffs at the time of the execution of the sale deed upon discharging the mortgage. The agreement also provided the creation rights of passage. Time was not agreed to be the essence of the contract.

In pursuance of the said agreement on 28-3-1990 Plaintiffs 1 and 2 paid a sum of Rs. 22,000/- to Defendants 1 and 2 who endorsed the same in token of having received the said amount. On 8-4-1990 the plaintiffs against paid a sum of Rs. 20,000/- to Defendants 1 and 2 and they endorsed the receipts of the same on the reverse of the agreement. At the time of entering into the bargain, the Defendants 1 and 2 represented that the scheduled land is in their possession and they are personally cultivating the land. In pursuance of the said agreement of sale, plaintiffs have been and are always ready and willing to perform their part of the contract and obtain the sale deed on payment of the balance of consideration. The plaintiffs requested the Defendants 1 and 2 to discharge the debt due to Mudunuru Co-op Society and produce the vouchers and the title

deeds from out of the advance amount and other amounts paid by the plaintiffs. The plaintiffs came to know that the Defendants 1 and 2 are in arrears of land revenue to the tune of nearly Rs. 7,000/-. The Society debt it is learnt is about Rs. 18,000/-. They are charged on the schedule property. The plaintiffs have been requesting Defendants 1 and 2 to perform their part of the contract and they began postponing the same on some pretext or the other. It is submitted that the bargain for the sale of the scheduled property was negotiated and settled through Kalavacharla Gopalakrishna, the scribe of the sale agreement. Therefore, when Defendants 1 and 2 began (Sic.began) postponing the execution of the sale deed and began postponing discharging the encumbrances, the Plaintiffs 1 and 2 approached Kalavacharla Gopalakrishna about the delay that is being caused by Defendants 1 and 2. Thereupon Kalavacherla Gopalakrishna appears to have requested Defendants 1 and 2 to discharge the charged debts. It also appears the said Gopalakrishna wrote several letters to Defendants 1 and 2 and in reply the 1st defendant also appears to have written letters to Kalavacherla Gopalakrishna in the hand writing of her husband Sirigneedi Nageswara Rao on 26-5-1990 and on 27-5-1990 requesting time and promising that they will execute the sale deed irrespective of the time limit. Sri Kalavacharla Gopala Krishna reminded Defendants 1 and 2 several times by telephone to complete the sale deed. It is further submitted when Defendants 1 and 2 began postponing the execution of the sale deed, Plaintiffs 1 and 2 demanded Defendants 1 and 2 at least to deliver possession to the plaintiffs. Accordingly the plaintiffs were put in possession of the schedule property in May 1990 and since then the Plaintiffs 1 and 2 have been cultivating their respective portions which they agreed to purchase in pursuance of the above agreement of sale. Unfortunately, the whole crop was got damaged due to Tungro virus and when the Revenue Authorities came for inspection, the plaintiffs have showed the damage caused to the crop. The Revenue authorities have seen the damage caused to the crop and also noted the fact that the plaintiffs have been in possession of the property and recorded the same in the revenue accounts. There was no second crop last year. Defendants 1 and 2 delivered the land to the Plaintiffs 1 and 2 in the presence of the Karnam Kalavacherla Gopalkrishna and Kambala Kondayya S/o. Gopalam who got the land measured and divided the plots of Plaintiffs 1 and 2 and got the bunds formed.

Instead of discharging the mortgage debt and other charged debts and execute the sale deed to the plaintiffs, 1st defendant issued a notice on 22-7-1990 with all false allegations. Thereupon plaintiffs herein got a reply sent through their Advocate on 3-8-1990 stating the true state of facts. On 30-8-1990 the Advocate of Defendant No. 1 sent further reply demanding a copy of the agreement of sale with a draft for Rs. 25/- towards expenses for sending the copy of the agreement. Thereupon the plaintiffs got a reply sent to the Advocate for the 1st defendant and also sent a Photostat copy and returned the Demand Draft of Rs. 25/-. It is submitted that in the letters written by the 1st defendant to Kalavacherla Gopalakrishna the 1st defendant has stated that Defendants 1 and

