

**THE HON'BLE SRI JUSTICE M. SATYANARAYANA
MURTHY**

APPEAL SUIT No.1121 OF 1997

JUDGMENT

The unsuccessful plaintiffs in O.S. No.22 of 1989 on the file of the Subordinate Judge Court (hereinafter will be referred as trial Court), Razole, preferred this appeal challenging the decree and judgment dated 30.04.1997, wherein the suit filed for specific performance of an agreement of sale was dismissed.

The parties to the appeal hereinafter be referred to as they were arrayed before the trial Court.

Respondent No.3 died during pendency of this appeal and his legal representatives were brought on record as respondent Nos.11 to 15 vide orders of this Court dated 02.07.2012 in A.S.M.P.No.2485 of 2007.

The plaintiffs filed the suit for specific performance of agreement of sale to direct the defendants to execute registered sale deed in favour of the plaintiff in terms of agreement of sale dated 02.03.1986 at his expenses, on receiving balance of sale consideration of Rs.75,000/- and to permit him to obtain registered sale deed in the event of failure to execute registered sale deed by the defendants within the stipulated time and for delivery of possession of the property. Alternatively, the plaintiff also claimed recovery of advance sale consideration of Rs.75,000/-

together with interest at the rate of 18% per annum from 02.03.1986 till the date of payment.

One Molleti Meerayya was the owner of the plaint schedule property. During his life time, he offered to sell the property and the plaintiff readily agreed to purchased the same for Rs.1,50,000/-. Accordingly, he entered into agreement of sale dated 02.03.1986 for consideration of Rs.1,50,000/-. The plaintiff paid advance of Rs.75,000/- on the same day, while agreeing to pay the balance of sale consideration within one year from the date of agreement on receipt of which a registered sale deed shall be executed in favour of the plaintiff. It is further agreed that after execution of registered sale deed, on receiving balance of sale consideration, Molleti Meerayya has to deliver vacant possession of the schedule property, which is on lease in favour of one Jiddu Ramamohanarao, to the plaintiff. While the matter stood thus, the vendor Molleti Meerayya died on 19.02.1988 before execution of registered sale deed as agreed under the agreement of sale. Thereupon, the plaintiff got issued registered notice dated 30.03.1988 demanding the legal heirs of late Molleti Meerayya to execute registered sale deed on receiving balance of sale consideration. Defendant Nos.3 and 4 issued reply notice dated 11.04.1988, whereas, defendant Nos.2 and 5 got issued reply dated 15.04.1988 raising several contentions. In the reply issued by defendant Nos.3 and 4, they set up

registered Will dated 26.12.1984, whereby, Molleti Meerayya bequeathed the schedule property to defendant Nos.8 to 10. Therefore, they are entitled to claim exclusive right over the property. They also questioned the validity of agreement of sale. Whereas, defendant Nos.2 and 5 got issued in their reply stating that Molleti Meerayya executed Will dated 14.01.1988 whereby he bequeathed the schedule property in their favour. They also expressed their readiness and willingness to execute registered sale deed on the receipt of balance of sale consideration of Rs.75,000/-.

In view of the dispute between the legal heirs with regard to setting up of two Wills, the plaintiff had no other alternative except to file the suit, while contending that the plaintiff is always ready and willing to perform his obligation under agreement of sale. But the defendants avoided to receive balance of sale consideration to execute registered sale deed. Under those circumstances, the plaintiff filed the suit seeking aforesaid reliefs.

Defendant Nos.2 and 5 resisted the claim by filing a written statement *inter alia* contending that the suit is not maintainable under law and called upon the plaintiff to put the agreement of sale to strict proof.

