

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No. 105 OF 1997

JUDGMENT:

The unsuccessful plaintiff in Original Suit No.49 of 1992 on the file of the Court of Subordinate Judge, Markapur, Prakasam district (for short, 'the trial Court'), preferred this appeal against the decree and judgment dated 10.06.1996.

2. The appellant herein was the plaintiff and the respondents herein were the defendants before the trial Court. For convenience of reference, the ranks given to the parties in O.S. No.49 of 1992 will be adopted throughout this judgment.

3. The appeal against defendants 3 and 4 was dismissed for default *vide* order dated 19-04-2001.

4. The plaintiff filed the suit, for specific performance of agreement to sale dated 19.05.1992, marked as Ex.A-1, and, in alternative, to grant permanent injunction restraining the defendants and their men from interfering with his peaceful possession and enjoyment of schedule property, alleging that schedule property originally belongs to late Vuddipati Pothuluraiah, who is father of defendants 1 and 2, and the said Vuddipati Pothuluraiah and his wife died intestate leaving behind defendants 1 and 2 to succeed their estate. Subsequently, defendants 1 and 2 inherited the property by succession from Vuddipati Pothuluraiah and cultivating the same by mutating their names in the revenue records. The 1st defendant and his children are living jointly in one house. The 1st defendant, being the manager, used to look after the joint family affairs; likewise, the 2nd defendant is residing in a house at Cumbum. Thus, defendants 1 and 2 did not partition the schedule property and continuing the schedule property as their joint family property. Defendants 1 and 2 offered to sell the

schedule property of an extent of Ac.10.63 cents for sale. However, agreed to receive consideration for Ac.10.00 cents or Ac.10.30 cents, as Ac.0.63 cents is uncultivable land, at the rate of Rs.20,000/- per acre and executed an agreement to sell, receiving advance of Rs.20,000/- on 19.05.1992 by both the defendants. As per the agreement to sell, the purpose of sale of the property is for family necessities. It is further agreed under the agreement to sell that if any of parties to agreement to sell committed default, they should pay Rs.20,000/- as penalty; and forego the advance paid under the agreement in the event of default committed by the plaintiff. On the date of execution of agreement to sell, the plaintiff was put in possession of the property. Since then, the plaintiff was cultivating the land, raising sunflower crop without any hindrance.

After taking measurements, as agreed under the agreement, it was found that Ac.1.00 cents of land is waste land and defendant 1 and 2 agreed to receive consideration for the cultivable land @ Rs.20,000/- per acre only, the plaintiff requested the defendants to execute registered sale deed, receiving balance of sale consideration, but the defendants did not execute registered sale deed in his favour. Thus, the plaintiff is always ready and willing to perform his part of obligation under the agreement to sell.

The plaintiff, having no other alternative, got issued a legal notice to defendants 1 to 4 to desist their illegal acts, demanding defendants 1 and 2 to execute registered sale deed, receiving balance of sale consideration on or before 03.06.1992. Acknowledging receipt of the notice, the 2nd defendant got issued reply denying due execution of agreement to sell while contending that defendants 1 and 2 have no right to execute agreement to sell in favour of the plaintiff since the property was bequeathed by Vuddipati Pothuluraiah under the will dated 17.07.1968, marked as Ex.B-1, in favour of their male children, who became absolute owners of the property. Thus, they denied their

obligation under the agreement to sell.

The plaintiff is always ready and willing to perform his part of obligation and, to show his *bona fides*, deposited Rs.1,92,600/- in State Bank of India, Cumbum, under No.SDA5/535967, ledger folio 47/70, dated 13.06.1992 by T.D.R. While the matter stood thus, defendant 4 to 6 obtained sale deed from defendant 3 and 7 but they are not *bona fide* purchasers. Therefore, defendants 4 to 6 are also impleaded as proper and necessary parties to the suit.

The defendants made an attempt to interfere with his peaceful possession and enjoyment of schedule property for a week, before the instant suit was filed, but their illegal and highhanded acts were resisted. As defendants 1 and 2 failed to execute registered sale deed, receiving balance of sale consideration, and the other defendants attempted to interfere with his peaceful possession and enjoyment of schedule property, the plaintiff filed the suit both for the reliefs of specific performance and permanent injunction restraining the defendants and their men from interfering with his peaceful possession and enjoyment of schedule property.

5. The 1st defendant filed written statement denying material allegations while admitting his relationship with Vuddipati Pothuluraiah. The 1st defendant specifically denied the alleged execution of agreement to sell, delivery of possession, continuing in possession and enjoyment of the property by the plaintiff in part performance of agreement to sell, and his obligation to execute registered sale deed while contending that Vuddipati Pothuluraiah, owner of schedule property, executed registered will dated 17.07.1968, which was his last testament, in sound disposing state of mind bequeathing his entire property to the sons of defendants 1 and 2. Vuddipati Pothuluraiah died in the year 1984. Consequently, his children *i.e.*, male children of defendants 1 and 2 succeeded his entire

estate as legatees under the will. Subsequently, male children of defendants 1 and 2 partitioned the property in the year 1985 and got their respective shares, separately, being cultivated by defendants 4 and 6 as tenants.

The original will executed by Vuddipati Pothuluraiah was gutted in fire accident about 20 years ago when a fire accident took place in the village. In the said fire accident, the houses of defendants 1 and 2 along with other houses were gutted. Thus, defendants 1 and 2 have no right, title, interest and possession over suit schedule property but their male children alone are the owners of the property as legatees under the will.

The plaintiff, who is a rich and influential person in the village, with an oblique motive, lured the defendants and tempted them to sell suit schedule property, knowing that defendants 1 and 2 have no right in it and defendants 4 and 6 are cultivating the same as tenants. The plaintiff, yet, pressurized defendants 1 and 2 to execute an agreement to sell nominally in his favour and that he will look after everything and fight out later to take possession of suit schedule property. Thereby, the 1st defendant was made to sign on the agreement in view of the promise made by the plaintiff to offer him some amount. There was no whisper in the recitals of agreement to sell, about delivery of possession. The plaintiff did not pay any amount under the agreement to sell and postponed the payment on one pretext or the other. After receiving suit summons, the 1st defendant obtained permission from the trial Court, inspected the document and found the recital regarding delivery of possession it was surreptitiously introduced at the end of the document and, thereby, it amounts to material alteration as it was without the consent of defendants 1 and 2 and it *voids* the document. Hence, the plaintiff, who approached the Court with false allegations, is not entitled to claim any relief in the suit and prayed for dismissal of

the suit.

6. The 2nd defendant filed written statement, separately, admitting the relationship between Vuddipati Pothuluraiah and defendants 1 and 2 while contending that the plaintiff is aware that defendants 1 and 2 had no right in the schedule property but, by playing fraud and misrepresentation, obtained her thumb impressions making them to believe as if they were required for securing loan. The 2nd defendant, being an illiterate and innocent, put her thumb impressions to the dictates of the plaintiff, who is a powerful and influential person in the village. Thus, the 2nd defendant never intended to execute agreement to sell in favour of the plaintiff for sale of schedule property but it is created by the plaintiff taking advantage of illiteracy and innocence of the 2nd defendant. After receipt of summons, she obtained permission from the trial Court; verified the suit document and found that her thumb impressions were obtained on the said document and made material alterations about delivery of possession of the property to the plaintiff. Therefore, the 2nd defendant is not under any obligation to execute registered sale deed, as she is not the owner of the property, and prayed to dismiss the suit.