2 would execute the sale deed irrespective of any time limit. After the reply notice, the 1st defendant and her husband approached the plaintiffs and requested the plaintiffs to wait for some time to enable them to discharge the mortgage debts and execute the sale deeds. Believing the representations of Defendant 1 and her husband the plaintiffs were hoping that the Defendants 1 and 2 would execute the sale deed. But to the utter dismay and surprise the Defendants 1 and 2 with the active assistance of the husband of the 1st defendant a Retired Circle Inspector well versed in Court affairs got the 3rd defendant collusively set up and a petition filed in ATC No. 129/91 as if the 3rd defendant was a permanent tenant in the schedule property and sought a declaration of the tenancy rights of the 3rd defendant and also filed I.A. No. 1089/1991 for a temporary injunction. The said petitions are pending enquiry. It is submitted that the 3rd defendant was never a tenant and he never cultivated the schedule property at any time. He was falsely set up by Defendants 1 and 2 and Siriginieedi Nageswara Rao only for the purpose of defeating the rights of plaintiffs under the above agreement of sale. Defendants 1 and 2 husband of the 1st defendant and the 3rd defendant conspired together and colluded together and brought into existence false and fictitious documents to create evidence of tenancy with the dishonest intention of defeating the rights of the plaintiffs dishonestly obtain wrongful gain by Defendants 1 and 2. The 3rd defendant land of Ac.0-40 cents is being cultivated by his father-in-law Kambala Karnudu. The 3rd defendant used to work in the Arrack company of one Ande Satyanaraya of Tadepalligudem. The 3rd defendant is involved in criminal offences. He was caught by Excise officials and the 3rd defendant assaulted the Excise officials. The 3rd defendant is accused in Crime No. 71/90 in M.C. No. 16/1990 before the Special Divisional Magistrate, Eluru and the said case is pending. Defendants are openly proclaiming that they will see that the plaintiffs are dispossessed from the schedule property and that they will misappropriate the part of the sale consideration already paid. The defendants have no manner of right to interfere with the possession and enjoyment of the schedule property. Defendants 1 and 2 are bound to execute the sale deed for the individual extents referred to above separately in favour of Plaintiffs 1 and 2. The 3rd defendant is added as necessary and proper party to the suit as he was set up by Defendants 1 and 2 to defeat the rights of the plaintiffs under the agreement of sale. The breach of contract was committed by Defendants 1 and 2 only and they are liable for damages for breach of contract alternatively besides being bound to refund the sale consideration paid by the plaintiffs to the defendants. The plaintiffs are entitled to claim refund of sale consideration of Rs. 50,000/- with interest at 18%. Interest is payable as damages for breach of contract and loss of interest. The plaintiff is also entitled to enforce the statutory charge on the schedule property for the alternative relief u/s 55(6) of the Transfer of Property Act.

6. Defendants 1 and 2 filed written statement with the following averments:

The allegations in Para 2 of the plaint with regard to the relationship between the Defendants 1 and 2 is true. The allegation in Para 2 that the plaintiffs and

Defendants 1 and 2 were entered into the agreement of sale under the terms and conditions mentioned in the agreement dated 23-3-1990. The alleged averment in the agreement that this defendants agreed to handover the original title deed at the time of registration of the sale deed is not true and correct and it is interpolated by the plaintiffs with the assistance of the scribe.

The allegations in Para 3 of the plaint that these defendants agreed to receive an amount of Rs. 22,000/- by 28-3-1990 and another Rs. 20,000/- by 5-4-199 and they also agreed to receive the balance of sale consideration by 30-5-1990 are true. The allegation that the Defendants 1 and 2 were to discharge the mortgage debt due to the Mudunuru Co-operative Society and that they have to produce the documentary evidence to the plaintiffs in token of having discharge the said mortgage debt is not true and correct. It is false to state that the plaintiffs agreed to deliver the title deed at the time of the execution of sale deed as stated above. The said averment in the agreement is interpolated with the assistance of the scribe by the plaintiffs.

