

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

C.C.C.A.No. of 115 of 2004

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JUDGMENT :

The present appeal is filed aggrieved by the dismissal Judgment and decree dated 25.11.2003 in O.S. No.456 of 1998 on the file of VII Additional Chief Judge, City Civil Court, Hyderabad. The above suit is filed by the plaintiff for specific performance of the contract for sale dated 27.01.1993 for Rs.7,00,000/- with respect to the plaint, agreement schedule property, said unsuccessful plaintiff filed the appeal against the defendants 1 to 4 of the appeal. Originally the suit was filed against sole defendant and later on the application of the defendants 2 to 4 no other than brothers of 1st defendant to come on record claiming the plaint schedule property covered by the agreement for sale is not the exclusive property fallen to the share of the 1st defendant but still joint family property of all the four brothers, said petition without prejudice to the contest was allowed by order dated 21.01.2000 in I.A. No.2061 of 1998.

2) The contentions in the grounds of appeal are that the trial Court failed to appreciate the oral and documentary evidence on record more particularly Ex.A-2 which was executed by defendant No.1 in favour of P.W-1 and erroneously observed that Ex.A-2 is not proved by the appellant, that the trial Court committed an error in framing an issue with regard to payment of consideration under agreement, that once Ex.A-2 is proved, a presumption is drawn that under Sections 91 and 92 of the Indian Evidence Act no oral evidence can be adduced to weigh the contents of Ex.A-2, that the lower Court has failed to appreciate the additional issue can only be framed provided the agreement of sale is admitted, but agreement of sale was disputed, that the lower Court has failed to consider the pleadings of the defendants and framed the issue of consideration erroneously, that the trial Court has failed to consider Ex.A-3 was executed in pursuance to Ex.A-2, that the trial Court has observed that there is no reference of Ex.A-2 in Ex.A-3, that actually Ex.A-2 was executed and in pursuance of Ex.A-2, the defendant No.1 executed Ex.A-3 that

the trial Court has observed that Ex.A-3 does not refer to Ex.A-2 that the trial Court has committed an error while appreciating the oral evidence of parties, that once Ex.A-2 and A-3 was executed, it is clear by the intention of the parties as possession was delivered and GPA was executed giving all powers to the vendor, otherwise Ex.A-3 would not have executed, that the trial Court has failed to appreciate that the defendant No.1 has failed to establish that he has borrowed the amount to a tune of Rs.1.00 lakh from the plaintiff, that the trial Court has created a negative burden on the plaintiff, that it is submitted that when there is no evidence on record to prove that the defendant No.1 had borrowed the amount from the plaintiff, the trial Court has committed an error by observing that Ex.A-3 was executed for the purpose of loan amount, that there is no iota of evidence to prove that it is a loan transaction, that there is no such issue framed by the Court, that the trial Court has failed to consider that once the loan amount is not proved, that there cannot be any finding by the trial Court that amount was lent by the plaintiff, as such, the trial Court has committed an error by mis-interpreting the evidence in the case, that the trial Court has failed to consider that after execution of Ex.A-2, the premises was let out by the plaintiff and he received the deposit amount from the tenant, that as seen from the records, the appellant has received a total deposit of Rs.90,000/- , that if the case of the defendant is believed when the plaintiff has advanced loan amount of interest, the amount towards deposit would have sufficed the amounts for the alleged principal amount and the appellant need not collect rents for a period of five years, that a perusal of documents Exs.A-2 and A-3 that were attested by the wife of 1st defendant and the plaintiff and the evidence of P.W-1 and P.W-2 categorically establishes that Ex.A-2 was executed by the 1st defendant and the same was not appreciated by the trial Court, that the trial Court has failed to consider that once Ex.A-2 was admitted then the legal presumption be drawn about the receipt of the consideration, which the Court failed to appreciate in spite of there being documentary evidence on record, that the trial Court has failed to appreciate that Ex.A-2 and A-3 were together executed on the same day, that if really, Ex.A-3 was executed in pursuance of the hand loan amount, it would have been mentioned in Ex.A-3 that the GPA is given till the repayment of the loan amount, that non-mentioning of the same disproves the contention of the defendant that Ex.A-3 was not executed for the