7. The 5th defendant filed separate written statement, which was duly adopted by defendants 4, 6 and 7, denying material allegations of the plaint *inter alia* contending that the alleged agreement to sell is not binding on the defendants and that defendants 1 and 2 are not the owners of schedule property and that the plaintiff never paid any amount to defendants 1 and 2 under the agreement to sell and the same was obtained by playing fraud. This defendant admitted about issuance of legal notice to defendants 1 to 4 to desist from their illegal acts while demanding defendants 1 and 2 to execute registered sale deed, receiving balance of sale consideration on 03.06.1992. On receipt of the same, the 2nd defendant got issued suitable reply

admitting her thumb impressions on the stamp papers while denying execution of the agreement. The market value of Ac.10.63 cents, as certified by the Sub-Registrar, Cumbum, dated 15.09.1992, is Rs.42,520/- per acre whereas the agreement was obtained for lesser value. Thereby, the plaintiff is not entitled to the relief of specific performance of agreement to sell as it would cause hardship to the defendants.

Vuddipati Pothuluraiah was the original owner of the property, after his death, legatees under the will dated 17.07.1968 became owners of the property under testamentary disposition and it is the last will. The said Vuddipati Pothuluraiah died in the year 1984. Thereby, defendants 1 and 2 have no right in the said property of Vuddipati Pothuluraiah to the knowledge of the plaintiff. The original will was gutted in the fire accident, which took place about 20 years ago. During the lifetime of Vuddipati Pothuluraiah, he leased out the suit schedule property to 4th defendant, who is the owner of adjacent lands on west and south of suit schedule property, on *koru* basis *i.e.*, as share cropper. The 4th defendant is the manager of joint family comprising himself and defendants 5 and 6, who are his sons, and defendants 4 and 6 are cultivating tenants of the land of Vuddipati Pothuluraiah for the past 20 years. The lease deeds executed by Vuddipati Pothuluraiah were also gutted in fire accident.

The topography of the plaint schedule property mentioned in schedule is not correct; there used to be an ancient bailing well shown as 'W' in the plan filed along with counter in I.A. No. 649 of 1992 and the said well was utilized to irrigate land of the 4th defendant and suit schedule property. Later on, he dug two borer-wells shown in big dots in the said bailing well 'W', fixed an electric motor for pumping water from the said well and constructed a shed shown as 'T' in the said plan for drawing water to his land and to the suit land.

It is further contended that after the death of Vuddipati Pothuluraiah, schedule property was partitioned among the legatees in the year 1985. Plot ABCDEF, plot GHPN and plot JKML fell to the share of the 7th defendant and his brothers; whereas plot FEDKG, plot HJVP and plot LMSRQV fell to the share of the 3rd defendant and his brother and they were in separate possession and enjoyment of their respective plots. Even after partition, the legatees *i.e.*, defendants 3 and 7 and their brothers had also continued the defendants 4 and 6 as tenants. When defendants 3 and 7 and his brothers intended to sell their respective plots to meet their family expenses, defendants 4 to 6 wanted to purchase the same. While negotiations were in progress, the plaintiff, who is loggerhead with defendants 4 to 6, had manoeuvred and procured an *ante* dated agreement to sell, from defendants 1 and 2 knowing fully well that defendants 1 and 2 had no right in the suit land. Thereby, the suit agreement, which is vitiated by material alterations, is not binding on the defendants.

The 7th defendant and his brothers sold their plots fell to their respective shares to the 11th defendant for consideration of Rs.21,400/- under a registered sale deed dated 29.06.1992 and the 3rd defendant and his minor brother sold their plots fell to their respective share to the 5th defendant for Rs.21,400/- under registered sale deed dated 02.06.1992, since then, defendants 5 and 11 were in continuous possession and enjoyment of the same by raising crop. The plaintiff was never in possession of the suit land, thereby, he is not entitled to the reliefs prayed for and prayed for dismissal of the suit.

8. The 3rd defendant, while adopting the written statement filed by the 5th defendant, filed separate written statement contending that he and his minor brother Pothuluraiah sold their plots 1 to 3 shown in the plan filed along with counter in I.A. No. 649 of 1992 to the 5th

defendant under registered sale deed dated 02.06.1992. He is an innocent villager, who knows only to sign, but the plaintiff, who is a powerful and influential person, by playing fraud and misrepresentation that his signatures were required for obtaining loan, obtained his signatures without disclosing contents of the document. Therefore, the plaintiff cannot take undue advantage of the same. In any event, the plaintiff is not entitled to claim relief of specific performance and permanent injunction as he obtained the document by playing fraud and finally prayed to dismiss the suit.

9. The 11th defendant filed separate written statement, which was duly adopted by defendants 8 to 10, denying material allegations while contending that she is not a necessary party to the suit so also defendants 3 to 10. She is the *bona fide* purchaser of schedule property from the 7th defendant and his brothers for proper consideration without notice of the suit filed by the plaintiff and prayed for dismissal of the suit.

10. Basing on the above pleadings, the trial Court framed the following issues, including one additional issue:

1. Whether the plaintiff obtained suit agreement to sell dated 19.05.1992 by force and misrepresentation from defendants 1 and 2?
2. Whether there is a material alteration in the agreement to sell?
3. Whether the plaintiff was put in possession of suit land on the date of agreement to sell?
4. Whether the suit land is self-acquired property of late Pothuluraiah, and whether he executed a registered will dated 17.07.1968 in favour of male issues of defendants 1 and 2?
5. Whether the plaintiff is entitled for the relief of specific performance?
6. Whether the plaintiff is entitled for perpetual injunction?

7. To what relief?

Additional issue:

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Whether the defendants 3 to 11 are necessary parties to the suit?

11. During the course of trial, on behalf of the plaintiff, PWs.1 to 6 were examined and marked Exs.A-1 to A-17. On behalf of the defendants, DWs.1 to 9 were examined and marked Exs.B-1 to B-23 and also marked Exs.C-1 and C-2 and Exs.X-1 and X-2.

12. Upon hearing argument of both the counsel, considering oral and documentary evidence available on record, the trial Court dismissed the suit holding that the agreement to sell, marked as Ex.A-1, was obtained by misrepresentation and negated the relief of specific performance and perpetual injunction.

13. Aggrieved by the decree and judgment under challenge, the unsuccessful plaintiff preferred the present appeal on various grounds. The main contentions of the plaintiff-appellant in the grounds of appeal are as follows:

- a) The trial Court did not consider the admission of affixing thumb impressions of 2nd defendant on Ex.A-1 by issuing Ex.A-3; thereby she is not entitled to raise a plea that Ex.A-1 does not bear her thumb impressions; thereby, the finding of the trial Court that Ex.A-1 was obtained by misrepresentation is *prime-facie* erroneous;
- b) The trial Court did not consider readiness and willingness of plaintiff to perform his part of obligation under the agreement to sell since the plaintiff deposited Rs.1,92,600/- in S.B.I. Cumbum under SDA 5153 5967, ledger folio 47/70, dated 13.06.1992 by T.D.R.; if the same is taken into consideration, the Court should have granted a decree believing readiness and willingness of

the plaintiff pleaded in the plaint, which is *sine-qua-non* for grant of specific performance of agreement to sell;

c) The trial Court did not consider the contents of previous registered correspondence between the parties and erroneously concluded that Ex.A-1 was obtained by misrepresentation. The trial Court also failed to consider the evidence of PW.2, who is the scribe of document explaining interpolation regarding delivery of possession and discharged the burden of the plaintiff as to when the interpolation was made but committed an error in arriving that Ex.A-1 is materially altered;

d) The trial Court also failed to consider the requirements to prove the will dated 17.07.1968, executed by Pothuluraiah, while deciding the 1st issue and if Ex.B-1 is not believed, the defendants 1 and 2, being the adopted son and natural daughter of Pothuluraiah, alone succeeded the estate of deceased Pothuluraiah as it was his self acquired property, thereby they are competent to sell the schedule property but the trial Court without insisting proof of will, as required under Section 68 of the Indian Evidence Act, 1872 and Section 73 of the Indian Succession Act, 1925 erroneously believed execution of Ex.A-1 and committed an error in denying the relief of specific performance and perpetual injunction;

e) If the trial Court considered oral and documentary evidence in proper perspective the plaintiff's case is to be believed that Ex.A-1 was executed by defendants 1 and 2 and that the plaintiff established his readiness and willingness to perform his part of obligation under the agreement to sell and thereby entitled to the decree of specific performance and perpetual injunction in view of the delivery of possession of property under Ex.A-1, on

the date of its execution but the trial Court on erroneous appreciation of evidence on record dismissed the suit and prayed to allow the appeal setting-aside the decree and judgment passed by the trial Court.