The further allegation that the agreement of sale is provided the creation of rights of passage is false. It is false to state the time was not agreed to be the essence of the contract.

The allegations in Para 4 that the defendants received Rs. 22,000/- on 28-3-1990 and Rs. 20,000/- on 8-4-1990 and they endorsed the receipt of the same on the reverse of the agreement is true. The further allegation that at the time of entering into the bargain, the Defendants 1 and 2 represented that the schedule land is in their possession and that they are personally cultivating the land is not true and correct. It is false to state that the plaintiffs are ready and willing to perform their part of contract to obtain the sale deed by paying the balance of sale consideration. It is false to state that the plaintiffs requested the Defendants 1 and 2 to discharge the debt due to the Mudunuru Co-operative Society and that to produce vouchers accordingly along with the title deeds from out of the advance amount and other amounts paid by the plaintiffs are all false and untenable. It is also false to state that the plaintiffs came to know at the time of the filing of the suit, that the Defendants 1 and 2 are in arrears of land revenue to the tune of nearly Rs. 7,000/- and that the society debt is about Rs. 18,000/-. It is false to state that the plaintiffs have been requested the Defendants 1 and 2 to perform their part of the contract and that they began postponing the same on some pretext or the other. It is false to state that the sale transaction was negotiated and settled through the scribe. It is false to state that when the Defendants 1 and 2 began postponing the execution of the sale deed and also postponing the discharge of encumbrances, the plaintiffs approached the scribe about the alleged delay being caused by the Defendants 1 and 2. It is false to state that the scribe requested the defendants to discharge the charged debts and that Defendants 1 and 2 wrote letters to the scribe in that connection as alleged in Para 4 of the plaint said to have been dated 26-5-1990, 27-5-1990. It is not correct to state that the husband of the first defendant

requested time and that he promised to get the sale deed executed in favour of the plaintiffs. The husband of the first defendant is not competent to extent time if any and the same is not binding on the Defendants 1 and 2. It is false to state that the Defendants 1 and 2 were requested by the scribe to complete the sale deed by telephone and he is not competent to interfere in the matter. It is false to state that the Defendants 1 and 2 are postponing to execution of sale deed and therefore the plaintiffs demanded the Defendants 1 and 2 to deliver possession of the plaint schedule properties to the plaintiffs and that accordingly in May, 1990, the plaintiffs were put in possession of the plaint schedule property. It is false to state that the Plaintiffs 1 and 2 have been cultivating their respective portions, which they agreed to purchase in pursuance of the agreement of sale. The allegations with regard to damage of crop due to Tungro-virus, the alleged inspection of revenue authorities and the alleged mutation that the plaintiffs are in possession and that the revenue authorities noted the damages to the crop as such, are all false and untenable invented for the purpose of the suit. The fact that there is no second crop during 1991 season is irrelevant for the purpose of the suit. The allegation that the Defendants 1 and 2 delivered the possession in the presence of the scribe and one Kambala Kondayya and that the above said persons measured the land and that they divided the land into plots of the Plaintiffs 1 and 2 and got the bunds formed are all false and untenable invented for the purpose of the suit.

The allegations in Para 5 of the plaint that instead of discharging mortgage of the land and other charged debts and executed a sale deed in favour of the plaintiffs, the first defendant issued a notice dated 22-7-1990 with false allegations, are not true and correct. The contents of the registered notice dated 22-7-1990 are true. The allegations contained in the reply notice issued on behalf of the plaintiffs are false and the same are invented for the purpose of the suit. It is true the advocate of the first defendant sent a further reply dated 30-8-1990. It is false to state that the first defendant wrote letters to the scribe, that irrespective of any time limit they are going to execute a sale deed are all false and untenable invented for the purpose of the suit. The allegation after that reply notice the first defendant and her husband approached the plaintiffs and requested the plaintiffs to wait for some time to enable them to discharge the mortgage debts and executed a sale deed is also not true and correct. The further allegation that the plaintiffs believed the representations of the first defendant and her husband and the plaintiffs waited for some time to enable them to discharge the mortgage debts. It is false to state that the Defendants 1 and 2 with the assistance of the first defendant's husband collusively got filed A.T.C. 129/91, the third defendant is a permanent tenant in the schedule property and the plaintiffs are aware of the same by the time of agreement of sale. The plaintiffs are well aware that the Defendants 1 and 2 never cultivated the plaint schedule property personally and they are being cultivated by tenants from time to time previously by Kommu Issak and others. The allegation about the alleged conspiracy between the third defendant and these defendants are not

