

(2019) 02 KAR CK 0023

In the Karnataka High Court

Case No : Regular First Appeal No. 1056, 1028 Of 2012

Venkatamma

APPELLANT

Vs

B.S. Suryaprakash

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Code of Civil Procedure, 1908 — Section 151, Order 2 Rule 2, Order 41 Rule 22, Order 13 Rule 4, Order 13 Rule 4(1),
Karnataka Stamp Act, 1957 — Section 35, 58, 58(1)
Evidence Act, 1872 — Section 73, 85
Specific Relief Act, 1963 — Section 20

Citation : (2019) 02 KAR CK 0023

Hon'ble Judges : Sreenivas Harish Kumar, J

Bench : Single Bench

Advocate : H.S. Dwarakanath, G. Vikram, G.Papi Reddyn.J .Ramesh, K.H. Jagadish, M.N. Munireddy, A. Lokanath

Judgement

1. The judgment and decree dated 8.6.2012 in O.S.No.10936/1997 on the file of XI Addl. City Civil Judge, Bengaluru has given rise to these two appeals. Plaintiff is the appellant in RFA.No.1028/2012 and the defendants 1 to 4, 6 and 7 and the legal representatives of defendant no.5 are the appellants in RFA.No.1056/2012. The parties are referred to with respect to rank of each of them in the suit for the purpose of narration of pleadings briefly and discussion on points arising for consideration.

2. The suit is for specific performance, declaration and permanent injunction. The plaintiff founded the reliefs on an agreement of sale date 15.02.1996 executed by one P.Muniyappa, the husband of the first defendant and father of defendants 2 to 7. The subject matter of the suit is a vacant site with a small shed bearing BDA.No.28, 2nd Stage, 1st Phase, B.T.M. Layout, Bengaluru, measuring East to West 15.24 meters and North to South 23.48 meters (referred to as suit property hereafter). The plaintiff pleaded that the Bangalore Development Authority ('BDA' for short) i.e., the 9th defendant allotted the suit property to P.Muniyappa,

who was a former member of Legislative Assembly. The allotment letter was issued on 26.6.1984; P.Muniyappa was to pay Rs.41,614/- to the BDA in connection with that allotment. As he was not in a position to mobilize funds for making payment to the BDA, he executed an irrevocable power of attorney in favour of 8th defendant on 19.07.1984 and authorized him to do all the acts that were necessary to deal with the suit property. On the strength of this power of attorney, the 8th defendant made initial payment of Rs.5,000/- to the BDA, and also paid the balance of site value to the BDA on a subsequent date. The BDA thereafter executed a lease cum sale agreement on 1.1.1985 in respect of suit property and issued the possession certificate to the 8th defendant who represented P.Muniyappa. It is stated that on 8.4.1985, P. Muniyappa swore to an affidavit and that on the same day, the second and the third defendants along with P.Muniyappa also executed a declaration deed in favour of 8th defendant reaffirming the absolute authority given to him to deal with suit property. As the things stood thus, P.Muniyappa and the 8th defendant had to face some financial constraints; they decided to sell the suit property and therefore, on 15.2.1996, the 8th defendant, with the consent of P.Muniyappa, entered into an agreement of sale with the plaintiff for total sale consideration of Rs.10,50,000/-. Having received Rs.10,00,000/- from the plaintiff and in part performance of the agreement, the 8th defendant put him in possession of the suit property besides handing over to him all the documents of the suit property and giving an undertaking that he would execute the sale deed as and when the plaintiff would make a demand. The plaintiff, having taken over possession of the suit property constructed a small shed there.

3. P.Muniyappa died on 30.4.1996. The plaintiff subsequently came to know that the BDA executed an absolute sale deed in respect of suit property in favour of the 8th defendant and that it was also cancelled at the instance of defendants 1 to 7. He also came to know that the BDA thereafter executed another sale deed in respect of suit property on 6.5.1997 in favour of 1st defendant. From these developments the plaintiff learnt that the defendants would not execute a sale deed in his favour and therefore, he got issued a legal notice to the defendants 1 to 8 on 28.2.1997 demanding of them execution of sale deed. It is stated that in the month of July 1997, the plaintiff met 8th defendant to request him to execute the sale deed and at that time, the 8th defendant demanded of the plaintiff payment of additional sum of Rs.1,00,000/- in relation to the penalty amount of Rs.50,000/- paid by him to the BDA and other expenses incurred by him in obtaining the sale deed; and also Rs.2,50,000/- to defendants 1 to 7 as they had paid penalty of Rs.1,64,607/- to the BDA and spent some money for obtaining sale deed from BDA to the name of 1st defendant.

4. The plaintiff stated that the BDA could not collect penalty two times and its demand was illegal. The plaintiff was ever ready to perform his part of the contract and as he came to know that the defendants 1 to 8 were attempting to alienate the suit property, and that they attempted to demolish the shed constructed by him, he filed a suit O.S.No.5726/1997, for permanent injunction.

Thereafter he filed another suit, the decree of which is impugned here in these appeals, for specific performance, a declaration that the action of 9th defendant in collecting the penalty amount twice as illegal and permanent injunction to restrain the defendants from interfering with his possession of suit property.

5. In the written statement filed by defendants 1, 2, 4 and 5, they contended that subsequent suit for specific performance was not maintainable in view of a suit for permanent injunction filed formerly in respect of same subject matter. They denied that P.Muniyappa ever appointed 8th defendant as his power of attorney and that the defendants 1, 2 and 3 jointly executed a declaration in favour of 8th defendant on 8.4.1995. They also denied the execution of an agreement of sale dated 15.2.1996 by the 8th defendant in favour of the plaintiff. They stated that the agreement was a created document. They claimed to have become absolute owners of the suit property after the demise of P.Muniyappa and possessed it. They also stated very specifically that when they came to know that the 8th defendant had obtained the sale deed illegally from the BDA, they approached the BDA for cancellation of that sale deed and execution of another sale deed in favour of 1st defendant. Accordingly, the BDA, after verifying the records cancelled the sale deed executed in favour of 8th defendant and then executed a sale deed in favour of 1st defendant by collecting an amount of Rs.1,64,607/- from them towards penalty. They asserted that they actually constructed a small watchman's shed in the suit property and denied the allegations of interference with the plaintiff's possession. Denying other plaintiff averments, they sought for dismissal of the suit.