recovery of the amount, that if Ex.A-2 and A-3 are correlated, it is only in pursuance to the agreement of sale, Ex.A-3 was executed which the lower Court has lost sight in spite of there being evidence on record, that the lower Court has erroneously observed that there is no documentary evidence for payment of Rs.7.00 lakhs towards consideration, that once Ex.A-2 is proved, the contents therein cannot be disputed and there is a presumption of receipt of consideration that the trial Court has observed that as the addressees in Ex.A-2 and A-3 are different, as such, Ex.A-2 was not prepared on 27.01.1993, that these observations can only be substantiated if proper defence was taken by the defendants, that in the present case, it is not the case of the defendant that Ex.A-2 was prepared on a different dates, that in such an event, the lower Court making such observation is against record, that the trial Court has failed to consider that subsequent evidence of D.W-2 and D.W-3 clearly establishes that they have changed the defence in view of the earlier evidence which is on record, that the lower Court gave a finding in favour of the appellant by holding that the property was partitioned among defendant No.1 to defendant No.4, that it is clear that the defendant No.1 in order to overcome with the agreement of sale, has set up case of it is a joint family property in spite of the fact that there was a partition and a Xerox copy of Ex.A-4 was filed before the Court, that the trial Court has failed to consider that in order to overcome with Ex.A-2, the defendants took a wayward defence contrary to the facts on record, that the trial Court has incorrectly applied Section 53-A of Transfer of Property Act, that actually the limitation does not run as seen from Ex.A-2, that no time is fixed in Ex.A-2 for the purpose of the contract as such, Ex.A-3 was executed, that in such a case, once there is a breach of contract when defendant No.1 cancelled the G.P.A by issuing a notice, the appellant had cause of action in filing a suit for specific performance, that the lower Court has failed to consider that once the consideration is paid, it is clear as per the averments made in the plaint that the plaintiff has performed his part of obligation and only registration of the documents is a formality, that in such a case, the lower Court has committed an error by making observation contrary to the record, that the trial Court has erroneously applied Article 113 while directing to appreciate that the claim of the plaintiff is barred, that the lower Court has failed to consider that as per the judgment rendered by the Supreme Court for immovable property, time is not the essence of the contract more particularly that entire consideration was paid

and Ex.A-3 was executed, as such, observation made by the Court in this context is without properly appreciating the law and prayed to allow the appeal by setting aside the decree.

3) The learned counsel for the appellant/plaintiff reiterated the said grounds urged in the appeal. It is during the course of hearing the appeal, the plaintiff filed the application in CCCA MP No.554 of 2015 for amending the plaint by incorporating the alternative relief for refund of the sale agreement amount of Rs.7,00,000/- with interest at 24% p.a. from the date of suit till the rate of realization. The learned counsel for the appellant also in support of the amendment application with reference to Section 22(1) and (2) of the Specific Relief Act, 1963 submitted the vigor of Order VI Rule 17 C.P.C has no application by virtue of the specific provision under the Specific Relief Act apart from same is showing for just decision of the case.

4) Though no separate counter filed in opposing the said application for amendment the learned counsel for the 1st defendant on one side vis-à-vis the learned counsel for other defendants/respondents 2 to 4 supported the trial Court's judgment of dismissal saying the very agreement itself is by the 1st defendant/1st respondent in dispute and plaintiff failed to prove the same and also the payment of Rs.7,00,000/- entire sale consideration and entitlement to the relief apart from no alternative prayer originally sought in the plaint, but for belatedly in the appeal and there are no grounds to allow either the application for amendment or the appeal to any extent but for dismissal confirming the trial Court dismissal judgment and decree.