14. During course of argument, learned counsel for the plaintiff-appellant, while reiterating the contentions in the grounds of appeal would contend that the admission of the 2nd defendant about affixing her thumb impressions by issuing legal notice marked as Ex.A-3 is sufficient to establish execution of Ex.A-1 but the trial Court without any basis concluded that Ex.A-1 was obtained by misrepresentation.

When it is contended by the defendants that Ex.A-1 was obtained by playing fraud and misrepresentation *etc.*, it is for the plaintiff to disclose the particulars of fraud, misrepresentation *etc.*, in the plaint in compliance of Order VI Rule 4 of C.P.C. but in the absence of compliance of Order VI Rule 4, it is difficult to meet those contentions by the plaintiff but the trial Court without insisting the particulars of fraud, misrepresentation *etc.*, in the written statements, believed the contention of the defendants that Ex.A-1 was obtained by misrepresentation. Therefore, the finding of the trial Court is *ex-facie* erroneous with regard to obtaining Ex.A-1 by misrepresentation.

It is specifically contended that the defendants raised a plea that Ex.A-1 was materially altered, in such case certainly the burden will be on the plaintiff, who is in possession of Ex.A-1, to explain as to when the alleged alteration took place and whether it is before signing the document or after signing the document but by examining the plaintiff himself as scribe of the document established that such interpolation was made before completion of execution of the document and observed that there is a variation in the colour of the ink used for the alleged interpolation and remaining part of the body of the document. The observation of the trial Court is *prima-facie* erroneous; when the

document is verified at a glance there is no such variation. Therefore, the plaintiff discharged his burden that the interpolation was made before completion of execution thereby it does not amount to material alteration.

Finally, the learned counsel for the plaintiff-appellant would contend that the agreement was entered for sale of the property at the rate of Rs.20,000/- per acre after taking measurements. Therefore, the plaintiff deposited Rs.1,92,600/- in State bank of India, Cumbam, which shows his *bona-fides* and, apart from that, the plaintiff has to obtain a registered document within one month from the date of execution of Ex.A-1 by paying balance of sale consideration and thereby expressed his readiness and willingness by issuance of Ex.A-2 notice calling upon the defendants to execute the registered sale deed but the trial Court did not appreciate the evidence on record with regard to readiness and willingness and committed an error in dismissing the suit. The clinching evidence on record proved the readiness and willingness of the plaintiff but the trial Court on erroneous appreciation disbelieved the case of the plaintiff, failed to exercise discretion conferred on Court under Section 20 of the Specific Relief Act, 1963, though the defendants did not raise any plea under Section 20 of the Specific Relief Act, which disabled the Court to exercise discretion to grant specific performance of agreement to sell.

It is also contended that when the plaintiff is in possession and enjoyment of the property, he is entitled to protect his possession much less under Section 53-A of Transfer of Property Act, 1882, more particularly, when there is a threat to interfere with his possession and enjoyment by the defendants but the trial Court on wrong appreciation of facts and law dismissed the Suit.

One of the major contentions of the plaintiff is that the will marked as Ex.B-1 is compulsorily attestable document, required to be

proved, as per the special rules of evidence under Section 68 of the Indian Evidence Act but the trial Court on erroneous appreciation of evidence on record accepted due execution of the will by Pothuluraiah bequeathing the property in favour of defendants 3 and 7 to 10, children of defendants 1 and 2, without insisting the defendant to prove execution of original of Ex.B-1, as required under Section 68 of the Indian Evidence Act and committed an error in accepting the will. If Ex.B-1 is disbelieved, defendants 1 and 2 are competent to deal with the property entering into an agreement to sell and, thereby, Ex.A-1 is valid and enforceable under law but the trial Court did not consider these contentions and committed an error in dismissing the suit.

15. *Per contra*, learned counsel appearing for the defendants-respondents, while reiterating the contentions raised before the trial Court drawn the attention of this Court to the evidence of PW.3 with regard to affixing thumb impressions of the 2nd defendant on Ex.A-1; so also the consideration allegedly paid under Ex.A-1. If the evidence of PW.3 is accepted, the execution of document was not completed in his presence but attested the document without obtaining thumb impressions of the 2nd defendant on Ex.A-1. Similarly, payment of total consideration of Rs.20,000/- cannot be accepted since the evidence of PW.3 disclosed that the plaintiff paid only Rs.19,000/- while agreeing to pay Rs.1,000/- later. Therefore, the plaintiff approached the Court with unclean hands thereby disentitled to claim the relief of specific performance, on this ground alone.

It is further contended by the learned counsel for the defendants that the interpolation with regard to delivery of possession in Ex.A-1 is *ex-facie* false in view of recitals in Ex.A-2 notice. If really, the word regarding delivery of vacant possession is incorporated even before the issuance of Ex.A-2, the question of mentioning the recitals with regard to agreement to deliver vacant possession at the time of

registration does not arise. Hence, the contents of Ex.A-2 disproved the contention of the plaintiff that the possession of the property was delivered on the date of execution of Ex.A-1. Besides the recitals of Ex.A-2, the voluminous evidence on record established that defendants 3, 7 to 10 alone are in possession and enjoyment of the property in their own right and cultivating the same through defendants 4 and 5 as lessees. Therefore, making false allegation regarding delivery of possession and failed to establish the same by adducing evidence is sufficient to decline the equitable relief of specific performance of agreement to sell. Hence, on this ground also the plaintiff is disentitled to claim decree for specific performance; finally it is contended that defendants 1 and 2 are incompetent to execute Ex.A-1 since the property was bequeathed in favour of defendants 3, 7 to 10 by executing the original of Ex.B-1, registered will, by Pothuluraiah long prior to execution of Ex.A-1. Therefore, by virtue of the original of Ex.B-1, defendants 3, 7 to 10 being the legatees to become owners consequent on the death of Pothuluraiah in the year 1984. Therefore, defendants 1 and 2, having no title, conveyed no right in the schedule property allegedly executed Ex.A-1 and thereby it is un-enforceable under law. That apart, the terms of document marked as Ex.A-1 are not certain, not even capable of being made certain since the consideration agreed to be paid by the plaintiff is only Rs.2,00,000/- for Ac.10.00 cents at the rate of Rs.20,000/- per acre but the plaintiff claiming specific performance for more than Ac.10.00 cents, invented a different story of agreeing to convey title without receiving any consideration for the remaining land *etc.*, Hence, the ambiguity in the extent and consideration in Ex.A-1 is not clarified by adducing any evidence, Ex.A-1 is un-enforceable under law. Therefore, the plaintiff is not entitled to claim any of the reliefs including the specific performance and perpetual injunction as the plaintiff approached the Court with unclean hands and the trial Court rightly declined to grant the relief of specific performance and prayed to dismiss the appeal

confirming the decree and judgment passed by the trial Court.

16. Considering rival contentions, perusing oral and documentary evidence on record, the points that arise for consideration are as follows:

- 1) Whether Ex.A-1, agreement to sell dated 19.05.1992, was obtained by the plaintiff, from defendants 1 and 2, by misrepresentation?
- 2) Whether Ex.A-1 is materially altered?
- 3) Whether the will dated 17.07.1968, marked as Ex.B-1, executed by Pothuluraiah, is true and valid? If not, whether defendants 1 and 2 are competent to enter into an agreement to sell, agreeing to sell the schedule property and whether it is enforceable under law?
- 4) Whether the plaintiff is always ready and willing to perform his part of obligation under the agreement to sell, Ex.A-1, and entitled to the discretionary relief of specific performance of agreement to sell?
- 5) Whether the plaintiff is in possession and enjoyment of the property, as on the date of filing suit, and whether defendants 1 to 11 infringed or invaded the legal right of the plaintiff in the schedule property? If so, is the plaintiff entitled to a decree for perpetual injunction?