true and correct. It is false to state that the Defendants 1 and 2 created evidence on tenancy with a dishonest intention of defeating the alleged rights of the plaintiffs for wrongful gain. It is false to state that the 3rd defendant land is being cultivated by his father-in-law and the same is irrelevant for the purpose of the suit. The allegation about the third defendant are all false and untenable and the same are irrelevant for the purpose of the suit. The alleged proclamations to dispossess the plaintiffs are not true and correct. The further allegations that the third defendant added as a proper and necessary party to the suit is untenable. It is false to state that the Defendants 1 and 2 committee breach of contract and that they are liable for damage for breach of contract alternatively besides being bound to refund the sale consideration paid by the plaintiffs to the defendants.

The allegation that the plaintiffs are entitled to claim refund of sale consideration of Rs. 50,000/- at 18% interest. It is false to state the interest is payable as damages breach of contract and loss of interest, the plaintiffs are not entitled to enforce the alleged statutory charge for the alleged alternative relief u/s 55(6) of the Transfer of Property Act.

The allegations in Para 6 of the plaint are not true and correct. The allegation that there is no cause of action for the plaintiffs to file the suit against the defendants and the alleged causes of action are all false and untenable invented for the purpose of the suit.

The valuation of the suit as stated in Para 7 and the Court fee paid as stated in Para 8 are not in accordance with law. The claim of the plaintiffs are exaggerated.

The plaintiffs are not entitled for a decree as prayed for in sub-paras a to e of Para 9.

These defendants hereby respectfully submits to the Hon'ble Court that the plaintiffs are not ready and willing to perform their part of the contract in this suit. The defendants are always ready and willing to perform their part of contract. The plaintiffs are fully aware about the debt due to the Mudunuru Co-operative Society, since the plaintiffs could not pay the sale consideration as per the terms and conditions of the agreement and since they are not ready and willing to perform their part of contract. They discharged the debt of Mudunuru Cooperative Society was kept pending deliberately by the plaintiffs. The plaintiffs are well aware that the defendants are eligible for relief under Agricultural and Rural Scheme, 1990 A.P., under which the defendants are entitled for the benefits of about Rs. 10,000/- and the Defendants 1 and 2 are liable to pay only Rs. 7,000/-. The plaintiffs ought to have taken recourse u/s 83 of Transfer of Property Act. The failure on the part of the plaintiffs to take recourse to Section 83 of Transfer of Property Act, amount to refusal to perform their part of the contract. Therefore, the plaintiffs are not entitled to seek specific performance of agreement of sale dated 23-3-1990. The plaintiffs are not ready for balance of consideration at any time by the time of the filing of the suit or afterwards. The defendants got issued a registered notice through their advocate dated

