

(2007) 10 KAR CK 0065

In the Karnataka High Court

Case No : Regular First Appeal No. 1389 of 2003

Sri. N. Hanumantharaya

APPELLANT

Vs

Smt. Mariamma and Others

RESPONDENT

Date of Decision : 09-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 18
Specific Relief Act, 1963 — Section 16 C

Citation : (2008) 2 KarLJ 678 : (2008) 3 KCCR 1465

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : R.B. Sadashivappa and T. Mohankumar, for the Appellant; K. Narasimha Murthy, for R.1-4 and M.K. Ramesh Gowda, Rajesh Kumar, S.V. Ganesh and S. Shivaswamy for C/R.5-8, for the Respondent

Final Decision : Allowed

Judgement

Subhash B. Adi, J.—This is the plaintiff's appeal against the judgment and decree dated 23.8.2003 passed in O.S.No. 4624/1992.

2. The suit is one for specific performance of the agreement dated 23.12.1989 by directing defendants 1 to 4 to execute a registered sale deed in favour of the plaintiff and for permanent injunction and cancellation of sale deed dated 28.5.1992 executed by defendants 1 to 4 in favour of defendants No. 5 to 8.

3. The case of the plaintiff is that defendants 1 to 4 are the owners of land measuring 23 guntas in Sy.No. 10/6 of Lottegollahalli Village, Kasaba Hobli, Bangalore North Taluk. They entered into an agreement of sale with the plaintiff to sell an area measuring 95 feet east-west and 63 feet north-south as described in the schedule, for consideration of Rs. 63,500/- on 23.12.1989. The plaintiff paid the entire sale consideration through two cheques bearing Nos. 227941 and 227942 for Rs. 50,000/- and Rs. 13,500/- respectively. There was no balance of sale consideration to be paid by the plaintiff. On receipt of the amount, the plaintiff was put in possession of the suit schedule property under agreement

dated 23.12.1989 and plaintiff is in possession of the suit schedule property, his name is entered in the R.T.C. Defendants 1 to 4 have executed the power of attorney in favour of the plaintiff and further they have also sworn to an affidavit in this regard. The plaintiff demanded execution of the sale deed, however, the defendants 1 to 4 did not execute the sale deed. It is on 15.7.1992, defendant No. 5 along with her husband and other persons came near the suit property stating that the suit schedule property belongs to them, the plaintiff told defendant No. 5 that he is in possession of the suit schedule property by virtue of agreement. Plaintiff had the benefit of temporary injunction and defendant No. 5 filed an application for vacating the temporary injunction and initiated proceedings before the Tahsildar, Bangalore North Taluk for change of khata and to enter his name. It is at that juncture, plaintiff came to know about the registered sale deed dated 28.5.1992 executed by defendants 1 to 4 in favour of defendants 5 to 8 in respect of 12 guntas of land in Sy.No. 10/6 of Lottegollahalli Village. It is alleged by the plaintiff that defendants 1 to 4 in collusion with defendants 5 to 8 have fraudulently created the sale deed with an intention to deny the legitimate right of the defendants. After coming to know of the sale transaction between defendants 1 to 4 and 5 to 8, defendants 5 to 8 were impleaded as parties to the suit, plaintiff also alleged that he was always ready and willing to complete his part of the contract and that defendants deliberately have not executed the sale deed. On these allegations, the plaintiff sought for decree for specific performance of the agreement of sale.

4. Defendants 1 to 4 filed written statement, inter alia admitting the agreement stating that, it is only loan transaction. They denied issuance of cheques by the plaintiff and also allege that the plaintiff is not entitled for the relief as there is no cause of action. Defendants 1 to 4 stated that they never signed any paper or document in favour of the plaintiff in respect of the suit schedule property and they have executed agreement dated 5.4.1988 in favour of defendant No. 5, same is prior in time to the agreement dated 23.12.1989 and these defendants have executed the sale deed in pursuance of the said agreement, the plaintiff has not made out any case for decree for specific performance of the agreement.

5. Defendants 5 to 8 filed separate written statement inter alia alleging that, as early as on 5.4.1988 the defendants had entered into an agreement with defendants 1 to 4 and a registered sale deed was executed in their favour on 28.5.1992. They further allege that plaintiff has not come before the Court with clean hands and has not disclosed the material facts. They also deny the transaction between the plaintiff and defendants 1 to 4 and stated that since their sale deed is in pursuance of the agreement dated 5.4.1988, they are in peaceful possession of the suit schedule property and plaintiff is not entitled for any relief muchless the relief against defendants 5 to 8. They also filed additional written statement inter alia alleging that the suit is barred by time for seeking the cancellation of sale deed in their favour.

6. The trial Court, based on these pleadings, framed the following issues:

(1) Whether the plaintiff proves that the defendants 1 to 4 executed agreement of sale on 23.12.1989?

