

(2011) 09 KAR CK 0148
In the Karnataka High Court
Case No : Regular First Appeal s 1092 of 2009

Smt. Kavita Ganashamdas

APPELLANT

Vs

Sri Sudarshan Murthy, Smt. Rathnavathi Ballal and Sri Sanjay
L. Carlo

RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Limitation Act, 1963 — Section 54, 54 (2)

Citation : (2011) 09 KAR CK 0148

Hon'ble Judges : Huluvadi G. Ramesh, J

Bench : Single Bench

Advocate : K. Suman, for the Appellant; Ravi and Ravi, for the Respondent

Final Decision : Allowed

Judgement

Huluvadi G. Ramesh, J.—These two appeals have been filed against the order passed by the 11th Addl. City Civil Judge, Bangalore City in OS 223/2000 and 2334/2000 on 25.8.2009.

2. Plaintiff is common in both the suits - one filed for permanent injunction and another for specific performance, According to the Plaintiff, the first suit is filed against Defendants 1 to 3 for the relief of permanent injunction to restrain them from interfering with the Plaintiffs possession and enjoyment of the suit schedule property. The second suit is for specific performance of the contract and for permanent injunction and from dispossessing. Subsequently the suit against the 2nd Defendant in OS 2334/2000 viz., Sanjay Carlo was got dismissed by the Plaintiff. Further, the suit in OS 223/2000 was not proceeded against Sanjay M Karlo who was the 3rd Defendant.

3. It is stated in OS 223/2000, 2nd Defendant is the owner of the suit schedule property and offered to sell the same for her family necessities. Plaintiff having accepted to purchase for a total consideration of Rs. 3,50,000/-, paid a sum of Rs. 50,000/- as advance at the time of execution of the agreement. Plaintiff is

said to have paid the remaining balance consideration to the 2nd Defendant well in time as such, she was not due in any amount to the 2nd Defendant towards sale consideration. The documents are at annexures A to D. It is also stated, on the date of agreement of sale, 2nd Defendant has delivered the vacant possession of the suit property and also the Plaintiff has been paying the electrical/water charges and taxes. It is also averred that Plaintiff had been requesting the 2nd Defendant to execute the registered sale deed however, the same has been postponed on one or the other pretext. It is also stated, the 1st and 2nd Defendants are making hectic efforts to sell away the property to third person at a higher price and efforts were also made to dispossess the Plaintiff from the suit property on 2nd January, 2000 and, in this regard, complaint also came to be filed by the Plaintiff. Also according to the Plaintiff, Defendants being localites having derived support from antisocial elements, posed a serious threat to the Plaintiff to dispossess and to knock off the property. Stating that cause of action arose during 1st and 2nd week of January, 2000, Plaintiff filed a suit for permanent injunction and also reserved her right to take necessary action against the 2nd Defendant for specific performance of the contract. It is also stated, she has spent money for renovation of the property to the tune of Rs. 7.5 lakhs.

4. The suit was resisted by Defendants 1 and 2. While admitting the ownership of 2nd Defendant and also entering into an agreement to sell with the Plaintiff for a consideration of Rs. 3,50,000/- and receiving advance payment of Rs. 50,000/- under the agreement dated 15.2.89, the 2nd Defendant denied the receipt of balance payment. It is stated, since the Plaintiff has not paid the balance consideration within the stipulated time, she cancelled the sale agreement by issuing a legal notice and later sold the property in favour of the 1st Defendant under a registered sale deed dated 9.2.1998. Since then, the 1st Defendant is in possession as a bonafide purchaser and denied the possession of the Plaintiff. Based on the pleadings in OS 223/2000, following issues have been filed:

1. Whether the Plaintiff proves that she was in lawful possession of the suit schedule property as on the date of the suit?

2. Whether the Plaintiff proves the alleged obstruction caused by the Defendants for her peaceful possession and enjoyment of the suit schedule property?

3. Is Plaintiff entitled to the relief sought for?

4. To what order or decree.

5. In OS 2334/2000 filed for specific performance, it is stated the 1st Defendant (2nd Defendant in the other suit) is the owner of the suit property and during 1989, she offered to sell the suit property for a consideration of Rs. 3,50,000/- and the Plaintiff paid a sum of Rs. 50,000/- as advance sale consideration on 15.2.1989 and the 1st Defendant delivered vacant possession of the schedule property to the Plaintiff and she occupied the same and the remaining amount of Rs. 3 lakhs was paid to the Defendant well within the time on different dates.

Plaintiff also has been paying electricity and water charges. Despite Plaintiff paid the balance consideration of Rs. 3 lakhs, though the Plaintiff requested the 1st Defendant to execute the sale deed on several occasions, she went on postponing the same. Plaintiff was all along ready and willing to get registered the sale deed from the 1st Defendant. 1st Defendant intended to sell the property to third persons for higher price, thereby intending to induct third person and dispossess the Plaintiff, 1st Defendant and her henchmen have posed a threat. Plaintiff has also let out the 1st floor and the front portion of the ground floor to the tenants and she is residing in the back portion. She also issued a legal notice to the Defendant. On receipt of the same, 1st Defendant on 10.3.2000, once again posed a threat and tried to dispossess the Plaintiff. It is also stated, 1st Defendant has executed a sale deed on 9.2.1998 in favour of the 3rd Respondent. The said sale deed is not binding on the Plaintiff and it was only done to create litigation on the suit property and hence, the suit for specific performance and for permanent injunction and, to declare that the sale deed dated 9.2.1998 in favour of the 3rd Respondent is not binding on the Plaintiff.