5) Heard both sides at length and perused the material on record and also the provisions and propositions, placed reliance.

6) Now, the points that arise for consideration are

- i. Whether the suit sale agreement is true and supported by consideration and if so, whether the plaintiff is entitled to the relief of specific performance or the alternative relief for refund of the amount with interest, if any?
- ii. If so, the trial Court's dismissal judgment and decree in toto of the plaintiff's suit claim is unsustainable and requires interference by this Court while sitting in appeal and to

what extent and with what observations?

iii. To what result?

7) As points (i) and (ii) are interrelated and requires to be dealt with for common finding, taken up together.

8) **POINTS (i) & (ii)**: As per the plaintiff's claim before the trial Court in nutshell, the 1st defendant in the oral partition covered by a subsequent memorandum of partition with his brothers (Defendant Nos.2 to 4), dated 21.12.1992 under Ex.A-4 photostat copy, got the plaint schedule property to his share apart from other extents, consisting of portion of Municipal No.5-3-964 with ground floor, first floor, 2nd floor admeasuring Ac.93.33 Square yards at Fasijungh Lane, Nizam Shahi Road, Hyderabad, within the boundaries described, subsequently the 1st defendant offered to sell the plaint schedule property for Rs.7,00,000/- in favour of the plaintiff and having received the entire sale consideration executed the agreement of sale with undertaking to execute sale deed as and when demanded and also executed on even date registered G.P.A in favour of the plaintiff for managing and also sale etc., of the plaint schedule property. The further averment is having received the entire sale consideration to execute sale as and when required and executed registered G.P.A of even date, a portion of the ground floor was given to plaintiff by defendant where plaintiff set up a stationery shop and the remaining portions of the schedule property was letting out and there was a joint bank account was opened by plaintiff and the 1st defendant in directing the tenants to pay the rents by cheques to the plaintiff for in turn to deposit in the joint account. It is further averred that the plaintiff received notice dated 18.08.1998 **retucing** G.P.A dated 27.01.1993 and plaintiff cause issued reply dated 04.09.1998 suitably and later on even plaintiff contacting the defendant No.1 to execute sale deed, he has been evading from which as the 1st defendant did not turn up to execute sale deed and withdraw the G.P.A revocation, plaintiff cause issued telegraphic notice dated 08.09.1998 and also cause published in Eenadu daily dated 12.09.1998 and issued another notice dated 13.09.1998 and the reply given to it on 16.09.1998 by the 1st defendant is by twisting the facts.

The further averments of plaintiff are plaintiff has been treated as absolute owner of the property by the 1st defendant pursuant to the agreement supra and now trying to avoid at the influence of some wealthy persons to have wrongful gain, that 1st defendant also delivered possession to the plaintiff of the premises and he has no right to cancel the G.P.A and bound to execute sale deed in performance of the sale agreement contract and plaintiff is ready and willing to obtain registered sale deed and also entitled to get benefits of the schedule property from the tenants to receive rents etc., from 1993. The further averments so far as defendant Nos.2 to 4 concerned are being the brothers of the 1st defendant, mischievously setting up by the 1st defendant in their claiming as if the schedule property is joint family property undivided though there was already a partition acknowledged by document and the 1st defendant was in exclusive possession and enjoyment even by the date of agreement of sale and the defendant Nos.2 to 4 have no right to oppose the suit claim, being set up by the 1st defendant collusively to oppose the suit claim if possible, and they are also bound to join along with the 1st defendant in execution of the sale deed. It is there from maintained the suit for specific performance as only relief and also to give symbolic possession. The suit filed was on 28.10.1998, the contest of the 1st defendant in his written statement before the trial Court in opposing the suit claim is that he never executed the contract for sale dated 27.01.1993 in favour of the plaintiff nor delivered or hand over possession of the property and there were no negotiations for sale between them and the alleged mutual agreement to alienate is untrue, so also execution of the sale agreement with the alleged terms and no sale consideration received from the plaintiff by the 1st defendant as never executed the sale agreement. It is averred that he executed the registered G.P.A. No.137/2013 registered at Sub-Registrar, Mojamjahi Market, Hyderabad being a neighbour and from the acquaintance with the plaintiff, that the plaintiff is a money lender and the 1st defendant's marriage performed and he was unemployed and in that juncture he used to borrow monies from the plaintiff ranging from Rs.1,000/- to Rs.5,000/- for which he was charging abnormal rates of interest at 8 to 10% per month since 1989, which the 1st defendant could not pay in lumpsum and it is in that juncture, plaintiff advised and obtained from 1st defendant the G.P.A and cause