17. **POINT No.1:** The suit is filed for specific performance of agreement to sell, Ex.A-1, alleging that defendants 1 and 2 executed Ex.A-1 agreeing to sell the schedule property; whereas, defendants 1 and 2 contended that the document was obtained by playing fraud, misrepresentation *etc.*, but the trial Court arrived at a conclusion that Ex.A-1 was obtained by misrepresentation, representing that his signature was required to obtain loan from a bank when he was at Udipi hotel. The said finding is now challenged before this Court

raising several contentions, more particularly, contending that execution of Ex.A-1 was admitted by both the defendants, issued Ex.A-3 reply notice and in the evidence of PWs.1 to 3 nothing was elicited to disprove the execution of Ex.A-1. However, during course of argument, learned counsel for the plaintiff-appellant would contend that the trial Court arrived at such a conclusion without any material.

18. In view of the specific plea and finding of the trial Court it is necessary to advert to the specific plea raised by defendants 1 and 2 in their written statements. As usual in Paragraphs 4 and 5 of the written statement, 1st defendant denied the very execution of Ex.A-1 but in Para 8 it is contended that the plaintiff with a threat to take action against defendants 1 and 2 and to blackmail them, brought Ex.A-1 into existence.

19. Para 11 of the written statement of 1st defendant is extracted hereunder for better appreciation:

11. While so, the plaintiff who is a rich and powerful person in the village, with an oblique motive had lured this defendant and tempted him to sell the suit land knowing fully well that they have no right in the suit land and further knowing fully well that the defendants 4 and 6 are the cultivating tenants of the legatees under the said will and in spite of the first defendant telling him that the defendants 1 and 2 have no right, yet had pressurized him, to nominally execute an agreement of sale in his favour and that he will look after every thing and fight out later on and to take possession of the suit land, the first defendant was made to sign the said agreement as he had promised to pay some amount but did not pay. There was no whisper even about giving possession of the suit land as the first defendant himself had no possession. The plaintiff was cleverly postponing payment of money and eventually filed the suit and did not pay anything.”

20. This specific plea of 1st defendant, in Para 11 of his written statement, at best, would go to show that the plaintiff tempted the 1st defendant by offering some amount to execute the agreement to sell

and that he would take care of the future litigation, got executed Ex.A-1. Due to the alleged act of luring or tempting to sell the property, on the ground of payment of some amount, he executed Ex.A-1. So, it is clear that by making misrepresentation the plaintiff allegedly obtained Ex.A-1 but during evidence, DW.1 totally changed his version and contended that on the pretext of obtaining loan on his behalf, his signature was obtained, when he was at Udipi hotel, which is contrary to the specific plea of the 1st defendant in Para 11 of his written statement. Therefore, any amount of evidence which is contrary to the plea raised by the 1st defendant cannot be looked into and the specific plea raised in Para 11 of the written statement was not substantiated by any evidence. Hence, the conclusions arrived by the trial Court that Ex.A-1 was obtained by making false representation or misrepresentation is erroneous.

21. The 2nd defendant, who is one of the alleged executants, filed a separate written statement, adopting the written statement filed by the 1st defendant, contending that she had no right but by playing fraud and misrepresentation made her to believe that her thumb impressions were required for securing a loan, and she being an illiterate, innocent villager put her thumb impressions to the dictates of the plaintiff, who is a rich and influential person in the village. After receipt of the summons, she obtained permission of the Court and inspected the suit document and to her great surprise she found that her thumb impressions were obtained on the suit document, which is an agreement to sell. She did not execute the suit agreement as alleged and that it is not valid, not supported by consideration thereby not binding on the defendants. While adopting the written statement filed by 1st defendant, 2nd defendant further contended that her thumb impressions were obtained, by playing fraud and misrepresentation, as has been required to obtain loan from the bank. So, the 2nd defendant

disclosed as to how her thumb impressions were obtained on Ex.A-1 in compliance of order VI Rule 4 of C.P.C. In the plea raised by defendants 1 and 2, the plaintiff alleged to have made a representation which is in fact false.

22. The word 'misrepresentation' is defined under Section 18 of the Indian Contract Act, 1872, which reads as follows:

"18. "Misrepresentation" defined: "Misrepresentation" means and includes, _

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement."

23. The alleged representation pleaded by defendants 1 and 2, at best, attracts clause 2 of Section 18 of the Indian Contract Act, 1872, if it is proved that it was obtained by making such representation, which is to gain an advantage to the plaintiff but made a representation misleading the defendants 1 and 2 causing prejudices to them amounts to misrepresentation but, in the instant case, the evidence on record is insufficient to believe that Ex.A-1 was obtained by making such false representation by the 1st defendant, who had allegedly gained advantage offered to cause prejudices to defendants 1 and 2. Therefore, it is difficult to sustain the finding of the trial Court regarding the misrepresentation allegedly made by the plaintiff in obtaining Ex.A-1. When the defendants admitted about their signatures and thumb impressions of on Ex.A-1, the burden heavily lies on them to prove that they never intended to execute Ex.A-1 as an agreement to sell, agreeing to sell the schedule property as held by this Court in ***Dr. Prashant K.Ravi and another Vs. S. Narasaiah (died) per L.Rs***^[1],

and ***B. Jogi Reddy Vs. Baldev Singh (died) by LRs***^[2].

24. If the principles laid down in the decisions cited *supra* are applied to the present facts of the case, the burden heavily lies on the defendants to establish that they never signed on Ex.A-1 with an intention to execute an agreement to sell, agreeing to convey the schedule property by executing registered sale deed receiving consideration there under, but the defendants except raising a contentious plea, nothing was brought on record to establish that they had no intention to execute Ex.A-1 and sell the property by cogent and satisfactory evidence. Thus, the defendants miserably failed to discharge their initial onus of proof, which squarely rests on them, when they specifically admitted about their signatures and thumb impressions. Even in the earlier correspondence *i.e.*, by way of reply marked as Ex.A-3 to the notice marked as Ex.A-2, they admitted about signing and affixing thumb impressions by defendants 1 and 2 respectively.

25. Undoubtedly, a duty is cast upon the plaintiff to prove due execution of Ex.A-1 intending to sell the property by defendants 1 and 2 when the suit is filed for the specific performance. In the instant case, the 1st defendant admitted about execution of Ex.A-1 on the promise made by the plaintiff to pay some amount to him and whereas the 2nd defendant's contention is that she affixed her thumb impressions on the misrepresentation made by the plaintiff that her thumb impressions were required to obtain loan. In fact, by the date of the alleged execution of Ex.A-1, the legatees under the will obtained loan from the bank vide Exs.X-1 and X-2, thereby question of making a representation that her thumb impressions are required for obtaining loan appears to be most improbable to the circumstances of the case. Hence, the plea of the 2nd defendant that her thumb impressions were obtained by misrepresentation for obtaining loan is *prima-facie* false.

26. The plaintiff examined himself as PW.1 besides examining the scribe and the attestors to establish due execution of Ex.A-1. PW.3 admitted in his evidence that in his presence signatures of 1st defendant were obtained while promising to obtain the thumb impressions of 2nd defendant, who was at her residence, at a later point time. Thus, it means by the time of attesting Ex.A-1, the thumb impressions of 2nd defendant were not obtained on Ex.A-1 but it was not her case, at any time that her thumb impressions were obtained subsequent to attestation 1st defendant on Ex.A-1. However, the consistent evidence of PWs.1 and 2, plaintiff and scribe of Ex.A-1, would establish that the signatures of 1st defendant and thumb impressions of 2nd defendant were obtained simultaneously on Ex.A-1. Hence, the stray sentence in the evidence of PW.3 is of no assistance to the defendants to disbelieve execution of Ex.A-1 by defendants 1 and 2.

