

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No. 1474 OF 1996

JUDGMENT:

The unsuccessful plaintiff in O.S.No. 20 of 1984 on the file of the Court of I Additional Subordinate Judge, Kakinada (for short, 'the trial Court'), preferred this appeal challenging the dismissal of the suit by decree and judgment dated 16-11-1995.

2. The appellant was the plaintiff and the respondents were the defendants before the trial Court and, for convenience of reference, the ranks given to the parties in the suit before the trial Court will be adopted throughout this judgment.

3. The plaintiff filed the suit for specific performance of agreement of sale dated 14-03-1982, directing the defendants to execute registered sale deed conveying plaint schedule property in favour of the plaintiff at her expenses or alternatively for refund of Rs.5,525/- together with subsequent interest at 12% *p.a.* on the principal amount of Rs.5,000/- from the date of suit till the date of payment and for permanent injunction restraining the defendants from ever interfering with the plaintiff's possession and enjoyment of the plaint schedule property, alleging that defendant Nos. 1 and 2, the owners of schedule property, offered to sell schedule property. The plaintiff agreed to purchase the same for Rs.20,000/-, paid advance of sale consideration of Rs.5,000/- on 14-03-1982 and obtained an agreement of sale by the plaintiff. As per the terms of the agreement of sale, defendant Nos. 1 and 2 shall execute registered sale deed soon after receipt of balance of sale consideration. The plaintiff is always ready and willing to perform his part of obligation under the agreement of sale by paying balance of sale consideration and obtain registered sale deed at her expenses but defendant Nos. 1 and 2 postponed execution of sale deed receiving balance of sale

consideration on one pretext or the other.

Since defendant Nos. 3 and 4 purchased the property subsequent to the agreement of sale, notice dated 21-07-1983 was issued to defendant Nos. 1 to 3 calling upon them to execute registered sale deed while informing readiness and willingness to pay balance of sale consideration to obtain registered sale deed. Defendant Nos. 1 and 2 got issued a litigious reply with false and untenable allegations whereas the 3rd defendant issued reply contending that the 3rd defendant himself and his wife purchased plaint schedule property, they are *bona fide* purchasers without notice of agreement of sale in favour of the plaintiff and, therefore, the plaintiff is not entitled for any of the reliefs. Defendant Nos. 3 and 4 have to join in execution of registered sale deed in favour of the plaintiff in pursuance of the agreement of sale since they are the subsequent purchasers with notice.

While the matter stood thus, defendant Nos. 1 and 2 threatened the plaintiff to interfere with the possession and enjoyment of schedule property without any lawful right. Therefore, the plaintiff claimed permanent injunction restraining the defendants and their men from interfering in any way with the peaceful possession and enjoyment of the property.

4. The 3rd defendant filed written statement, which was duly adopted by the 4th defendant, wife of the 3rd defendant, specifically denying material allegations *inter alia* contending that he is not aware of the alleged agreement of sale executed by defendant Nos. 1 and 2 in favour of the plaintiff dated 14-03-1982 for sale consideration of Rs.20,000/- and payment of advance sale consideration of Rs.5,000/-.

The specific contention of the 3rd defendant is that he purchased 471 ½ square yards of site in S.No. 155/2-2 in Ramanayyapet Village from defendant Nos. 1 and 2 by registered sale deed dated 24-06-1983 and a

passage was also provided from the site up to puntha on its north. The 4th defendant purchased similar extent in the same survey number from defendant Nos. 1 and 2 under registered sale deed dated 24-06-1983. The two items purchased by defendant Nos. 3 and 4 are described in the schedule annexed to the written statement. Since the date of purchase, they are in possession and enjoyment of the property in their own right. Thus, defendant Nos. 3 and 4 are *bona fide* purchasers for value without notice of prior agreement of sale in favour of the plaintiff.

The plaintiff's husband Vidiyala Harnath arranged sale of schedule property annexed to the written statement. The plaintiff and her husband are aware that defendant Nos. 3 and 4 purchased schedule of property annexed to written statement from them for valuable consideration and they are in continuous possession and enjoyment from 24-06-1983. The defendants denied delivery of possession of the property in pursuance of the agreement of sale to the plaintiff and the alleged attempt made by them to interfere with the possession and enjoyment of schedule property annexed to the written statement. Therefore, defendant Nos. 3 and 4 are not under obligation to join in execution of registered sale deed conveying schedule property as they did not purchase schedule of property annexed to the plaint and, apart from that, they are *bona fide* purchasers for valuable consideration without notice. Thereby, there was no cause of action against defendant Nos. 3 and 4 and prayed for dismissal of the suit.

5. The 2nd defendant filed written statement, which was duly adopted by the 1st defendant, denying material allegations of the plaint while contending that they never executed agreement of sale dated 14-03-1982 in favour of the plaintiff agreeing to sell plaint schedule property for consideration of Rs.20,000/- on receipt of Rs.5,000/- as advance. They also denied the alleged interference with the possession and enjoyment of the property while

contending that possession of the property was never delivered to the plaintiff. It is further contended that the agreement of sale dated 14-03-1982 is not true, valid and binding on the defendants.

The specific case of the defendants is that an extent of 58 cents of dry land in S.No. 155/2-2 in Ramanayyapet Village is the ancestral property of the 1st defendant and his adoptive brother late Lovaraju. The 1st defendant and his adoptive brother partitioned the said property into two equal shares as per the partition list dated 12-04-1977. The northern half *i.e.* 29 cents abutting to puntha fell to the share of the 1st defendant while the southern half of 29 cents abutting to State Bank Colony Road was allotted to the share of his adoptive brother Lovaraju. Lovaraju offered to sell his share to a veterinary doctor. In that connection, Lovaraju requested defendant Nos. 1 and 2 to subscribe their signatures. At the time of sale of property to veterinary doctor, Vidiyala Harnath, husband of the plaintiff, instigated defendant Nos. 1 and 2 to dispute the adoption of Lovaraju so that the 1st defendant may get entire property exclusively for himself. Vidiyala Harnath further instigated the 2nd defendant to raise a thatched shed in the site that fell to the share of Lovaraju and to remove cashew nut trees existing therein. Thereupon, the said Lovaraju and his wife complained to Police, Sarpavaram, against the 2nd defendant. The Police, Sarpavaram, arrested the 2nd defendant in that connection. Thereupon, Vidiyala Harnath took up the cause of defendant Nos. 1 and 2 and got the 2nd defendant released from police station, representing that defendant Nos. 1 and 2 got good case to fight against the said Lovaraju disputing his very adoption, promising to take up litigation on behalf of defendant Nos. 1 and 2 and to look after the litigation on agreeing allotment of 500 square yards to him in the event of success in the litigation against Lovaraju. Vidiyala Harnath also took the partition list dated 12-04-1977 from defendant Nos. 1 and 2, obtained