The main contentions of defendant Nos.2 and 5 are that the schedule property and other properties are the

self acquired properties of Molleti Meerayya, the adopted son of Challayya. Defendant Nos.2 and 5, while in possession and enjoyment of properties, late Molleti Meerayya executed a Will dated 14.01.1988 in sound and disposing state of mind bequeathing his properties to his sons. The said Will is the last Will. After the death of Molleti Meerayya, all his children jointly arranged and attended to his obsequies. To perform obsequies, the sons of the deceased Molleti Meerayya borrowed amount from State Bank of India, Tatipaka. After performing obsequies, the brothers and sisters in the presence of their relatives and village elders verified several Wills of Molleti Meerayya and accepted the Will dated 14.01.1988 as his last Will and testament. Consequently, they agreed to take possession of their respective properties, bequeathed to each of them. Accordingly, in or about last week of February, 1988, the properties were partitioned among the legatees under the Will executed by Molleti Meerayya. While the matter stood thus, in the last week of March, 1988, disputes arose between the defendants on one hand and plaintiff on the other. Regarding the agreement of sale dated 02.03.1986, the same is said to have been executed by late Molleti Meerayya in favour of the plaintiff in respect of the plaint schedule property.

In the Will dated 14.01.1988, late Molleti Meerayya made a reference of disputed agreement of sale and

defendant Nos.1, 3 and 4 intended to go by the suit agreement and designedly with ulterior motive, decided to ignore and in-effectuate the Will dated 14.01.1988 executed by late Molleti Meerayya, though in the beginning they accepted the Will. Therefore, in view of the Will dated 14.01.1988, defendant Nos.2 and 5 alone are entitled to claim the property of Molleti Meerayya and they are ready to receive balance of sale consideration and execute registered sale deed in favour of the plaintiff. The defendants have no objection to execute registered sale deed, if the plaintiff establishes the truth and genuineness of the suit agreement and pay balance of sale consideration. Finally, defendant Nos.2 and 5 prayed for dismissal of the suit.

Defendant No.8 filed separate written statement denying material allegations of the plaint *inter alia* contending that the agreement of sale dated 02.03.1986 is not true, valid or supported by consideration or binding on the defendants. The alleged agreement of sale is a rank forged document, brought into existence by the plaintiff at the instance of his viyyanka the defendant No.2. Molleti Meerayya did not and could not have executed alleged agreement of sale. Thus defendant No.2 got the suit document inspected with the permission of the Court and found that it was a rank piece of forgery. Even if the signature was treated to be true, it must have been obtained by the plaintiff and defendant Nos.2 and 5

fraudulently. The alleged agreement must have been fabricated just before issuing registered notice in post haste only to harass defendant Nos.1, 2, 3, 4, 8, 9 and 10 due to disputes between them.

Defendant No.8 further contended that the plaintiff is none other than the son-in-law of late Molleti Meerayya and viyyanka of defendant No.2. The deceased Molleti Meerayya executed a registered Will dated 26.12.1984 in sound and disposing state of mind, bequeathing his property to defendant Nos.2,9 and 10, the son of defendant No.1.

One Jaddu Ramamohana Rao is the tenant and Jaddu Satya Prasad and Jaddu Suryarao are the sub tenants in the plaint schedule property under late Molleti Meerayya and the tenancy is at Will. During the life time of Molleti Meerayya, he received rent every month in advance from the said Jaddu Ramamohana Rao. After the death of Molleti Meerayya, the said Jaddu Ramamohana Rao used to pay rent at the rate of Rs.250/- per month to defendant No.8 and the same was noted by Jaddu Ramamohana Rao in a note book maintained by him. Jaddu Ramamohana Rao was paying property tax to the Panchayat being a tenant in occupation of the property. Earlier defendant No.8 and his brothers filed O.S.No.155 of 1989 on the file of Principal District Munsif, Razole for termination of tenancy and for eviction of

tenants, sub tenants and other consequential reliefs.

The defendants denied the alleged acceptance of Will set up by defendant Nos.2 and 5 after obsequies of Molleti Meerayya in the presence of relatives and village elders, while contending that the Will dated 14.01.1988 is not true, valid or duly executed and attested. Therefore, defendant Nos.1, 3, 4, 8, 9 and 10 alone are entitled to claim property as legatee under the Will.