opened joint bank account at Mahesh Cooperative Urban Bank, Bengaluru to withdraw the amounts therefrom from time to time to adjust and the 1st defendant categorically agreed and executed the G.P.A on 27.01.1993 and plaintiff obtained a portion of ground floor on lease at a rent of Rs.5,000/- per month and the other portions, the 1st defendant was managing that the 1st defendant opened joint account bearing No.11533 in Mahesh Cooperative Bank, Bengaluru, he used to collect rents from tenant by cheques and depositing into the account and the plaintiff after deposit of the amounts, used to draw amounts and in that way plaintiff withdrew in all about Rs.4,00,000/- from said joint account right from June, 1993 till August, 1998 and he collected amounts more than what he lent and the contrary allegations of execution of agreement or taking of consideration or delivery of any portion of the premises are untrue, so also any demand for specific performance.

9) The 1st defendant further claimed that it is the joint family property of him and his brother and he is not the owner and there was no partition and he did not represent muchless hand over any past partition document dated 21.12.1992 to plaintiff and the alleged demands for specific performance are untrue and the contention that after sale agreement pursuant to it the G.P.A executed is not correct for reasons supra, in fact the G.P.A executed for reasons supra, later cancelled by issuing notice to the plaintiff and it is in reply plaintiff asked for execution of sale deed for the first time pursuant to the alleged agreement dated 01.09.1993 by keeping quiet all through, if true with no reason and it is the 1st defendant after cancellation of the G.P.A published in Eenadu and the plaintiff cause issued to reply through same paper and cause issued telegram notice for which he cause issued reply suitably from the facts. It is further contended the alleged agreement or possession or treating the plaintiff as absolute owner over the property are untrue. Thereby, it is the contention that plaintiff has malafide intention to grab the property fabricated the false agreement for sale which the 1st defendant never executed that too when the property is joint family property of him and his brothers defendant Nos.2 to 4 and not absolute property of the 1st defendant, hence to dismiss the suit claim.

10) The written statement of defendant Nos.2 to 4 subsequently impleaded in

the suit on their own is by disputing the plaintiff's suit claim and execution of agreement by the 1st defendant and any right of the 1st defendant over the property in claiming same still joint family property and thereby no way bind, the defendant Nos.2 to 4, whereas the sale agreement or G.P.A, by opposing the plaintiff's entitlement of any reliefs in the suit for specific performance and also denying any alleged partition orally or evidencing by memorandum dated 21.12.1992 saying there is no such document in existence. It is also the contention of claim is otherwise barred by time and the plaintiff is disentitled to the reliefs for lack of diligence etc., in seeking to dismiss the suit claim. It is further averred that defendants 1 to 4 entered into development agreement for entire property bearing No.5-3-64 on 28.11.1985 in total 1400 Sq. yards with Barkath Builders who developed and in consideration one block has fallen to the share of the promoters and the other portion to the owners i.e., defendants 1 to 4 and the plaint schedule also part of the development agreement and the premises developed by Barkath builders and the so called agreement is thereby untrue, unbelievable and unenforceable. The trial Court pursuant to the above pleadings framed mainly three issues as to whether any agreement of sale executed by the 1st defendant and if so binding on defendant Nos.2 to 4 and if so, plaintiff entitled to the claim for specific performance and the additional issues as to whether plaintiff paid Rs.7,00,000/- consideration under Ex.A-2 agreement.