thumb impression of the 1st defendant and signature of the 2nd defendant on stamp paper for sale of site of 500 square yards that may accrue to the 1st defendant in case the adoption of Lovaraju is held invalid by Court of law. Subject to this understanding, defendant Nos. 1 and 2 signed the agreement, without going through its contents, out of confidence reposed on him.

Vidiyala Harnath also promised to bear the litigation expenses against Lovaraju. Taking advantage of the stamp paper containing thumb impression of the 1st defendant and signature of the 2nd defendant, Vidiyala Harnath created the suit agreement speculatively but possession of the property was never delivered to the plaintiff. Therefore, the agreement is not enforceable under law and, consequently, the plaintiff is not entitled to the relief of specific performance.

The property covered by the alleged agreement of sale fell to the share of Lovaraju and he was in possession and enjoyment of the property till he sold the property to veterinary doctor in the year 1982. After sale, veterinary doctor is continuing in possession and enjoyment of the property.

As Lovaraju sold his property, Vidiyala Harnath demanded the 1st defendant to sell 500 square yards abutting to puntha on the northern side of 58 cents. Accordingly, defendant Nos. 1 and 2 agreed but the said Vidiyala Harnath postponed obtaining registered sale deed by paying balance of sale consideration. The agreement of sale for sale of 471 ½ square yards out of 29 cents is a fabricated document and not binding on defendant Nos. 1 and 2 and that defendant Nos. 3 and 4 purchased site on southern side abutting to the site of Lovaraju providing a pathway to reach puntha on its northern side. Thereby, the plaintiff is not entitled to claim any relief.

The 2nd defendant further contended that defendant Nos. 1 and 2 have no objection to refund Rs.5,000/- received towards advance of sale

consideration for sale of the property on northern side abutting to puntha.

Identification of the property is uncertain and not capable of being made certain. Consequently, the agreement is not enforceable due to uncertainty. Defendant Nos. 1 and 2 further contended that they are ready and willing to execute registered sale deed as per the understanding between them. Otherwise, they have no objection to refund Rs.5,000/- to the plaintiff. Ex.A1 was brought into existence in the circumstances stated above. However, the plaintiff is not entitled to claim specific performance of agreement of sale conveying plaintiff schedule property and prayed to dismiss the suit.

6. The 2nd defendant amended his written statement contending that he issued reply notice dated 01-08-1983 requesting the plaintiff to pay balance of sale consideration and obtain registered sale deed from defendant Nos. 1 and 2 within a period of 15 days from the date of receipt of the said reply with a threat to terminate the agreement of sale dated 14-03-1982 in the event of failure to comply with the demand. Having received the reply notice, the plaintiff failed to pay balance of sale consideration to obtain registered sale deed within the stipulated time. Thereby, the plaintiff is not entitled to claim the relief of specific performance as time is essence of the agreement of sale.

The schedule mentioned in the agreement is vague. On this ground alone, the suit is liable to be dismissed and prayed for dismissal of the suit finally.

7. The plaintiff filed re-joinder under Order VIII Rule 9 of the Code of Civil Procedure (for short, 'C.P.C.') contending that time is not essence of the contract under agreement of sale dated 14-03-1982 and that the defendants are not entitled to take inconsistent pleas. Finally, she prayed to decree the

suit.

8. Basing on the above pleadings, the trial Court framed the following issues and additional issue:

Issues:

1. *Whether the defendants 1 and 2 executed the suit agreement to sell in favour of the plaintiff without going through its contents and whether it is not true, valid and binding on the defendants 1 and 2?*
2. *Whether the suit property covered by the suit agreement to sell does not belong to the defendants 1 and 2?*
3. *Whether the defendants 3 and 4 purchased the suit property from the defendants 1 and 2 bona fide without notice of the prior agreement to sell dated 14-03-1982 in favour of the plaintiff?*
4. *Whether the plaintiff is entitled for the permanent injunction prayed for? And*
5. *To what relief?*

Additional Issue:

Whether the time is essence of the contract as alleged by the defendants?

(extracted).

9. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and got marked Exs.A1 to A4. On behalf of the defendants, D.Ws.1 and 2 were examined and got marked Exs.B1 to B4 and Ex.C1.

10. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court granted alternative relief of refund of Rs.5,000/- together with interest @ 12% *p.a.* while declining to grant primary relief of specific performance.

11. Dissatisfied with the grant of alternative relief of refund of advance of sale consideration while declining to grant primary relief of specific performance, the unsuccessful plaintiff preferred this appeal on various

grounds mainly contending that the trial Court did not consider each issue separately and did not record finding thereon. Therefore, the judgment of the trial Court is not in accordance with Order XX Rule 5 of C.P.C. and that, in view of admission of execution of Ex.A1, the trial Court would have granted decree in favour of the plaintiff but committed an error in negating the primary relief of specific performance without any justifiable cause. The trial Court did not consider the schedule mentioned in Ex.A1 so also the schedule annexed to the plaint but found that there is any amount of uncertainty in the schedule and declined to grant the relief of specific performance erroneously.

It is further contended that defendant Nos. 1 and 2 refused to execute registered sale deed in pursuance of Ex.A1 only on the ground that the schedule of property belongs to his adoptive brother Lovaraju as per the partition list but the same is factually incorrect and not established. Therefore, the finding of the trial Court is erroneous and declined to grant the primary relief of specific performance without any legal reasoning and prayed to allow the appeal setting aside the decree and judgment of the trial Court.