(2) Whether the plaintiff proves that the defendants 1 to 4 have executed an irrevocable power of attorney and affidavit stating that they have received the entire sale consideration?

(3) Whether the defendants 1 to 4 prove that they have executed agreement of sale in favour of defendant-5 on 5.4.1988 and registered sale deed on 28.5.1992?

(4) Whether the plaintiff is entitled as sought for?

(5) What decree or order?

7. Before the trial Court, the plaintiff got examined his power of attorney as PW-1 and also got examined one witness as PW-2 and got marked Exs.P.1 to P.23 whereas, the power of attorney of defendants 5 to 8 was examined as DW-1 and one witness was examined as DW-2 and got marked Exs.D.1 to D.8.

8. Though defendants 1 to 4 filed their written statement, they did not chose to enter the witness-box or lead any evidence. The trial Court, on appreciation of the evidence hold that the agreement dated 23.12.1989 is proved and further held that the plaintiff has proved that defendants 1 to 4 have executed irrevocable power of attorney and affidavit and they received the entire sale consideration. However, the trial Court held that defendants 1 to 4 have executed an agreement of sale in favour of defendant No. 5 on 5.4.1988. Further they have executed registered sale deed dated 28.5.1992 in favour of defendants 5 to 8. On these findings, the trial Court negatived the suit of the plaintiff.

9. Sri. R.B. Sadashivappa, learned Counsel appearing for the plaintiff submitted that, the agreement dated 23.12.1989 at per Ex.P.2 is not in dispute. Under the said agreement, an area measuring 95 feet east-west and 63 feet north-south approximately measuring 5th guntas was agreed to be sold for consideration of Rs. 63,500/- and by referring to Ex.P.2 he pointed out that, the sale consideration was paid by way of two cheques for Rs. 50,000/- and Rs. 13,000/-. He also pointed out that the earlier agreement dated 11.11.1989 is referred in the agreement-Ex.P.2. He submitted that the nature of the transaction in Ex.P.2 though it is titled as "possession letter", but it is "the agreement of sale". In this regard, he referred to the contents of the agreement and pointed out that defendants 1 to 4 have admitted that they have received the entire sale consideration and they will execute the registered sale deed either in favour of the plaintiff or any persons nominated by the plaintiff and further, they have admitted that there is no balance of consideration required to be paid by the plaintiff and have admitted that they have no objections for changing the khata in the name of the plaintiff.

10. He referred to Ex.P.4- the General Power of Attorney, Ex.P.3- affidavit and pointed out that, in the affidavit, defendants 1 to 4 have admitted that plaintiff has been put in possession and he would be entitled to enjoy the property by

getting khata changed into his name. He also relied on Ex.P.4- the GPA wherein defendants 1 to 4 have admitted that the plaintiff is entitled to enjoy the property as owner by stating that, due to some reason they could not manage the property and they have no objection to plaintiff managing the property in a manner he likes. By relying on Ex.P.2 he submitted that prior in time i.e. on 11.11.1989 itself, the agreement had been executed and thereafter, possession was delivered under the agreement dated 23.12.1989 by agreeing to sell the suit schedule property in favour of the plaintiff. He further submitted that defendants 1 to 4 have admitted that, the entire sale consideration has been received by them. He also pointed out that in furtherance of the said document, the name of the plaintiff is entered in the revenue records and plaintiff has been in possession of the suit schedule property and he has paid the land revenue. In this regard, he referred to the document Exs.P.8 to P.11 showing the entry of the name of the plaintiff.

11. He further submitted that the defendants 5 to 8 are not the bona fide purchasers as they had the knowledge of the agreement of sale in favour of the plaintiff, as the husband of defendant No. 5, who is father of defendants 6 to 8 has attested the agreement-Ex.P.17-the earlier agreement dated 11.11.1989. Despite of the knowledge of the agreement in favour of the plaintiff, defendants 5 to 8 have purchased the suit schedule property and they are not the bona fide purchasers. He also submitted that on behalf of defendants 5 to 8 it is the husband of the defendant No. 5 has been examined as DW-1, who has attested the agreement in favour of the plaintiff and that being so, he cannot deny the existence of the agreement in favour of the plaintiff and having knowledge of the agreement in favour of the plaintiff, purchase made by defendants 5 to 8 cannot be treated as bona fide purchase without knowledge of the prior transaction.