11) The trial Court recorded the evidence pursuant to the issues, that is of plaintiff as P.W-1 and his wife, P.W-2 and one B.Ramesh P.W-3 who placed reliance upon Exs.A-1 to A-14 viz., agreement of sale, general power of attorney, Photostat copy of memorandum of past partition, Notice, reply including telegraphic notice and reply notice, paper publication, sketch plan of the properties showing separate possessions and letter from M.C.H of payment of property tax and document executed by 4th defendant Y.Srinivas and Photostat copy of receipt. On behalf of defendants, the 1st defendant was examined as D.W-1 and his wife Vijaya as D.W-2 and 3rd defendant as D.W-3 and they placed reliance on certified copy of sale deeds Ex.B-1 to B-9 of 1993, 1997 and 1998 and Ex.B-10 property tax bill dated 01.09.2002. It is from said evidence oral and documentary and after hearing the trial Court held by commonly dealing with the issues and additional issue in dismissal of the suit

with findings more particularly from paras 8 to 20 of the Judgment that the Ex.A-2 agreement shows it is out and out un-registered sale and not agreement for amounts stated in full, and property delivered and Ex.A-3 is the General Power of Attorney of which term No.2 reads that 'I am unable to devote sufficient time over the said property, as such I hereby appoint the plaintiff as true and lawful attorney to look after and manage said property or said portion of ancestral and in my name'. The G.P.A no way whispered the agreement for sale if true and even dated 27.01.1993, and till Ex.A-5 notice dated 18.08.1998 issued by 1st defendant to the plaintiff canceling the G.P.A and once G.P.A cancelled and the sale agreement not believed including the so called payment of entire consideration of Rs.7,00,000/- and delivery of possession for nothing left but to obtain sale deed and the G.P.A obtained and subsequently realizing rents till cancellation of G.P.A shows the sale agreement is a sham one and not with intention to purchase obtained by plaintiff and there is no other documentary evidence to support Rs.7,00,000/- consideration paid by plaintiff to defendant on 27.01.1993 and if true instead of obtaining G.P.A he could have obtained registered sale deed and there is something to show between plaintiff and the 1st defendant monetary transactions which made him to execute in favour of the plaintiff the G.P.A. It is also pointed out by the trial Court with reference to the address given in the Ex.A-2 agreement, that of the 1st defendant as house No.15-5-441, Osmanshahi, whereas in the G.P.A Ex.A-3 house No.5-2-1017 of Mojam Jahi Market, Hyderabad and if both were executed on some day, there could be no occasion for such difference and it shows Ex.A-2 was not prepared on 27.01.1993 but later and equally to say no consideration paid on that day muchless executed the agreement but for plaintiff might have obtained signatures of the 1st defendant and his wife on Ex.D-2 without their knowledge and that is why plaintiff kept quiet without even demanding for specific performance if agreement there to get sale deed, till 1st defendant issued Ex.A-5 notice dated 18.08.1998. It is also observed by the trial Court that under section 16(c) of the Specific Relief Act, 1963 a person who fails to aver and prove readiness and willingness always to perform the essential terms of the contract relief cannot be granted and in the present case from plaint there is no such averment. Even in plaint para No.8, plaintiff averred that in August, 1998 he noticed change in the attitude of the 1st defendant and