6. In the written statement filed by the 1st Defendant, she admitted the execution of the agreement to sell and also receipt of Rs. 50,000/- but, she denied Plaintiff having paid the remaining Rs. 3 lakhs and also stated the suit property was never delivered to the Plaintiff. Rather, she herself continued to be in possession. As the balance sale consideration was not paid, she got issued a legal notice on 25.10.1995 and cancelled the agreement of sale executed in favour, of the Plaintiff and later, sold the property to the 3rd Defendant. As such, the 3rd Defendant became the absolute owner and he had inducted one Janardhan Gandhi to the suit property under the rental agreement. In order to make unlawful gain, Plaintiff has created false documents and filed suit in OS 223/2000 in collusion with the police inspector illegally to dispossess the said Janardhan Gandhi. At that time, she took the water and electricity bills for the period and also contended that the suit is barred by time and there is no cause of action for the Plaintiff to institute the suit.

7. The 3rd Defendant in the written statement filed, while admitting that 1st Defendant was the owner of the suit property stated that she sold the suit property in favour of the 3rd Defendant on 9.2.1998 and delivered possession of the same on the very day. It is also stated, though the Plaintiff entered into an agreement with the 1st Defendant during February 1989, possession of the suit property was not delivered to the Plaintiff and the 1st Defendant cancelled the sale agreement in favour of the Plaintiff and also denied further construction put up by the Plaintiff. While denying the alleged threat to the Plaintiff, it is stated, the 3rd Defendant has inducted one Janardhan Gandhi as a tenant in the suit property under a rental agreement and also Plaintiff had filed three different suits at Mayo Hall for relief of injunction and specific performance and the same was suppressed and those suits filed to prove her possession were dismissed. This OS 223/2000 for the relief of bare injunction is filed without seeking leave of the Court to file a suit for specific performance as such, the suit is hit by Order 2

Rule 2, Code of Civil Procedure. The 3rd Defendant is a bonafide purchaser for valuable consideration and suit is barred by limitation and accordingly, sought for dismissal of the suit.

8. Based on the pleadings, following seven issues and four additional issues were framed on different dates:

1. Whether the Plaintiff proves that the 1st Defendant was agreed to sell the suit schedule property for a valuable consideration of Rs. 3,50,000/- and executed an agreement of sale dated 15.2.1989 by receiving an advance amount of Rs. 50,000/-?

2. Whether the Plaintiff proves that he was put in possession of the suit schedule property in part performance of the contract as on the date of execution of the agreement of sale?

3. Whether the Plaintiff proves that she was and is always ready and willing to perform her part of the contract?

4. Whether the suit is barred by time?

5. Is Plaintiff entitled for the relief of specific performance of contract?

6. Is Plaintiff entitled for the relief of permanent injunction?

7. To what order or decree?

Additional Issues:

4. Whether the 3rd Defendant proves that the suit is not maintainable under Order 2 Rule 2, CPC as alleged in para 23 of the written statement?

9. After evidence was let in on behalf of both sides, after inquiry, the trial court dismissed both the suits as against which, the present appeals are filed on various counts.

10. Heard the counsel for the respective parties.

11. Counsel for the Appellant has strenuously contended that the trial court committed an error in dismissing the suit and also erred in not considering the payment made by the Plaintiff to the 1st Defendant, the vendor under receipts. The trial court has taken the evidence of expert witness as the gospel truth without considering the signature of the 1st Defendant on the stamps holding that it is manipulated. The vendor has admitted the readiness and willingness of the Plaintiff by her conduct and rather, she never denied the capacity of the Plaintiff. Time is not the essence of the contract and when she filed the suit for injunction, she came to know about the subsequent conduct of the Defendant that she is denying specific performance. Clause 3 of the agreement clearly indicates that time is not the essence of the contract. The alleged legal notice issued by the 1st Defendant terminating the agreement has not reached the Plaintiff nor the 1st Defendant proved the same nor produced any

acknowledgement. The trial court has wrongly drawn the presumption stating that Plaintiff had the knowledge by receiving the certificate of posting which is a perverse finding. The agreement clearly indicates that possession is parted with. Plaintiff also has reserved the liberty to file a suit for specific performance in the first suit filed for injunction. In the first suit filed, some of the parties are different than the parties in the second suit. As such, question of reserving liberty may not arise. Even otherwise, there is compliance of Order 2 Rule 2, Code of Civil Procedure.