12. He submitted that the total extent of the land bearing Sy.No. 10/6 measures 23 guntas. The alleged sale deed in favour of defendants 5 to 8 is to the extent of 12 guntas and the plaintiff has agreed to purchase 5 guntas of the land. He also submitted that defendants 1 to 4 have admitted the document and signature on the agreement of sale-Ex.P.2. But only stated that it is a loan transaction. He further pointed out from the written statement filed by defendants 1 to 4 and submitted that though these defendants allege that there was an agreement dated 5.4.1988 in favour of defendant No. 5, but the same has not been proved and in turn he pointed out that husband of defendant No. 5 being a witness to Ex.P.2 and having knowledge of the sale transactions, the agreement between the plaintiff and defendants 1 to 4, for the purpose of suit they have got-up this document dated 5.4.1988. In this connection he also submitted that under the sale deed-Ex.D.2 in favour of defendants 5 to 8, the land sold is pointed out by:

East - Munivogarappa and his brothers" land and Nagashetti boundary;

West - Road leading to Devi Nagar;

North - K. Krishnappa"s land; and

South - Temple property;

whereas the property agreed to be sold in favour of plaintiff is bounded by:

East - Munivogarappa's property and Nagashetti boundary;

West - Road;

North - Property sold to other by Krishnappa and

South - Remaining land of Sy.No. 10/6.

13. Relying on both the schedules, he submitted that the total extent is 23 guntas and what is sold in favour of defendant Nos. 5 to 8 is 12 guntas and the remaining 11 guntas is remaining with defendants 1 to 4.

14. He relied on Ex.D.2-sale deed and pointed out that there is no reference to the agreement alleged to have entered between the defendants 1 to 4 and 5 to 8 and in turn in the sale deed it is mentioned that, on the date of execution of the sale deed, the entire sale consideration amount of Rs. 38,000/- was paid and further, he also pointed out that, though the registered sale deed is executed in favour of defendants 5 to 8, defendants 1 to 4 have retained the original document with than only. Relying on this document he submitted that if really there was an agreement as alleged by the defendants, a reference should have been made in Ex.D.2. He also referred to Ex.D.3, the alleged agreement and pointed out that under the alleged agreement, defendants 1 to 4 agreed to sell 12 guntas of land in favour of defendants 5 to 8 for consideration of Rs. 50,000/- and it is mentioned that on the said date the defendants received Rs. 20,000/- as advance and remaining 30,000/- was to be paid at the time of registration of the sale deed. By referring to Ex.D.3 and Ex.D.2, he pointed out that if really there was an agreement on 5.4.1988 itself for Rs. 50,000/-defendants 1 to 4 could not have registered the sale deed for Rs. 38,000/- and if defendants 1 to 4 have received advance of Rs. 20,000/- out of Rs. 50,000/- sale consideration, the balance is only Rs. 30,000/-and not Rs. 38,000/-. By relying on Exs.D.2 and D.3 he submitted that stand of defendants 1 to 4 and 5 to 8 that there was an agreement dated 5.4.1988 is mutually contradicting each other. He further submitted that if Ex.D.3 is not proved, admittedly the sale deed in favour of defendants 5 to 8 being subsequent to the agreement in favour of plaintiff and the husband of defendant No. 5 being a witness to Ex.P.17, defendants 5 to 8 are not the bona fide purchasers. He further submitted that subsequent purchasers have no right to claim any justification of their transaction as the said transaction is admittedly with the knowledge of the prior agreement.

15. He further submitted that though defendants 1 to 4 have denied payment of amount under Ex.P.2, Ex.P.20 is a bank statement produced by the plaintiff, is not denied and he pointed out that the amount of Rs. 50,000/- as well as Rs. 13,500/- have been credited to the account of defendant No. 1.

16. In support of his contention he further relied on Exs.P.8 to P.11, the entry of

the name of the plaintiff in the ROR which is also to the knowledge of defendants 5 to 8. He also submitted that defendants 1 to 4, with full knowledge of the existence of the agreement and having received full sale consideration, in order to defraud the plaintiff, they deliberately got the sale deed executed in favour of defendants 5 to 8 and submitted that act of defendants is nothing but a fraud on the plaintiff.

17. He relied on a decision reported in the case of Aniglase Yohannan Vs. Ramlatha and Others, in the matter of got up document and submitted that, while appreciating the evidence, conduct of the parties is required to be considered. He also relied on another decision in the case of Devalsab (Dead) by Lrs. Vs. Ibrahimsab F. Karajagi and Another, and submitted that when the payment is not disputed, execution of the agreement is not disputed and the subsequent sale in favour of defendants 5 to 8 being in collusion with defendants 1 to 4, the trial Court was not justified in dismissing the suit by relying on Ex.D.3, the alleged agreement dated 5.4.1988. The trial Court, without appreciating the evidence adduced by the plaintiff, has erroneously dismissed the suit.

18. He further submitted that, the plaintiff has proved the agreement as per Ex.P.2 and has paid entire sale consideration and insofar as his readiness and willingness is concerned, same does not arise. Further, the agreement dated 5.4.1988 alleged to be in favour of defendants 5 to 8 is not proved and defendants 5 to 8 being the subsequent purchasers are not entitled for any relief. Defendants 1 to 4 having filed written statement, having not chosen to enter the witness-box to deny the evidence of the plaintiff, the trial Court was not justified in dismissing the suit.