27. One of the contentions of the 1st defendant is that though the plaintiff promised to pay some amount for execution of Ex.A-1, he did not pay any amount, as seen from the recitals of Ex.A-1. Receipt of part of sale consideration of Rs.20,000/- is acknowledged by the 1st defendant by putting his signatures and 2nd defendant by putting her thumb impressions on each page of Ex.A-1. Therefore, the contention that the plaintiff did not pay any amount as promised by him to the 1st defendant is *ex-facie* erroneous and on the basis of such contention it is difficult to accept that Ex.A-1 was obtained by the plaintiff without payment of any part of sale consideration. Even according to the terms of Ex.A-1, the total consideration payable under Ex.A-1 is Rs.2,00,000/- and paid advance of Rs.20,000/-, while agreeing to pay the balance of sale consideration at the time of registration. Hence, it is difficult to hold that Ex.A-1 is not supported by consideration, in view of

the consistent evidence of PWs.1 to 3. However, in the evidence of PW.3, the plaintiff paid an amount of Rs.10,000 to 1st defendant, and Rs.9,000/- to the 2nd defendant, while agreeing to pay Rs.1,000/- at their village. Thus, it means by the date of execution of Ex.A-1, total amount of Rs.20,000/- as advance of sale consideration was not passed to the defendants but only Rs.19,000/- was paid. It is the case of the defendants that they did not receive any amount as advance of sale consideration.

28. On overall consideration of the entire material available on record, it can safely be held that the plaintiff established execution of Ex.A-1 but the trial Court on erroneous appreciation of evidence came to a conclusion that it was obtained by making misrepresentation, in view of the specific plea and evidence of both the parties, the finding of the trial Court is un-warranted and the same is hereby *set-aside* holding that the defendants 1 and 2 executed Ex.A-1 in favour of the plaintiff. Accordingly, the point is answered in favour of the plaintiff and against the defendants.

29. **POINT No.2:** One of the contentions of the defendants is that Ex.A-1 is materially altered. In the written statement filed by 2nd defendant, no specific plea of material alteration of Ex.A-1 was raised; at the same time, in the written statement filed by 1st defendant in Para 12, he raised a specific plea that Ex.A-1 was materially altered without the consent of defendants 1 and 2 and thereby Ex.A-1 is *void*. The trial Court basing on the recitals of Ex.A-2, notice concluded that Ex.A-1 was materially altered and, apart from that, the trial Court verified Ex.A-1, agreement to sell and found the recital with regard to delivery of possession on Ex.A-1 was in different ink and added the recital at the end of the document, on the basis of variation in the ink, concluded that Ex.A-1 was materially altered. Undoubtedly, the material alteration of Ex.A-1 *voids* the document, if it is proved. In the

instant case, the plaintiff admitted the recital with regard to delivery of vacant possession of the property was incorporated at the end of the document but it was incorporated before completion of execution of Ex.A-1. Completion of execution would arise only when the parties to the suit have signed on the document with an intention to execute. If the incorporation of the recital in Ex.A-1 took place prior to signing on the document by 1st defendant and affixture of thumb impressions by 2nd defendant, certainly the alteration cannot be said to be a material alteration. Thus, the initial onus of proof squarely rests on the plaintiff to establish that it was not materially altered. From a perusal of the recital with regard to delivery of possession at Page No.3 of last sentence in Ex.A-1, any prudent man at a glance can find variation of ink used in incorporating the words in vernacular language '*sadaru un-registered vikraya bhoomi neede nee swadhinam cheyadaminadi*' with the other part of the body of the document and the colour of the ink used for the alleged alteration is dark when compared to the ink used in writing the other part of the body. The words in vernacular language '*induku sakshulu*' written with the same pen and ink used for drafting Ex.A-1, except the particular recital with regard to delivery of possession of the property.

30. Thus, it is clear from the document, the above words in vernacular language were incorporated subsequent to completion of writing of Ex.A-1 but that by itself is not a ground to conclude that Ex.A-1 is materially altered. If those words are incorporated subsequent to signing of Ex.A-1 by 1st defendant and affixing thumb impressions by 2nd defendant, certainly it would amount to material alteration and thereby the document is not enforceable under law as it is *void*. In view of clear interpolation it is the duty of the plaintiff to establish due execution of Ex.A-1 before its execution was completed, since the initial onus of proof squarely lies on the plaintiff.

31. The plaintiff was examined as PW.1 and he testified about delivery of possession of the property, on the date of execution of Ex.A-1. In the last sentence at page No.2 of his examination-in-chief, PW.1 asserted that the suit land was in his possession and it was not delivered to the 5th defendant but nothing was stated whether the interpolation was subsequent to completion of execution or before completion of its execution. However, in the cross-examination at Page No.7, admitted that he enquired about possession of the property with the village Karnam before entering into an agreement and visited the land also and at Page No.8 he admitted that the land was not measured but it is in his cultivation. If the contents of Ex.A-1 are taken into consideration, the property is required to be measured before execution of registered sale deed. If that is the case, how the plaintiff is in possession of entire extent of Ac.10.63 cents was not explained. A suggestion was put to PW.1 that the possession of the property was not delivered and the condition relating to delivery of possession of the land was inserted in Ex.A-1 at the time of filing suit after last line, but denied by the witness. However, in the last sentence of 2nd Para at Page No.8, he admitted that originally it was not written. Therefore, it is clear that the interpolation was subsequently done but it was not clear whether it was done before completion of execution or after.

32. PW.2 is the scribe of document and in his examination-in-chief, he admitted that while completing scribing of the document he had forgotten to mention about delivery of possession of the property; when the contents of document were read over to the parties then they realized that the recital of delivery of possession of the property was not mentioned in the document. Therefore, while completing scribing the document, he made a mention regarding delivery of possession of the property at the fag end of the document to avoid insertion of those sentences between the lines. In the cross-examination, he admitted that the contents of the document were read over to the parties before

obtaining their signatures and a suggestion was put to PW.2 that there is a material alteration incorporating the words '*sadaru un-registered vikraya bhoomi neede nee swadhinamu cheyadamu inadi*' and denied by him, at the end of cross-examination a suggestion was put to him that the document is materially altered subsequent to completion of execution and denied by him.

33. PW.3 is the attesor who is an important witness to establish the alleged material alteration; according to him, the 1st defendant signed on the document in his presence and both the parties informed him that they will obtain left hand thumb impressions of Kotamma, 2nd defendant, as she was at her house and one Eswaraiah, husband of Kotamma, attested the document Ex.A-1 as witness, later he enquired Kotamma, about affixing her thumb impressions and she informed that she affixed thumb impressions. From this recital, it is clear that the thumb impressions of Kotamma were obtained after completion of execution of the document at her residence, as she was not readily present at the time of scribing the document. In the cross-examination, PW.3 admitted that he does not remember whether the parties have discussed anything about delivery of possession of the land and that he does not remember about incorporation of any recital in Ex.A-1 about delivery of possession. There was discussion about delivery of possession after contents of the document were read over but that fact was not supported by PW.3, who is attesor. If really, that was discussed, PW.3 would have spoken about delivery of possession and incorporation of particular sentence regarding delivery of possession in Ex.A-1. Therefore, the evidence of PW.3 is not in support of the plaintiff's case regarding incorporation of recital regarding delivery of possession in Ex.A-1.

34. PW.4 is another attesor who testified in the same lines of PW.3 regarding execution of Ex.A-1. He is a resident of Cumbum village

and the transaction took place at his residence in the presence of PW.3 but the 2nd defendant was not present at the time of completion of transaction and admitted that he does not remember that anything was discussed on that day about delivery of possession. In the cross-examination, the recital in the document was confronted to the witness to elicit about delivery of possession. PW.4 testified that the recital regarding delivery of possession was written in the document on the same day but it is not clear whether the interpolation was done subsequent to completion of execution or before completion of execution. If really, when there was no discussion about delivery of possession, interpolation regarding delivery of possession in Ex.A-1 is highly doubtful. Therefore, the evidence of PWs.1 and 2 is not corroborated by the evidence of any witness, who are independent regarding interpolation.