12. On the point of limitation, it is argued Article 54(2) of the Limitation Act applies as the Plaintiff came to know of refusal only during 2000 and the suit is not barred by limitation. Apart from that, even according to the 1st Defendant, she admitted Plaintiff was wrongfully dispossessed by the Defendant. Plaintiff is in possession in part performance of the agreement and also it is stated, lease was only in respect of ground floor. Ex.D4 does not depict Janardhan Gandhi was put in possession. Defendants have not produced any documents, rather, based their case on the records built-up by them in the contempt proceedings which is void ab initio as the consent of the advocate general was not obtained as such, the police report cannot be relied upon. Though the trial court held that time is not the essence of contract, it came to a wrong conclusion on the point of limitation. To stand by his contention that Article 54(2) of the Act applies to this case, he relied upon a decision in Ramzan Vs. Hussaini, . Even clauses 2 & 3 of the agreement do not fix the time for specific performance. As such, the date of knowledge to be reckoned is the conduct of the Defendant refusing specific performance which the Plaintiff came to know only during 2000 and she filed the suit well within time. It is also submitted, suit for injunction filed does not operate as res judicata or as a bar to file the suit for specific performance so as to apply Order 2 Rule 2, CPC and that, delay is not a ground to deny the relief of specific performance, in support of his argument, counsel has relied upon a judgment, in the case of Motilal Jain Vs. Smt. Ramdasi Devi and Others, and also another decision in Prakash Chandra Vs. Angadlal and Others, and also the decision in Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others, to contend that relief of specific performance is a rule and refusal is only an exception and Defendant cannot take the advantage of his own wrong. Even the conduct of the Defendant shows that the sale deed was registered six months after drafting of the deed. 3rd Defendant is not a bonafide purchaser for value without notice rather, he was aware of the agreement and the same has been admitted by DW 1 in her cross-examination. To contend that too much of reliance on the hand writing expert who gave opinion on the advance amount receipts is uncalled for, learned Counsel has relied upon the decision in Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Others, and also on the decision in Ram Narain Vs. State of Uttar Pradesh, and submitted that the court cannot wholly embark upon the opinion of the handwriting expert. It is also his contention, the Plaintiff has paid the full consideration of Rs. 3,50,000/- during 1989 itself. The vendor has, after receiving the amount, went on postponing registering the sale

deed and after ten years, sold the same to 3rd Defendant only for Rs. 4 lakhs. It is only a sham transaction to defeat the right of the Plaintiff. Accordingly, he has sought for allowing the appeals.

13. Counsel representing the Respondents stated, the Appellant was not in possession of the suit schedule property as on the date of the suit for injunction. The stand of the Appellant that she was given in possession of the suit property cannot be accepted rather, the vendor Rathnavathi has made an unequivocal statement that she handed over possession to one Sudarshan Murthy/3rd Respondent on the date of execution of the sale deed in his favour. Subsequently, Sudarshan Murthy entered into lease agreement with one N K Janardhan Gandhi. The agreement is at Ex.D4 and DW 2 the tenant, was examined in this regard. There is also admission on the part of the Appellant in the cross-examination that she was not given possession at any point of time. Also, she admitted that Rathnavathi is shown as residing in the suit schedule property. The plea of the Appellant that she put up a construction is contrary to her own stand when she has admitted Rathnavathi has constructed the house. The 3rd Respondent has stated in detail as to how his tenant was illegally dispossessed by the Appellant's men. It is stated, there are several admissions with regard to delivery of possession and payment of sale consideration which is contrary to the own evidence of the Appellant. Learned Counsel also contended, even the FSL report regarding payment receipts are not in support of the Appellant's case. Balance sale consideration was not paid and possession was not delivered and the Appellant was not ready and willing to discharge the contract. The Appellant has taken the electricity and water bills after having illegally dispossessed the tenant of the 3rd Respondent. In this regard, complaint was also filed by the 3rd Respondent, it is also submitted, as per Ex.P1 -agreement, sale consideration should be paid after the expiry of the lease period within sixty days i.e., from 25.7.1995 within two months. Even Ex.P1 demonstrates the original title deeds were handed over to the Appellant but, she failed to perform her part of the contract. A legal notice was issued to the Appellant forfeiting the advance amount of Rs. 50,000/- and the 1st Respondent also demanded the Appellant to return all the original title deeds and, after the sale deed was executed, 1st Respondent has handed over all the original title deeds to the 3rd Respondent. The conduct of the Appellant discloses that she was not ready and willing to perform her part of the contract. Pursuant to the notice issued at Ex.D3, Appellant has returned all the original deeds to the 1st Respondent and that itself indicates that Appellant was not ready and willing to perform her part of the contract and Appellant did not come forward to pay the remaining balance as stipulated. According to the Respondents, the suit property was not given to the Plaintiff and she was not in possession of the suit property as on the date of the suit and possession was taken forcefully and illegally subsequent to the suit, It is stated, as per the agreement, balance consideration was to be paid only after the expiry of the lease in favour of the vendor. 1st Respondent issued a legal notice canceling the agreement and forfeiting Rs. 50,000/- paid by the Plaintiff. The

Plaintiff was not ready and willing to perform her part of the contract. The Plaintiff also admitted in her cross-examination that she came to know about the expiry of advocate Madan Gopal as such, she enquired and she had the knowledge of termination notice. Pursuant to the notice at Ex.P3. the Plaintiff has returned all the documents and the suit filed by the Plaintiff is barred by limitation and 1st Defendant has denied the balance payment of Rs. 3 lakhs by the Plaintiff. Balance consideration was not paid and the agreement was cancelled and also the subsequent suit filed by the Plaintiff for specific performance is also hit by O 2 P. 2, Code of Civil Procedure. Thus, on various grounds it is contended that Sudarshan Murthy is a bonafide purchaser of the suit property and accordingly, sought for dismissal of the appeals. Learned Counsel in support of his argument, has relied upon several decisions.