6. Defendants 3, 6 and 7, though filed separate written statement, stuck to the defence setup by defendants 1, 2, 4 and 5. The 8th defendant in his written statement supported the plaintiff. The BDA, being the 9th defendant contended that the plaintiff being not an allottee of a site had no locus standi to question the imposition of penalty and therefore the declaratory relief that the plaintiff claimed could not be granted.

7. The trial court raised ten issues and two additional issues, recorded the evidence of five witnesses from plaintiff's side and four witnesses from defendant's side and received documentary evidence Ex.P.1 to P.43 and Ex.D.1 to D.50. Upon appreciation of evidence, the trial court decreed the suit partly, granted decree of permanent injunction restraining the defendants 1 to 7 from dispossessing the plaintiff from the suit property without due process of law and dismissed the suit relating to specific performance. Hence these two appeals; the plaintiff has questioned the dismissal of suit for specific performance and the defendants 1 to 4, 6 and 7 and legal representatives of 5th defendant have questioned the grant of decree of permanent injunction against them.

8. I have heard the arguments of the learned counsel Sri. N.J.Ramesh, Sri. H.S.Dwarakanath, Sri. G.Papi Reddy. I find it proper to refer to the points urged during arguments contextually, however their arguments give rise to following points for discussion.

- i. Whether the agreement of sale, Ex.P.8, is worth rejection and cannot be acted upon as it is insufficiently stamped?
- ii. Has the trial court erred in upholding execution of Ex.P.8 by defendant no.8 in favour of plaintiff being the power of attorney holder of P.Muniyappa?
- iii. Has the trial court correctly held that the suit for specific performance is hit by Order II Rule 2 CPC in view of earlier suit for injunction filed by the plaintiff?
- iv. Whether the finding of the trial court that plaintiff was in possession of the schedule property on the date of suit is correct?
- v. Whether interference with impugned judgment and decree is required?

POINT No.(i):

9. The vehement argument of Sri. Dwarakanath and Sri. G. Papi Reddy is that Ex.P.8 is insufficiently stamped document. It shows delivery of possession to the plaintiff. The duty payable was on the market value of the suit property according to Article 5(e)(i) after it stood amended with effect from 01.04.1995. It is true that agreement was marked, as no objection was raised at the time of marking; but subsequently an application under Section 151 CPC was filed for reconsidering the marking of the agreement. The trial court rejected the application. A writ petition was filed, and it was also dismissed. The defendants 1 to 7 preferred SLP to the Supreme Court which clearly observed that it was open to the petitioners to raise the question of admissibility of the document at the time of hearing of the suit. Therefore Sri.Dwarakanath, argued that though Section 35 of Karnataka Stamp Act states that a document once marked in evidence without objection cannot be questioned again, in view of the observation by the Supreme Court, the trial court should have reconsidered and held that agreement was insufficiently stamped. He also argued that marking of a document is different from acting upon it and therefore although the document was marked, it should not have been acted upon. Relating to this point, Sri. Dwarakanath placed reliance on three decisions (1) R.V.E.VENKATACHALA

GOUNDER vs ARULMIGU VISWESARASWAMI AND V.P.TEMPLE AND OTHERS [(MANU/SC/0798/2033], (2) SYED YOUSUF ALI vs YOUSUF AND OTHERS [MANU/AP/0024/2016] and (3) ATHAPURAM RAGHURAMIAH AND ANOTHER vs DYAVA RAMAIAH [MANU/AP/0772/2012].

10. Sri. N.J.Ramesh countered this point by arguing that the trial court in fact again considered the question of admissibility of agreement of sale. In the judgment, the trial court has very specifically referred to this aspect and held that Section 35 of the Karnataka Stamp Act is a clear bar for reconsidering the document once it was marked without objection. On this point, he referred to some of the decided cases namely (1) SAKAMMA vs PAVADI GOWDA AND OTHERS (ILR 1998 KAR 3842), (2) SHYAMAL KUMAR ROY vs SUSHIL KUMAR AGARWAL [2006 SAR (Civil) Page 939] and BARIUM CHEMICALS LIMITED vs VISHWA BHARATI MINING CORPORATION AND ANOTHER [(2009) 16 SCC 262].

11. The findings of the trial court on this point show that it has referred to the direction given by the Hon'ble Supreme Court, but its opinion is that the agreement was marked without any objection by the defendants and in view of Section 35 of Karnataka Stamp Act, the defendants cannot contend that Ex.P.8 is inadmissible in evidence.

12. This finding of the trial court on Ex.P.8 cannot be said to be incorrect, as according to Section 35 of the Stamp Act, once an instrument is admitted in evidence, such admission shall not be called in question at any stage of the suit or proceeding on the ground that instrument is insufficiently stamped. But Section 58 of the Stamp Act is an exception which enables an appellate court to reconsider this aspect. Before considering Section 58, it is necessary to mention here that as rightly argued by Sri. H.S. Dwarakanath, mere receiving a document or instrument in evidence by giving an exhibit number, (the procedure that is followed while recording evidence) does not in any way permit the court to act upon an instrument which is insufficiently stamped. Section 35 of the Stamp Act only prohibits questioning the admission of a document at a subsequent stage in the same proceedings. The prohibition as envisaged in Section 34 of the Stamp Act for acting upon the instrument is not taken away by Section 35. 'Acting upon' means to rely upon or consider an instrument for granting a relief in a suit which is founded on that very instrument. To this extent the argument of Sri H.S.Dwarakanath is acceptable; therefore there is no need to refer to some of the decisions that he has cited. The trial court has merely proceeded on the ground that no objection was taken at the time of marking the agreement; it has not discussed whether it could have acted upon insufficiently stamped agreement. This finding cannot be upheld. However there is another aspect to be mentioned here.

