THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.No. 321 OF 1997

JUDGMENT:

The unsuccessful plaintiff in O.S.No. 118 of 1990 on the file of the Court of Subordinate Judge, Tadepalligudem (for short, 'the trial Court'), preferred this appeal challenging the decree and judgment dated 04-09-1996, whereunder the suit filed by the plaintiff for specific performance of agreement of sale dated 26-12-1988 was dismissed while granting alternative relief of refund of advance of sale consideration together with interest.

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

3. The plaintiff filed the suit for specific performance of agreement of sale, directing the defendants to execute registered sale deed in his favour or his nominee on receipt of balance of sale consideration or alternatively for refund of advance of sale consideration paid to the defendants together with interest, alleging that schedule property is property of joint family. The 1st defendant is father and defendants 2 to 4 are his sons. Defendants 1 to 4 constituted as members of Hindu joint family and the 1st defendant is acting as manager of joint family. Defendants 1 to 4 agreed to sell schedule property at Rs.1,25,000/- and executed an agreement of sale in favor of the plaintiff on 26-12-1988. At the time of execution of agreement of sale, defendants 1 to 4 received Rs.45,000/- as advance of sale consideration from the plaintiff. Defendants 1 to 4 agreed to execute regular registered sale deed in favour of the plaintiff or his nominee on or before 30-01-1989 on receipt of balance of sale consideration of Rs.80,000/-. Defendants 1 to 4 also agreed to produce title deeds and link documents; promised to pursue to execute registered sale deed for Ac. 0.03 cents of land in favour of the plaintiff by Earla Veeranna to whom the above Ac. 0.03 cents of land was sold; get the property released from mortgage with Tadepalligudem Large Size Co-operative Credit Society Limited (for short, 'the Society'); furnish full satisfaction certificate along with original sale deeds; get the land measured and to provide 10 yards width road on the western side of schedule property.

Subsequent to execution of agreement of sale, the plaintiff came to know that schedule property was proposed to be acquired by Government but later withdrawn the acquisition proceedings. Thereby, defendants 1 to 4 executed the agreement of sale keeping the plaintiff in total darkness.

The plaintiff paid Rs.15,000/- on 29-12-1988; Rs.20,000/- on 28-01-1989; Rs.5,000/- on 14-04-1989; Rs.5,000/- on 01-06-1990 and Rs.10,000/- on 08-07-1990. All the payments were received by defendants 1 and 3 on their behalf and on behalf of defendants 2 and 4 and endorsed the same on the reverse of agreement of sale. Thereby, the plaintiff paid in total a sum of Rs.1,00,000/- and he is always ready and willing to pay balance of sale consideration of Rs.25,000/- to obtain registered sale deed. The plaintiff, expressing his readiness and willingness to pay balance of sale consideration and obtain registered sale deed, demanded the defendants to receive balance of sale consideration and execute regular registered sale deed but the defendants did not respond to the demand. Having no other alternative, the plaintiff got issued legal notice dated 21-07-1990 demanding the defendants to execute registered sale deed receiving balance of sale consideration of Rs.25,000/-. The 1st defendant, on receipt of notice, got issued reply with false and untenable allegations but defendant Nos. 2 to 4 refused to receive notice and they were returned un-served. Thereby, the defendants avoided to receive balance of sale consideration and execute registered sale deed despite the plaintiff expressing his readiness and willingness to perform his part of contract. Hence, the suit.

4. During pendency of the suit, the 1st defendant died on 03-07-1991 leaving behind his sons, wife and daughters. Since sons of the 1st defendant were already on record as defendants 2 to 4, his wife and daughters are impleaded as defendants 5 to 8 respectively.

5. The 3rd defendant filed written statement denying material allegations including execution of agreement of sale; receipt of advance of sale consideration of Rs.45,000/- on the date of execution of agreement of sale; part payments on 29-12-1988, 28-01-1989, 14-04-1989, 01-06-1990 and 08-07-1990; and endorsing the same on the reverse of agreement of sale while denying the alleged promise made by the defendants to pursue Veeranna to execute registered sale deed for Ac. 0.03

cents of land which was already sold to him out of schedule property so also to provide 10 yards width road to the plaintiff.