The agreement of sale is brought into existence with the collusion of defendant Nos.2 and 5 taking advantage of the disputes between the legal heirs and that the said Molleti Meerayya had no necessity to sell the property for Rs.1,50,000/- and execute agreement of sale, agreeing to sell the plaint schedule property. Therefore, the agreement is not enforceable under law.

The plaintiff was never ready and willing to perform his part of contract. Till the registered notice was received by the father of defendant No.8, this defendant and his brothers were not aware of the alleged agreement of sale and that the suit is not maintainable for any of the reliefs including the alternative relief.

Based on the above pleadings, the trial Court framed the following issues:

- (i) Whether the alleged agreement of sale dated 02.03.1986 is true, valid, supported by consideration and binding on defendant Nos.8 to 10 and

whether the plaintiff is entitled to the specific performance as prayed for?

- (ii) Whether the suit is bad for non-joinder and mis-joinder of parties?
- (iii) Whether the suit is in time?
- (iv) Whether the plaintiff is estopped from questioning the title, possession and enjoyment of defendant Nos.8 to 10?
- (v) Whether the plaintiff is entitled to subsequent interest and if so at more than 6% per annum?
- (vi) To what relief?

Issue No.4 is recasted as follows:

“Whether the plaintiff is estopped from questioning the title, possession and enjoyment of defendant Nos.8 to 10?”

During the course of trial, plaintiff and two witnesses were examined as PWs.1, 2 and 3. Exs.A1 to A6 were marked. The defendants examined DWs.1 to 5 and got marked Exs.B1 to B8.

Upon hearing argument of both the counsel, considering oral and documentary evidence on record, the trial Court held issue No.1 against the plaintiff, while holding issue Nos.2 and 3 against the defendants and in favour of the plaintiff. The trial Court further held that the plaintiff is not entitled to claim refund of amount with subsequent interest as the agreement itself was disbelieved and finally dismissed the suit.

Aggrieved by the judgment and decree passed by the trial Court, the unsuccessful plaintiff preferred the present appeal on various grounds.

The main contentions raised before this Court in grounds of appeal are as under:

- (i) The deceased Molleti Meerayya is no other than the father-in-law of the plaintiff and there is no reason to suspect the father-in-law in execution of agreement of sale in favour of the plaintiff. But the trial Court did not accept the agreement of sale pointing out several inconsistencies, more particularly, about possessing Rs.12,000/- by late Molleti Meerayya on the date of execution of Ex.A1, based on Ex.B6 and committed an error in disbelieving the agreement - Ex.A1.
- (ii) The trial Court did not appreciate the evidence on record with regard to the inconsistent plea of forgery and fabrication of Ex.A1 and failed to give any suggestion to the witnesses about fabrication by the defendants' counsel in the cross examination and the consistent case of the defendants is that the agreement is forged, but ultimately failed to prove the forgery. But the trial Court believed the contention that Ex.A1 is fabricated though it was in the real contest before the trial Court and such finding is erroneous and finally prayed to set aside the decree and judgment of the trial Court and pass decree in favour of the plaintiff granting preliminary relief of specific performance of agreement of sale Ex.A1, dated 02.03.1986, and direct the defendants to execute registered sale deed in favour of the plaintiff and after receiving balance of sale consideration of Rs.75,000/-, deliver the vacant possession of the schedule property to the plaintiff.

During the course of argument, Kum.Sindoora

V.N.L., learned counsel appearing on behalf of V.L.N.G.K.Murthy pointed out several inconsistencies in the findings, more particularly, with regard to the findings of the trial Court that Ex.A1 is fabricated document, though specific plea of the defendants was not suggested to the witnesses examined on behalf of the plaintiff in their cross examination, in the absence of any suggestion, putting their case to the witness, the Court has to believe the case of the plaintiff and placed reliance of two judgments of Calcutta High Court and the Apex Court reported in ***A.E.G.Carapiet Vs.A.Y.Derderian***^[1] and ***M.B.Ramesh (dead) by LRs. Vs. K.M.Veeraje Urs (dead) by LRs.***^[2]