13. Section 35 of the Stamp Act also refers to section 58 which empowers the appellate courts to deal with insufficiently stamped instruments. The appellate court may act upon on its own to impound the insufficiently stamped instrument. Sub-section (1) of Section 58 empowers the court to take action under three circumstances. They are - the court of first instance should have admitted an instrument in evidence i) as duly stamped or 2) holding that instrument does not require to be stamped or 3) upon payment of duty and penalty according to Section 34. A situation like admitting a document without objection despite such instrument being insufficiently stamped, is not found in sub-section (1), but section 58 (1) cannot be given such a narrow interpretation. The appellate court is not powerless to take action under section 58 (1) even on its motion, whenever it finds and comes across an instrument which is insufficiently stamped, but admitted in evidence without any objection. The attention of Sri N.J.Ramesh, learned counsel for appellant was drawn to this provision of law and he was required to submit his point of view on impounding of Ex.P8. He took time to make submission in this regard and then submitted that Ex.P8 could be impounded according to Section 58(1), but submitted that appellant was ready to make good the deficit duty and pay the penalty. At a later date, he reported

payment of deficit stamp duty and the penalty on Ex.P8, and for this reason the bar to act upon no longer exists and Ex.P.8 cannot be rejected now.

Point No. (ii):-

14. With regard to due execution of agreement of sale, Sri. Dwarakanath argued that according to the plaintiff P.Muniyappa appointed defendant no.8 as his power of attorney by executing Ex.P.1. The defendants 1 to 7 have seriously disputed the signature of P.Muniyappa on Ex.P.1. There is no proof that P.Muniyappa executed a power of attorney. Although execution of Ex.P.1 appears to have been made before a Presiding Officer of a Small Causes Court, there is no proof that P.Muniyappa appeared before the Presiding Officer of that Court. The advocate who might have identified the executant should have been examined. The signature of the executant should have been referred to an expert's opinion. The court should not venture to compare the disputed signature with admitted signature according to Section 73 of the Indian Evidence Act. The trial court has simply believed the execution of power of attorney by applying Section 85 of the Indian Evidence Act. Where there is no proof with regard to appointing 8th defendant as power of attorney of P.Muniyappa, it cannot be said that execution of the agreement of sale by the 8th defendant has stood established merely for the reason that the plaintiff examined the attestors to the agreement of sale. On the point that the court should not resort to Section 73 of the Indian Evidence Act, Sri. Dwarakanath has referred to some of the judgments of the Supreme Court in O.Bharatan vs K.Sudhakaran and Others [AIR 1996 SC 1140], Thiruvengada Pillai vs Navaneethammal and Others [AIR 2008 SC 1541] and this court in Baba Corporate vs V.Narayana Murthy [MANU/KA/0157/2015]. Sri. Dwarakanath further argued that the defendants 1 to 7 have not preferred separate appeal or cross-objections challenging the finding on some of the issues, yet according to Order 41 Rule 22 CPC, they can assail the findings against them on these issues.

15. Sri. N.J.Ramesh appearing for plaintiff/appellant argued that on the issues relating to execution of agreement and payment of sale consideration amount, the trial court has correctly appreciated the evidence. The plaintiff, apart from examining himself as PW-1 also examined the attestors to the agreement and an advocate, i.e., the scribe of Ex.P.3. Their evidence shows that P.Muniyappa executed a power of attorney in favour of 8th defendant. The execution of power of attorney cannot be disbelieved, it was executed before the Presiding Officer of Small Causes Court. It is not the case of defendants that no power of attorney was executed before the Presiding Officer of a Court; what they contend is that the advocate who identified P.Muniyappa should have been examined. This was not necessary. Whenever execution of a document takes place before Presiding Officer of a Court, presumption under Section 85 of the Evidence Act is available and rightly the trial court has drawn presumption. PW-2 is the advocate who drafted a declaration given by some of the defendants confirming the execution of power of attorney in favour of 8th defendant. His evidence is not assailed at

all. The evidence given by 8th defendant fully supports the plaintiff's case. In the trial court, it was not argued that signature on the power of attorney should have been referred to expert's opinion. For the first time, this issue is raised in the appeal. There are circumstances indicating the valid execution of power of attorney. Moreover the defendants have simply denied the execution, it is not their case that signature of P.Muniyappa was forged in order that reference to expert's opinion might be necessary. He referred to Ex.P.5, P.6, P.30, P.31, P.44, Ex.D.45 etc.

16. As rightly argued by Sri.Dwarakanath, proof regarding Ex.P.8, the agreement of sale is dependent on proof of power of attorney, Ex.P.1. Therefore whether at all 8th defendant was appointed as power of attorney of P.Muniyappa requires examination. The learned trial court judge has held that Ex.P.1 was attested by the 1st defendant, Venkatamma, that she should have entered the witness box to refute her being an attestor and that since the execution was before a judge, presumption under Section 85 of the Indian Evidence Act can be raised. It is also held that defendants 1 to 7 have not taken steps to disprove the signatures found on Ex.P.1.

17. The above findings of the trial court cannot be said to be incorrect. The cross examination of PW.1 shows a simple suggestion denying execution of Ex.P.1. There is no suggestion that signature appearing on Ex.P.1 as that of P.Muniyappa is forged. It's execution was before a judge of a court. The said judge might not be having personal acquaintance with P.Muniyappa, but he would not have admitted the execution unless P.Muniyappa was identified by an Advocate. The said advocate was not examined as a witness. PW.2 is the scribe of Ex.P.2 and not Ex.P.1. Notwithstanding the non-examination of the advocate who identified the executant of Ex.P.1, its execution before a judge of a court cannot be lightly weighed. The trial court has rightly held that presumption under Section 85 of Evidence Act can be attached.