19. In reply to the argument, learned Counsel appearing for defendant Nos. 5 to 8 submitted that, Ex.P.2 is not an agreement and the suit is filed based on Ex.P.2. Plaintiff claims decree of specific performance on the basis of Ex.P.2 dated 23.12.1989 and not based on agreement dated 11.11.1989. In the plaint, he has not stated the earlier agreement.

20. He further submitted that, the suit is filed on 21.7.1992 whereas, defendant Nos. 5 to 8 were sought to be impleaded by application dated 22.11.1993. Learned Counsel pointed out from the plaint averment that, the plaintiff had the knowledge of the purchase of the wait schedule property by the defendants-5 to 8. In the plaint, plaintiff at para-5 has stated that, the defendant No. 5 had attempted to interfere with the possession of the plaintiff, based on alleged sale deed. Plaintiff filed an application inter alia for temporary injunction. In response to the said application, these defendants had filed an application for vacating temporary injunction on 3.8.1992. In the said application, these defendants have categorically stated that they have purchased the suit schedule property from defendant Nos. 1 to 4. He referred to Article 59 of the Limitation Act and submitted that, suit ought to have been filed within three years from the date of knowledge. If the date of knowledge is taken as 3.8.1992, the amendment

sought for by the plaintiff is on 24.2.1997 and amendment comes into effect only from the date on which the amendment is carried out. He submitted that, the suit is filed admittedly beyond the period of 3 years from the date of knowledge.

21. In this regard, he also submitted that, though plaintiff sought for amendment of the plaint including the amendment of prayer, however, till today, the plaint has not been amended by incorporating the prayer for setting aside the sale deed in favour of defendants-5 to 8. He submitted that, if the suit is filed beyond the period of 3 years from the date of knowledge of the same, the suit is barred by limitation under Article 59 of the Limitation Act. He also referred to the evidence of PW-1 and pointed out that, PW-1 had the knowledge of the sale in favour of defendant Nos. 5 to 6. In this regard, he referred to the evidence of PW-1 dated 6.9.1999 and submitted that, PW-1 has submitted that, as on the date of the application for vacating temporary injunction, defendants-5 to 8 had made clear that, they have obtained the sale deed and he also admits that, he has alleged in his application that, defendants-5 to 8 are contending that they have purchased 12 guntas at land from defendants-1 to 4.

22. He relied on a decision reported in Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another, and submitted that, in at case of suit for possession, the recovery of possession from the purchaser is filed by the minor after attaining the majority and no prayer was sought for setting aside the sale deed. Subsequently, said prayer was added by amendment. However, the amendment was made after three years from the date of minor attaining the age of majority. In such circumstances, the Apex Court held that the suit is barred by time. He also relied on a decision reported in Southern Ancillaries Private Limited Vs. Southern Alloy Foundaries Private Limited, and submitted that, not carrying out the amendment within the stipulated period under Order VI Rule 18 of CPC would be of any use to the defendant. In this regard, he relied on paragraphs-24 end 25 of the said judgment and submitted that, under Order VI Rule 18, if the party fails to amend his written statement within the stipulated time, than necessarily the Court has to proceed only on the basis of unamended written statement. Fact that such defendant has separately filed amended written statement not carrying out the amendment in the original one would not be of any use to him. By relying on this decision, learned Counsel submitted that the plaintiff had filed an application for amendment of the plaint and after amendment application was allowed, he did not carry out the amendment as required under Order VI Rule 18 within the stipulated time or even thereafter also. In the absence of amendment of the plaint, the plaintiff is not entitled for relief that is a sought by way of amendment. He also relied on another decision of the Apex Court reported in 2005(6) SC 389 in the matter of Union of India v. Pramod Gupta (D) By LRS and Ors. and referred to paras-144 and 146 and submitted that, in terms of Order VI Rule 18 of the Code of Civil Procedure, such amendments are required to be carried out in the pleadings by a party who has obtained leave to amend his pleadings within the time granted therefore and if no time was specified, then within fourteen days from the date of passing of the

order. The consequence of failure to amend the pleadings within the period specified under Order VI Rule 18 of the Code, then the party shall not be permitted to amend his pleadings thereafter unless the time is extended by the court. He also submitted that, the plaintiff has not sought for time to amend the plaint nor amendment is carried even thereafter also. Fact that the plaintiff though got the amendment application allowed, has not incorporated the prayer for setting aside the same in favour of defendants-5 to 8. By relying on these decisions, he submitted that, Order VI Rule 18 being mandatory and plaintiff having failed to amend the plaint, seeking setting aside of the sale deed in favour of defendants-5 to 8, the relief of cancellation of sale deed executed by defendants-1 to 4 in favour of defendants-5 to 8 cannot be granted.