The 3rd defendant specifically contended that joint family property was already partitioned long ago and the property of the defendants' family is being enjoyed by the respective members of joint family exclusively in their own right. In the said partition, an extent of Ac. 1.00 cents of land was allotted to the share of the 3rd defendant. Out of Ac. 1.00 cents, the 3rd defendant sold Ac. 0.03 cents to Veeranna in the year 1986 under registered sale deed. The said fact is within the knowledge of the plaintiff. Thus, the allegation that the defendants constituted as members of undivided Hindu joint family is false and the remaining defendants have nothing to do with schedule property.

It is also contended that readiness and willingness pleaded by the plaintiff is not true and correct and the plaintiff tampered Ex.A1 incorporating road of 10 yards width. It is finally contended that the 3rd defendant is the absolute owner of schedule property, not liable to execute registered sale deed in favour of the plaintiff receiving the alleged balance of sale consideration or even not liable to refund the advance of sale consideration allegedly received by the defendants and prayed for dismissal of the suit.

6. Defendants 1, 2 and 4 filed memo adopting the written statement of the 3rd defendant.

7. On the strength of the above pleadings, the trial Court framed the following issues (extracted):

Issues:

1) *Whether the plaintiff is entitled to seek specific performance of agreement of sale dated 26-12-1988?*

2) *Whether the plaintiff is ready and willing to perform his part of the contract?*

3) *Whether the plaintiff is entitled to the relief of return of Rs.1,16,980/- with interest at 12 ½% p.a.?*

4) *Whether the agreement of sale dated 26-12-1988 is not enforceable under law?*

5) *To what relief?*

8. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 5 were examined and

got marked Exs.A1 to A11. On behalf of the defendants, D.Ws.1 to 5 were examined and got marked Exs.B1 to B19 and Exs.X1 to X4.

9. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court, believing execution of agreement of sale by defendants 1 to 4 and receipt of Rs.1,00,000/- on different dates, directed the defendants to refund the said amount together with interest at 10% *p.a.* from the date of suit till decree and subsequent interest at 6% *p.a.* from the date of decree till realization while declining to grant primary relief of specific performance.

10. Aggrieved by the decree and judgment, the plaintiff preferred the present appeal raising the following contentions:

(a) The trial Court, having found that Ex.A1 dated 26-12-1988 and payment endorsements Exs.A2 to A6 are true and correct, ought to have decreed the suit in favour of the plaintiff but the trial Court, on erroneous appreciation of evidence on record, negated primary relief of specific performance;

(b) The trial Court did not consider the recital in Ex.A1 with regard to the promise made by the defendants to pursue Veeranna to execute registered sale deed for Ac. 0.03 cents of land, further recital regarding provision for pathway of 10 yards width and denied primary relief of specific performance erroneously;

(c) Even if sale deed could not be executed for Ac. 0.03 cents, which is small portion of schedule property, the plaintiff is entitled to decree for part of schedule property under Section 12 (2) of the Specific Relief Act, 1963 (for short, 'the Act of 1963'), but this was not considered by the trial Court;

(d) The trial Court, on erroneous approach, concluded that the 3rd defendant alone is owner of schedule property while accepting the partition pleaded by the defendants. Even if the property was allotted to the 3rd defendant, he is bound to execute registered sale deed but, on erroneous appreciation, the trial Court denied primary relief of specific performance and prayed to set aside the decree and judgment of the trial Court.

11. During the course of argument, learned counsel for the plaintiff would contend that when Exs.A1 to A6 were believed and the plaintiff expressed his readiness and willingness to perform his part of obligation by issuing Ex.A7 notice dated 21-07-1990, the trial Court would have granted decree for primary relief of specific performance. The trial Court declined primary relief only on the sole ground that schedule property is exclusive property of the 3rd defendant as it was allotted to him in partition among joint family members. The trial Court failed to consider admissibility of Exs.X1 to X4 in evidence since no permission was obtained to adduce secondary evidence. If Exs.X1 to X4 are excluded from consideration, the plea of partition cannot be sustained and placed reliance on ***H.Siddiqui (dead) by L.Rs. Vs. A.Ramalingam***. Even otherwise, Ex.A1 agreement of sale consists of reciprocal promises and the plaintiff and the defendants are in the capacity of promisee and promisor to each other. In such case, the plaintiff may compel any one of the promissors under Sections 43 and 45 of Indian Contract Act, 1872 (for brevity, 'the Act'). Therefore, the trial Court would have granted decree in favour of the plaintiff granting primary relief of specific performance but, without considering law on this aspect, negated primary relief of specific performance.