18. Indeed, as has been held in the judgments cited by Sri. Dwarakanath, the court cannot resort to comparing the disputed signature with admitted signature according to Section 73 of the Indian Evidence Act. But argument of Sri.Dwarakanath that the court cannot take the aid of Section 73 of the Indian Evidence Act is not acceptable at all. These judgments do not lay down a proposition that there is a total prohibition to make a comparison. If there are similarities between the disputed signature and the admitted signature and if they are apparently visible, the courts do have power to resort to Section 73 of Indian Evidence Act. If a contention is raised that signature is forged and it is not possible to find out differences in the signatures on just comparison, it is better to leave it to opinion of an expert. It is not the bare denial of a signature or hand writing that necessitates an expert's opinion, but it should be substantial; the party who seeks support from a disputed document should first be cross examined thoroughly that a signature or handwriting is forged or document is fabricated. Only thereafter, expert's opinion can be sought. In this case, position

is totally different. Not only Ex.P.1, but there are two more documents as per Ex.P.2 and Ex.P.3 that very clearly show 8th defendant being appointed as power of attorney of P.Muniyappa. Ex.P.2 is an affidavit executed by P.Muniyappa and Ex.P.3 is a declaration made by P.Muniyappa, his wife Venkatamma and two sons Rajendra Prasad and Sadashivaiah. These two documents do contain a reference to power of attorney. PW.2 is the scribe of Ex.P.2 and Ex.P.3. His evidence is so clear that he prepared these documents, took them to court of Small Causes and identified them before the judge who thereafter admitted the execution of those two documents. PW.2 has not been discredited in the cross examination. His evidence cannot be discarded at all. Moreover, in Ex.P.3, there is a reference to 8th defendant having made certain payments to the BDA on behalf of P.Muniyappa. Corresponding references to the said payments are found in Ex.P.14, P.15 and P.18. In Ex.P.21, a notice issued by the BDA on 20.1.1997, it is shown that Kalappa is the power of attorney of P.Muniyappa. Above all, when 8th defendant tendered evidence, he spoke about Ex.P.1, P.2 and P.3 and also produced some other documents, as per Ex.D.17, D.18, D.19 and D.20. If cross examination of DW.2 is seen, an inference can be drawn that he was not impeached, there is no cross examination on these documents at all. If Ex.P.1 is a created power of attorney, DW.2 should have been questioned in that context. Except a suggestion nothing is forth coming. Therefore his evidence cannot be discarded. The cumulative effect of evidence of PW.1, PW.2 and DW.2 is that execution of Ex.P.1, P.2 and P.3 would get proved.

18. Another point argued is that defendant no.8 did not obtain consent of P.Muniyappa before executing the power of attorney Ex.P.8. In this regard Sri.Dwarakanath has referred to two judgments of the Supreme Court in Syed Abdul Khader vs Rami Reddy and Others (AIR 1979 SC 553) and Timblo Irmaos Limited, Margo vs Jorge Anibai Matos Sequeira and Others (AIR 1977 SC 734) and a judgment of this court in R.Sandhyarani vs M.Mylarappa [2008(1) Kar. LJ. 524]. Sri. G.Papi Reddy also argued emphatically that 8th defendant had no authority to enter into agreement with the plaintiff. It is needless to say that an agent cannot exceed the powers granted to him by his principal; this is the first principle governing principal-agent relationship. But the argument of Sri.Dwarakanath that P.Muniyappa had not consented for entering into an agreement with the plaintiff as per Ex.P.8, is not appealing. It is true that in Ex.P.1, it is recited that the 8th defendant should obtain the consent of P.Muniyappa before conveying the suit property. To prove that there was consent, the plaintiff has produced two documents Ex.P.9 and Ex.P.44. As regards Ex.P.9, Sri. Dwarakanath argued that it is just a receipt; it does not indicate express consent given by P.Muniyappa. And with regard to Ex.P.44, he argued that it cannot be considered at all, for it was produced at a very belated stage, i.e., when the trial court posted the case for final arguments. It is a created document. There is no explanation as to why it was not produced at the earliest point of time. If P.Muniyappa had given consent, his signature could have been obtained on Ex.P.8, but his signature was not obtained. This shows that there

was no consent. For countering this argument, Sri. N.J. Ramesh, referred to Ex.P.9 which shows that P.Muniyappa received sale consideration amount from 8th defendant who had collected the same from the plaintiff. It is as good as consenting to the transaction. DW.2, has not been cross examined on Ex.P.9. Therefore the transaction as per Ex.P.8 is not bad. With regard to Ex.P.44, he argued that though it was produced after recording of defendants' witnesses was over, the court accepted the reasons for its belated production and allowed the plaintiff to produce that document. P.Muniyappa indicated his consent in his letter head.

19. The trial court has not discussed the evidentiary value of Ex.P.44. This letter clearly states that P.Muniyappa, on 13.2.1996, expressed his consent in writing for conveying the suit property to the plaintiff by the 8th defendant. If this document is ignored because of its late production into court, Ex.P.9 alone remains for consideration. The trial court has held that Ex.P.9 shows consent given by P.Muniyappa as he received Rs.10,00,000/- from the 8th defendant in connection with sale of suit property. PW.1 produced Ex.P.9; what is found in cross examination of PW.1 on Ex.P.9 is just a suggestion that Ex.P.9(a) is not the signature of P.Muniyappa and the said document was created after his death. Nothing more is found. Very importantly DW.2, who also speaks about paying Rs.10,00,000/- and obtaining a receipt as per Ex.P.9 from P.Muniyappa, has not been cross examined at all on this document. Ex.P.9 was a transaction that took place between DW.2 and P.Muniyappa and therefore DW.2 should have been cross examined. A mere suggestion given to PW.1 assumes no significance. Even if Ex.P.44 is ignored, Ex.P.9 indicates consent by P.Muniyappa. With regard to argument that signature of P.Muniyappa should have been obtained on Ex.P.8, it has to be stated that since 8th defendant was P.Muniyappa's power of attorney, there was no need to obtain P.Muniyappa's signature. Therefore conclusion to be drawn is that 8th defendant did not exceed his powers being an agent.