22-7-1990 demanding and intimating the plaintiffs that due to failure on the part of the plaintiffs to perform their part of the contract and since they are not ready and willing to perform their part of contract by 31-5-1990 and since the plaintiffs committed wilful default and breach of terms of agreement of sale and that therefore the agreement of sale stands cancelled and the amount paid to the defendants under the agreement of sale had been forfeited. It is also specifically mentioned the plaintiffs were warned that if the attempts by the plaintiffs to trespass into the plaint schedule property, the defendants will be constrained to proceed against the plaintiffs in accordance with law. Thereafter, the plaintiffs got issued a reply notice dated 3-8-1990 with all false and frivolous allegations. After the exchange of notices the plaintiffs the scribe and the alleged Kambala Kondayya, who is no other than the first plaintiff's Viyyanka conspired together and to squat over the property forever fabricated the certificates etc., from the Mandal Revenue Officer, Pentapadu and file the suit with averments as if the plaintiffs are in possession of the plaint schedule property by the time of the filing of the suit. The plaintiffs are not entitled to file the suit for permanent injunction against the Defendants 1 and 2 who are the owners of the property. The false averments in the plaint that in May, 1990. The Defendants 1 and 2 handover the plaint schedule property to the plaintiffs itself shows that the plaintiffs are not ready with the balance of sale consideration and that they are not ready and willing to perform their part of the contract. Due to the acts of the plaintiffs subsequent to the exchange of notices also categorically shows that the agreement dated 23-3-1990 has become unenforceable under law. Under the Indian Stamp Act and the Indian Registration Act as amended under Act 17 of 86. The suit agreement is unenforceable under law due to lack of stamp duty.

The plaintiffs violated the terms and conditions of the agreement of sale even by 30-5-1990. They are not ready and willing to perform their part of the contract at all time prior to 13-5-1990 and till the date of the filing of the suit. Therefore, the plaintiffs are not entitled to claim specific performance of the agreement of sale dated 23-3-1990.

These defendants further respectfully submits to the Hon''ble Court that since the plaintiffs are at fault and since the plaintiffs have put up their false claim of possession, they are not entitled for the alternative equitability relief or refund of purchase money, there is no agreement between the parties to pay interest over the alleged purchased money.

These defendants claim for permanent injunction is not maintainable under law since the Defendants 1 and 2 are the owners of the plaint schedule property. Since the plaintiffs have not in possession and enjoyment of the plaint schedule property as on the date of the filing of the suit they are not entitled for the relief of permanent injunction against the defendants.

7. On the strength of the pleadings, the following issues were settled:

1. Whether the plaintiffs are entitled for the specific performance as prayed for?

2. Whether the plaintiffs are entitled for the relief of permanent injunction as prayed for?

3. Whether the plaintiffs are entitled for refund as an alternative relief as prayed for?

4. To what relief?

8. Subsequent thereto, an additional issue was framed to the following effect:

Whether the time is of the essence of the contract under Ex.A1 agreement dated 23-3-1990?

9. The learned Judge appreciated the evidence available on record and came to conclusion that in the facts and circumstances of the case time is not essence of the contract and ultimately decreed the suit. The execution of Ex.A1 agreement dated 23-3-1990 under receipt of Rs. 22,000/- and Rs. 11,000/- from each of the plaintiffs on 28-3-1990 and receipt of Rs. 20,000/-, i.e., Rs. 10,000/- from each of the plaintiffs on 8-4-1990 and mortgage debt to be discharged, these facts are not in serious controversy. The principal question which had been canvassed in elaboration was that time being the essence of contract under Ex.A1, the relief of specific performance cannot be granted. It was specifically pleaded in the plaint that though the period was mentioned as 30-5-1990 time was not made the essence of contract and though this question was canvassed in elaboration, the same was not specifically pleaded in the written statement. Be that as it may, an additional issue was framed and findings also had been recorded in relation thereto. It is needless to say that in the case of enforcement of the relief of specific performance in relation to Immovable property normally time is not the essence of contract. The performance of certain terms by 30-5-1990, i.e., to discharge the mortgage debt to Maddunur Co-operative Society and to handover the title deeds to the plaintiffs at the time of registration, these are said to be the essential terms which are put forth for the purpose substantiating the stand that time is the essence of the contract. Except introducing a recital to that effect, no other consequence as such had been specified in the terms and conditions of Ex.A1. Apart from this aspect of the matter, as it appears from the material on record the appellants herein-Defendants 1 and 2 had thought of this plea or this defence only at a later point of time. Be that as it may, as already specified supra, an additional issue had been framed and findings had been recorded by the learned Judge in this regard. Several of the circumstances had been taken into consideration in arriving at a conclusion that time cannot be said to be essence of the contract.