Finally, it is contended that, though the defendants are incompetent to execute agreement of sale for Ac. 0.03 cents which was already sold to Veeranna, the plaintiff is entitled to claim specific performance for the remaining land after exclusion in view of Section 12 of the Act of 1963 but the trial Court, without considering facts and law in proper perspective, negated primary relief and requested this Court to reappraise entire evidence on record with reference to law and pass a decree in favour of the plaintiff granting primary relief of specific performance of agreement of sale dated 26-12-1988.

12. Learned counsel for the defendants, refuting the contentions raised by learned counsel for the plaintiff, would submit that relief of specific performance is purely discretionary, such discretion has to be exercised judiciously under Section 20 of the Act of 1963 and placed reliance on ***M.V.Shankar Bhat and another Vs. Claude Pinto since (deceased) by L.Rs. and others***; ***K.Ahmed Alli Sab, deceased (by L.Rs.), and others Vs. Desai Abdul Gani Desai***; ***A.C.Arulappan Vs. Smt. Ahalya Naik***; and ***Mayawanti Vs. Kaushalya Devi***. Learned counsel further contended that

the plaintiff is incompetent to claim relief of specific performance for the reason that the defendants are not competent to execute agreement of sale marked as Ex.A1 since the property was allotted to the share of the 3rd defendant who is enjoying the same in his own right exclusively. Thereby, Ex.A1 agreement of sale is not enforceable against all the defendants, supported the finding recorded by the trial Court in all respects and prayed for dismissal of the appeal confirming the decree and judgment of the trial Court.

13. 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 Ex.A1 agreement of sale dated 26-12-1988 is enforceable under law, if so, whether the 3rd defendant, being one of the joint promissors under agreement of sale, is liable to execute registered sale deed in favour of the plaintiff?

(2) Whether the plaintiff is entitled to primary relief of specific performance of agreement of sale?

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

The suit was filed for primary relief of specific performance of agreement of sale dated 26-12-1988 and also claimed alternative relief of refund of advance of sale consideration paid under Exs.A1 to A6 together with interest at 12.5% *p.a.* The defendants denied the very execution of Ex.A1 and receipt of advance of sale consideration while disputing readiness and willingness by the plaintiff to obtain registered sale deed. However, the trial Court, believing execution of Ex.A1 and payment of amount under Exs.A1 to A6, passed decree granting alternative relief of refund of Rs.1,00,000/- together with interest. Thereby, the trial Court believed the contention of the plaintiff about execution of Ex.A1 agreement of sale and payment of part of sale consideration under Exs.A1 to A6. The said finding is not challenged by the defendants by filing separate appeal or filing any cross-objections. Thus, the finding recorded by the trial Court about execution of Ex.A1 agreement of sale dated 26-12-1988, payment of advance of sale consideration of Rs.45,000/- under Ex.A1 and different part payments under Exs.A2 to A6 attained finality since it is not challenged by learned counsel for the defendants during argument. Hence, I need not decide genuineness or otherwise of Exs.A1 to A6.

15. The only question before me is whether or not schedule property is separate property of the 3rd defendant in view of allotment of the same to the share of the 3rd defendant in partition among the defendants. If, for any reason, this Court finds that the partition pleaded by the defendants is true, what the consequences of such partition are to be examined. As seen from the recitals of Ex.A1 agreement of sale, defendants 1 to 4 made the plaintiff to believe that schedule property is joint family property while making clear assertions in Ex.A1 that they are in joint possession and enjoyment of the property, agreed to produce link documents and title deeds pertaining to schedule property and also promised to pursue Veeranna, to whom Ac. 0.03 cents of land was sold, to execute registered sale deed for Ac. 0.03 cents of land along with other property belonging to them jointly for discharging debt due to the Society duly signed by all the defendants. Defendants 1, 3 and 4 also received part of sale consideration under Exs.A2 to A6 on different dates referred above. This fact was proved by producing Ex.A1. Even in the evidence of P.W.1, he testified that defendants 1 to 4 executed Ex.A1 agreement of sale in favour of the plaintiff receiving Rs.45,000/- on the date of execution of Ex.A1 and other part payments under Exs.A2 to A6. In cross-examination, nothing has been elicited to disprove execution of Ex.A1 and part payment endorsements marked as Exs.A2 to A6. In cross-examination, nothing was elicited except suggesting that the plaintiff did not pay any amount to the defendants and the plaintiff did not express his readiness and willingness to perform his part of contract but got denial of it. Strangely, a suggestion was put to P.W.1 that Exs.A2 to A4 endorsements were bought into existence in collusion with defendants 1 and 4 though P.W.1 is personally aware that the 3rd defendant only has right to receive sale consideration under Ex.A1. P.W.1 admitted that he had personal knowledge by the date of execution of Ex.A1 that Ac. 0.03 cents of land was registered in the name of Veeranna due to unavoidable circumstances. Therefore, the facts elicited in the cross-examination, at best, are useful to prove that P.W.1 is aware about sale of Ac. 0.03 cents to Veeranna. Except that, nothing was elicited to disprove Exs.A1 to A6.