12. During the course of argument, Sri Vedula Srinivas, learned counsel for the appellant-plaintiff, would contend that when the property was identified with reference to existing boundaries and in the absence of any ambiguity in the agreement of sale with regard to identity of the property, the Court has to pass decree in favour of the plaintiff granting primary relief of specific performance. However, when there is such ambiguity, the Court can understand from the facts on hand drawing a presumption and placed reliance on ***Kassim Beevi Vs. Meeranchi Mytheen Beevi and others***^[1] and ***Debendranath Mohanty Vs. Annapurna Mohanty***^[2] in support of his contentions.

It is further contended that defendant Nos. 3 and 4 are not *bona fide*

purchasers for valuable consideration as they were aware about the existence of prior agreement of sale Ex.A1 in favour of the plaintiff. The initial onus of proof is on defendant Nos. 3 and 4 to establish that they are *bona fide* purchasers without notice of prior agreement of sale Ex.A1 in view of the principle laid down in ***Veeramalai Vanniar (died) and others Vs. Thadikara Vanniar and others***^[3] but they failed to prove that they are *bona fide* purchasers without notice of prior agreement of sale Ex.A1.

13. *Per contra*, Sri Vedula Venkata Ramana, learned senior counsel for the defendants, would contend that defendant Nos. 1 and 2 never agreed to sell plaint schedule property as it was allotted to Lovaraju, adoptive brother of the 1st defendant, in partition *vide* partition list. Therefore, defendant Nos. 1 and 2 have no title to schedule property and, thereby, the agreement of sale is not enforceable in view of Section 17 of the Specific Relief Act, 1963 (for brevity, 'the Act of 1963').

One of the major contentions of the defendants is that the plaintiff was not examined as witness and, therefore, an adverse inference has to be drawn against the plaintiff that what she pleaded in the plaint is not correct for her non-examination and when there is any amount of ambiguity with regard to identity of the property, the agreement cannot be enforced due to uncertainty in the terms of the agreement and placed reliance on ***Man Kaur (Dead) by L.Rs. Vs. Hartar Singh Sangha***^[4], ***Manjunath Anandappa Urf Shivappa Hansi Vs. Tammanasa and others***^[5] and ***Saradamani Kandappan Vs. S.Rajalakshmi and others***^[6] in support of their contentions.

14. Considering rival contentions, perusing oral and documentary evidence and the decree and judgment under challenge, the points that arise for consideration are as follows:

- (1) *Whether defendant Nos. 1 and 2 executed Ex.A1 agreement of sale in favour of the plaintiff agreeing to convey plaint schedule property in favour of the plaintiff for Rs.20,000/-?*
- (2) *Whether plaint schedule property is identifiable based on plaint schedule and schedule of property in Ex.A1 and whether there is any uncertainty in identification of the property, if so, is the agreement void due to uncertainty?*
- (3) *Whether defendant Nos. 1 and 2 are the owners of plaint schedule property, if so, are they liable to execute registered sale deed having title to plaint schedule property?*
- (4) *Whether non-examination of the plaintiff as witness before the Court is fatal to her case?*
- (5) *Whether the plaintiff is entitled for specific performance of agreement of sale executing registered sale deed conveying plaint schedule property?*
- (6) *Whether the plaintiff is in possession and enjoyment of plaint schedule property as on the date of filing suit and whether the defendants made any attempt to infringe or invade the legal right of the plaintiff, if so, is she entitled to claim permanent injunction restraining the defendants and their men from interfering with her possession and enjoyment over schedule property?*

15. **In Re. Point No. 1:**

The suit is filed for specific performance based on agreement of sale allegedly executed by defendant Nos. 1 and 2 in favour of the plaintiff marked as Ex.A1 but the defendants' contention was that it was obtained by misrepresentation by Vidiyala Harnath, husband of the plaintiff, who

instigated defendant Nos. 1 and 2 to dispute the adoption of Lovaraju so that they may get the entire property of 58 cents exclusively for themselves and, due to the advice of Vidiyala Harnath, the 2nd defendant raised a thatched shed in the site fell to the share of Lovaraju and removed the cashew nut trees therein. Thereupon, a complaint was given to Sarpavaram Police by the said Lovaraju against the 2nd defendant. Then, Vidiyala Harnath took up the cause of defendant Nos. 1 and 2 and got them released from police station while promising to look after the litigation on behalf of defendant Nos. 1 and 2 and to take 500 square yards of site in the event of succeeding in the litigation, took copy of Ex.B2 partition list dated 12-04-1977 and obtained thumb impression of the 1st defendant and signature of the 2nd defendant on stamp papers for sale of 500 square yards that may accrue to the 1st defendant in case adoption of Lovaraju was held invalid in Court of law. Therefore, the agreement of sale was obtained for sale of 500 square yards as consideration to look after the litigation. Thus, execution of agreement of sale is not much in controversy. Even in the evidence adduced on behalf of the defendants, they made several categorical admissions about execution of Ex.A1 but in the circumstances explained in the written statement of the 2nd defendant. The 2nd defendant was examined as D.W.1. In his examination in chief at the end of page No. 2, a suggestion was put to D.W.1 that defendant Nos. 1 and 2 agreed to sell the land for Rs.20,000/- receiving Rs.5,000/- as advance of sale consideration under Ex.A1 and delivered vacant possession of the land to P.W.1 under Ex.A1 but denied by D.W.1. In cross-examination at the end of page No. 5, he made the following categorical admissions which are extracted hereunder:

"I never expressed any intention of my selling land to P.W.1. (the witness adds) I executed the Ex.A1 agreement under the circumstances stated in the chief examination."