10. The first plaintiff was examined as P.W.1, who had deposed about all the details and as already specified supra, several of the facts are not in controversy. P.W.1 also deposed that at the time of agreement Defendants 1 and 2 informed about the original title deeds pledged with Co-operative Society and it was agreed that Defendants 1 and 2 shall discharge the society debt and pay the amount and return the title deeds along with voucher to P.W.1 before the

registration. This witness also deposed that the agreement also provides for laying of bowdi to this land under the agreement. This witness also deposed in detail about the payments made. This witness further deposed about Ex.A1 and also the letters written by the first defendant to village kamam, which were given to him by the village karnam, Ex.A5 and A6. P.W.1 also deposed that the son-in-law of the first defendant rang up to village karnam to the effect that they need not worry even though time was mentioned in the agreement. P.W.1 further deposed that in May 1990, the first defendant, her husband and karnam delivered possession of the land to first plaintiff after getting the land measured and divided the land between him and the second plaintiff. The bund was also raised. This witness further deposed that Defendants 1 and 2 sent a notice to them dated 22-7-1990 Ex.A7 and they had given their reply Ex.A8, the postal acknowledgements are Ex.A9 and A10. P.W.1 also deposed that the advocate for first defendant issue a notice to his advocate requesting him to send a copy of agreement, which is Ex.A1 1. P.W.1 further deposed that his advocate returned the D.D. and sent Xerox copy of the agreement along with covering letter Ex.A12, the postal acknowledgment is Ex.A13. P.W.1 also deposed about D3 filing A.T.C. 129 of 1991 for declaration that he is the cultivating tenant and for injunction. The certified copy is Ex.A14 and he filed certified copies of adangals for fasli 1397 and 1398 and the certificate issued by the Mandal Revenue Officer is Ex.A.17. This witness also deposed that Defendants 1 and 2 had not discharge the mortgage debt due to Muddunur Co-operative Society till 18-7-1991. The said society issued a certificate that the debt was discharged on 18-7-1991 and the title deeds were returned on 24-7-1991. The certificate is Ex.A18. This witness also deposed that the husband of D2 is having telephone at this residence. Ex.A19 is the telephone bill to evidence that karanam contacted to Defendants 1 and 2 on 26-5-1990. A.T.C. No. 129 of 1991 as dismissed for non-prosecution. The certified copy of the suit registered is Ex.A20 and the certified copy of adangals for Fasli 1400 and 1401 is Ex.A21 and Ex.A22 is the certified copy of adangal for Fasli 1403. Exs.A23 to 25 are land revenue receipts for payment of land revenue. P.W.1 also deposed that in pursuance of the agreement of the sale they have been in possession of the property. P.W.1 also deposed that the husband of first defendant wrote a letter to his advocate on 1-10-1990, which is marked as Ex.A26. This witness also deposed the other details. P.W.1 was cross-examined. Several questions were put to him on the aspect of delivery of possession. This witness also denied several suggestions. However, P.W.1 admitted that the debt due to the society was discharged by D.1 and D.2 by that time. This witness also denied the suggestion that under the guise of interim injunction granted in the suit for the first time they trespassed into the plaint schedule property. The wife of the second plaintiff was examined as P.W.2, who deposed that her husband went to Dubai one year ago and was working as mason and she also deposed that P.W.1 and her husband obtained agreement of sale for the plaint schedule property and the land purchased by her husband is in their possession. In the Cross-examination, no doubt, she deposed that she does not know the contents of Ex.A1, but in the light of the evidence of P.W.1 who