20. Sri H.S.Dwarakanath assailed the admissibility of the agreement of sale Ex.P.8 on another ground. He referred to Order XIII Rule 4 of CPC and argued that every document admitted in evidence must be endorsed in the manner stated in Sub-rule (1) of Rule 4 of Order XIII CPC. Since Ex.P.8 does not contain such an endorsement, there is no admission of this document in the eye of law. I do not think that this argument holds good. Certainly, Order XIII Rule 4 CPC provides for a procedure to be followed while admitting a document. The agreement of sale is given an exhibit number as P8. If this document is perused, it becomes very clear that these requirements are met with. Instead of stating specifically that it was produced by the plaintiff, the word 'P' is used to denote that it was produced by the plaintiff. Generally the documents are given exhibit numbers in 'P' series and 'D' series. 'P' indicates the word 'plaintiff' and 'D' indicates the word 'defendant'. The Presiding Officer has put his initial below the exhibit number. It is not only this agreement of sale, every document received in evidence in the suit are given numbers like that. It is quite strange that objection is taken to the marking of the agreement of sale only and no objection is taken

with respect to marking other documents in the same manner. Order XIII Rule 4 CPC only prescribes a procedure of admitting documents in evidence, if there is any deviation in procedure, unless it seriously prejudices a party, it cannot be given any importance at all. The argument of Sri H.S.Dwarakanath cannot be upheld.

21. Now Ex.P.8, the agreement of sale is considered. The above discussion shows that P.Muniyappa appointed 8th defendant as his power of attorney and that the execution of the agreement was with the consent of P.Muniyappa. In addition, the plaintiff also examined the attestors, who adduced evidence as PW.3 and PW.5. Their testimonies very much establish the fact that 8th defendant executed the agreement. PW-4 is the advocate who scribed Ex.P.8. PW.3, PW.4 and PW.5 corroborate the testimony of each other. They have not been discredited in the cross examination.

More than all, 8th defendant i.e., DW.2 has also spoken about execution of agreement and in this regard his evidence has remained unassailed. There is one document, i.e., Ex.P.23 which shows that P.Muniyappa was financially distressed and this could be the reason for P.Muniyappa appointing 8th defendant as his power of attorney to transact with BDA. In fact 8th defendant has produced some documents which show that he has paid Rs.70,000/-to P.Muniyappa having entered into an agreement of sale with him. These documents were not at all referred to by Sri. Dwarakanath or Sri. N.J.Ramesh while arguing. These documents show that the transaction of agreement of sale as per Ex.P.8 was not a created and a collusive document. Therefore the finding of the trial court with regard to due execution of the agreement of sale has to be upheld.

Point no. (iii) 22. Sri. H.S. Dwarakanath and G.Papi Reddy very much argued that the suit for specific performance is hit by Order II Rule 2 of the Code. There is no dispute that the plaintiff filed a suit O.S.5726/1997 for permanent injunction to restrain the defendants from alienating the suit property. The reason for instituting the said suit was alleged attempt by the defendants to sell the suit property. In the plaint, the plaintiff stated very specifically that he had reserved his right to file suit for specific performance.

23. Sri Dwarakanath and G.Papi Reddy argued that on the date of institution of injunction suit, cause of action to seek the relief of specific performance was very much available. By then he had issued a legal notice demanding of the defendants execution of the sale deed. The plaintiff omitted to sue the defendants for specific performance. No leave of the court was obtained. Mere a statement in the plaint reserving the right to file another suit for specific performance was not sufficient. Therefore, subsequent suit for specific performance was not maintainable in view of bar contained under Order II Rule 2 of the Code. Sri Dwarakanath referred to judgment of Supreme Court in N.V.Srinivasa Murthy and Others vs Mariyamma (Dead) by proposed LRs and Others [AIR 2005 SC 2897] and Sri G.Papi Reddy placed reliance on another judgment of the Supreme Court in Virgo Industries (Eng.) Private Limited vs

Venturetech Solutions Private Limited [(2013) 1 SCC 625].

24. Sri N.J.Ramesh met the above argument by arguing that the very fact that the plaintiff pleaded in his first suit about reserving his right to sue the defendants for specific performance would indicate his bona fides; it was not intentional. The plaintiff had to file an injunction suit to protect the suit property; if he had not filed that suit, the defendants 1 to 7 would have sold the suit property. He also argued that the plaintiff was under confusion at that time as to against whom he should proceed. The BDA cancelled the sale deed in favour of 8th defendant and executed another sale deed in favour of first defendant and thereafter defendants 1 to 7 tried to sell the suit property. These events made the plaintiff to file a suit for injunction first. He also instituted the suit for specific performance very soon. He further argued that in view of the judgment of the Supreme Court in the case of Rathnavathi and Another vs Kavita Ganashamdas [2015 SAR (Civil) 130], institution of suit for injunction does not bar the subsequent suit for specific performance. He also referred to some judgments in the cases of Haridas Das vs Smt. Usha Rani Banik and Others [2006 SAR (Civil) 337], Bhimangouda vs Sangappa Irappa Patil and Others and [AIR 1960 (Mys) 178, Sucha Singh Sodhi (D) Thr. Lrs. vs Baldev Raj Walia and Another [2018 SAR (Civil) 711].

25. The finding of the trial court is that Order II Rule 2 of the Code very much applies to suit for specific performance. It has assigned the reasons that at the time when suit for injunction was filed, cause of action for instituting a suit for specific performance was very much available. The Supreme Court in the case of Haridas has not ruled that mere averment in the plaint regarding reservation of right to file another suit without obtaining leave of the court suffices the requirement of Order 2 Rule 2 of CPC. The plaintiff has not placed any material to show that he was permitted by the court in O.S.No.5726/1997 to file fresh suit for the relief of specific performance. The cause of action for both the suit being same, the second suit for specific performance is not maintainable.