She strongly contended that the finding of the trial Court that Ex.A1 is fabricated is without any basis and the total evidence adduced by defendants is only to establish the forgery of Ex.A1 and not fabrication of Ex.A1. But the trial Court while disbelieving the contention that Ex.A1 is forged document, erroneously recorded the finding that Ex.A1 is a fabricated document. In view of the failure of defendant Nos. 1, 3, 4, 8, 9 and 10 to suggest that Ex.A1 is a fabricated document, their plea cannot be accepted and the suit is bound to be decreed based on the evidence available on record. It is further contended that the plaintiff by issuing legal notice marked as Ex.A2, called upon the defendants to execute registered sale deed expressing readiness and willingness to pay balance of sale consideration and obtain registered sale

deed. But the trial Court on erroneous appreciation dismissed the suit.

Per contra, Sri M.S.R.Subramanyam, learned counsel appearing for defendants would contend that the argument advanced by the learned counsel for the plaintiff is nothing but a hair splitting argument and the same cannot be accepted when the defendants raised two pleas one is forgery and the other is fabrication. Though the learned counsel failed to suggest the positive case of the defendants, during the cross examination of PWs.1 to 3, it would not have any effect on the plea raised by the defendants, thereby, negation of claim of defendant Nos.1,3,4,8,9 and 10 does not arise.

It is also contended that a bare look at the contents of Ex.A1 and the manner of writing the document itself indicates that it is a fabricated document, on the strength of the same, the trial Court rightly concluded that Ex.A1 is a fabricated document. Such findings based on evidence cannot be reversed in this appeal since the findings of the trial Court are supported by legal reasoning and prayed to dismiss the appeal, confirming the decree and judgment passed by the trial Court.

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

- (i) Whether the agreement of sale dated 02.03.1986 - Ex.A1 is true, valid and genuine.**
- (ii) Whether the plaintiff is always ready and willing to perform his part of obligation under Ex.A1.**
- (iii) Whether plaintiff is entitle for relief of specific performance of agreement of sale – Ex.A1 and for delivery of vacant possession of the schedule property, if not, is the plaintiff entitled to recover Rs.75,000/- together with interest from the date of execution of Ex.A1 till the date of realization.**

POINT No.1:

The suit is filed for primary relief of specific performance of agreement of sale and alternatively for refund of sale consideration of Rs.75,000/- together with interest. The agreement was allegedly executed by Molleti Meerayya, father of the defendants on 02.03.1986 for Rs.1,50,000/- agreeing to execute registered sale deed on receipt of balance of sale consideration within one year from the date of execution marked as Ex.A1. But Molleti Meerayya, the promisee under Ex.A1 died on 19.02.1988. Later, the plaintiff got issued a notice marked as Ex.A2 demanding the defendants to execute registered sale deed, receiving balance of sale consideration. Curiously, the defendants divided themselves into two groups, defendant Nos.2 and 5 as

one group, issued reply Ex.A3 dated 15.04.1988, setting up a Will dated 14.01.1988 claiming that they are legatees under the Will executed by Molleti Meerayya, the testator in sound disposing state of mind and expressed their readiness and willingness to execute registered sale deed on payment of their share as legatees under Will, subject to proof of genuineness of the agreement of sale. Similarly, defendant Nos.3 and 4 as another group issued notice to reply dated 11.04.1988 marked as Ex.A4, denying the very execution of agreement of sale by Molleti Meerayya contending that there was no necessity to sell the property to discharge debts and that the document Ex.A1 is forged and fabricated and denied their liability to execute a registered sale deed.

When defendant Nos.1, 3, 4, 8, 9 and 10 disputed the very execution of Ex.A1 by the original owners of property, the onus is on the plaintiff to establish the execution of Ex.A1 by producing cogent and satisfactory evidence, otherwise disentitled to claim the relief of specific performance.