14. In the light of the argument advanced, the points that arise for consideration are -

Whether the trial court is justified in holding that Plaintiff has failed to prove that 1st Defendant had agreed to sell the suit property for a valuable consideration of Rs. 3,50,000/- and executed an agreement of sale on 15.2.1989?

Whether the trial court is justified in holding that Plaintiff failed to prove that she was put in possession of the suit property in part performance of the contract;

Whether the trial court is justified in holding that the Plaintiff failed to prove that she was always ready and willing to perform her part of the contract;

Whether the trial court is justified in holding that the suit is barred by limitation.

Whether the trial court is justified in rejecting the relief of specific performance;

Whether the trial court is justified in rejecting the relief of permanent injunction;

Whether the trial court is justified in holding that there is due execution of sale deed by 1st Defendant to 3rd Defendant.

Whether the trial court is justified in holding that the sale in favour of the 3rd Defendant is binding on the Plaintiff and that Plaintiff is not entitled for relief.

Whether the trial court is justified in holding that suit is not maintainable stating there is on-complainant of Order 2 Rule 2, CPC Whether the trial court committed any illegality or error in dismissing the suits filed by the Plaintiff.

Whether Plaintiff is entitled for the relief of permanent injunction and specific performance.

15. What order.

16. Learned Counsel for the Appellant has relied on the decision of this Court in the case of H. M. Krishna Reddy v. S C Narayana Reddy - AIR 2001 KAR 442 to contend that Article 54 part II applies to the case i.e., limitation of three years begins to run from the date when the Plaintiff has notice of the Defendant

refusing to perform the contract. Learned Counsel has submitted that the alleged notice said to have sent by the Defendant has neither reached the Plaintiff nor the Plaintiff was aware of it. Even consulting the advocate as admitted by the Plaintiff is not in connection with the cancellation of the agreement. The trial court has entered into a wrong presumption that the Plaintiff had knowledge earlier i.e., during 1995 as such, suit is barred by limitation, is without any basis. Further, it is also contended, neither notice nor acknowledgment for having served the notice on the Plaintiff as alleged by the Defendant is produced before the court.

17. In the case on hand, according to the Plaintiff after the agreement for sale, the Plaintiff was put in possession. However, the same has been disputed. The Defendant and the subsequent alienee have accepted the possession of the Plaintiff though it is stated, the Plaintiff illegally dispossessed the Defendants. What is being pleaded and stated by the Plaintiff is, due to the conduct of the 3rd Defendant in attempting to dispossess the Plaintiff she filed a suit for injunction immediately thereafter during 2000 reserving liberty to file a comprehensive suit for specific performance against the 1st Defendant and the subsequent purchaser. Appellant's counsel submitted that at the time of entering into an agreement, since the lease period had not expired as per the conditions stipulated by the BDA at the time of allotment of the suit property in favour of the 1st Defendant, it was agreed that the sale deed will be executed after the expiry of the lease period in the year 1995. It is also stated, the Appellant was all along wailing and now and then requesting the 1st Defendant to execute the sale deed. Since already the advance of Rs. 50,000/- was given at the time of agreement, the remaining Rs. 3 lakhs was paid during 1989 by installments and the Plaintiff had already performed her part of the contract by paying the entire consideration during 1989 itself. Except that the 1st Defendant had to execute the sale deed, there was no lapse on the part of the Plaintiff and the Plaintiff was ever ready and willing to get the sale deed executed. However, the 1st Defendant went on postponing on one or the other pretext. Ultimately, on coming to know the refusal to execute the sale deed, a suit for injunction reserving liberty followed by suit for specific performance, came to be filed.

18. It is also submitted, there is compliance of Order 2 Rule 2, Code of Civil Procedure. In the suit for injunction filed specifically against the 3rd Defendant who tried to obstruct possession, question of seeking permission as per Order 2 Rule 2, CPC does not apply. Even otherwise, that liberty is reserved.

19. Learned Counsel for the Respondents, in support of his argument that the suit filed subsequently for specific performance is hit by Order 2 Rule 2, Code of Civil Procedure, has relied upon the decision in the case of E. Jayaram and Another Vs. Lakshmi alias Bhagyalakshmi and Another, and also the decision in the case of Kamal Kishore Saboo Vs. Nawabzada Humayun Kamal Hasan Khan, on the issue regarding permission of the Court to file a subsequent suit.

20. Counsel for the Respondent has also relied upon the decision in the case of

S. Kugashankar Vs. Subhash Chand Goel, Sunita Kugashanker and Kugashanker Mahendra, to contend that courts are required to examine all relevant factors and circumstances to determine the nature of contract and its binding effect upon the parties either to grant or not to grant relief u/s 20(2) of the Specific Relief Act and also regarding the readiness and willingness on the part of the Plaintiff to perform the contract as per Section 16(i)(c) of the said Act.