16. The 3rd defendant was examined as D.W.1. He denied entire execution of Ex.A1 and specifically contended that by the date of execution of Ex.A1, D.W.1 himself, his father and bothers partitioned joint family property. In the said partition, schedule property was allotted to his share in the year 1976. He further testified that in the

partition, the 1st defendant was allotted Ac. 0.90 cents and his other brothers were allotted one acre each. Since then, they are in exclusive possession and enjoyment of the same. The original partition deed is allegedly with the Society to secure loan by way of equitable mortgage. In examination in chief, D.W.1 admitted that he received Rs.45,000/- at the time of execution of Ex.A1 but defendants 1, 2 and 4 have no right to receive any consideration under Ex.A1. This positive admission of D.W.1 is sufficient to accept execution of Ex.A1 receiving advance of Rs.45,000/-. However, the contention of D.W.1 is that the other defendants are not entitled to receive any amount under Exs.A2 to A4. According to the plaintiff, the 3rd defendant himself received Rs.5,000/- under Ex.A5 and Rs.10,000/- under Ex.A6 and endorsed the same on the reverse of Ex.A1 but strangely the 3rd defendant denied receipt of Rs.5,000/- and Rs.10,000/- under Exs.A5 and A6 respectively though they bear his signatures. Therefore, the testimony of D.W.1 that he did not receive amount covered under Exs.A5 and A6 is not believable since Exs.A5 and A6 were proved by examining the scribe of those endorsements besides testifying the said fact by P.W.1 in his evidence. Moreover, the defendants did not file any cross-objections or separate appeal challenging the finding recorded by the trial Court though the trial Court directed the defendants to refund entire Rs.1,00,000/- received under Exs.A1 to A6. Therefore, the finding of the trial Court need not be disturbed while deciding the present appeal with regard to execution of Ex.A1 by defendants 1 to 4 and payment of Rs.1,00,000/- under Exs.A2 to A6. Hence, the finding of the trial Court to the extent indicated above is upheld.

17. The main reason for denying primary relief of specific performance is that joint family property was partitioned in the year 1976, schedule property was allotted to the share of the 3rd defendant, defendants 1, 2 and 4 have nothing to do with schedule property and, therefore, the agreement is unenforceable under law. Learned counsel for the plaintiff would contend that though the defendants did not prove earlier partition by producing primary evidence *i.e.* by producing original partition list before the trial Court, the trial Court, basing on Ex.X3, accepted that there was partition. Unless permission was accorded to adduce secondary evidence, the defendants are not entitled to adduce secondary evidence to establish partition. As per the provisions of the Indian Evidence Act, 1872 ('the Act of 1872' for brevity), a fact can be proved by producing primary evidence *i.e.* by producing document itself when partition is reduced into writing or by producing secondary

evidence after obtaining permission as required under the provisions of the Act of 1872. Here, in the written statement, a bald allegation is made that the property was allotted to the share of the 3rd defendant and the same was mortgaged with the Society but did not disclose the date of partition or reducing the same into partition list by the defendants. However, in Ex.A1, there is a reference about subjecting the property to mortgage with the Society; at the same time, there is also a clear recital that the 3rd defendant sold Ac. 0.03 cents of land, out of schedule property agreed to be sold, to Veeranna by executing registered sale deed and agreed to pursue to re-convey Ac. 0.03 cents to the plaintiff. The recitals in Ex.A1 are sufficient to conclude that the 3rd defendant sold Ac. 0.03 cents, mortgaged the property with the Society and the defendants agreed to redeem the mortgage by the date of executing registered sale deed.