It is followed by a suggestion at the end of page No. 6 of cross-examination that Ex.A1 was executed only with an intention to sell the property and denied by him. Similarly, at page No. 10 of cross-examination, D.W.1 admitted that there was a recital in Ex.A1 to the effect that immediately after the balance of sale consideration was made ready by the plaintiff, he was ready to execute sale deed but he had not received any advance of Rs.5,000/- under Ex.A1. When I advert to the contents of written statement filed by the 2nd defendant, he made a clear judicial admission in para No. 9 of the amended written statement about his readiness and willingness to repay Rs.5,000/- and, similarly in para No. 14, he made the following judicial admissions:

"The defendants 1 and 2 have no objection to refund the sum of Rs.5,000/- to the plaintiff."

These judicial admissions coupled with the admission regarding thumb impression and signature on Ex.A1 are suffice to conclude that defendant Nos. 1 and 2 received Rs.5,000/- towards advance of sale consideration under Ex.A1. In addition to the evidentiary and judicial admissions referred *supra*, in reply marked as Ex.A3 dated 01-08-1983, the defendants demanded the plaintiff to pay balance of sale consideration within a period of 15 days from the date of receipt of reply notice with a threat to terminate the agreement of sale dated 14-03-1982. This judicial admission in the reply notice is another strong reason to believe that defendant Nos. 1 and 2 executed Ex.A1 agreement of sale for sale of plaintiff schedule property to the plaintiff for Rs.20,000/- receiving advance of Rs.5,000/- under Ex.A1. If really defendant Nos. 1 and 2 did not execute Ex.A1 with intention to sell the property, question of receiving Rs.5,000/- as advance of sale consideration and expressing their readiness and willingness to refund the amount do not arise.

16. When defendant Nos. 1 and 2 made judicial admissions, those admissions are binding on them and the plaintiff need not be called upon to prove due execution of Ex.A1 in view of Section 58 of the Indian Evidence Act, 1872. It is settled law that admission is the best piece of evidence in view of the principle laid down in **Sita Ram Bhau Patil Vs. Ramachandra Nago Patil**^[7], wherein it was held that

"Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission."

"In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor can it reverse or discharge the burden of proof of the plaintiff."

In **Nagubai Ammal and others Vs. B. Shama Rao and others**^[8], wherein the Apex Court held that

*"Admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in **Slattey v. Pooley**, wherein it had been observed "What a party himself admits to be true, may reasonably be presumed to be so."*

However, defendant Nos. 1 and 2 did not explain the reasons under

what circumstances such admissions were made and no explanation was given by them for making such judicial admissions in the written statement, in Ex.A3 reply and evidentiary admissions in the testimony of D.W.1. In the absence of any explanation, the Court is bound to accept the judicial admissions regarding execution of Ex.A1 receiving Rs.5,000/- as advance of sale consideration. When the defendants pleaded specific circumstances which compel them to execute Ex.A1, the burden heavily lies on them to explain the circumstances. Though defendant Nos. 1 and 2 raised several contentions under what circumstances Ex.A1 was executed but their evidence is not believable in view of the admissions made by D.W.1 both in the written statement and oral evidence as well as Ex.A3 reply notice. In those circumstances, the contention of defendant Nos. 1 and 2 that they executed Ex.A1 in the circumstances mentioned in the written statement cannot be accepted. Hence, I hold that defendant Nos. 1 and 2 executed Ex.A1 agreement of sale with intention to sell plaint schedule property for Rs.20,000/-. Accordingly, the point is held in favour of the plaintiff and against defendant Nos. 1 and 2.

17. **In Re. Point No. 2:**

The plaintiff claimed relief of specific performance seeking a direction against defendant Nos. 1 and 2 to execute registered sale deed and direct defendant Nos. 3 and 4 to join in execution of Ex.A1 as they are subsequent purchasers with notice whereas defendant Nos. 1 and 2 contended that suit schedule property was allotted to Lovaraju in partition and executed partition list which was taken by Vidiyala Harnath, husband of the plaintiff, at the time of obtaining Ex.A1 and that schedule is vague and uncertain; thereby, the agreement is void and unenforceable under law. In view of the specific contentions, it is relevant to advert to plaint schedule property for deciding the real controversy and it is extracted hereunder for better appreciation:

"East Godavari District, Kakinada Taluk, Kakinada Sub Registrar, Kakinada

Municipality, Gaigolupadu Village, H/o Ramanayyapet Village, Block No. 69, Ward No. 30, 500 square yards in a full extent of Ac. 0.58 cents in S.No. 155/22 within the following boundaries:

East : Site of Palika Subba Rao

West : Site of Palika Achamma

South : State Bank Colony Road

North : Puntha

With full fruit bearing trees, rights of way, water and easement etc."

Whereas, the 3rd defendant purchased item No. 1 of the schedule annexed to the written statement filed by the 3rd defendant and item No. 2 was purchased by the 4th defendant, wife of the 3rd defendant, and the same is extracted hereunder for better appreciation:

"Property purchased by the 3rd defendant:

Item No. 1: East Godavari District, Kakinada Taluk, Ramanayyapet Village Zeroity Dry. S.No. 155/2-2 out of Ac. 0.58 cents full Ac. 0.29 cents northern side within the following boundaries:

East : 56' = 16.98 meters site of Palika Subbarao

South : 69' = 20.93 meters site purchased by 4th defendant

West : 56' = 16.98 meters site of Palika Suryanarayana

*North : 72' = 21.84 meters site covered by item No. 2 herein
and the remaining land of the defendants 1 and 2.*

Total site: 433 square yards.

Item No. II: do do do do do

Passage within the following boundaries:

*East : 69' = 20.93 meters land belonging to the defendants
1 and 2*

West : 69' = 20.93 meters site of Palika Suryanarayana

North : 10' = 3 meters Puntha

South : 10' = meters site of covered by item No. 1 above

Joint undivided half of the above 38 ½ square yards

Grant total: 47 ½ square yards

PROPERTY PURCHASED BY THE IV DEFENDANT:

East Godavari District, Kakinada Taluk, Ramannayya peta village, S.No. 155/2-2 out of Ac. 0.58 cents full northern side Ac. 0.29 cents – 433 square yards within the following boundaries:

East : 56' = 16.93 meters site of Palika Subbarao

West : 56' = 16.93 meters site of Palika Suryanarayana

*North : 69' = 20.93 meters site purchased by the 3rd
Defendant*

*South : 66' = 20.02 meters site belonging to the Veterinary
Doctor*

Total extent: 433 square yards."