21. Counsel has also relied on the decision in the case of Padmanabhan Vs. Thomas and Another, wherein referring to Section 37 of the Specific Relief Act it is observed, when possession is obtained by forcible entry, suit at the instance of such person is not maintainable and to contend that injunction is an equitable remedy and the person who claims equity must show his entitlement for the relief he has sought for.

22. The very stand of the Plaintiff is, on coming to know of the conduct of the Defendants, she filed a suit for injunction in the year 2000. In the absence of producing any cogent evidence as to service of notice on the Plaintiff canceling the agreement entered into by the 1st Defendant, it has to be held, Plaintiff had knowledge of refusal of specific performance only in the year 2000 as such as per Article 54(2) of the Limitation Act, suit has been rightly filed within limitation i.e., from the date of notice of the Defendant refusing to perform the contract. The decision of this Court noted above, aptly applies to the case on hand. The finding of the trial court on the point of limitation, in the context, drawing a presumption that the Plaintiff had the knowledge of the event earlier through her advocate, appears to be perverse.

23. So far as the observation of the trial court that there is noncompliance of Order 2 Rule 2 CPC is concerned, except one Defendant who is common, other Defendants are different and also at the inception, at the time of filing the suit for injunction, the Plaintiff has reserved liberty to file a suit for specific performance as such, the subsequent suit filed by the Plaintiff for specific performance cannot be held to be hit by Order 2 Rule 2, CPC i.e., seeking permission of the court to file subsequent suit.

24. According to the Plaintiff, she was put in possession of the suit property pursuant to and subsequent to the agreement. However, according to the Defendant, Plaintiff forcibly took possession from Janardhan Gandhi who is the tenant of the 3rd Defendant who, on purchasing of the property from the 1st Defendant, had inducted the tenant. What is noted in the context is, the Plaintiff is in possession of the property and she had sought for injunction and suit is filed for specific performance against Defendant Rathnavathi by reserving liberty. When the Plaintiff was cautious enough to reserve liberty at the time of filing a suit for injunction to protect herself from dire consequences, she filed a suit for injunction immediately and thereafter, filed a suit for specific performance. The liberty so reserved in the earlier suit enables the Plaintiff to file a subsequent suit for specific performance and Plaintiff was aware of the immediate threat, as such, she filed a suit first for injunction and then for specific performance by

reserving liberty. In the context, seeking prior permission of the Court for filing a subsequent suit with the earlier liberty reserved is only formal and the Plaintiff has complied with the requirement of seeking permission of the Court. As such, the finding of the trial court that the suit is bad for not obtaining prior permission, is negated.

25. Appellant's counsel has also relied upon Union of India (UOI) and Others Vs. G. Vasudevan Pillay and Others, in respect of Section 16 of the Specific Relief Act, 1963. In para 5 it is held:

The plea that the Plaintiff was not ready and willing to perform his part of contract is specifically available to the vendor/Defendant. It is personal to him. The subsequent purchasers have got only the right to defend their purchase on the premise that they have no prior knowledge of the agreement of sale with the Plaintiff. They are bonafide purchasers for valuable consideration. Though they are necessary parties to the suit, since any decree obtained by the Plaintiff would be binding on the subsequent purchasers, the plea that the Plaintiff must always be ready and willing to perform his part of the contract is available only to the vendor or his legal representatives, but not to the subsequent purchasers.

26. Learned Counsel has also relied upon Nirmala Anand's case cited supra on the point of readiness and willingness as per Section 20 of the Specific Relief Act and to contend that the relief of specific performance cannot be refused to the purchaser who was ready and willing to perform her part of the contract.

27. In the case on hand it is seen as submitted by the Appellant's counsel, the vendor Rathnavathi has not specifically denied the conduct of the Plaintiff regarding her readiness and willingness. It appears in the context, having received the full sale consideration, this vendor has not disputed or denied the readiness and willingness of the Plaintiff.

28. So far as payment of sale consideration is concerned, there is a dispute as to receiving Rs. 3 lakhs by the vendor. However, there are documents viz., the receipts at Ex.P2 and P3 for Rs. 1 lakh and 2 lakhs respectively, dated 2.5.1989 and 4.7.1989. There is also the signature of Rathnavathi on the stamp paper. As the receipts were disputed, the same was referred to the handwriting expert. On the issue of opinion of the handwriting expert is concerned, learned Counsel has relied upon Bhagwan Kaur's case cited supra, wherein the Apex Court has held:

The evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed: The court should, therefore, be wary to give much weight to the evidence of handwriting expert. Conclusions based upon mere comparison of handwriting must at best be indecisive and yield to the positive evidence in the case,

29. Learned Counsel referring to the evidence of the handwriting expert submitted, the opinion of the Expert was taken as a gospel truth by the trial court without application of mind and, the trial court ought to have compared the

various signatures of the vendor available. Just because the signature of the vendor was well within the stamp affixed, unnecessarily there is a presumption based on the expert's opinion which is wavery and the opinion of the expert cannot be accepted in entirety in the context as the expert has not given detail evidence as to distinguish and differentiate. Counsel has also relied upon the decision of the Apex Court in Ram Narain's case cited supra regarding Section 45 of the Evidence Act and the opinion of the handwriting expert and its evidentiary value, wherein in para 4 it is observed:

Now it is no doubt true that the opinion of a handwriting expert given in evidence is no less fallible than any other expert opinion adduced in evidence with the result that such evidence has to be received with great caution. But this opinion evidence which is relevant, may be worthy of acceptance, if there is internal or external evidence relation to the document in question supporting the view expressed by the expert. If after comparison of the disputed and the admitted writings by the court itself, when the Presiding Officer is familiar with that language, it is considered sage to accept the opinion of the expert then the conclusion so arrived at cannot be assailed on special leave on the mere ground that comparison of handwriting is generally considered as hazardous and inclusive and that the opinion of the handwriting expert has to be received with considerable caution. The question in each case falls for determination on the appreciation of evidence and unless some serious infirmity or grave failure of justice is shown, this Court would normally re-appeal by special leave.

30. Thus, the above ratio leads to an inference that too much of reliance on the opinion of the Expert to conclude is totally uncalled for. The court has to compare the signatures/handwriting with its experience or language to arrive at a conclusion. The trial court also has not embarked on other inquiry in the context, to arrive at a conclusion. In stead, it is shown to have relied upon the expert's opinion fully. The opinion of the expert on the issue that signatures marked at S1 to S3 shows free and firm movement in their execution along with smooth, clear, rhythmic and uniform quality of strokes. In Ex P1, there is said to be another signature as Ex.P1 (f) other than the questioned signature marked as Ex.P1 (g). The signature marked at Ex.P1 (1) has not been marked as disputed signature. The signature marked at Ex.P1 (f) is found freely and firmly written along with clear, rhythmic and uniform quality of strokes. The signature at Ex.P1 (f) when compared with admitted signature marked as S1 to S3 shows consistency in writing habits with the admitted signatures as such, he has come to the conclusion that signatures at Ex.P 1(f) and the admitted signatures are written by one and the same person. In the cross-examination, the Expert has stated that he cannot say the year in which the signatures at Ex.P1 (g) was affixed as the document was not sent to him expect page 6 of the document at Ex.P1 and, for the question had he requested to send the documents either two years prior or two years later to the year 1989 for the purpose of comparison of signature, he has stated he has not requested as it was not necessary. He has admitted that there will be natural variations in the signature affixed during the year 1999

and 2002-03 by a person. He has admitted that there is no specific instruction by the court to take signature on Ex.P1 (f) for comparison. There is a specific direction to compare the signature found at Ex.P 1(g) with the admitted signatures.

31. In the chief-examination, he has stated that person who wrote the admitted signatures at S1 - S3 did not write the questioned signatures marked at Ex.P1 (g), 2(a), 3(a) and 4(a)., However, in the cross-examination he has stated, signature found at Ex.P1(g) is not in its natural form and it has signs of forgery. Similar was the conditions to Ex.P2(a), 3(a) and 4(a). Further, in the cross-examination he has stated on seeing the enlarged photo prints of Exs.P1 (g) and P2 (a), natural variations cannot be accounted in the case of forged signatures. He denied the suggestion that signatures found at S1 to S3 and signatures at Exs.P1 (g), 2(a) and 3(a) and 4(a) are one and the same and, also it is suggested that he has not conducted the examination in a scientific manner which also he has denied.

32. In para 14 of the cross-examination so far as signature on Ex.P3 and 4 are concerned, although she admits the address shown is correct, she has denied the signatures and what she also states is, she is unable to identify them. In para 15, to the suggestion to DW 1 that after receiving the amount of Rs. 3 lakhs at Exs.P2 to 4, they have handed over possession to the Plaintiff, she has denied the said suggestion. However, she pleaded that she does not know who is in possession of the property. Even with regard to several receipts at Exs.P9 to 11 i.e., revenue receipts, she has pleaded ignorance that PW 1 has paid the amount. In paragraphs 13 and 14 of the cross-examination, she has pleaded ignorance as to where the agreement - Ex.P1 was prepared and who were the witnesses to Ex.P1.

33. At this juncture, the evidence of DW1 has to be looked into. In para 11 & 12, she has stated thus:

BDA has sanctioned the suit schedule site to me; we have constructed the building after it was sanctioned to us. I don't know in which year, it is true that we have entered into agreement with Plaintiff as per Ex.P1 to sell the suit schedule premises as it was. It is true that at that time there was half building in the suit schedule property. It is true that we have signed the said agreement after reading the same. I have signed each of the pages of Ex.P1. I was paid Rs. 50,000/- of advance amount from Plaintiff as the time of Ex.P1. The said money was given to me in cash by the Plaintiff. I don't know reading English. I don't remember a to whether I got money through cheque or cash. I have not signed anywhere on stamps. It is false to suggest that I have received Rs. 50,000/- through cheque and that I have signed on the stamps. It is false that now I am lying that the signatures on stamps are not mine.