18. Learned counsel for the plaintiff mainly demonstrated about illegality in admitting secondary evidence *i.e.* by marking Ex.X3 partition list since no permission was obtained to adduce secondary evidence as required under Sections 65 to 67 of the Act of 1872 and placed reliance on ***H.Siddiqui (dead) by L.Rs. Vs. A.Ramalingam*** (1st *supra*), wherein the Apex Court categorically held as follows:

> *"The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy o the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The Court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon."*

In view of the law declared by the Apex Court referred *supra*, there must be factual foundation in pleadings as to non-availability of original document and explain in whose possession it is available as required under Order VII Rule 14 of the Code of Civil Procedure (for short, 'C.P.C.') but there is no factual foundation in the present case to permit the defendants to adduce secondary evidence. Ex.X3 is

Photostat copy of partition list which is allegedly mortgaged with the Society to obtain loan. Though original partition list is available with the Society, they simply produced Photostat copy of the same attested by concerned officer and nothing prevented the Society to produce the original and take back the same after substituting certified copy of it but, instead of adopting such established procedure, the Society produced only Photostat copy which is not an authenticated copy of the partition list. On this ground alone, the document Ex.X3 is inadmissible in evidence.

19. The defendants also produced land revenue receipts issued by revenue department marked as Exs.B1 to B17 to establish that the 3rd defendant has been paying land revenue to revenue department since 1982. However, Ex.X1 disclosed that the 3rd defendant executed registered sale deed dated 06-01-1986 conveying Ac. 0.03 cents of land to Veeranna. Similarly, Ex.X4 is registered sale deed executed by the 2nd defendant in favour of E.Venkamma. These two documents Exs.X1 and X4 and Exs.B1 to B17 would clinchingly establish that there was partition, otherwise question of sale of property by defendants 3 and 2 under Exs.X1 and X4 does not arise. Similarly, later payment of land revenue to Government is also another strong circumstance to accept the contention that there was partition. However, when the partition is reduced into writing, plea of the defendants cannot be accepted unless the document is produced before the trial Court. Moreover, reference of Ex.X1 in Ex.A1 agreement of sale itself indicates that the 3rd defendant in his individual capacity, as an exclusive owner, sold Ac. 0.03 cents of land out of schedule property. The trial Court without adverting to various provisions of the Act of 1872, more particularly Sections 65 to 67 of the Act of 1872 and Order VII Rule 14 of C.P.C., admitted Ex.X3 in evidence without there being any foundation in pleadings as required under law to permit the defendants to adduce secondary evidence. Thus, admission of Ex.X3 is against the principle laid down by the Apex Court in the decision referred 1st *supra*. Hence, Ex.X3 cannot be looked into. If Ex.X3 is excluded from consideration, there is absolutely no iota of evidence to conclude that there was partition. If the partition pleaded by the defendants is oral, then other circumstances can be taken into consideration like payment of land revenue and execution of sale deed in favour of Veeranna and Venkamma by defendants 3 and 2 under Exs.X1 and X4 respectively but it is not their case that partition was oral. Therefore, Ex.X3 is inadmissible in evidence and the same needs no consideration while deciding the real controversy between the parties. Even if

Ex.X3 is not accepted, other documents marked as Exs.X1 and X4 would establish allotment of suit schedule property to the share of 3rd defendant, in the partition; apart from that, payment of land revenue to revenue authorities is another strong circumstance to accept the partition pleaded by 3rd defendant.

20. To prove the contents of Ex.X3, the defendants summoned D.W.3 for production of Ex.X3 and to give evidence. In his evidence, D.W.3 testified that original of Ex.X3 was sent to legal advisor for his opinion but, just before end of cross-examination, D.W.3 again asserted that original of Ex.X3 was available with Central Bank along with file. Therefore, it is evident that original of Ex.X3 is not available with D.W.3 but how he could produce Photostat copy of the same was not explained in his entire evidence. When original of Ex.X3 is available with Central Bank, the defendants would have summoned the document from Central Bank by following procedure. When original of Ex.X3 is not produced, Photostat copy of the same cannot be accepted.

21. The defendants also got examined E.Veeranna, vendee under Ex.X1, as D.W.2. D.W.2 testified about purchase of Ac. 0.03 cents of land and continuing in possession and enjoyment of the same. In cross-examination, nothing was elicited to disprove execution of Ex.A1. However, this *factum* of sale of Ac. 0.03 cents is mentioned in Ex.A1 itself. Therefore, the evidence of D.W.2 is useful to prove the contention of the defendants regarding allotment of schedule property to the share of 3rd defendant. Hence, I find no perversity in the finding of the trial Court to set-aside the finding regarding partition and allotment of the schedule property to the share of 3rd defendant.