deposed about all the details, the evidence of P.W.2 is only in support of what had been deposed by P.W.1. P.W.3, the village karnam had deposed about all the details. This witness also deposed about Ex.A27 letter written by D.2's husband for arrangement of sale of land. He deposed about the details of bargain too and the payments and the subsequent conversation and the first defendant writing letter to him and this witness also deposed about Ex.A5 and A6, the letter written by her husband. This witness specifically deposed that Defendants 1 and 2 in Ex.A5 stated irrespective of the time agreed, they will execute the sale deed. This witness also deposed about Defendants 1 and 2 delivering the possession of the lands to Plaintiffs 1 and 2. P.W.3 also specifically deposed that the husband of D.1 and Kondaiah came for delivery of possession and since then the plaintiffs are in possession of the property and they have been raising crops and the lands of the each of the plaintiff had been demarcated and the bund was raised and possession had been delivered after P.W.3 measured the land. In cross-examination this witness deposed that because of debt in co-operative society, the registration could not take place. Several of the suggestions put to him had been specifically denied by this witness. P.W.4 is an agriculturist of the village, who deposed about purchase of the land by the plaintiffs, village karnam measuring the land boundaries, bund being fixed between the two plots of plaintiffs and the husband of D. 1 delivering the possession of the property and the plaintiffs being in possession of the respective properties. Several of the suggestions put to this witness in cross-examination had been denied by this witness.

11. As against this evidence, the first defendant examined herself as D.W. 1 and she had taken the stand that the plaintiffs were not ready and willing to discharge the debt and also she had deposed about several of the facts, thrown the blame on the plaintiffs for non performance of the conditions stipulated in Ex.A1. This witness was cross-examined and re-examined and also she was further cross-examined. D.W.2 is the son-in-law of the first defendant and the husband of the second defendant. This witness also deposed about certain details relating to the transaction and also relating to the aspect of delivery of possession and approaching the Mandal Revenue Officer in relation to the extracts. This witness deposed in cross-examination that Ex.A27 is the letter written by him. This witness deposed that it is a fact that there is recital in Ex.A1 that there is no proper income from the schedule land. This witness also deposed that it is not mentioned in Ex.A1 about D3 being tenant and to be evicted. This witness also was cross-examined on several aspects relating to the payments and several of the suggestions put to this witness had been specifically denied.

12. On the strength of this evidence, the learned Judge recorded the findings. The evidence of P.W.3 apart from the evidence of P.W. 1 is clear and categorical about all the aspects. P.W.3 specifically deposed about the assurance made by Defendants 1 and 2 that despite the term or condition in Ex.A1, the plaintiffs need not worry. Ex.A5 and A6 had been strongly relied upon and findings had been recorded by the learned Judge. The evidence of P.W.3 is clear and

categorical in this context. Hence, on the over all appreciation of the evidence available on record, this Court is of the considered opinion that the findings recorded by the learned Judge cannot be said to be faulty findings, so far as it relates to the aspect of time being not essence of the contact. The facts and circumstances coupled with the recitals in Ex.A1, contents of Ex.A5 and A6, the evidence of P.Ws.1 and 3 had been well appreciated and hence, this Court does not see any reason to disturb those findings relating to this aspect.

13. Yet another important contention had been advanced with all seriousness that though by mere inadvertence objection had not been taken relating to the admissibility of Ex.A1 before the learned Judge, the same can definitely be agitated before this Court both on the ground of inadmissibility and also on the ground of the same being liable for stamp duty and penalty. Both the Counsel made elaborate submissions in this regard.

Section 36 of the Indian Stamp Act 1899 reads as hereunder:

36. Admission of instrument where not to be questioned:--Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

14. In T. Chandri and Others Vs. Kambrath Kanarakutty, , the learned Judge of Kerala High Court held that when the document was admitted in evidence with consent and no objection was raised by the defendant at that time, the subsequent plea by the defendant that since one of the stamps was not cancelled, the document was not admissible would not be tenable and once the document is admitted the case of the plaintiff stands proved and he is entitled to the decree as prayed for. Reliance was placed on the decision of Apex Court in Ram Rattan (Dead) by Lrs. Vs. Bajrang Lal and Others, , wherein the Apex Court at Para 6 observed as hereunder:

When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the less be obligatory upon the Court to decide the objection. If after applying mind to the rival contentions the trial Court admits a document in evidence, Section 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument

has not been duly stamped. The Court, and of necessity it would be trial Court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the Court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting Section 36 (see *Javer Chand and Others Vs. Pukhraj Surana*,). The endorsement made by the learned trial Judge that "objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation Section 36 would not be attracted.