subsequently received the notice from the 1st defendant dated 18.08.1998 revoking the general power of attorney dated 27.01.1993 and that is set up as cause of action to the suit and thus the alleged agreement of sale dated 27.01.1993 is not an agreement of sale and plaintiff ought to have demanded 1st defendant for execution of sale deed within three years from so called Ex.A-2 agreement date and once it is outright sale even it is barred by law and the plaintiff has no cause of action and it is also not binding on defendants 2 to 4. It is however observed that, the 1st defendant having executed the general power of attorney for the suit schedule property and having admitted the same, he cannot turn round to say contra to it from estoppel applies and the general power of attorney is binding on the 1st defendant though not on other defendants 2 to 4 and in the cross-examination of D.W-3/D-3 he deposed that defendants 1 to 4 are enjoying their separate portions by realizing rents individually and the 1st defendant/D.W-1 admits in the cross-examination that tenant occupying D-portion of Ex.A-11 is paying rent to that through cheques and the other defendants occupying second floor of D-portion are paying by cheques rents in his favour, so also tenants occupying the first floor and it shows the property was already partitioned among defendants 1 to 4 and the general power of attorney dated 27.01.1993 till revocation on 18.08.1998 in force and it proves the partition between defendants 1 to 4 in respect of their joint family property and thereby held Ex.A-2 agreement is a sham and nominal one brought up by plaintiff to claim the property wrongly and no way binding on defendants 2 to 4 in dismissal of the suit claim.

12) It is said findings, now in attack in the grounds referred supra. So far as alternative relief sought for amendment in the appeal during hearing concerned Section 22 of the Specific Relief Act reads as follows:

“22. Power to grant relief for possession, partition, refund of earnest money, etc.- (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, as for-

- a. possession, or partition and separate possession, of the property, in addition to such performance; or

- b. any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21”.

13) The non-abstante clause in Section 22 of the Specific Relief Act with rider of notwithstanding anything contained in C.P.C is suffice to say in its operation prevail over Order VI Rule 17 C.P.C and that rider of due diligence once trial commenced, has no application to Section 22 of the Act as the person suing for specific performance in appropriate case ask for possession, partition and separate possession or other relief including refund of earnest money or deposit paid or made in case of claim for specific performance refused. However, unless such relief claimed, the same cannot be granted by Court, provided even not claimed in the plaint, the Court shall at any stage of the proceeding allow to amend the plaint and it is the power of the Court which is without prejudice to the power to award compensation under Section 21 of the Specific Relief Act. The same is very clear of entitlement to the amendment and once asked the power of Court to grant. In fact even from the respondents there is no quarrel on the proposition, hence the amendment petition is allowed.

14) In fact there is no further evidence required muchless any additional pleas including for defence as the very sale agreement and entitlement to the reliefs in dispute including from evidence in support of the pleadings and the findings of the trial Court discussed supra, but for how far to interfere with the trial Court's dismissal judgment and decree for this Court while sitting in appeal concerned to answer including from the subsequent event by amendment of the alternative relief also from the expression of the Apex Court in **Babulal V. M/s.Hazarilal Kishorilal** and following the same another expression of this Court permitted such amendment in the specific performance of the contract for

sale, at appeal stage invoking Section 22 of the Specific Relief Act discussing with reference to Order VI Rule 17 C.P.C vide ***Ramachandra V. Rama Krishnamma***. So far as compliance of Section 16(1) of the Specific Relief Act of always ready and willing to perform his part of the contract by the plaintiff, vendee, concerned, the Apex Court in ***Motilal Jain V. Ramdasi Devi*** that such an averment is not a mathematical formula, it can be expressed only, not by certain specific words or terms but to understand or infer or cull out from reading of the plaint as a whole; where it indicates readiness and willingness of plaintiff is suffice and where plaintiff paid 2/3rds of consideration at the time of sale agreement and demanded the defendant by three notices as referred in the plaint, with no response, the trial Court held erred in refusing the relief by observation of no specific finding of readiness and willingness. It is also observed that it cannot be said plaintiff not entitled to the relief of specific performance merely because also sought an alternative relief from combined reading of Sections 21, 22 and 30 of the Specific Relief Act. So far as delay concerned, the Apex Court observed by delay even within limitation period any third party's rights are intervened that can be a defence in opposing the claim to consider. A perusal of the plaint averments as referred supra with reference to the Ex.A-2 agreement terms show once entire sale consideration shown paid subject to proof of what is remained is only obtaining of sale deed and possession if not proved regarding the plea of possession taken or delivered, and the agreement no way provided any stipulation for performance to commence three years therefrom as per Article 54 of the Limitation Act which otherwise even provides three years to count from date of demand and refusal and even Ex.A-5 notice dated 18.08.1998 cancelling the G.P.A can be taken as refusal the suit filed within three years therefrom can be said within limitation as suit filed in the year 1998 itself. Thus, the suit has filed and framed is maintainable and within the parameters of Section 16(c) of the Specific Relief Act also. What the trial Court observed of it is an outright sale un-registered and not a contract for sale to perform is not correct from the settled law that even entire consideration paid and possession shown delivered and what is remained is obtaining of sale deed, suit for specific performance lies to get sale deed as that part of the contract still to perform even the sale agreement recites as if outright sale.