26. It is difficult to concur with the findings of the trial court that the suit is hit by Order II Rule 2 of the Code. Before expressing my opinion, I find it necessary to refer to the judgments that are cited by the counsel for the parties. In the case of N.V.Srinivasa Murthy (supra) the plaintiff in the first instance filed a suit for permanent injunction and later on filed another suit for declaration and injunction. The Supreme Court held that when the first suit was filed, the plaintiff could have sought the relief of declaration on the basis of the sale deed of the year 1953 and therefore the second suit was barred by Order II Rule 2 of the Code. The clear observation of the Supreme Court is as below :-

"13. In paragraph 11 of the plaint, the plaintiffs have stated that they had earlier instituted original suit No.557 of 1990 seeking permanent injunction against defendants and the said suit was pending when the present suit was filed. Whatever relief the petitioners desired to claim from the civil court on the basis of averment with regard to the registered sale deed of 1953 could and ought to

have been claimed in original civil suit No.557 of 1990 which was pending at that time. The second suit claiming indirectly relief of declaration and injunction is apparently barred by Order 2, Rule 2 of the Code of Civil Procedure".

27. In the case of Virgo Industries (Engineering) Private Limited (supra), the Supreme Court has laid down a principle with regard to requirements for application of provisions contained in Order II Rule 2 CPC :-

"11. The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit. It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society v. Ponnamman Educational Trust [(2012) 8 SCC 706]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted herein below:

"Cause of Action" has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular action on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

28. In the case of Haridas Das (supra), the facts were that the time for execution of the sale deed was nearing. The appellant came to know that the original owner of the property namely Kalipadadas, with a view to defeating the appellant's right was trying to sell part of the property to one Chunnilal Dev and mortgaged another part of the suit property to the Housing Board. The appellant paid the balance amount of Rs.1,000/- to Kalipadadas and asked him to execute the sale deed. Since the appellant was threatened to be dispossessed, he filed a title suit to protect his possession. He also sought relief of permanent injunction against the original owner to restrain him from dispossessing him and selling the suit property to any third party. In the plaint filed in the said suit, he reserved his right to file another suit for getting the sale deed executed. Later on he filed another suit for specific performance and in this second suit, Order II Rule 2 of the Code was invoked. In the background of these facts and circumstances, the Supreme Court came to the conclusion that Order II Rule 2 of the Code had no application. The clear observations of the Supreme Court are as follows : -

"17. When the aforesaid principles are applied to the background facts of the present case, the position is clear that the High Court had clearly fallen in error

in accepting the prayer for review. First, the crucial question which according to the High Court was necessary to be adjudicated was the question whether the Title Suit No. 201 of 1985 was barred by the provisions of Order II Rule 2 CPC. This question arose in Title Suit No.1 of 1986 and was irrelevant so far as Title Suit No.2 of 1987 is concerned. Additionally, the High Court erred in holding that no prayer for leave under Order II Rule 2 CPC was made in the plaint in Title Suit No.201 of 1985. The claim of oral agreement dated 19.8.1982 is mentioned in para 7 of the plaint, and at the end of the plaint it has been noted that right to institute suit for specific performance was reserved. That being so the High Court has erroneously held about infraction of Order II Rule 2 CPC. This was not a case where Order II of Rule 2 CPC has any application".

29. Again in the case of Ratnavathi (supra), the Supreme Court had an occasion to deal with applicability of Order II Rule 2 of the Code. Here also the plaintiff in the first instance filed a suit for injunction to protect his possession and then filed another suit for specific performance. When the plaintiff filed the first suit he did not obtain leave of the Court for instituting another suit for specific performance. While discussing whether Order II Rule 2 of the Code is a bar for specific performance suit, the Hon'ble Supreme Court has observed as below :-

"29. In the instant case when we apply the aforementioned principle, we find that bar contained in Order II Rule 2 is not attracted because of the distinction in the cause of action for filing the two suits. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.

31. In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short "the Act") read with Order 39 Rule 1 & 2 of CPC. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of The Act.

32. One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based.

36. The submission has a fallacy for two basic reasons. Firstly, as held above, cause of action in two suits being different, a suit for specific performance could

not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit.

30. In the case of Sucha Singh Sodhi (supra), following the judgment in Rathnavathi and another, the Hon'ble Supreme Court has held :-

"36. This Court in Rathnavathi & Another vs. Kavita Ganashamdas (2015 (5) SCC 223) had the occasion to examine this very question on somewhat similar facts in detail. This Court after taking into account the earlier decisions of this Court which dealt with this question held in Paras 22 to 31 that bar contained in Order 2 Rule 2 of the Code on such facts is not attracted against the plaintiff so as to disentitle him from filing the subsequent suit to claim specific performance of agreement against the defendants in relation to the suit property.

37. We apply the law laid down in the case of Rathnavathi (supra) and hold that the suit filed by the original plaintiff for specific performance of agreement against the respondents (defendants) is not barred by Order 2 Rule 2 of the Code and is held maintainable for being tried on merits".

31. The principles deducible from the above decisions are that for applicability of Order II Rule 2 of the Code, the second suit must be founded on a cause of action which was available to the plaintiff when he instituted the first suit; and in the first suit, without stating any reason the plaintiff should have omitted to claim a relief which he could have claimed at that time. A separate application under Order II Rule 2 of the Code may be filed; if the court grants the application, it amounts to expressly permitting the plaintiff to file another suit to claim a relief that he has omitted at that time. At times, it so happens, as can be seen in the case on hand, that the plaintiff simply avers in the plaint about reserving his right to file another suit for the relief that he has omitted; and in such an event if the court proceeds to decide the suit, the inference that can be drawn is that leave is impliedly granted. The circumstances as a whole must be considered to arrive at a conclusion as to implicit leave. In fact in the case of Haridas (supra), the Hon'ble Supreme Court held that Order II Rule 2 of the Code was not applicable to suit for specific performance instituted later finding that in the plaint filed in the first suit, the plaintiff had stated that he had reserved his right to institute a suit for specific performance.