To substantiate his contentions, the plaintiff examining himself as PW.1, testified that Molleti Meerayya executed agreement of sale Ex.A1 dated 02.03.1986 for Rs.1,50,000/- and received Rs.75,000/- as advance while agreeing to execute registered sale deed on payment of balance of sale consideration, within one year from the

date of executing Ex.A1. In the cross examination of PW.1, a suggestion was put to PW.1 that Ex.A1 is rank forgery and no suggestion was given to him that Ex.A1 is a fabricated document. On cross examination dated 02.08.1996, a suggestion was put to PW.1 that the sale agreement is a forged one and brought into existence at the instance of defendant Nos.2 and 5, Molleti Meerayya has no necessity even to sell the plaint schedule property as on the date of Ex.A1, the suggestion was bluntly denied by the witness, PW.1. At the end of the cross examination dated 02.08.1996 again suggested to the witness that Ex.A1 is a forged document to grab the valuable property and got denial of it. Similarly, in the evidence of PW2- attester of Ex.A1 supported the plea of the plaintiff about purchase of property for Rs.1,50,000/- and payment of Rs.75,000/- as advance, while agreeing to pay the balance sale consideration on the date of execution of regular registered sale deed within one year. When I turned to cross examination of PW.2, it is clear from the consistent case of defendant Nos.1, 3, 4, 8, 9 and 10 that the document is forged and the suggestion was put to PW.2. The attester of the document Ex.A1 was never executed by Molleti Meerayya and it is forged. No suggestion was put to PW.2 that Ex.A1 is a fabricated document in the entire cross examination. Similarly, PW.3, the scribe of the document Ex.A1, was examined to prove execution of Ex.A1 and is totally supported plea of

the plaintiff about execution of Ex.A1 and payment of advance sale consideration and the terms and conditions therein. In the lengthy cross examination of PW.3, no suggestion was put to him that Ex.A1 is a fabricated document, but suggested to the witness that it is only a forged document. Thus, it is clear from the cross examination of PWs.1 to 3 that the defendants' stand is only that Ex.A1 is forged but not fabricated.

The plea of forgery and fabrication are inconsistent with one another. However, the defendants are entitled to take inconsistent pleas in the pleadings, but they have to confine to any one of the pleas, during trial. Therefore, it is evident from the cross examination of PWs.1 to 3 that the defendants confined to the plea of forgery in the cross examination of Pws.1 to 3, though they raised alternative plea of fabrication of Ex.A1.

When execution of a document is in dispute, a document can be proved by the party in different modes of proof contemplated under the provisions of Indian Evidence Act, 1872 (for short, 'the Act of 1872'). In similar circumstances, the Apex Court in ***State (Delhi Administration) Vs. Pali Ram***^[3] laid down certain modes of proof to establish execution of document in dispute and held as follows at paragraph 23:

“ Just as in English law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person:

(1) By an admission of the person who wrote it; and

(2) By the evidence of some witness who saw it written.

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

(i) By the evidence of a handwriting expert.
(Section 45)

(ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)

(iii) Opinion formed by the Court on comparison made by itself. (Section 73)

All these three cognate modes of proof involve a process of comparison. In mode (i), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (ii), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned.”

In the present case, the plaintiff adopted the second mode of proof i.e., by direct evidence, examining the witness who saw it written by Molleti Meerayya. The document was not sent to hand-writing expert either by the plaintiff or defendants and also the trial Court did not exercise its power under Section 73 of the Act of 1872. However, when the evidence of PWs.1, 2 and 3 is consistent about execution of Ex.A1, the onus of proof, will be shifted to the defendants to disprove Ex.A1, since they are claiming that Ex.A1 is forged or fabricated

document both in the notice and in the written statement.