Thus, it is evident from the material on record that the 3rd defendant purchased 433 square yards (item No. 1) and 38 ½ square yards (item No. 2) totaling 471 ½ square yards in S.No. 155/2-2 out of total extent of 58 cents under Exs.B3 and B4. It is the specific contention of defendant Nos. 1 and 2 that the property sold to defendant Nos. 3 and 4 was allotted to defendant Nos. 1 and 2 in partition under partition list whereas the property adjacent to State Bank Colony Road was allotted to the share of Lovaraju under Ex.B2 partition list and copy of the partition list was taken by Vidiyala Harnath at the time of obtaining Ex.A1. Thus, husband of the plaintiff is aware about allotment of property in the partition to Lovaraju and the plaintiff agreed to purchase only the land in dispute between Lovaraju and the 1st defendant in the event of success of Vidiyala Harnath in getting adoption of Lovaraju invalid by Court of law. Thus, it is clear from the contention of defendant Nos. 1 and 2 that the plaintiff agreed to purchase 500 square yards out of the share of Lovaraju if his adoption is declared invalid by Court of law. Even otherwise, the schedule of property is only 500 square yards out of 58 cents

in S.No. 155/2-2 but boundaries were given to entire extent of 58 cents and it is not known whether it was executed for any specific area out of 58 cents. In the agreement of sale marked as Ex.A1, the schedule of property is mentioned as follows:

"East Godavari District, Kakinada Taluk, Kakinada Sub-Registrar, Kakinada Municipality, Ramanayyapet Village, H/o Gygolupadu, 69th block, 30th ward, S.No. 155/2.2, an extent of 500 square yards out of 58 cents within the following boundaries:

East : Site of Palika Subbarao
West : Site of Palika Achemma
South : State Bank Colony Road
North : Puntha

It is further mentioned that out of 58 cents, defendant Nos. 1 and 2 agreed to sell 500 square yards on southern side of 58 cents with trees existing therein with all easement rights etc., and delivered possession of the same. So, as per Ex.A1, defendant Nos. 1 and 2 agreed to sell southern part of 58 cents that means land adjacent to State Bank Colony Road but the boundaries mentioned in the schedule are not for 500 square yards and it is for entire 58 cents. Therefore, it is difficult to identify the property agreed to be sold to the plaintiff by defendant Nos. 1 and 2 based on the schedule annexed to the plaint or the schedule of Ex.A1 since measurements of the site agreed to be sold under Ex.A1 were not mentioned specifically.

18. According to Order VII Rule 3 of C.P.C., where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. Here, the plaint contains a schedule but the specific land agreed to be sold is not identifiable based on survey number or boundaries as there is ambiguity with regard to identification of the

property. The main endeavour of learned counsel for defendant Nos. 1 and 2 is that the agreement is ambiguous and uncertain. Thereby, it is void due to uncertainty. Consequently, it is not enforceable under law. According to Section 29 of the Indian Contract Act, 1872 (for brevity, 'the Act of 1872'), agreements, the meaning of which is not certain, or capable of being made certain, are void. In the instant case, there is any amount of ambiguity in the schedule annexed to the plaint and in the schedule of Ex.A1 for identifying 500 square yards on the southern side of 58 cents. Therefore, Ex.A1 is uncertain. Consequently, the agreement is void and not enforceable under law. If the terms of agreement are ambiguous or uncertain or not capable of making certain, the same cannot be enforced in a Court of law as held by Apex Court in ***Vimulesh Kumari Kulasreshta Vs. Sambhaji Rao***^[9]. In view of the principle laid down in the above judgment and in view of Section 29 of the Act of 1872, the agreement is void since 500 square yards on the southern side of 58 cents in S.No. 155/2-2 is not identifiable either based on boundaries or survey number. Hence, the agreement is void as Section 9 of the Act of 1963 permits to raise any plea governing contracts.

19. One of the contentions of the plaintiff is that when identification of the property is in dispute in a suit for specific performance, the same can be identified based on evidence and placed reliance on ***Debendranath Mohanty Vs. Annapurna Mohanty*** (2nd *supra*). In the above judgment, the Orissa High Court relied on the judgment of Apex Court in ***Prakash Chandra Vs. Angadlal and others***^[10], wherein it was ruled that

"The ordinary rule is that specific performance should be granted; it ought to be denied only when equitable considerations point to its refusal and the circumstances show that the damages would constitute an adequate relief."

But, this principle has no relevance. However, in para No. 6 of the judgment, the Orissa High Court, discussing about relevancy of boundaries for identification of the property, held that specific performance can be

refused only under the circumstances stated in Section 20 of the Act of 1963. The only reason assigned by the lower Appellate Court for refusing the prayer for specific performance of the contract is that description of the land given in the agreement was unspecific but the said objection was neither raised by the defendant in pleadings nor the said point was argued before the trial Court. Therefore, it is not a ground to deny the relief of specific performance. Similarly, in ***Kassim Beevi Vs. Meeranchi Mytheen Beevi and others*** (1st *supra*), the Kerala High Court held as follows:

"Where there was misdescription in the agreement of sale about the boundaries of the property agreed to be sold and this discrepancy was noticed by the court passing the decree for specific performance, the execution of the decree could not be opposed on the technical plea of misdescription of the property, when there was no dispute as to identity of the property agreed to be sold. In the case of this nature, the execution Court is bound to carry out and implement its decree in accordance with its tenor, which in turn would imply that the property should be correctly described with the proper boundaries. It is not as if by doing so the Court is traversing beyond the decree or causing any prejudice to any of the parties or conveying property not agreed to be conveyed."