34. It is the case of PW1 i.e., Plaintiff, herself and 1st Defendant have signed on the agreement. The signature found on Ex P1 (1) and the standard signatures on

comparison are found to be by one person and also Ex.P1(f) is found freely and firmly written. What has been disputed is, the signature found on the stamps are not that of 1st Defendant. In Ex.P1 in the end at page 6, it is also specifically mentioned receiving of the advance amount by cheque i.e., on 15.2.1989 over which there is a stamp affixed and in the said page 6, the column which is depicted is said be in the natural course.

35. The signature found on the stamp at Ex.P1 marked as Ex.P1 (g), is a disputed signature and the Defendant denies having put her signature on the stamp. The opinion of the expert is, Ex.P1 (g) and Exs.P2 (a), 3(a) and 4(a) are not written by same person. However, the 1st Defendant never pleaded nor proved that Plaintiff was not ready and willing to perform her part of the contract even before issuance of alleged notice of termination much less she has also not produced the related documents like registered post acknowledgement due which was returned back served or unserved. The presumption by the trial court that Plaintiff came to know about the termination of the agreement through her counsel appears to be without any basis and perverse.

36. The bare denial of the contention raised by the Plaintiff would not satisfy the requirement as to alleged breach or readiness and willingness on the part of the Plaintiff. If the signature is written slowly and if there is little variation in the running of strokes, the same cannot be made much of Might be as argued, the 1st Defendant being rustic and as admitted by her, must have written slowly to cover her signature within the stamp and the same need not be doubted.

37. On perusal of the 1st Defendant's signature at various places - on deposition, vakalath, it is found her signature is not uniform. As such, the contention of the Appellant's counsel the entire payment was made and also she being in possession of the suit property (building), Plaintiff awaited and pressed for executing the sale deed, cannot be ruled out. In the context, when the 1st Defendant has admitted having signed on all the pages of the agreement, necessarily the signature at Ex.P1 (g) necessarily would be that of the 1st Defendant. Might be to fit into the stamp she must have written slowly, as such, there would not be free flow of the strokes and for the sake of denial, she has denied having signed on the stamp. But, when all other particulars and as per own admission, she has signed on the agreement, necessarily, it would be stamped. As such, though there is little variation, it has to be held the signature is that of 1st Defendant on Ex.P1 (g). Further, when Ex. P1 has been admitted and she has also received an amount of Rs. 50,000/- at that point of time, there was no reason for the Plaintiff to create such a document. That is, at an undisputed point of time. Ex.P1 came into existence. In view of the admission by the 1st Defendant that she signed on all the pages of Ex.P1, even if there is a little variation at Ex.P1(g), it has to be treated as that of the 1st Defendant. The conclusion drawn by the Expert appears to be on the basis that the signature on Ex.P1(g), 2(a), 3(a) and 4(a) are on stamps. If it is written to adjust on the stamp by the 1st Defendant herself, only on the ground that there is no free flow

of strokes, he must have come to such a conclusion. What is to be noticed is the conduct of the 1st Defendant in disposing of the property in favour of the 3rd Defendant and non-production of the alleged termination notice A/c due by the 1st Defendant and, to admitting the agreement. Further, according to the Plaintiff", she has invested Rs. 7.5 lakhs on construction/renovation of the suit property having taken possession as per the agreement in part performance of the contract.

38. The decision relied upon by the Respondent's counsel in Padmanabhan's case referred to above as regards Section 37 of the Specific Relief Act, is about the general principle. Especially, in the case on hand, Ex.P1 - Agreement provides for handing over possession to the Plaintiff by the Defendant and by breath, if it is handed over to a third person, then necessarily it would be a different aspect for seeking possession or injunction. As such, the ratio laid in Padmanabhan's case is not applicable to the case on hand.

39. At this juncture, I may refer to the judgment relied upon by the Respondent's counsel in the case of Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others, to contend that as per Section 20 of the Specific Relief Act, there is a guideline as to how discretion should be exercised when the Plaintiff seeks equitable relief of specific performance and that he should come to the court with clean hands and also to contend that third party purchaser is a bonafide purchaser for value without notice and, in such a situation, the relief of specific performance has to be rejected.

40. In the case on hand, in the factual background, there is shown to be a breach committed by the 1st Defendant in disposing of the property in favour of the 3rd Defendant who in turn, is shown to have had knowledge of the earlier transaction between the Plaintiff and the 1st Defendant. As such, the above decision is not applicable to the present case.

41. In the case of Tarlok Singh Vs. Vijay Kumar Sabharwal, relied upon by the Respondent's counsel, as per Article 54 of the Limitation Act, the parties by agreement determined the date for specific performance. Thereafter amendment was sought. Subsequently, in the suit filed, it was contended the limitation began to run from 6.4.1986, i.e., date fixed and the suit is barred by limitation. In my opinion, the facts of the case are not applicable to the case on hand.

42. The decision in K. Narayana Reddy v. Ramakrishna Reddy -2005 (3) KCCR 1733, has been relied upon by the Respondent's counsel regarding the applicability of Section 18 and Article 54 of the Limitation Act to contend that limitation to file a suit is three years. The said judgment has been rendered in a different context, as such, the same is not applicable to the case on hand.