35. However, the 1st defendant was examined as DW.1 and clearly denied the execution while contending that there is a material alteration. In the last 5 lines of examination-in-chief, at page No.2, he asserted that there is no recital that possession was delivered to him but after receiving the Court summon, he verified Ex.A-1 with the permission of the Court and found that the interpolation was made subsequent to completion of execution. Therefore, DW.1 specifically pointed out the material alteration in the document. In the entire cross-examination of DW.1, nothing was elicited to prove that the interpolation took place before completion of execution of the document.

36. As seen from the recital of Ex.A-1, the pen and ink used for writing the interpolation regarding delivery of possession and the remaining part of the document is totally different and any prudent man can find out variation in ink and, apart from that, PW.2 himself admitted that it was subsequently written before completion of execution, as

there was discussion about delivery of possession after contents of the document were read over. However, that fact was not spoken to by PWs.3 and 4 and PW.1 also about discussion. It appears from the evidence of PW.2 that he being an experienced scribe of document writer conveniently developed a theory of discussion about delivery of possession to overcome the difficulty regarding interpolation. If really, the interpolation took place before completion of the execution of Ex.A-1, it would have been written with the same pen with which the other part of the document was written. Therefore, the variation in ink is sufficient to conclude that it was written subsequently. DW.1 clearly asserted that the interpolation took place subsequent to completion of execution and his testimony remained unrebutted. In such case, it can safely be concluded that the interpolation is a material alteration which *voids* the document as the plaintiff miserably failed to discharge his initial onus of proof that rests on him to establish that the interpolation had taken place before completion of execution of Ex.A-1. Therefore, the document is not enforceable under law as there is a material alteration in Ex.A-1.

37. In ***Kalianna Gounder Vs. Palani Gounde and another***^[3], the Apex Court ruled as follows:

“A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration, without the consent of the party bound, is exactly the same as that of cancelling the deed.

It is also stated in Article 604 at pp. 370 and 371:

An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed;

...an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses

that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable thereunder.

This rule has been applied by the Privy Council in *Nathu Lal and others v. Mussamat Gomti Kuar and others* L.R.67 IndAp318. The Judicial Committee observed in that case at page 333:

A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument.

The Judicial Committee observed at page 333:

A material alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc.,

and after applying that test they held that the alteration in that case was not material in the sense of altering the rights, liabilities or legal position of the parties or the legal effect of the document.”

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38. In view of law declared by the Apex Court, if any alteration changes or varies the rights and liabilities of the parties to document, such alteration can be said to be material alteration. Here, delivery of possession is incorporated; subsequently, it would change or vary the liabilities and rights of the parties to Ex.A-1. Hence, this alteration is material alteration.

39. The trial Court only based on the recitals of Ex.A-2 notice concluded that the defendants agreed to deliver possession of the property at the time of execution of registered sale deed. In fact, there is an averment in Ex.A-2 that in pursuance of the sale agreement, defendants 1 and 2 also agreed to give possession of the schedule property on the same date and a separate clause to that effect was also written in the agreement but this recital is not clear whether it is agreed to be delivered at the time of execution of the registered sale deed or on the date of execution of Ex.A-1 itself. Therefore, the conclusion arrived by the trial Court basing on the recital in Ex.A-2 cannot be accepted. However, on perusal of the contents of Ex.A-1, I

find that the recital with regard to delivery of possession is a subsequent incorporation in the document Ex.A-1 and the plaintiff failed to establish that the interpolation had taken place before completion of execution. Hence, in view of the principles laid down by the Apex Court in ***Kalianna Gounder*³**, I find that Ex.A-1 is not enforceable. Accordingly, the point is answered in favour of the defendants and against the plaintiff.

40. **POINT No.3:** According to the plaintiff, the schedule property was the ancestral property of defendants 1 and 2 and one Pothuluraiah was the original owner of the schedule property. After his death, 1st defendant being the adopted son, 2nd defendant being the daughter succeeded the estate of deceased Pothuluraiah and agreed to sell the property to the plaintiff; whereas the defendants contention is that Pothuluraiah was not absolute owner of the property and executed a will under the original of Ex.B-1 in sound disposing state of mind bequeathing the schedule property and other property in favour of defendants 3 and 7 to 10, thereby the defendants 1 and 2 have no right or title to the schedule property and incompetent to enter into any contract with third parties for sale of the property, consequently, the original of Ex.A-1 is not enforceable under law as they have no title to the property. The trial Court believed the will under the original of Ex.B-1 and held that the defendants 1 and 2 were nothing to do with the schedule property and defendants 3, 7 to 10 are the owners of the schedule property and thereby the agreement is not enforceable under law. The finding is challenged before this Court raising several contentions, more particularly, that execution of Ex.B-1 by Pothuluraiah bequeathing the schedule property to defendants 3 and 7 to 10 during his life time under the original of Ex.B-1 by the plaintiff and the will is required to be proved under the special rules of evidence contained in Section 68 of Indian Evidence Act but the document was not proved as required under law; thereby, Ex.B-1 cannot be accepted

and if Ex.B-1 is excluded from consideration, defendants 1 and 2 alone are entitled to enjoy the property with absolute rights being legal heirs of deceased Pothuluraiah and competent to execute an agreement to sell and convey title to the property in favour of third parties.

41. During course of argument, learned counsel for the plaintiff-appellant, while reiterating the said contention drawn the attention of this Court to the evidence on record about denial of execution of original of Ex.B-1 by Pothuluraiah in the examination of PW.1; whereas, the learned counsel for the defendants contended that when execution of original of Ex.B-1 is admitted, the proof as required under Section 68 of Indian Evidence Act can be dispensed with and placed reliance on a judgment in ***Pemmada Prabhakar and others Vs. Youngmen's Vysya Association and others***^[4].

42. According to the defendants, the original of Ex.B-1 was gutted in fire as the entire village was gutted in fire accident which occurred long prior to filing of the suit. Occurrence of fire accident in the village and damage caused to the property is an undisputed fact. Ex.B-1 is only a certified copy of the will and it is admissible in evidence provided a permission is obtained to adduce secondary evidence explaining the reasons but no such permission was obtained. However, the document is marked as Ex.B-1 in the evidence of DW.1 and, at this stage, it is un-necessary whether permission was obtained to adduce secondary evidence or not. However, signing on the original of Ex.B-1 can be proved by summoning the thumb impressions or signatures register known as B-Register maintained in the Registrar's office but for the reasons best known to the defendants they did not summon for production of the relevant register to prove the signatures and thumb impressions on the original of Ex.A-1 or execution of original of Ex.B-1 by Pothuluraiah. At the same time, the original of Ex.B-1 is a compulsorily attestable document and it is required to be

proved under Section 68 of the Indian Evidence Act examining any one of the attestors if they are alive. Sections 69, 70 and 71 of the Indian Evidence Act provided a separate procedure to prove execution of compulsory attestable document in case no attesting witnesses are available. However, it is not the case of the defendants that no attesting witnesses were available to the process of the Court and no steps were taken.

43. Learned counsel for the defendants would contend that when execution of Ex.B-1 is admitted, proof as required under Section 68 of Indian Evidence Act can be dispensed with but proviso to Section 68 says that it shall be necessary to call an attesting witness in proof of execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

44. Therefore, proof of the will under Section 68 of the Indian Evidence Act is not exempted from proving the document though its execution is admitted. Therefore, the contention of the learned counsel for the defendants cannot be accepted even by applying the proviso to Section 68 of Indian Evidence. The provisions of Indian Succession Act also did not exempt proof of will as required under Section 68 of the Act. Therefore, the contention of learned counsel for the defendants that when the execution of the will is admitted it need not be proved, is without any substance and it is against the legal requirement under Section 68 of the Indian Evidence Act.