23. He submitted that the amendment is beyond the time of limitation, no cause of action arises, secondly that, though amendment application is allowed, amendment is not carried out, such a prayer is not available for the plaintiff and further, the limitation starts from the date of allowing of the application.

24. He further submitted that, there is no averment as regards to the notice of the agreement of the plaintiff to the defendants 5 to 8 in the pleading. He referred to para-5A of the amended plaint and submitted that, plaintiff has not stated anything about the knowledge of the prior agreement in his favour.

25. On merit, he referred to the pleadings of the plaintiff and submitted that the plaintiff has not shown that he is ready and willing to perform his part of contract and further he submitted that, the plaintiff has sought for decree of specific performance of the agreement dated 23.12.1989 and pointed out that the said transaction is not an agreement of sale, but it is only a possession certificate and not a document of agreement of sale.

26. As regards to the attestation by the husband of defendant No. 5, learned Counsel submitted that, no knowledge can be attributed to the attesting witnesses about the transaction. In this regard, he relied on a decision reported in AIR 1945 82 (Privy Council) and submitted that, mere attestation is not enough to attribute the knowledge. He also submitted that, the plaintiff has not alleged that, the defendants-5 to 8 had the knowledge of the prior agreement and there being no pleading to that effect and merely because DW-1 has attested the agreement of sale in favour of the plaintiff, that does not by itself becomes a knowledge to the defendant No. 5 or defendant Nos. 5 to 8.

27. In support of the said contention, he relied on other decisions also viz., Volume No. 45 Indian Case page 954, Vol. No. 70 Indian Case page 315 and Vol.87 Indian Case page 652. All these decisions were referred by the learned Counsel in support of his contention that, the attestation does not mean the knowledge of transaction nor a knowledge can be attributed to the attesting witnesses. He also submitted that the trial court on appreciation of the evidence, has dismissed the suit of the plaintiff and Appellate Courts ordinarily do not interfere with the discretion exercised by the trial court and in this case, the trial

court, on merit as well as in exercise of its discretion found that the plaintiff is not entitled for a decree for specific performance and further submitted that, the judgment and decree of the trial court does not call for interference.

28. Learned Counsel for the defendants-1 to 4 submitted that, Ex.P2 is not an agreement of sale and further submitted that, at the best it is only the certificate of possession. He further submitted that, the agreement in favour of defendants-5 to 8 being prior in time and the alleged agreement being subsequent, the plaintiff does not get right to enforce the alleged agreement. He further submitted that, the suit for specific performance of an agreement of sale requires a clear pleading in terms of Section 16-C of the specific Relief Act and in this regard, he referred to Form No. 47 and 48 prescribed in the Schedule to CPC and submitted that, plaintiff is required to specifically plead that he is ready and willing to perform his part of agreement and in this regard, plaintiff is required to make a demand for transfer of the property and there has to be a pleading in consonance with Form No. 48. By referring to Form Nos. 47 and 48, he further submitted that, since the plaintiff has not pleaded that he had demanded for execution of the sale deed, it cannot be held that he was ready and willing to perform his part of contract. The Plaintiff is not entitled for the decree.

29. Learned Counsel relied on a decision reported in Abdul Khader Rowther v. Sara Bai, 1989(43) ELT797(SC) and submitted that, if there is no pleading as prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code, no equitable relief could be granted. In this regard, he relied on para-10 of the said judgment.

30. In reply, learned Counsel for the plaintiff submitted that, Ex.P17 is the earlier agreement dated 11.11.1989 and the said agreement is attested by none other than the husband of defendant No. 5. It cannot be said that the attesor is totally ignorant of the transaction. At regards to the demand of the plaintiff for execution of the sale deed, he referred to para-3 of the plaint and submitted that, plaintiff has categorically stated that he made several demands for the execution of the ale deed, however, defendants-1 to 4 did not execute the sale deed. Though defendants-1 to 4 in their written statement have denied the said allegation, but defendants-1 to 4 having not stepped into the witness box, and led the evidence to the contrary, defendants-1 to 4 cannot now raise a contention that the plaintiff was not ready and willing to perform his part of contract. However, he submitted that, such a question also does not arise under the facts and circumstances of this case particularly, when the defendants do not dispute Ex.P2 and under Ex.P2, the entire sale consideration has been paid and it is evidenced by cheque and the cheque has been encashed as per Ex.P20. If the entire sale consideration has been paid by the plaintiff, there remains nothing for the plaintiff to do in terms of the contract. Performance of the contract on the part of the plaintiff is concerned, it is completed on the date of agreement and it is the defendants to execute the sale dead. He further submitted that, the plaintiff having been put in possession in part performance of the agreement, the