43. The specific case of the 3rd Defendant is, after the sale, he put the 4th Defendant as a tenant in the premise, and he has been illegally and forcibly dispossessed through the help of police. The 3rd Defendant has moved this Court in contempt proceedings and ultimately, he failed in his attempt to make out a

case of forcible dispossession. Even the application filed by him seeking for permission to prosecute the Plaintiff or police officer for the alleged contempt has not been entertained and permission was not granted to prosecute the contempt proceedings. As such, any evidence brought on record regarding contempt proceedings and the conduct of the parties which is also on record, need not be looked into as additional evidence as, the contempt proceedings itself is held to be void in the circumstances for want of prior permission. As such, the Defendants were refrained from proceeding to prosecute the Plaintiff or the police officer. What is being noticed in the evidence of 1st Defendant is, she is not aware of who is in possession of the suit property. But, it is also clear that there is a mentioning in the agreement at Ex.P1 to part with the possession of the suit property in favour of the Plaintiff. In the context whether the Plaintiff has taken possession pursuant to the agreement entered into or she has illegally dispossessed the 3rd or 4th Defendant and taken possession, the fact remains that even as per the Defendants Plaintiff has occupied the property illegally. However, in the circumstances, in furtherance of part performance when the Plaintiff is entitled for possession as mentioned in Ex.P1 and if she has continued in possession then necessarily the suit filed for specific performance, as discussed earlier, is well within time and also in view of the fact that cause of action arose to the Plaintiff only during 2000 on coming to know of the conduct of the 1st Defendant in selling the property in favour of the 3rd Defendant. In the absence of any document produced to show legally the agreement was terminated and, in the context of the evidence on record and when it is also pleaded by 3rd Defendant that he is a bonafide purchaser for value without notice, but, it appears the 1st Defendant in collusion with the 3rd Defendant proceeded to commit breach of contract entered into between Plaintiff and her, now the 3rd Defendant cannot be said to be a bonafide purchaser for value without notice particularly when even after ten years, the 1st Defendant resorted to sell the property to the 3rd Defendant for Rs. 4 lakhs only i.e., for Rs. 50,000/- more from what was agreed to be sold to Plaintiff. In the circumstances, having regard to the escalation in the market value, at the most, Plaintiff could be directed to part with another Rs. 4 lakhs while directing Defendants 1 and 3 together to execute the sale deed in favour of the Plaintiff since the conduct of the Plaintiff depicts that she has performed her part of the obligation and has paid the entire sale consideration of Rs. 3.50 lakhs and, except by implied denial, the 1st Defendant has not specifically denied the readiness and willingness on the part of the Plaintiff which clearly leads to an inference that 1st Defendant having received sale consideration at Ex.P1 and Exs. P2-4, totaling Rs. 3,50,000/-, was avoiding to execute the sale deed in favour of the Plaintiff.

44. It is also pertinent to note, the agreement was executed in the year 1989. At that time the right of 1st Defendant had not ripened to alienate the property as she got the property allotted from the BDA on lease cum sale basis. The right has ripened only after 1995 to execute the sale deed. In the process, as there is

delay subsequently even after receiving the money, this Defendant has aspired for more money and executed the sale deed in favour of 3rd Defendant. The conduct of the Defendant in the context is nothing but breach of contract.

45. Further, the admission by DW 4 / 3rd Defendant that he came to know that there is an agreement entered into with the Plaintiff by the 1st Defendant and that that agreement has been cancelled and, that the 1st Defendant had obtained Rs. 50,000/- as advance, especially in para 24 of the cross-examination, are vital admissions which makes it clear that he had knowledge of the transaction between the Plaintiff and 1st Defendant and that he is not a bonafide purchaser for value without notice.

46. Since the agreement at Ex.P1. is insufficiently stamped, to make it a valid document, Plaintiff shall have to pay the stamp duty as per requirement of the Stamp Act.

47. In view of the discussions made above, points raised are answered accordingly. Appeals are allowed. The impugned judgment and decree passed refusing the injunction and dismissal of the suit for specific performance are set aside. The Defendants are permanently enjoined from interfering with the peaceful possession and enjoyment of the property by the Plaintiff. It is hereby declared that the sale deed executed by Rathnavathi in favour of M Sudarshan Murthy is void and not binding on the Plaintiff, as such, it is ordered as be cancelled. A direction be issued to the Sub-Registrar concerned to cancel the sale deed entered into between the Rathnavathi and M Sudarshan Murthy. It is further directed that Defendants Rathnavathi and M Sudarshan Murthy shall join and execute the sale deed in favour of the Plaintiff, however, by receiving Rs. 4 lakhs as ordered above. It is for the Plaintiff to deposit Rs. 4 lakhs within three months from the date of receipt of certified copy of this order and she shall also bear the registration expenses. In the event the said Rathnavathi and M Sudarshan Murthy do not come forward to execute the sale deed in favour of the Plaintiff, it is for the trial court to make arrangements to get the sale deed executed in Plaintiff's favour through the court. In the circumstances parties to bear their own costs. It is for the Plaintiff to pay the stamp duty on the agreement in accordance with law.