45. In the present case, the defendants though set up a will executed by Pothuluraiah, marked as Ex.B-1, bequeathing his schedule property in favour of defendants 3, 7 to 10 and the same was disputed both in the plaint and in the evidence of plaintiff. In such case, the defendants, who are the propounders of the will, are under an obligation to prove the will as required under Section 68 of the Indian Evidence Act. Even otherwise, the proviso contained in Section 68 of

the Indian Evidence Act would apply only to the compulsory attestable documents other than the will. Therefore, the will is exempted from application of the proviso to Section 68 of the Indian Evidence Act. Hence, the will is still required to be proved as required under Section 68 of Indian Evidence Act, even if its execution is not denied. It is settled law that the propounder of the will has to prove due execution of the will and dispel all the suspicious circumstances in execution of the Will. Here, the original will was not produced, on the lame excuse that it was gutted in the fire accident that took place in the village. The occurrence of fire accident is admitted but the plaintiff did not admit gutting of Pothuluraiah's house in the fire accident. Even assuming for a moment, that the fire accident took place and the entire house of the defendants was gutted in the fire accident and the original will was burnt in the said accident still there is a different mode of proof of signatures of the testator Pothuluraiah on the will by summoning B-Register from the Office of Registrar but no such steps were taken by the defendants. In those circumstances, the will cannot be said to be proved and in the absence of proof of will, Ex.B-1 cannot be admitted in evidence for the purpose of deciding rights of the parties but the trial Court on erroneous appreciation of law under Section 68 of Indian Evidence Act concluded that when execution of compulsory attestable document is admitted it need not be proved. This view is totally contrary to the proviso to Section 68 of Indian Evidence Act.

46. In ***Smt. Indu Bala Bose and others Vs. Manindra Chandra***

Bose and another^[5], the Apex Court ruled as follows:

“The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on

the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that it also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances even succeed in the case."

47. In another decision of this Court in ***Malapati Suryamba and others Vs. Venigalla Koteswaramma and others***^[6], this Court ruled as follows:

"It is the duty of the propounder of the will to dispel the suspicious circumstances surrounding the will. Mere proof of will as required U/s. 68 of Indian Evidence Act is not sufficient to succeed on the basis of will."

48. Therefore, in view of my foregoing discussion and in view of the principles laid down in ***Manindra Chandra Bose***⁵ and ***Malapati Suryamba***⁶ the finding of the trial Court that the defendants proved execution of Ex.B-1 will by Pothuluraiah bequeathing the property in favour of defendants 3 and 7 to 10 is hereby *set-aside* holding that execution of Ex.B-1 in sound and disposing state of mind is not proved. However, in view of my foregoing discussion on point No.1, though Ex.A-1 is not obtained by the plaintiff by playing fraud or misrepresentation but in view of material alteration in Ex.A-1 it is also un-enforceable under law. Accordingly, the point is answered.

49. **POINT Nos.4 and 5:** One of the contentions of the defendants

is that the defendants 1 and 2 had no title to the property in view of bequeath marked as Ex.B-1, executed by Pothuluraiah, in favour of defendants 3 and 7 to 10 and that the agreement is not enforceable under law. Undoubtedly, if the will is accepted, defendants 1 and 2 had no right or title to the property, they are incompetent to enter into any agreement with the plaintiff to sell the property, in view of bar under Section 17 of the Specific Relief Act. Learned counsel for the defendants placed reliance on a judgment of the Apex Court in ***Pemmada Prabhakar⁴***, wherein the Apex Court had an occasion to deal with Section 17 of the Specific Relief Act and held that when the executants of the agreement assured that they would get the signatures of other co-sharers, who had right and interest in the property and their signatures were not obtained and in such case it is un-enforceable under law and no decree for specific performance can be passed as it was not executed by all the co-sharers of the property but the principle laid down in the above judgment has no direct bearing on the issue involved in this matter as the defendants failed to establish execution of original of Ex.B-1 as required under law in view of my finding on point No.3. Therefore, the question of non-joining of defendants 3, 7 to 10 to execute Ex.A-1 does not arise and they are claiming right and title to the schedule property, independently, by virtue of original of Ex.B-1 and not claiming as shareholders in the property. Therefore, the principle laid down by the Apex Court has no direct application to the present facts of the case. Hence, the contention of learned counsel for the defendants that defendants 1 and 2 are not the absolute owners of the property as defendants 3 and 7 to 10 being legatees are the owners of the schedule property is not accepted for the reason that the will was not proved as required under Section 68 of the Indian Evidence Act.

50. Yet, the learned counsel for the defendants contended that even if Ex.B-1 is excluded from consideration, still the plaintiff is not entitled to claim equitable and discretionary relief of specific

performance in view of Section 20 of the Specific Relief Act as the plaintiff did not approach the Court with clean hands and drawn the attention of this Court to several discrepancies in the evidence of PWs.2 and 3, who are the scribe and attestor of Ex.A-1 with regard to passing of consideration, uncertainty in the terms of agreement, Ex.A-1; whereas the learned counsel for the plaintiff would contend that the terms of agreement can be made certain and that the defendants received advance sale consideration of Rs.20,000/-, receipt of the same was acknowledged, signing on Ex.A-1 by 1st defendant and affixing thumb impressions by 2nd defendant, therefore, no further proof of passing of consideration is required when execution of Ex.A-1 is accepted.

51. One of the contentions of learned counsel for the plaintiff-appellant is that to establish the readiness and willingness, the plaintiff deposited Rs.1,92,600/- in the State bank of India, Cumbum branch. If the balance of sale consideration of Rs.1,92,600/- is accepted, the total extent would be Ac.10.63 cents at the rate of Rs.20,000/- per acre but the total sale consideration agreed to be paid under Ex.A-1 was only Rs.2,00,000/- out of it, Rs.20,000/- allegedly paid and the balance was only Rs.1,80,000/- agreed to be paid within one month from the date of execution of Ex.A-1. Hence, deposit of Rs.1,92,600/- for a total extent of Ac.10.63 cents also shows the *mala fides* on the part of the plaintiff.

52. As seen from the contents of Ex.A-1, it is an agreement to sell of immovable property for Rs.2,00,000/- dated 19.05.1992 and the defendants 1 and 2 agreed to sell the schedule property at the rate of Rs.20,000/- per acre, acknowledged receipt of Rs.20,000/- as advance of sale consideration while agreeing to execute registered sale deed on payment of balance of sale consideration of Rs.1,80,000/- on or before 19.06.1992 and there is a specific condition that in the event the plaintiff failed to pay balance of sale consideration and obtain registered sale deed within the stipulated time, the contract would get terminated. Therefore, time is the essence of the contract. However,

as per page No.3 of Ex.A-1, the total extent agreed to be purchased is Ac.10.30 cents out of Ac.10.63 cents in Survey No.122. It is further recited that the plaintiff has to pay sale consideration for an extent of Ac.10.30 cents whereas the schedule annexed to the decree copy is the land situated in Bestawarapeta Mandal at Basinepalli village, Praksam district in an extent of Ac.10.63 cents in survey No.122, equivalent to 4.256 Hectares within the boundaries east – rasta; south – land of defendants 4 to 6, west – land of defendants 4 to 6 and one Tellagorla Rajamma and north – land of B. Ranga Reddy and others and the market value of which was Rs.2,12,600/-. When the schedule property mentioned in Ex.A-1 is compared with the schedule annexed to the plaint, the plaintiff though obtained an agreement to sell for Ac.10.00 or Ac.10.30 cents, he claimed specific performance for total extent of Ac.10.63 cents at the rate of Rs.20,000/- per acre. The agreement was executed only for Rs.2,00,000/- out of which Rs.20,000/- was allegedly paid on the date of execution of Ex.A-1, while agreeing to pay balance of sale consideration of Rs.1,80,000/- within one month. Therefore, there is any amount of uncertainty in the extent mentioned in Ex.A-1 for the simple reason that the total sale consideration agreed to be paid under Ex.A-1 is Rs.2,00,000/- whereas total extent purchased under Ex.A-1 is Ac.10.33 cents out of Ac.10.63 cents, the rate per acre was Rs.20,000/- the value of Ac.10.30 cents would be Rs.2,06,000/-. If the total extent is Ac.10.63 cents the value of the total property would be Rs.2,12,600/- but here the defendants claimed specific performance for total extent of Ac.10.63 cents within the boundaries mentioned above. Thus, he claimed specific performance in respect of the property which is not covered by Ex.A-1 and the discrepancy with regard to total consideration agreed to be paid and rate per acre mentioned therein and balance of sale consideration agreed to be paid are not reconciling with one another. Thus, there is any amount of uncertainty in the recitals of Ex.A-1. When the terms of agreement are uncertain, it

is not enforceable under law in view of Section 29 of Indian Contract Act as it is *void*; when agreement is not certain or capable of being made certain are *void*. Thus, the agreement under Ex.A-1 is not enforceable under law due to uncertainty or not capable of being made certain.