15. In *Dokka Joganna v. Upadrasta Chayadevi* 1997 (6) ALD 224: 1997 (5) ALT 628, while dealing with the scope and ambit of Section 36 of the Indian Stamp Act 1899 the learned Judge of this Court observed:

Dealing with the scope and ambit of this section, it has been held in a catena of decisions that once a document is admitted in evidence rightly or wrongly, with or without objection, it is not permissible for the Court including appellate or revisional Court to reject the same on the ground that it has not been duly stamped. (See *V.E.A. Annamalai Chettiar and Another Vs. S.V.V.S. Veerappa Chettiar and Others*, ; *Nalluru Basavaiah Naudu v. Takella Venkateshwarlu* 1956 An. WR 490 : 1956 ALT 22: AIR 1957 AP 1022; and *P. Ramana Reddi v. K. Rukminamma* 1968 (1) An. WR 221). In the light of the above settled proposition of law, the admissibility of the suit documents cannot be left open to be decided at a later stage, i.e., while rendering judgment taking into account other oral and documentary evidence that may be adduced by the parties to the suit. Thus, it has become imperative to decide their admissibility in evidence at this stage itself i.e., before they are marked and proved on behalf of the respondent/plaintiff.

16. In *Palcvala Suryanarayana Vs. Mosa Kamaraju*, , the learned Judge of this Court while dealing with the Section 36 of the Indian Stamp Act 1899 held that when once a document is admitted and received as evidence without any objection, any objection regarding the sufficiency of the value of the stamp cannot be raised at a later stage.

17. In *Javer Chand and Others Vs. Pukhraj Surana*, , the apex Court held that when once a document had been marked as an exhibit and had been used by the parties for examination of witnesses, Section 36 of the Indian Stamp Act would come into operation and when once the document had been admitted as evidence, it is not open either for trial Court or Court of appeal or the Court of revision to go behind such order. Same view was expressed by the Apex Court in *H.S. Limited v. Dilip Construction* AIR 1969 SC 1238 . In *Isra Fatima Vs. Bismillah Begum and Another*, , it was held that where the plaintiff failed to raise any objection at the time of marking of the document and once the document

was admitted in evidence without objection, there cannot be any challenge as to its admissibility subsequently. It was further held that when the document became an exhibit and part of the record, application filed by the plaintiff to de-exhibit such document is misconceived.

18. It is no doubt true that in the present case when Ex.A1 was marked no specific objection as such had been raised. It is also equally true that nothing is available on record whether any such objection had been raised and despite the same Ex.A1 was marked. Whether objections specifically had been raised or not, when at the appropriate time an objection was not raised relating to the admissibility of the document especially on the ground of the liability of the stamp duty and penalty, it may have to be taken that the same was exhibited with the consent of the parties as though there was no objection and taking any other view in such a matter would be definitely impracticable view since there may be varied circumstances under which such objections either may be raised or may not be raised. It is suffice to state that having kept quiet and having permitted the document in question to be exhibited before the trial Court without raising any little finger, this Court is of the considered opinion that for the first time before the appellate Court such objection cannot be permitted to be put forth by the appellants. Hence, this contention which was argued in elaboration by the Counsel representing the appellants especially basing on ground No. 11 raised before the appellate Court cannot find favour at the hands of this Court and the same is hereby rejected. Consequently, it is needless to say that all the other findings recorded by the learned Judge also are hereby confirmed. It is needless to say that there is ample evidence available on record relating to the delivery of possession and for the plaintiffs being in possession of the property, not only the revenue records, the evidence of P.Ws.1 and 3 also is available. Hence, this Court is not inclined to disturb the findings even in relation to the aspect of possession too and the said findings also are hereby confirmed.

Point No. 4:

19. In the light of the foregoing discussion, it is needless to say that the appeal is devoid of merit and accordingly the same shall stand dismissed with costs.