To rebut the evidence of PWs.1 to 3, defendant examined DWs.1 to 5. DW1 as usual in his examination-in-chief testified disputing the very execution of Ex.A1 and specifically contended at page 2 of his examination-in-chief that defendant Nos.2 and 5 fabricated the suit agreement of sale, one Will and filed a suit. So the plea of DW1 is totally changed from the cross examination of PWs.1 to 3, set up a plea of fabrication for the first time in the examination-in-chief of DW1, without suggesting the same to any of the witnesses PWs.1 to 3. At the end of examination-in-chief in the last three lines, DW1 testified that suit agreement of sale is not true and genuine; the signatures found in Ex.A1 are not that of Molleti Meerayya and prayed for dismissal of the suit. The plea of forgery and fabrication are consistent to each other. In the cross examination of DW.1, several suggestions were put to him, but he failed to elicit anything in support of the case of the plaintiff. DW.2 is the son of Molleti Meerayya, whose evidence is not consistent. It is specifically contended that defendant Nos.2 and 5 created Ex.A1 and unregistered Will to grab the schedule property of Molleti Meerayya. Similarly, DW.3 also testified in lines of DWs.1 and 2 contending that Ex.A1 was created by defendant Nos.2 and 5 in collusion with the plaintiff and got filed the present suit. At one stage i.e., in the written statement

their contention before the trial Court was that the agreement of sale Ex.A1 is rank forged and fabricated document. When it comes to the evidence of PWs.1 to 3, they limit their cross examination to prove that Ex.A1 is a forged document. In the examination-in-chief of DWs.1 and 2, they contended that Ex.A1 was created by defendant Nos.2 and 5 in collusion with defendant No.3 and it is a fabricated document. Therefore, defendant Nos.1, 3, 4, 8, 9 and 10 are changing their contention from time to time which is inconsistent with one another. The defendants raised both the pleas of forgery and fabrication in the notice marked as Ex.A4 and in the written statements filed by them.

The word forgery is not defined anywhere, but, the dictionary meaning of the word forgery is-

“the act of falsely making or making material alteration with an intent to defraud in writing, which is if genuine might be of legal efficacy or finding of legal liability, or a spurious article bearing false signature”.

The word fabricate means-

“to make or manufacture, build, to make by combining parts, assemble to invent as lies or reasons or concoct”.

Thus, both forgery and fabrication are totally distinct pleas and they are not defined anywhere. However, under Section 463 of Indian Penal Code (for short, ‘the I.P.C.’), forgery is defined as follows:

“Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery”.

Section 464 of I.P.C. deals with making of false document, which reads as under:

“A person is said to make a false document or false electronic record— First —Who dishonestly or fraudulently—

- a) makes, signs, seals or executes a document or part of a document;
- b) makes or transmits any electronic record or part of any electronic record;
- c) affixes any electronic signature on any electronic record;
- d) makes any mark denoting the execution of a document or the authenticity of the electronic signature,

with the intention of causing it to be believed that such document or part of document, electronic record or [electronic signature] was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or Secondly —Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with [electronic signature] either by himself or by any other person, whether such person be living or dead at the time of such alteration; or Thirdly —Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his [electronic signature] on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration”.

These two contentions of forgery and fabrication are totally different and inconsistent to one another. In case of fabrication, taking advantage of the signed papers, the documents will be prepared, whereas, in case of forgery, it is totally creation of document. Here, the plea of the defendants is inconsistent at every stage. However, in the cross examination of PWs.1 to 3, no suggestion was put to any of them that Ex.A1 is a fabricated document, but a suggestion was put to PWs.1 to 3 that Ex.A1 is a forged document and got denial of it. In the evidence of DW.1, his contest is that the document is forged and fabricated, but, whereas, in the evidence of DW.2, he testified that Ex.A1 is created by defendant Nos.2 and 5 and filed the present suit. Therefore, in view of inconsistent pleas, it is difficult to conclude that either of the plea is true. More particularly, when the defendants confined to the plea of forgery, in the cross examination of PWs.1 and 2 without putting their specific case that Ex.A1 is fabricated document, the Court has no option except to believe the case of the plaintiff by applying the principles laid down in ***A.E.G.Carapiet Vs. A.Y.Derderian(supra)*** wherein, the Division Bench of the Calcutta High Court held as follows:

“Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to

prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to given and lead evidence by producing witnesses. This much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share."