22. The trial Court found that Ex.A1 is unenforceable under law only for the reason that the property was allotted to the share of the 3rd defendant and defendants 1, 2 and 4 have no interest or title to schedule property. Assuming for a moment that the property was allotted to the share of the 3rd defendant and joined as executant of Ex.A1 along with defendants 1, 2 and 4 agreeing to sell the property receiving Rs.45,000/- under Ex.A1, he is bound to execute registered sale deed in favour of the plaintiff for the reason that Ex.A1 is a reciprocal agreement, obligations of both the parties are mutual and performance of obligation under Ex.A1 by the plaintiff depends upon the performance of obligation by the defendants. Thus, Ex.A1 is

reciprocal agreement and both the plaintiff and the defendants are under obligation to perform their individual obligations as specified in Ex.A1.

23. Now, I would like to turn to the provisions of the Act. Sections 43 and 45 of the Act are the relevant provisions applicable to the present situation. According to Section 43 of the Act, when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Similarly, Section 45 of the Act deals with devolution of joint rights. According to it, when a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly. On a co-joint reading of Sections 43 and 45 of the Act, defendants 1 to 4 are both promisors and promisees and, similarly, the plaintiff is also promisor and promise since the obligations under Ex.A1 are mutual or reciprocal. Thus, the defendants occupied the position of both promisors and promisees *vice versa* the plaintiff. In such case, in view of Section 43 of the Act, the plaintiff may compel any one of the joint promisors to perform his obligation. If the principle laid down under Sections 43 and 45 of the Act is applied to the present facts of the case, the 3rd defendant, who is claiming to be exclusive owner of schedule property in view of the alleged partition, is bound to perform his obligation admittedly having received substantial amount under Ex.A1 from the plaintiff. Similarly, according to Section 17 of the Act of 1963, a person who had no title cannot be compelled to perform his obligation but Section 17 of the Act of 1963 has no application for the reason that the 3rd defendant is the absolute owner even according to pleadings and evidence adduced by the defendants and the 3rd defendant, being one of the joint promisors, is, therefore, under obligation to perform his part of obligation under Ex.A1 agreement of sale. Hence, the 3rd defendant can be compelled to execute registered sale deed receiving balance of sale consideration. Merely because the other defendants *i.e.* defendants 1, 2 and 4 have no title or interest in the property, the agreement cannot be said to be unenforceable since one of the joint promisors *i.e.* the 3rd defendant is the owner of schedule property even according to their own pleadings and evidence adduced by the defendants.

24. The defendants, by their representation, made the plaintiff to enter into Ex.A1 agreement of sale and, believing the same, the plaintiff parted with huge amount of Rs.1,00,000/- under Exs.A1 to A6. However, receipt of amount is not much in controversy as the finding of the trial Court is not challenged by the defendants. When the defendants made such representation and enjoyed the benefit out of the contract, the defendants are estopped to raise such contention that defendants 1, 2 and 4 have no title and it is the exclusive property of the 3rd defendant. On this ground also, the evidence adduced by the defendants is of no avail.

25. Learned counsel for the defendants would contend that either the 3rd defendant or all the defendants are unable to perform their part of contract in view of sale of Ac. 0.03 cents of land out of schedule property to Veeranna under Ex.X1. No doubt, there is a reference about sale of Ac. 0.03 cents in Ex.A1 agreement of sale but the defendants promised to pursue Veeranna to reconvey the same property to the plaintiff. The defendants have nothing to do with Ac. 0.03 cents of land by the date of execution of Ex.A1 as title is already vested with Veeranna and, therefore, the defendants are ceased to be the owners of Ac. 0.03 cents of land. In such case, for sale of Ac. 0.03 cents of land to the plaintiff despite knowledge about sale of the same to D.W.2 Veeranna under Ex.X1, the defendants cannot be compelled to execute registered sale deed for the said Ac. 0.03 cents. Merely because a piece of land cannot be conveyed to the plaintiff in terms of Ex.A1 agreement of sale, the entire agreement cannot be rendered worthless. Section 12 of the Act of 1963 permits the Court to decree a suit for specific performance for part of contract. According to Section 12 (2) of the Act of 1963, where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency. If Section 12 (2) of the Act of 1963 is applied to the present facts of the case, unperformed part of agreement is only in respect of Ac. 0.03 cents out of schedule property which is a bare minimum. Merely because the defendants could not perform their part of obligation in respect of Ac. 0.03 cents, relief of specific performance cannot be denied in view of Section 12 (2) of the Act of 1963. Therefore, I find no substance in the contention of leaned counsel for the

defendants.