32. It is not quite uncommon that a transferee having obtained possession of an immovable property may resort to instituting a suit for injunction against the transferor in case of threat to his possession of the property. Such kind of a suit, as it relates to protecting the possession only, does not create a bar under Order II Rule 2 of the Code for the subsequent suit for specific performance. The

transferee under the agreement may some times bring a suit for permanent injunction to stop alienation of property by the transferor. This type of suit can definitely be considered as bar for subsequent suit for specific performance if on the day when injunction suit was filed, cause of action to institute suit for specific performance was available and if the plaintiff had not obtained leave of the court. Of course the court can examine about the implicit leave if the circumstances do warrant. But, a suit for injunction prohibiting alienation by the transferor cannot be always be considered as bar under Order II Rule 2 of the Code for the subsequent suit for specific performance if on the date of first suit, cause of action for seeking the relief of specific performance was not available.

33. In the case on hand the facts and circumstances are such that on the date of first suit for injunction, as can be made out from Ex D1, the plaint in O.S.No.5726/1997, the plaintiff had the notice of breach of contract by defendants 1 to 7 being the legal heirs of P.Muniyappa on whose behalf defendant No.8 had executed an agreement of sale, and he had issued a notice demanding execution of sale deed from them. Therefore cause of action to claim the relief of specific performance was available to plaintiff when he sued the defendants for the first time. He reserved his right to institute a suit for specific performance by stating so in the plaint. No express order was passed by the court granting leave to institute suit for specific performance. The important aspect to be noted here is that suit for injunction was filed on 29.07.1997 and suit for specific performance was filed on 08.09.1997. These dates do indicate that suit for specific performance was filed within a short span after institution of suit for injunction. The subsequent proceedings are important. The two suits were consolidated and on 22.12.2006, the trial court permitted the plaintiff to withdraw his first suit for injunction, and therefore only suit for specific performance was taken up for adjudication. In a circumstance like this, whether Order II Rule 2 of the Code can be employed is the question. To answer this, Order II Rule 1 needs to be referred to as it contains the real intent of framing of a suit for several reliefs based on a cause of action. The intention is to prevent further litigation. In the decisions cited by Sri H.Dwarakanth and Sri. G.Papi Reddy, the Hon'ble Supreme Court has in clear words stated that the object behind imposing a bar under Order II Rule 2 of the Code is to prevent double vexation of the defendant. If this principle is kept in mind and applied to the circumstances of this case, it is possible to hold unhesitatingly that Order II Rule 2 of the Code does not emerge into consideration at all. Firstly there was no long gap between the two suits; secondly they were consolidated for common trial and lastly the first suit was permitted to be withdrawn. This being the distinguishment, Order II Rule 2 of the Code has hardly any application. This is the reason why the Hon'ble Supreme Court has clearly spelt out in its judgment in the case of Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd., AIR 2003 SC 511 that "59. A decision, as is well-known, is an authority for which it is decided and not what can logically be deduced there from. It is also well-settled that a little difference in facts or additional facts may make a lot of difference in the

precedential value of a decision. [See Smt. Ram Rakhi v. Union of India & Ors. [AIR 2002 Delhi 458], Delhi Administration (NCT of Delhi) v. Manoharlal [AIR 2002 SC 3088], Haryana Financial Corporation and Anr. v. M/s Jagdamba Oil Mills & Anr. [JT 2002 (1) SC 482] and Dr. Nalini Mahajan etc. v. Director of Income Tax (Investigation) & Ors. [(2002) 257 ITR 123]."

34. Therefore the arguments of Sri. Dwarakanath and Sri. G.Papi Reddy on this point is not acceptable and I hold that Order II Rule 2 of the Code is not applicable.

Point No. (iv)

35. Sri. H.S.Dwarakanath and Sri. G.Papi Reddy, argued that the trial court should not have granted the decree of permanent injunction finding possession of suit property being with plaintiff. Their argument is that when the very execution of agreement is denied, the trial court should not have come to a conclusion based on a recital in the agreement with regard to delivery of possession to plaintiff. Sri. H.S.Dwarakanath has argued that in Ex.P11, a legal notice issued by the plaintiff, the defendants were asked to handover possession of the schedule property to plaintiff by executing the sale deed. Once delivery of possession was sought, it amounts to an admission within the meaning of Section 58 of the Indian Evidence Act. It is relevant to be considered to hold that there was no delivery of possession under the agreement. He has also argued that the court is bound to act on admission and in support of his argument he has placed reliance on three rulings of the Supreme Court (1) THIRU JOHN AND OTHERS vs RETURNING OFFICER AND OTHERS [AIR 1977 SC 1724],

(2) RAMJI DAYAWALA AND SONS (P) LIMITED vs INVEST IMPORT [AIR 1981 SC 2085] AND (3) AVADH KISHORE DAS vs RAM GOPAL AND OTHERS [AIR 1979 SC 861]. Sri. G.Papi Reddy also argued another point that the defendant no.8 Kalappa obtained a sale deed directly from the BDA to his name after the death of Muniyappa, and the BDA having noticed the fraud committed by him, cancelled that sale deed and then executed another sale deed in favour of 1st defendant Venkatamma, the wife of Muniyappa. These transactions are relevant to infer that possession was not delivered to plaintiff; a clear collusion between the plaintiff and the 8th defendant for defeating the rights of defendants 1 to 7 can be noticed and therefore the plaintiff's claim to having possession should be rejected.

36. The trial court has held that the agreement shows delivery of possession to plaintiff who later on constructed a shed by spending a sum of Rs.35,000/-. The original documents of the property were also delivered to plaintiff. The evidence of DW2 corroborates the testimony of PW1 as regards delivery of possession. Referring to sale deed executed by the BDA in favour of first defendant on 06.05.1997, it is held by the trial court that there is absolutely no material on record to show that the defendants 1 to 7 were put in possession of the property and therefore even after cancellation of sale deed in favour of defendant no.8,

plaintiff continued to be in possession of the suit property and his possession is lawful.