By following the said principle, the Apex Court in ***M.B.Ramesh (dead) by LRs. Vs. K.S.Veeraje Urs (dead) by LRs(supra)*** laid down the same principle in paragraph No.20.

In view of the principles laid down in the above two judgments, this Court can safely conclude that the contesting defendants limited their defense to forgery, but not fabrication. But the trial Court, while disbelieving forgery of Ex.A1 held that the agreement is fabricated, which is not at all the case of the plaintiff during the trial, more particularly, when PWs.1 to 3 were cross examined, who are competent to testify about the genuineness of the document. The reasons for arriving to such conclusion by the trial Court is that the mode of writing the document on three sheets and more particularly, the closure lines on page No.3 of Ex.A1. But, all these were not pointed out at any stage during trial when PWs.1 to 3 were cross examined, enabling witnesses to explain the reason for closure lines at page No.3 of Ex.A1.

While appreciating the evidence in civil cases,

under Section 3 of the Act of 1872, the trial Court must look into evidence on record more particularly, the facts elicited in the cross examination of witnesses. The cross examination is an important process in the judicial proceedings to elucidate truth or otherwise in the plea set up by one or the other party. The advocate, who is cross examining the witnesses has to put the case of his client in the cross examination by way of suggestion, otherwise, it will be a surprise to the witnesses to that extent, at later stage. But, in the present case, the defendants did not suggest PWs.1 to 3 that Ex.A1 is fabricated document. Therefore, recording a finding that Ex.A1 is a fabricated document by the trial Court, considering the way in which Ex.A1 was written on stamp papers is erroneous.

While passing the judgment, the trial Court has to appreciate the entire evidence, more particularly, the crucial cross examination of PWs.1 to 3. But, without applying its mind, based on suggestion put to PWs.1 to 3 that Ex.A1 is a forged document, the trial Court concluded that Ex.A1 is a fabricated document.

Even otherwise, when the plea of defendants is fabrication of Ex.A1, the burden heavily lies upon the defendants who set up the plea of fabrication, in view of the principle laid down in ***Dr.Prashant K.Ravi and another Vs.S.Narasaiah (died) per L.Rs***^[4] and ***Veeramreddy Nagabhushana Rao Vs. Jyothula***

Venkateswara Rao^[5] and B.Jogi Reddy Vs.Baldev Singh (died) by L.Rs^[6].

In view of the law, declared by this Court, consistently, the burden is upon the defendants to prove that Ex.A1 is fabricated, more particularly, when they are admitting the signatures of Molleti Meerayya on Ex.A1. But, without shifting the onus of proof on to the defendants, the trial Court recorded the finding that Ex.A1 is a fabricated document which is not at all the case of the plaintiff, at any stage during cross examination of PWs.1 to 3 as such the findings of the trial Court is perverse and erroneous on the face of record and the same is liable to be set aside.

In the present case, the plaintiff proved the execution of Ex.A1 by examining PWs.2 and 3, the attester and scribe, adopting the second mode of proof as laid down by the Apex Court in **Pali Ram's Case (Supra)**. Their evidence is consistent as to the execution of Ex.A1 by Molleti Meerayya. Apart from that, the signatures of executant on Ex.A1 are not disputed by the defendants. In such case, the trial Court would not have disbelieved the execution of Ex.A1, agreement of sale by Molleti Meerayya in favour of the plaintiff.

The trial Court pointed out several improbabilities regarding the possessing Rs.12,000/- under Ex.B6 -

passbook of Molleti Meerayya to the credit of his savings bank account and the mode of writing document, concluded that the said Molleti Meerayya has no necessity to sell the property and when he sold the property for Rs.1,50,000/- for discharging debts, he would not have waited for a year during his life time for receiving balance of sale consideration and execution of sale deed. Undisputedly, the plaintiff is the son-in-law of Venkaiah and defendant No.2, who supported the case of the plaintiff in all respects, because of close relation. The fixation of time for an year for payment of balance of sale consideration would not create any suspicion. Mere possessing Rs.12,000/- by itself is not a ground to disbelieve execution of Ex.A1. But, it always depends upon the total value of the debts of Molleti Meerayya. Therefore, disbelieving the execution of Ex.A1 on the above improbabilities is erroneous in view of the close relationship between the parties.