contention of the defendants that the plaintiff was not ready and willing to perform his part of contract is of no significance. He submitted that, the sale agreement Ex.D3 produced by the defendants-5 to 8 having not been referred under Ex.D2, it cannot be treated as an agreement prior in time to the agreement of the plaintiff, once the entire sale consideration is paid and further, the plaintiff having been put in possession in part performance of the contract in terms of Exs.P2, P3 and P4, the question of readiness and willingness does not assume any importance. In this regard, he relied on a decision reported in AIR 2006 Kant 603 Head Note-D in the matter of Manaba Housing Co-Operative Society Limited v. Marikellaiah and Ors. and pointed out that, readiness and willingness could be inferred from the conduct of the parties. Learned Counsel submitted that, the plaintiffs having paid the total of the sale consideration itself is a proof of their readiness and willingness to perform their part of the contract and in the present case, he submitted that, plaintiff having paid the entire sale consideration, the question of his readiness and willingness is hardly of any consequence. With these submissions, he submitted that, the trial court in disregard to the evidence led by the plaintiff has dismissed the suit.

31. In the light of the rival contentions, the points that arise for consideration are:

- 1) Whether the trial court was justified in dismissing the suit after holding that the plaintiff having proved the agreement and having paid the full sale consideration?
- 2) Whether the defendants-5 to 8 prove that the suit of the plaintiff as against them is barred by time?
- 3) Whether defendants-5 to 8 prove that no relief is sought for against the cancellation of sale deed in their favour, as no amendment has been carried out in terms of Order VI Rule 17 of CPC?
- 4) Whether defendants-1 to 4 prove as to, whether the pleadings of the plaintiff are in consonance with Form Nos. 47 and 48 and that the plaintiff has failed to establish that, he was ready and willing to perform his part of contract?
- 5) What other reliefs?

32. Defendants-1 to 4 are the owners of the suit schedule property. Plaintiff claims that, he has entered into an agreement to purchase the suit schedule property measuring 95 feet East West and 63 feet North South approximately 54 guntas. Ex.P2 is produced as a suit document to claim that the plaintiff has entered into the agreement of sale. Defendants-1 to 4 have not disputed the execution of agreement Ex.P2. It is alleged that, it is a loan transaction. Ex.P2, though it is stated as "Swadheena Patra" (possession certificate), however, the nature of transaction in the said document reads as under:

33. Though the title mentions at Swadheena Patra, but the transaction as per Ex.P2 is concerned, it clearly states that, defendants-1 to 4 agreed to sell the

suit schedule property in favour of the plaintiff, not only they have agreed to sell the suit schedule property, but they also admit the receipt of Rs. 63,500/- towards full sale consideration. In the said document, it is stated that, defendants will execute the sale deed whenever the plaintiff calls upon the defendants-1 to 4 to execute the same. However, if the defendants fail to execute the same, the plaintiff has right to get the registered sale deed in his favour. As far as payment of sale consideration is concerned, defendants though denied, however, cheque numbers have been referred to in Ex.P2. In support of the said transaction, Ex.P20 is produced by the plaintiff, which is a Bank statement of defendant No. 1. In the said document, Rs. 50,000/- and Rs. 13,500/- have been credited in her account and this fact is not disputed by defendants-1 to 4. The earlier agreement dated 11.11.1989 produced at Ex.P17 same is attested by husband of defendant No. 5 same is also not in dispute. The agreement dated 11.11.1989 has been referred in Ex.P2. If Ex.P2 is held to be proved, the agreement dated 11.11.1989 cannot be disputed. The document Ex.P2 empathetically makes it clear that, they agreed to sell the suit schedule property for the consideration stipulated therein. In the said document it is admitted, by the defendants-1 to 4 that the entire sale consideration has been paid on the said date itself. Not only the defendants have executed Ex.P2, but they have acted upon the same, which is evident from Exs.P3 and P4. Ex.P3 is an affidavit sworn to by defendants-1 to 4 before the Notary, wherein they admit the receipt of Rs. 50,000/- as well as Rs. 13,500/- by cheque. They also admit that the plaintiff was put in possession and admit that he is entitled to enjoy the property as his own. This is coupled with General Power of Attorney executed by defendants-1 to 4 on the same day interalia, authorising the plaintiff to enjoy the suit property in any manner he likes. To show that the said agreement was acted upon, the name of the plaintiff was also mutated in the revenue records as per Exs.P8 to P11. In Ex.P8, name of the plaintiff is shown in the cultivator's column in respect of 5 guntas of land. Similarly, from 1989-90 onwards. Plaintiff has produced the tax paid receipts in respect of said land as per Exs.P12, P13, P14, and P15 and it is also supported by a confirmation letter issued by the Tahsildar, Bangalore North Taluk as per Ex.P16. Thus, these documents establish that, defendants have executed agreement of sale as per Ex.P2. It also establishes that, the defendants-1 to 4 have received the full sale consideration amount under Ex.P2. It is also established that the plaintiff was put in possession of the suit schedule property and plaintiff has enjoyed the suit property in part performance of the agreement of sale.