15) Now, coming to the plaintiff's suit claim concerned, Ex.A-4 is the past partition list or memorandum acknowledging oral partition between defendant Nos.1 to 4 i.e., the 1st defendant and his brothers. The original as per plaintiffs with defendants and only Photostat given to him at the time of entering the so called G.P.A and sale agreement, the same marked without objection and as such the procedural aspect on marking deemed waived and not open of no foundation even laid for existence of original as laid down in ***R.V.E.Venkatachala Gounder V. Arulmigu Visweswaraswami & V.P. Temple*** and followed by ***Dayamathi Bai V. K.M.Shaffi***. The trial Court also from the evidence on record more particularly besides evidence of P.W-1 with reference to evidence of D.W-1/1st defendant and D.W-3/D-3 cross-examination admissions held rightly of the properties between defendants 1 to 4 already partitioned and not joint as claimed by defendants 2 to 4 leave about the development agreement entered with third parties to develop their respective properties all even together for nothing to show any blending or re-uniting of the already partitioned properties acknowledged by the past partition.

16) It shows further including by the time G.P.A Ex.A-3 executed in favour of the plaintiff by the 1st defendant specifying the property as his, as rightly concluded by the trial Court. It is thus, the G.P.A execution and the plaintiff schedule property belongs to the 1st defendant are proved from the evidence on record as rightly concluded by the trial Court.

17) It is needless to say the fundamental principle of law that in suit for specific performance to succeed, the plaintiff must plead and prove his case positively with readiness and willingness and entitlement to the equitable and discretionary relief or even any alternative relief and the defendants to non-suit the plaintiff can take any even inconsistent pleas in defence. Coming to the crux regarding the sale agreement and payment of Rs.7,00,000/- pursuant to which how far proved by the plaintiff concerned, the plaintiff/P.W-1 in his cross-examination deposed that on that day firstly sale agreement obtained and later the G.P.A obtained. Both are shown dated 27.01.1993. It is important here a strong circumstance against the case of the plaintiff as rightly concluded by the trial Court from the evidence on record that, if really the first document is sale agreement and subsequently the G.P.A obtained on even date why again G.P.A