37. Scrutinizing the evidence, it is not possible to differ from the findings of the trial court. The discussion on point no.2 shows that there was due execution of agreement by defendant no.8 in favour of plaintiff. Defendant no.8 was put in possession of property by virtue of Ex.P1 & Ex.P2. Very particularly Ex.P3, a declaration executed by Muniyappa's wife and two sons also indicates possession being delivered to defendant no.8. The factual position being thus, it is not impossible to draw further inference that defendant no.8 put plaintiff in possession of property, in the capacity of GPA holder of Muniyappa. It is very important to mention here the dates - the agreement, Ex.P8 was executed by defendant on 15.02.1996 and P.Muniyappa died on 30.04.1996. The GPA as per Ex.P1 was very much in force. The plaintiff has also produced the original documents of the property viz the allotment letter, the possession certificate, the demand notice, the approved plan, etc., all issued by the BDA. These documents are all marked as exhibits, P4, P5, P6 and P7 and P16. Production of these documents by the plaintiff was not possible unless they were handed over to him by defendant no.8 consequent upon delivery of possession of the said property to him. DW2 i.e., defendant no.8, in his cross examination refutes the suggestion that possession of schedule property was held by P.Muniyappa till his death and then taken over by defendants 1 to 7, but rather asserts that the plaintiff held the possession on the date when BDA cancelled the sale deed executed in his favour. Therefore the evidence on record, as held by the trial court shows the plaintiff's possession only.

38. Now another point of argument of Sri. H.S.Dwarakanath is considered. There cannot be a second word that fact admitted by a party or his agent requires no further proof and such an admission can be considered as a substantive evidence. The Hon'ble Supreme Court in the case of THIRU JOHN & OTHERS (SUPRA) has held below :-

"15. It is well settled that, a party's admission as defined in Sections 17 to 20 fulfilling the requirements of Section 21, Evidence Act, is substantive evidence proprio vigore. An admission, if clearly and unequivocally made, is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so and until the presumption was rebutted the fact admitting must be taken to be established".

39. In the other two decisions, cited by Sri. H.S.Dwarakanath on this point, it has been held that admission furnishes the best evidence. Examined whether a sentence found in Ex.P11 amounts to an admission or not, it has to be stated that, though defendants had been called upon in the said notice to handover possession of schedule property to plaintiff by executing a sale deed, the same does not amount to admission. The reason being that whilst PW1 was being cross examined, his attention was not drawn to Ex.P11, particularly with reference to

the sentence purporting to be an admission. When PW1 in his examination in chief affidavit asserted to have taken possession, his attention should have been drawn to this sentence and questioned. Since Ex.P11 is a legal notice issued on behalf plaintiff, whatever that has been stated there amounts to previous statements and he should have been cross examined. Section 145 provides for contradicting a witness on his previous statement. Section 155 of the Indian Evidence Act also provides for proving former statements inconsistent with any other part of evidence of a witness. Therefore to apply the rule of admission, attention of the witness must be drawn to previous contradictory statement or the so called admission and afforded an opportunity of explaining it; without this procedure being followed, no inference based on such an admission can be drawn. Moreover the admission, must not only be clear and unambiguous, but also of such a nature as to compel or persuade the court in the given set of circumstance to believe and act upon it. A stray circumstance, can never be considered as admission; what is found in Ex.P11 is that kind of a sentence which can hardly be treated as an admission. Therefore the finding of the trial court about possession of schedule property being with plaintiff is not erroneous.

Point No. (v)

40. The trial court has not answered the issue relating readiness and willingness of the plaintiff to complete his part of performance for being entitled to decree of specific performance. Ample evidence is available to show that he was always ready and willing. He has pleaded about it. Out of total sale consideration of Rs.10,50,000/- he has already paid Rs.10,00,000/- and the balance amount is Rs. 50,000/-. Though he has stated in evidence that he made payment of this amount also towards penalty to be paid to BDA, he is ready to pay again Rs.50,000/-. It is not the case of defendants that the plaintiff was not ready to perform his part of contract. Issuance of legal notice to the defendants indicates his readiness and willingness.

41. The trial court denied the relief of specific performance applying the bar contained under Order II Rule 2 CPC, not for any other reason. Now that a finding is given that Order II Rule 2 CPC is not applicable, this case requires examination under Section 20 of the Specific Relief Act. The facts and circumstances discussed above show that plaintiff is entitled to a decree for specific performance. The defendants 1 to 7 being the legal heirs of P.Muniyappa and defendant 8 being the GPA holder of P.Muniyappa are bound to execute the sale deed. In fact defendant no.8 is ready. It is not the case of defendants 1 to 7 that the plaintiff is taking undue advantage of a situation. They have not pleaded about hardship also. Rather what is forth coming is their dishonesty. Their conduct in repudiating the contract despite having clear knowledge about it, demonstrates their dishonesty and a clear eye on the present market value of the property which has seen manifold increase over the years. Judicial notice can be taken in this regard in the background of location of schedule property. Hence a clear conclusion can be drawn that the judgment of the trial court can be set

aside to the extent of dismissing the suit for specific performance.

42. The trial court has decreed the suit for permanent injunction restraining defendants no.1 to 7 from dispossessing the plaintiff from the suit property without taking recourse to due process of law. Probably the trial court has granted this relief keeping in mind that according to it decree for specific performance could not be granted. Since I have now held that the plaintiff is entitled to decree for specific performance also, he is entitled to decree of permanent injunction as has been claimed by him in the suit. To this extent the judgment of the trial court also stands modified.

43. In the result the following order :-

(i) RFA 1028/2012 is allowed. RFA 1056/2012 is dismissed.

(ii) The judgment and decree dated 08.06.2012 is O.S.No.10936/1997 on the file of XI Additional City Civil Judge, Bengaluru, is modified. Dismissal of the suit for specific performance is set aside, decree of specific performance is granted.

(iii) The plaintiff is directed to deposit the balance of sale consideration of Rs.50,000/-before the trial court within two months from today and there upon the defendants are directed to execute the sale deed in respect of the suit property in favour of plaintiff, failing which the plaintiff can get the sale deed executed through court.

The judgment and decree of permanent injunction granted by the trial court is confirmed.

The plaintiff is entitled to costs of these two appeals.