34. As far as defendants-1 to 4 are concerned, except filing the written statement, have not chosen to enter the witness box to deny the case of the plaintiff. This circumstance also supports the case of the plaintiff.

35. The cast of the defendants-5 to 8 is concerned, they claim that, as far as Ex.D3, defendants-5 to 8 entered into an agreement of sale with the defendants-1 to 4 on 5.4.1988 and submitted that their agreement is prior in time. It could be noticed that, under Ex.D3, the sale consideration is fixed at Rs.

50,000/-and it is also the case of the defendants-5 to 8 that, in furtherance of Ex.D3, Ex.D2 a registered sale deed was executed on 28.5.1992. If the case of the defendants-5 to 8 is that, there was an agreement on 5.4.1988 and in pursuance of the said agreement, the sale has taken place, necessarily the said agreement would have been reflected in Ex.D2. Very interestingly, the sale consideration under the agreement in 1988 is shown as Rs. 50,000/- whereas, the sale deed, which came to be executed after nearly 4 years in 1992, the sale consideration is shown as Rs. 38,000/-Under the Ex.D3, defendants-1 to 4 have received Rs. 20,000/- by way of advance and balance to be paid was only Rs. 30,000/-Ex.D2 neither shows the deduction of the advance amount paid earlier nor it shows that the sale consideration is in respect of only balance of the amount. Though this agreement is alleged to have been executed earlier to the date of the same, but there is no corresponding evidence to show that, it is in pursuance of the said agreement, the sale deed was executed. The sale deed is totally silent on the aspect of earlier agreement. In my view, the agreement set up by defendants-5 to 8 on 5.4.1988 and same is not proved.

36. Learned Counsel for defendants-5 to 8 submitted that, they were not parties to the suit and they were subsequently impleaded. In this regard, he pointed out that the suit is filed on 21.7.1992. The plaintiff had filed an application for grant of temporary injunction. After defendants-5 to 8 were impleaded, they filed an application interalia, seeking vacating of the temporary injunction on 3.8.1992 and in the said application, they have categorically stated that, they have purchased the suit schedule property under a registered sale deed in terms of Ex.D2 and this fact is also not in dispute as PW-1 in his evidence dated 6.7.1999 has admitted that the defendants-5 to 8 have stated that, they have purchased the suit schedule property under a sale deed and he has also admitted that, he has mentioned the purchase of the property by defendants-5 to 8 in his application for grant of temporary injunction. Apart from this, even in the plaint, plaintiff has alleged, that, the defendant No. 5 tried to interfere with the possession of the suit schedule property on the pretext that he has purchased the same.

37. Article 59 of the Limitation Act stipulates for period of 3 years in the case of seeking setting aside of the instrument or a decree or for the rescission of a contract. In this case, the plaintiff sought for amendment of the plaint, for incorporating para-5A and also for prayer for setting aside the sale deed in favour of defendants-5 to 8, if the knowledge is attributed to the plaintiff on 3.8.1992, admittedly, the amendment application is filed on 24.2.1997 i.e., clearly after lapse of 3 years. It is also settled law that the limitation has to be considered on the date of which the amendment is carried out. In this case, even if it is taken as 24.2.1997, the date of amendment, by that date from the date of knowledge, 3 years period has lapsed. Thus, the plaintiff's suit as against defendants-5 to 8 is concerned, it is barred by time under Article 59 of the Limitation Act.

38. Though the plaintiff sought for amendment of the plaint for incorporating of para-5A as well as the prayer for setting aside the sale deed in favour of defendants-5 to 8, in this regard, the amendment application was allowed on 12.1.1998 and from that date, within 14 days, the plaintiff was required to carry out the amendment in the plaint. However, even today, as far as prayer for setting aside the sale deed is concerned, on perusal of the original plaint from the records, it is clear that the plaintiff has not carried out the amendment in the plaint and in view of the judgment of the Apex Court in 2005 (6) Supreme Today 389 (supra), the party who falls to carry out the amendment is not entitled for the benefit of amendment. On this ground also, the plaintiff is not entitled for grant of relief of setting aside the sale deed in favour of defendants-5 to 8. This view is also supported by the decision of the Madras High Court reported in Southern Ancillaries Private Limited Vs. Southern Alloy Foundaries Private Limited, : (supra). Insofar as limitation is concerned, apart from Article 59 of the Limitation Act, the Apex Court in a decision reported in Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another, has categorically held that limitation starts from the date of allowing of an amendment application and the date of knowledge is the date of starting point. In my view, the plaintiff is not entitled for relief as far as setting aside of the sale deed in favour of defendants-5 to 8 is concerned.