The principles laid down in the above two judgments are not binding precedents on this Court. Even otherwise, the facts of the above two decisions are different for the reason that the specific extent in this case is 500 square yards on southern side of 58 cents in S.No. 155/2-2 but the boundaries were given to entire 58 cents. In case, while executing sale deed, the same boundaries are mentioned, it amounts to conveying title in entire extent. The width and length of 500 square yards were also not mentioned and that a specific plea was raised in the pleadings that there is any amount of ambiguity in Ex.A1 with regard to identification of 500 square yards. Therefore, the principles laid down by Kerala High Court and Orissa High Court have no relevance to the present case. Hence, the contention of the plaintiff regarding identification of the property is not accepted.

20. The trial Court, after appreciating entire material on record, rightly

concluded that the schedule is ambiguous and uncertain. Thereby, Ex.A1 is void and unenforceable under law. Even after discerning the entire material available on record, I find no illegality in the conclusion arrived by the trial Court. Hence, the finding of the trial Court is hereby confirmed holding this point in favour of the defendants and against the plaintiff.

21. **In Re. Point No. 3:**

The major contention of defendant Nos. 1 and 2 is that southern half of 58 cents *i.e.* 29 cents was allotted to Lovaraju in the partition between the 1st defendant and Lovaraju under partition list marked as Ex.B2 whereas the specific case of the plaintiff is that she purchased only 500 square yards out of 58 cents abutting to State Bank Colony Road. The trial Court held that defendant Nos. 1 and 2 had no right over southern half of 58 cents as it was allotted to the share of Lovaraju and, thereby, they are not liable to execute registered sale deed in terms of Ex.A1. The said finding is now assailed in this appeal by the unsuccessful plaintiff raising several contentions. In any view of the matter, it is the duty of this Court to record a finding afresh uninfluenced by the finding recorded by the trial Court. Therefore, I advert to the pleadings and evidence on record to decide the real controversy between the parties. According to defendant Nos. 1 and 2, 58 cents of dry land in S.No. 155/2-2 of Ramanayyapet Village is the ancestral property of the 1st defendant and his adoptive brother late Lovaraju and they partitioned the property on 12-04-1977 under Ex.B2 partition list. In the said partition, 29 cents of site abutting to Puntha on its northern side was allotted to the share of the 1st defendant while allotting the remaining 29 cents southern side to Puntha abutting to State Bank Colony Road to Lovaraju (vide para No. 6 of the written statement of the 2nd defendant) whereas the contention of the plaintiff is that defendant Nos. 1 and 2 are owners of southern half. In the evidence of P.W.1, husband of the plaintiff, he asserted that defendant Nos. 1

and 2 are owners of plaint schedule property but he made crucial admissions in his cross-examination with regard to knowledge about partition of the property. In the cross-examination dated 01-11-1994, P.W.1 specifically admitted about furnishing copy of the partition list and the specific admission is extracted hereunder for better appreciation:

"Prior to execution of Ex.A1, the defendants showed the partition deed and they have not shown other documents. 1st defendant showed the partition list between D1 and his adopted brother Lovaraju."

P.W.1 further admitted in his cross-examination as follows:

"The contents mentioned in Ex.A1 are true. Out of 58 cents, half of share is in possession of Lovaraju and remaining half share is in possession of Tatayya. The southern side land is in possession of Lovaraju and northern portion is in possession of D1."

In further cross-examination, P.W.1 admitted as follows:

"I came to know the southern portion of Lovaraju was purchased by Dr. Prasad Veterinary Doctor. I do not know whether the southern half portion of 58 cents is in possession of the Doctor."

The evidentiary admissions extracted above would clearly establish that 29 cents of site southern side portion was allotted to Lovaraju in partition under Ex.B2 partition list and it is within the knowledge of P.W.1, husband of the plaintiff. In addition to the above admissions, P.W.1 admitted that the partition list shown to him by defendant Nos. 1 and 2 is on whitepaper and not on stamp papers. A copy of the same was given to him but, subsequently, they took away the same from him. This piece of evidence is not based on any pleading. However, in view of the admissions, extracted above, in the evidence of P.W.1, the property was partitioned between the 1st defendant and Lovaraju and southern half of 58 cents was allotted to the share of Lovaraju which defendant Nos. 1 and 2 agreed to sell subsequent to partition to the plaintiff under Ex.A1.

22. The plaintiff also got examined one Anusuri Abbayi, one of the attesters of Ex.A1, as P.W.2. P.W.2 testified about execution of Ex.A1 on

payment of Rs.5,000/- as advance of sale consideration to defendant Nos. 1 and 2 and their affixing thumb impression and signature on Ex.A1. At best, his evidence is helpful only to prove execution of Ex.A1 and payment of advance of sale consideration. In cross-examination, P.W.2 made crucial admissions with regard to allotment of southern half of 58 cents to Lovaraju and northern half of 58 cents to the 1st defendant. His evidence further disclosed that after dispute, the 1st defendant and his adoptive brother Lovaraju got 29 cents each. This piece of evidence is not believable for the reason that at the time of obtaining Ex.A1 itself, P.W.1 obtained copy of the partition list. Therefore, question of partition of property after dispute between the plaintiff and defendant Nos. 1 and 2 is not acceptable. In further cross-examination, P.W.2 admitted that defendant Nos. 1 and 2 agreed to sell 500 square yards abutting to State Bank Colony Road on its south and that the land abutting to State Bank Colony Road was sold by Lovaraju to Veterinary Doctor and it is in the possession of Veterinary Doctor. Similarly, P.W.3, scribe of Ex.A1, testified about execution of Ex.A1 and payment of Rs.5,000/- as advance of sale consideration *etc.,*. In cross-examination, P.W.3 admitted that defendant Nos. 1 and 2 agreed to sell 500 square yards situated towards south to total extent of 58 cents. The southern boundary mentioned as State Bank Colony Road but he does not know who is in possession of the site covered by Ex.A1 and he did not go through the partition deed between Lovaraju and the 1st defendant at the time of scribing Ex.A1.

23. The oral evidence of P.Ws.1 to 3 clearly disclosed that the total extent of 58 cents was partitioned between the 1st defendant and Lovaraju under Ex.B2 partition list and it is even in the knowledge of P.W.1 at the time of obtaining Ex.A1. A copy of the partition list was also taken by him. The evidentiary admission of P.W.1 clinchingly proved the partition between Lovaraju and the 1st defendant and it is supported by Ex.B2 and evidence of

P.W.2.