On over all consideration of the entire material available on record, it is evident that the trial Court, without considering the cross-examination of PWs.1 to 3 and the earlier version of the defendants and in the written statement, in-consistent with the pleas of defendants, dismissed the suit holding that Ex.A1 is a fabricated document. But in view of the fore-going discussions, the finding is erroneous. Accordingly, it is set aside, holding that Ex.A1 agreement of sale executed by Molleti

Meerayya during his life time and received Rs.75,000/- while agreeing to receive balance of sale consideration of Rs.75,000/- within one year and execute registered sale deed. Accordingly, the point is held in favour of the plaintiff and against the defendants.

POINT No.2

Mere proof of execution of agreement of sale Ex.A1 is not sufficient to pass a decree in favour of the plaintiff and it is the duty of the plaintiff to plea and prove that the plaintiff is always ready and willing to perform his part of obligation throughout, in compliance of Section 16 (C) of the Specific Relief Act (for short, 'the Act of 1963'), from the beginning in the notice marked as Ex.A2, expressed willingness and readiness, then issued Ex.A2 calling upon legal representatives to received balance of sale consideration and execute registered sale deed. In the plaint also a specific allegation is made that plaintiff is always ready and willing to perform his part of obligation and the same is supported by oral evidence of PW.5. Apart from that, plaintiff possessed substantial properties of his own including tractor and other properties and is able to pay the balance of sale consideration. The financial soundness or condition of PW.1 was not denied by suggesting that PW1 did not possess any source to pay the balance of sale consideration in the entire cross-examination. Thus, the un-rebutted testimony of PW.1

established that he possessed source of income and established that he is ready and willing to perform his part of obligation under Ex.A1, strictly adhering to Section 16(C) of the Act of 1963. Thus, plaintiff established the mandatory requirement under Section 16(C) of the Act of 1963.

The relief of specific performance is purely discretionary in nature under Section 20 of the Act of 1963 and denial of specific performance is only in three circumstances contained in Section 20 clause 2 of the Act of 1963. They are as follows:

“Section 20 (2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(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. Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.”

In the present case, the defendants did not raise any such contention to attract Section 20 clause 2 (a) to (c) of the Act of 1963 and no issue was framed by the trial Court. Therefore, when no such plea was raised, the Court can pass a decree for specific performance in favour of the plaintiff, as it is purely discretionary in nature. Hence, I find that it is a fit case to grant relief of specific performance in favour of the plaintiff, setting aside the decree and judgment under challenge passed by the trial Court in O.S.No.22 of 1989, dated 30.04.1997. Accordingly, the point is answered.

In the result, the appeal is allowed, suit is decreed for primary relief of specific performance of agreement of sale, without costs, with the following directions:

- (a) **The plaintiff is directed to pay balance of sale consideration to the credit of the Suit O.S.No.22 of 1989 on the file of Subordinate Judge Court (Senior Civil Judge), Razole, within three months from the date of judgment, under due intimation to all the defendants by registered post with acknowledgement due and to the advocate on record both in the trial Court and this Court.**
- (b) **On such deposit (vide clause-a), the defendants shall execute registered sale**

deed within one month thereafter, in the event of failure to execute the sale deed by the defendants within the time prescribed, the plaintiff may obtain registered sale deed through process of the Court.

(c) In the event the plaintiff failed to deposit balance of sale consideration as aforesaid (clause-a) within the prescribed time, the agreement shall stand rescinded.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Dt. 04.08.2015

vhb

[\[1\]](#) AIR 1961 CALCUTTA 359

[\[2\]](#) 2013 7SCC 490

[\[3\]](#) AIR 1979 SCC 14

[\[4\]](#) 2007 (6) ALD 104

[\[5\]](#) 2011 (2) ALD 629 (DB)

[\[6\]](#) 2003 (4) ALD 276 (DB)