26. One of the major contentions raised by learned counsel for the defendants before this Court is that relief of specific performance is purely a discretionary relief under Section 20 of the Act of 1963. Unless the plaintiff approaches the Court with clean hands, the Court cannot exercise its discretion in favour of the plaintiff to grant decree for specific performance. Undisputedly, relief of specific performance is purely discretionary and such discretion can be exercised judiciously in view of Section 20 of the Act of 1963 but exercise of such discretion is hedged by three exceptions contained in sub-section (2) of Section 20 of the Act of 1963 which are thus:

> *"(a) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*
>
> *(b) Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or*
>
> *(c) Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.*

In fact, there was no plea regarding exceptions contained under Section 20 (2) of the Act of 1963 and no issue was framed by the trial court with regard to the exceptions to deny relief of specific performance but the trial Court, without recording any finding for denial of specific performance while exercising discretion, denied primary relief of specific performance only on the ground that Ex.A1 agreement of sale is unenforceable.

27. Learned counsel for the defendants drawn attention of this Court to several judgments of the Apex Court. In ***Mayawanti Vs. Kaushalya Devi*** (5th supra), the Apex Court held as follows:

> *"In a case of specific performance it is settled law, and in deed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific*

performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

In ***A.C.Arulappan Vs. Smt. Ahalya Naik*** (4th *supra*), the Apex Court held as follows:

"The jurisdiction to decree specific relief is discretionary and the Court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the Court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20 (2) of the Specific Relief Act, 1963 as to under what circumstances the Court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff."

In ***M.V.Shankar Bhat and another Vs. Claude Pinto since (deceased) by L.Rs. and others*** (2nd *supra*), the Apex Court held that an agreement; entered into subject to ratification of terms and conditions thereof by co-heirs, who are not parties to the agreement, and undue influence is exercised while obtaining the agreement; is not enforceable and the Court, therefore, cannot exercise its discretionary jurisdiction in favour of the plaintiff to grant relief of specific performance. However, the facts of the above judgment are totally different from the facts of the present case for the reason that some of the co-heirs were not parties, the agreement was entered into subject to obtain consent of co-heirs, the agreement was obtained by playing undue influence and, consequently, the Court did not exercise its discretion. Therefore, the principle laid down in the above judgment has no application to the present facts of the case.

28. Learned counsel for the defendants further drawn attention of this Court to ***K.Ahmed Alli Sab, deceased (by L.Rs.), and others Vs. Desai Abdul Gani Desai*** (3rd *supra*), wherein this Court held as follows:

"Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the Court. The trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses considered the relevant facts and reached a conclusion. The Appellate Court should not have reversed that decision disregarding these facts and, in my view, the Appellate Court seriously flawed in its decision."

29. On overall consideration of law declared by the Apex Court and this Court, the Court cannot exercise discretion to grant relief of specific performance merely because it is lawful to do so but such discretion has to be exercised judiciously keeping in mind the exceptions contained under Section 20 (2) of the Act of 1963 while declining relief of specific performance. Here, no such contention was raised before the trial Court, no plea was raised in the written statement, no issue was framed and no finding was recorded by the trial Court. Hence, this contention of the defendants is without any factual foundation and the same is, therefore, rejected by applying the principle laid down by the Apex Court in ***Prakash Chandra Vs. Narayan***.

30. In view of my foregoing discussion, the 3rd defendant, without conceding that he is the exclusive owner of schedule property in view of the alleged partition, can be compelled to perform his part of obligation being one of the joint promisors and promisees in view of Sections 43 and 45 of the Act. Thereby, it is difficult to hold that Ex.A1 agreement of sale is not enforceable as the other defendants had no interest or title to the property. If none of the defendants had title, then it can safely be concluded that Ex.A1 agreement of sale is not enforceable but it is not even the case of the defendants that they had no title and the specific case of the defendants from the beginning is that the 3rd defendant is the exclusive owner who is also one of the joint promisors and promisees under Ex.A1. The finding of the trial Court that Ex.A1 agreement of sale is not enforceable under law is, therefore, erroneous and it is contrary to Sections 43 and 45 of the Act. Accordingly, the point is held in favour of the plaintiff and against the defendants.