24. As usual, D.W.1 testified about the partition between the 1st defendant and his adoptive brother Lovaraju, allotment of southern half to Lovaraju and northern half to the 1st defendant and produced Ex.B2 partition list before the trial Court. However, in cross-examination at page No. 6, D.W.1 made a stray admission that no partition deed was executed between the 1st defendant and his brother. This piece of evidence is insignificant for the reason that the partition between the 1st defendant and his brother Lovaraju was admitted by P.Ws.1 and 2 and supported by Ex.B2. Apart from that, in the first sentence of further cross-examination dated 08-09-1995, D.W.1 specifically asserted that in the year 1977, a partition deed was executed between his father and his brother; in the said deed, boundaries pertaining to his father's share are mentioned and that southern boundary to the said portion is not State Bank Road as per Ex.B2. At page No. 10 of the cross-examination, D.W.1 admitted the recitals of Ex.A1 but no suggestion was put to D.W.1 denying allotment of southern half of 58 cents to the share of Lovaraju. Therefore, the unrebutted testimony of D.W.1 coupled with evidentiary admissions of P.Ws.1 and 2 establish that southern half of 58 cents *i.e.* land abutting to State Bank Colony Road was allotted to the share of Lovaraju and defendant Nos. 1 and 2 agreed to sell 500 square yards out of the southern half of 58 cents to the plaintiff. Therefore, by the date of execution of Ex.A1, defendant Nos. 1 and 2 are not owners of the land agreed to be sold *i.e.* 500 square yards out of the southern half of 58 cents which was already allotted to the share of Lovaraju. Defendant Nos. 1 and 2 further laid foundation to the case in reply notice itself marked as Ex.A3 and the same is supported by both oral and documentary evidence. Therefore, defendant Nos. 1 and 2 are not the owners of 29 cents on the southern side of 58 cents as it was allotted to the share of Lovaraju under Ex.B2.

25. When defendant Nos. 1 and 2 are not the owners of the property agreed to be sold, Ex.A1 is not specifically enforceable in view of Section 17 of the Act of 1963. Section 17 of the Act of 1963 says that contract to sell or let property by one who has no title cannot be specifically enforced in favour of a vendor or lessor, who, knowing himself not to have any title to the property, has contracted to sell or let the property; who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt. In the present case, P.W.1 admitted that by the date of Ex.A1, the property was partitioned and obtained copy of the partition list by him at the time of execution of Ex.A1. Therefore, knowing that defendant Nos. 1 and 2 have no title to the property, the plaintiff purchased the property. When knowledge is attributable to the plaintiff that defendant Nos. 1 and 2 have no title to the property agreed to be sold under Ex.A1, it is for the plaintiff to enter into witness box and plead that she had no knowledge about title of defendant Nos. 1 and 2 but, obviously for different reasons, she avoided to enter into witness box tendering herself for cross-examination by the adversary. However, P.W.1 had knowledge about partition of property and allotment of southern half to the share of Lovaraju under partition list. P.W.1 further admitted that the said Lovaraju sold his share to one Prasad, Veterinary Doctor, and he is in possession of the said site. Thus, it is evident from the record that the plaintiff purchased the property with full knowledge that defendant Nos. 1 and 2 have no title to the property. Thereby, the agreement or contract of sale is not specifically enforceable in view of Section 17 of the Act of 1963. As per my discussion in the earlier paras, defendant Nos. 1 and 2 have no title to the southern half of 58 cents. Thereby, the contract is not enforceable under law. Accordingly, the point is held against the plaintiff and in favour of defendant Nos. 1 and 2.

26. **In Re. Point No. 4:**

One of the contentions of learned counsel for defendant Nos. 1 and 2 is that non-examination of the plaintiff is fatal to her case and a presumption is to be drawn that what she pleaded is not true. Admittedly, the plaintiff did not enter into witness box and her husband testified as P.W.1. In fact, Section 120 of the Indian Evidence Act, 1872, says that in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. P.W.1 is husband of the plaintiff. Hence, he is a competent witness. However, the Supreme Court in ***Man Kaur (Dead) by L.Rs. Vs. Hartar Singh Sangha*** (4th *supra*) held that

"The legal position as to who should give evidence in regard to matters involving personal knowledge can be summarized as follows:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove

the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

Finally, the Apex Court held that if the plaintiff has to prove her readiness and willingness, it is within her exclusive knowledge who has to enter into witness box tendering herself for cross-examination. In the event she failed to enter into witness box, the Court can draw an adverse inference that what she pleaded is not correct. In ***Vidhyadhar Vs. Manikrao*** ^[11], the Apex Court reiterated the following well-recognized legal position:

"Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct."

In view of the law declared by Apex Court, when a particular fact is within the knowledge of the plaintiff, it is for her to enter into witness box tendering herself for cross-examination by the adversary. In case the plaintiff did not enter into witness box, the Court has to draw an adverse inference

that what she pleaded is not correct. In the present case, it is for the plaintiff to prove her readiness and willingness besides proof of lack of knowledge about title of defendant Nos. 1 and 2 to schedule property. Therefore, an adverse presumption is to be drawn by applying the principles laid down by Apex Court in the judgments referred *supra* and it is fatal to the case of the plaintiff. Accordingly, the point is answered in favour of defendant Nos. 1 and 2 and against the plaintiff.

27. In Re. Point No. 5:

The plaintiff claimed specific performance of agreement of sale marked as Ex.A1 directing defendant Nos. 1 and 2 to execute registered sale deed and join defendant Nos. 3 and 4 who allegedly purchased plaintiff schedule property. As per the evidence on record, defendant Nos. 3 and 4 purchased part of northern half from defendant Nos. 1 and 2 under Exs.B3 and B4 whereas the plaintiff purchased 500 square yards out of southern half of 58 cents which was allotted to Lovaraju in the partition that took place long prior to execution of Ex.A1 *vide* Ex.B2 and it is admittedly sold by Lovaraju to Prasad, Veterinary Doctor, and he is in possession of the same.