obtained and registered and the 1st document on that day if true of sale agreement executed not registered apart from said sale agreement even not referred in the G.P.A subsequently obtained though supposed to refer. In fact, the G.P.A if subsequently is supposed to refer the sale agreement and once sale agreement already executed, there is no meaning in obtaining G.P.A but for if necessary to deliver possession to G.P.A holder and in his favour or in favour of other alienee and to execute sale deed and to deliver possession if not already delivered. The sale agreement nowhere specifically even mention about delivery of possession. Even the claim that possession was delivered under the sale agreement is belying from subsequent G.P.A on same date to manage the property leave about to execute documents of sale etc. It is because there is no question of management of the property already if delivered but for to execute sale deed. Further more said version of plaintiff/appellant is belying from the factum of the joint account opened by the 1st defendant and plaintiff together and the plaintiff is only in occupation of a portion in ground floor out of the plaint schedule property which the 1st defendant claims as tenant was inducted and paying rents to adjust to the amounts lent and undisputedly other tenants in other portions out of the plaint schedule paying rents into the joint accounts by cheques or otherwise and the joint account is operating by plaintiff and the 1st defendant and that shows the property belongs to the 1st defendant and there is no delivery of possession to the plaintiff, as had it been it is meaningless of opening joint account and depositing rents into it by tenants. It is in fact fitting to the observation of the trial Court of the amounts as claimed by the 1st defendant borrowed from plaintiff and for that obtained some signed papers while obtaining G.P.A and same utilized in creating an agreement. The change in address of the 1st defendant also belies the case of the plaintiffs and substantiates the said conclusion as rightly arrived by the trial Court. The plaintiff already out of the rents recovered from the joint account about Rs.4,00,000/- not in dispute. In fact, it is also the rent for the portion occupied by the plaintiff to adjust. Apart from it even to believe entire consideration of Rs.7,00,000/- as if out rightly paid in cash, there is no substantial plea muchless if it is by other documentary proof or the like to substantiate the means of the plaintiff of owning Rs.7,00,000/- cash. The contention that his averment even as per the 1st

defendant of money lender etc., not sufficient to presume he got Rs.7,00,000/- cash for nothing of his case of invested in any bank or borrowed from anybody for paid, that is neither in plea nor any iota of documentary evidence to establish such possessing of Rs.7,00,000/- cash that is also the conclusion rightly arrived by the trial Court in not believing the Ex.A-2 sale agreement and coupled with it, the other circumstances are; there is no meaning in obtaining if at all obtained sale agreement a G.P.A but for vice versa of trial Court's observation substantiates of G.P.A obtained for the lending and also any signed papers that in make use and as if an agreement for sale. No prudent person will keep quiet without even pursuant to the G.P.A if at all there is an agreement to execute sale deed, and not even by demanding though what remained is to obtain sale deed and nothing more if agreement is true and in existence. Apart from it, there is no possession delivered from what is discussed supra; if at all as a G.P.A holder to manage the property and deliver possession to that extent also plaintiffs plea is inconsistent and unclear to the equitable relief to seek and get. The trial Court therefrom rightly concluded that there is some basis for Ex.A-5 notice dated 18.08.1998 in revoking G.P.A with averments saying the amounts to adjust already completed and G.P.A purpose seized. In fact even taken proved Ex.A-2 agreement and pursuant to which even separate G.P.A executed under Ex.A-3, the G.P.A is irrevocably as per Section 202 of the Contract Act. However, the factual matrix here discussed supra not the same to strictly apply those provision more particularly from the G.P.A is silent regarding the sale agreement if at all already in existence of even date that is the crux for applying the Contract Act provision supra of existence of transfer or creation of interest from which G.P.A if executed unless specific condition thereto revoke, not revocable-vide, ***Suraj Lamp Industries Pvt. Ltd V. State of Haryana.***

18) Having regard to the above, once the plaintiff could not make out a case regarding his possessing of Rs.7,00,000/- and payment of the entire consideration thereunder and existence of Ex.A-2 agreement and it is supported by consideration, the trial Court is right in its conclusion and for this Court while sitting in appeal even merely because some other view also shown possible, there is nothing to interfere including to deviate from the findings of

the trial Court or to grant any alternative relief for refund muchless even by adjustment of Rs.4,00,000/- and odd already recovered out of the so called Rs.7,00,000/- advanced under the agreement to order for balance Rs.3,00,000/- or so with interest even from today.

19) In the result, while allowing the amendment application, the appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any pending, shall stand cancelled.

Dr. B. SIVA SANKARA RAO, J

08.12.2015

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