39. The trial court has held that the plaintiff has proved the agreement of sale. The trial court has also held that the plaintiff has paid the full sale consideration on the date of agreement itself. As stated above, this is also evident from Exs.P2, P3, P4 and P20. In a case where the entire sale consideration is paid, there remains nothing to be done from the plaintiff's side.

40. On the contention of the learned Counsel for defendants-1 to 4 that the suit is not in consonance with Form No. 47 and 48 and the plaintiff has not pleaded his readiness and willingness to perform his part of contract, it is necessary to notice two circumstances, one is that the payment of entire sale consideration, second is that the contract is partly performed by putting the plaintiff in possession. If the contract is partly performed and the sale consideration has been fully paid, there remains nothing for the plaintiff to do anything in furtherance of the contract. Ex.P2 also stipulated that defendants-1 to 4 have received the entire sale consideration and they were required to execute the sale deed. In my view, if the entire sale consideration has been paid by the plaintiff, the question of their performance of the contract does not arise. As far as demand for execution of the sale deed in terms of Form No. 48 of the Schedule to the CPC is concerned, it may not be necessary to demand by issuing notice. Plaintiff has shown his readiness and willingness and has filed the suit in time. Plaintiff has also stated in his pleading that, he had made demands to the defendants and the same is not denied by defendants-1 to 4 by entering into witness box. Except filing the written statement, the defendants-1 to 4 have not led evidence. Non-denial of the cast of the plaintiff by defendant Nos. 1 to 4, it has to be taken that the plaintiff not only has proved the agreement of sale and

he has paid the entire sale consideration as found by the trial court, and is always ready and willing to accept the registered sale deed.

41. The suit schedule entire property bearing Sy.No. 10/6 measuring 23 guntas and out of 23 guntas, 12 guntas is sold to defendants-5 to 8 and that fact is not in dispute. Despite the sale in favour of defendants-5 to 8, the extent of 11 guntas of land still contains with defendants-1 to 4. Defendants-1 to 4 having admitted the agreement of sale, having admitted the receipt of entire sale consideration and having also found that the plaintiff is in possession and enjoyment of the suit schedule property in pursuance of the agreement of sale in terms of Exs.P3, P4 and P8 to P11, the defendants are liable to execute the sale deed in favour of the plaintiff.

42. The question is whether the suit schedule property and the property sold to the defendants-5 to 8 are one and the same or different? Though there is some over-lapping in the schedule land, however, it is not disputed by the parties that, out of entire 23 guntas, the defendants-5 to 8 have purchased only to the extent of 12 guntas and even today, the defendants-1 to 4 have not denied the availability of remaining extent of the land. If that is so, the plaintiff, who has proved the agreement and who has paid the entire sale consideration way back in the year 1989 itself and having been in possession, he is entitled for the specific performance of the agreement in respect of the area mentioned therein. However, if there is over-lapping of the land, the defendants, who entered into an agreement and did not perform his part of contract by executing the sale deed and who had an advantage of receipt of amount and thereafter, having executed the sale deed in favour of defendants-5 to 8, the conduct of the defendants-1 to 4 shows that deliberately they avoided to enter the witness box and have deliberately entered the sale transaction with the defendants-5 to 8. In such circumstances, the conduct of defendants-1 to 4 is required to be considered. Defendants-1 to 4 having entered into an agreement with the plaintiff, there was no reason for them to enter into the sale transaction with defendants-5 to 8. Though defendants-5 to 8 succeeded in showing that the relief sought for by the plaintiff against them is barred by time, nevertheless, a person, who promises, is bound to perform. I find that the conduct of the defendants-1 to 4 after having entered into an agreement of sale and having received the entire sale consideration from the plaintiff and then executing sale deed in favour of defendant-5 to 8 amounts to fraud on the plaintiff. In my opinion, defendant-1 to 4 are liable to execute the sale deed in respect of an area measuring 63 feet x 95 feet. If the area is over-lapping, the defendants are directed to execute the sale deed to the extent of area from the remaining land, as the boundaries are also not tallying, and the land is vacant land.

43. Since I have already held that the plaintiff is not successful in getting the sale deed set aside executed in favour of defendants-5 to 8, if there is any over-lapping of the land, defendants-1 to 4 are directed to execute the sale deed in favour of plaintiff from the area remaining without disturbing the area of

defendants-5 to 8. Since the sale deed in favour of defendants-5 to 8 is upheld, the plaintiff is entitled for the sale deed to the extent mentioned above from the land other than the land already sold to defendants-5 to 8. Since defendants-5 to 8, sale deed is upheld, they are deemed to be in possession.

Accordingly, the appeal is allowed. The judgment and decree dated 23.8.2003 passed in O.S.No. 4624/1992 is set aside.