28. To seek the relief of specific performance, the plaintiff has to prove her readiness and willingness through out by producing cogent and satisfactory evidence and, to substantiate her contention, she got examined her husband as P.W.1. However, Ex.A2 notice dated 21-07-1983 shows the readiness and willingness of the plaintiff to pay balance of sale consideration to obtain registered sale deed. When I advert to the terms of Ex.A1, agreement of sale, defendant Nos. 1 and 2 have to execute registered sale deed on payment of balance of sale consideration by the plaintiff. Thus, no time was fixed for performance of obligation under the agreement by the plaintiff. However, in the reply notice marked as Ex.A3, defendant Nos. 1 and 2 demanded the plaintiff to pay balance of sale consideration within 15 days from the date of receipt of Ex.A3 notice with a threat to terminate the

agreement of sale in the event of failure to pay balance of sale consideration. Thus, defendant Nos. 1 and 2 made time as essence of the contract but the contract was not terminated by due intimation *i.e.* by issuing notice. Therefore, time is not essence of the contract. Though made subsequently, the agreement was not terminated by issuing any notice.

29. Learned counsel for defendant Nos. 1 and 2 would contend that the plaintiff has to prove her readiness and willingness throughout strictly adhering to Section 16 (c) of the Act of 1963 but failed to establish her readiness and willingness. Thereby, the plaintiff is disentitled to claim the relief of specific performance and placed reliance on ***Man Kaur (Dead) by L.Rs. Vs. Hartar Singh Sangha*** (4th *supra*), ***Manjunath Anandappa Urf Shivappa Hansi Vs. Tammanasa and others*** (5th *supra*) and ***Saradamani Kandappan Vs. S.Rajalakshmi and others*** (6th *supra*), wherein the Supreme Court reiterated the principle that the plaintiff has to plead and prove readiness and willingness to perform part of obligation under the agreement of sale in a suit for specific performance. In view of the principles laid down in the above judgments and mandatory requirement under Section 16 (c) of the Act of 1963, the plaintiff has to plead and prove readiness and willingness and, when readiness and willingness is within the knowledge of the plaintiff, the plaintiff has to enter into witness box but, for the reasons best known to the plaintiff, she did not enter into witness box to prove her readiness.

30. As per my finding on point Nos. 1 and 2, the agreement is void for uncertainty and not enforceable in view of Section 29 of the Act of 1872; and that defendant Nos. 1 and 2 had no title to the property and that the plaintiff purchased the property with full knowledge that defendant Nos. 1 and 2 had no title to the property. Thereby, Ex.A1 is not enforceable against defendant Nos. 1 and 2. That apart, the plaintiff did not enter into witness box to prove

her readiness and willingness or lack of knowledge about title to the property. Thereby, an adverse presumption is drawn for her non-examination.

31. The relief of specific performance is purely discretionary and equitable. When the plaintiff claiming such equitable and discretionary relief under Section 20 of the Act of 1963, the plaintiff has to approach the Court with clean hands disclosing the true facts but, in the present case, the plaintiff claimed specific performance of agreement of sale based on an ambiguous document and that too the property mentioned in Ex.A1 is not identifiable based on survey number or boundaries. Added to that, the vendors of the plaintiff *i.e.* defendant Nos. 1 and 2 are not the owners of southern half of 58 cents, agreed to be sold under Ex.A1, by the date of execution of Ex.A1 since partition had taken place between the 1st defendant and Lovaraju long prior to execution of Ex.A1. In those circumstances, discretion cannot be exercised to grant the relief of specific performance of agreement of sale and defendant Nos. 1 and 2 cannot be compelled to execute sale deed for the extent of 500 square yards out of southern half of 58 cents abutting to State Bank Colony Road. That apart, the original owner *i.e.* Lovaraju already sold the property to Prasad, Veterinary Doctor, and it is in his possession as admitted by P.W.1. Hence, the plaintiff is not entitled to claim the relief of specific performance of agreement of sale Ex.A1. Accordingly, the point is held in favour of defendant Nos. 1 and 2 and against the plaintiff.

32. **In Re. Point No. 6:**

One of the reliefs claimed by the plaintiff is to restrain the defendants and their men from interfering with her possession and enjoyment of the property purchased under Ex.A1 whereas the contention of defendant Nos. 1 and 2 is that southern half of 58 cents was allotted to the share of Lovaraju and he sold the same to Prasad, Veterinary Doctor, who is in actual

possession of the property. P.W.1 admitted in his oral evidence that southern half of 58 cents abutting to State Bank Colony Road was purchased by one Veterinary Doctor and he is in possession of the same. Thus, it is evident that the plaintiff is out of possession though there is a recital in Ex.A1 about delivery of unidentifiable 500 square yards. When the plaintiff is out of possession, she is not entitled to claim the relief of perpetual or permanent injunction, which is purely discretionary relief under Section 38 of the Act of 1963 and, when the relief of specific performance is denied as per my finding on point Nos. 1 to 5, question of granting permanent injunction does not arise. Accordingly, the point is held against the plaintiff and in favour of the defendants.

33. In view of my foregoing discussion and finding on point Nos. 1 to 6, I find no grounds warranting interference with the finding recorded by the trial Court, the appeal is devoid of merits and deserves to be dismissed.

34. In the result, the appeal is dismissed confirming the decree and judgment passed in O.S.No. 20 of 1984 on the file of the Court of I Additional Subordinate Judge, Kakinada, dated 16-11-1995. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 06-02-2015.

JSK

[\[1\]](#) AIR 1987 KERALA 226

[\[2\]](#) AIR 1996 ORISSA 89

[\[3\]](#) AIR 1968 MADRAS 383

[\[4\]](#) (2010) 10 SC 512

[\[5\]](#) AIR 2003 SC 1391

[\[6\]](#) (2011) 12 SCC 18

[\[7\]](#) AIR 1977 SC 1712

[\[8\]](#) AIR 1956 SC 593

[\[9\]](#) AIR 2009 SC 806

[\[10\]](#) AIR 1979 SC 1241

[\[11\]](#) (1999) 3 SCC 573