31. **<u>In Re. Point No. 2:</u>**

Though the defendants denied readiness and willingness of the plaintiff to perform his part of obligation in the written statement, the evidence adduced by the plaintiff clinchingly proved readiness and willingness of the plaintiff to perform his part of obligation under Ex.A1 since he paid Rs.55,000/- under Exs.A2 to A6 subsequent to execution of Ex.A1 besides payment of Rs.45,000/- on the date of execution of Ex.A1. Though a specific period is fixed for payment of balance of sale consideration, the defendants insisted for payment of amount on different occasions and, accordingly, he made payments under Exs.A2 to A6. Even otherwise, the recitals of Ex.A1 go to show that the plaintiff has to pay balance of sale consideration on the date of execution of registered sale deed subject to compliance with mutual obligations on the part of the defendants like production of link documents, discharge of mortgage debt with the Society and get the land measured. Therefore, taking into consideration of all the attending circumstances, it can safely be concluded that the defendants failed to perform their part of obligation under Ex.A1. Till the defendants perform their obligation, question of payment of balance of sale consideration by the plaintiff does not arise. When an order of performance is fixed under Ex.A1 agreement of sale, both the parties are bound to perform their obligation in view of Section 42 of the Act. However, during argument before this Court, learned counsel for the defendants did not raise any contention with regard to proof of readiness and willingness as required under Section 16 (c) of the Act of 1963. In such case, the Court need not record any finding since it was not questioned. Time is not essence of the contract since there is no clause for termination of agreement of sale in view of failure to pay balance of sale consideration within time stipulation. In ordinary course of events, time is not essence of contract in case of sale of immovable property unless there is a specific clause terminating agreement of sale for default of parties to the agreement. Non-payment of balance of sale consideration within time is not at all a ground to decline relief of specific performance in view of the attending circumstances. Even after issuance of Ex.A7 legal notice by the plaintiff, the defendants got issued Ex.A8 reply denying their existence as joint family and execution of Ex.A1 agreement of sale. In these circumstances, it is really difficult for the plaintiff to pay balance of sale consideration to obtain registered sale deed. Hence, non-payment of balance of sale consideration within the stipulated time is not a ground to decline relief of specific performance of agreement of sale for part of schedule property after excluding Ac. 0.03 cents which was already sold to Veeranna under Ex.X1 in view of Section 12 (2) of the Act of 1963. Accordingly, the point is answered.

32. In view of my finding on point Nos. 1 and 2, the plaintiff is entitled to specific performance of Ex.A1 agreement of sale for schedule property after excluding Ac. 0.03 cents already sold to E.Veeranna under Ex.X1 on payment of balance of sale consideration to the 3rd defendant.

33. In the result, the appeal is partly allowed directing the 3rd defendant to execute registered sale deed in favour of the plaintiff for schedule property after excluding Ac. 0.03 cents already sold to E.Veeranna under Ex.X1 within three months after receiving balance of sale consideration of Rs.65,000/- from the plaintiff. The amount already paid by the plaintiff to the 3rd defendant i.e. Rs.45,000/- under Ex.A1, Rs.5,000/- under Ex.A5 and Rs.10,000/- under Ex.A6 shall be appropriated towards sale consideration under Ex.A1. The 1st defendant, who received Rs.15,000/- under Ex.A2 and Rs.5,000/- under Ex.A4, and defendants 1 and 4, who received Rs.20,000/- under Ex.A3, are directed to refund the amount covered by Exs.A2 to A4 within three months together with interest @ 12% p.a. Since the 1st defendant died, the other defendants are liable to pay the same, being legal-heirs, who succeeded estate of the deceased 1st defendant. In the event of failure to execute registered sale deed by the 3rd defendant within three months on receipt of balance of sale consideration, the plaintiff is at liberty to approach the Court of Subordinate Judge, Tadepalligudem, to obtain the same through process of the Court. Pending miscellaneous petitions in this appeal, if any, shall stand closed in consequence. No order as to costs.

M.SATYANARAYANA MURTHY, J.

Date: 11-09-2015.

JSK