53. As seen from the terms of Ex.A-1 it was only an agreement not accompanied by delivery of possession but, according to my finding, the recital with regard to delivery of possession is subsequently incorporated in Ex.A-1 and the delivery of possession was not proved by any satisfactory and cogent evidence. On the other hand, the defendants themselves established that they are in possession and enjoyment of the property in their own right. The plaintiff produced adangals for the faslis 1396 to 1401, marked as Exs.A-9 to A-14. At best, those documents would go to show that the defendants 1 and 2 and Pothuluraiah were in possession and enjoyment of the property. On the other hand, I have recorded a finding that Ex.A-1 was materially altered, on this ground also, it is difficult to exercise discretionary power to grant decree of specific performance in favour of the plaintiff.

54. One of the contentions of the defendants from the beginning is that the agreement to sell was obtained by misrepresentation, fraud *etc.*, but according to my finding on point No.1 obtaining of Ex.A-1 by misrepresentation was not accepted. The defendants 1 and 2 also specifically contended that no consideration was passed under Ex.A-1 but as seen from Ex.A-1 both defendants 1 and 2 acknowledged receipt of Rs.20,000/- as advance of sale consideration, the burden is upon the plaintiff to prove passing of advance of sale consideration of Rs.20,000/-, the plaintiff himself was examined as PW.1, besides examining the scribe and attesor as PWs.2 and 3. Strangely, PWs.2 and 3 did not accept passing of total advance sale consideration of Rs.20,000/- at the time of execution of Ex.A-1 but testified that the plaintiff paid Rs.10,000/- to 2nd defendant and Rs.9,000/- to 1st defendant while agreeing to pay Rs.1,000/- in the village. Thus, the

oral evidence of PWs.2 and 3 runs contrary to the case of the plaintiff about passing of advance sale consideration of Rs.20,000/- at the time of execution of Ex.A-1. Therefore, passing of consideration of Rs.1,000/- which is part of the alleged advance sale consideration of Rs.20,000/- was not established by adducing any evidence by the plaintiff. On the other hand, in the evidence of defendants, nothing has been elicited to prove payment of Rs.1,000/- as promised by the plaintiff and even no suggestion was put to them about payment of Rs.1,000/- in the village, as promised before PWs.2 and 3. Hence, passing of consideration of Rs.1,000/- was not proved by adducing any evidence. Thus, the plaintiff approached the Court with unclean hands raising several false pleas and made an attempt to prove the following false pleas:

- 1) Delivery of possession at the time of execution of Ex.A-1;
- 2) Material alteration to Ex.A-1 to incorporate the recital about delivery of possession;
- 3) Passing of advance sale consideration of Rs.20,000/- (Rs.1,000/- out of Rs.20,000/- was not paid even according to the evidence of PWs.2 and 3)
- 4) Un-certainty in the terms and conditions of the contract and Ex.A-1 shows that the plaintiff agreed to sell land at the rate of Rs.20,000/- per acre and the total consideration agreed to be paid is only Rs.2,00,000/- but the total extent mentioned in Ex.A-1 is Ac.10.30 cents out of Ac.10.63 cents; whereas the suit is filed for total extent of Ac.10.63 cents and deposited balance of sale consideration of Rs.1,92,600/- in the State Bank of India, Cumbum branch to prove his readiness and willingness.

55. It is settled law that when the plaintiff approached the Court with unclean hands and failed to fulfil the terms and conditions of agreement to sell, the Court cannot exercise its power to grant the relief of specific performance as held by the Apex Court in **Pemmada Prabhakar⁴**, wherein in Para 33 of the judgment, the Apex Court held as follows:

“It is an undisputed fact that the plaintiffs have not approached the trial Court with clean hands. It is evident from the pleadings of the Agreement of Sale which is produced for the decree for specific performance of Agreement of Sale as the

plaintiffs did not obtain the signatures of all the co-sharers of the property namely, the mother of the defendants, the third brother and 3 sisters. Therefore, the agreement is not enforceable in law as the persons who have executed the sale deed, did not have the absolute title of the property. Apart from the said legal lacuna, the terms and conditions of the Agreement of Sale for payment of sale consideration agreed to be paid by the first plaintiff in instalments within the period stipulated as indicated above were not paid. The First Appellate Court and the High Court have not exercised their power under Section 20(2) of the Specific Relief Act which by itself is the substantial question of law which fell for consideration before the High Court as the First Appellate Court failed to consider this important aspect of the matter and exercised its power while determining the rights of the party, particularly, in the light of the unenforceable contract between the plaintiffs against the defendants as all of them are not parties to the Agreement of Sale document (Ex.A-1) and the executants viz. defendant Nos.1 and 2 have not acquired absolute title to the property in question. Therefore, the impugned judgment is vitiated and liable to be set-aside.”

56. In a Division Bench judgment of this Court in ***Sri Krishna***

Devloor (D.S. Krishna) (died) Per LR Vs. N. Madhavi and others^[7],

it was ruled as follows:

“36. The relief of specific performance of an agreement of sale is equitable in nature. Section 20 of the Specific Relief Act enunciates the principle that guides the grant or denial of the relief. Even if an agreement is proved, the Court is required to take into account, the conduct of the parties, the fairness in the deal, and the entitlement of the plaintiff, while framing the relief. The Court can never extend its helping hand to a person, who indulges in dubious transactions, and attempts to deceive the innocent persons.”

57. In view of the principles laid down by the Apex Court in ***Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and***

others^[8], it was held as follows:

“It is settled law that the parties who seeks to avail of the equitable jurisdiction of Court and specific performance being equitable relief, must come to the Court with clean hands. In other words, the parties who makes false allegations does not come with clean hands and is not entitled to the equitable relief.....”

58. The same view is expressed by this Court in ***Puvvada Chiranjeeva Rao Vs. Busi Koteswara Rao***^[9], wherein it was held as follows:

“By its very nature, an equitable relief requires the person claiming it to be fair, reasonable and trustworthy. A plaintiff would disentitle himself from claiming such relief, if he has flouted the terms of the very agreement, which he seeks to enforce, with impunity. A person cannot be permitted to reap the benefits of a transaction partly through his unilateral acts, and to approach a Court of law for the balance of it. A plaintiff in a suit of such nature must prove his bona fide, before he seeks the assistance of the Court to compel the other person to perform his part of the obligation. It is not without reason that relief of specific performance is treated as equitable. In the ordinary course of things, if a party to a contract commits breach of terms thereof, the aggrieved party can certainly institute proceedings for damages. Further, the concerned party may choose to pay damages than to abide by the terms of the contract, may be for variety of reasons. Grant of relief of specific performance would curtail the freedom of a party to the agreement to rescind from it. Such a course can be adopted only when the persons who seek the relief convince the Court about their bona fides and prove that the entire blame for not taking the contract to its logical end, is with the other party.”

59. By applying the principles laid down by the Apex Court and this Court and in view of my foregoing discussion, I am not inclined to exercise discretion to grant equitable relief of specific performance as the plaintiff approached the Court with unclean hands. On this ground alone the plaintiff is disentitled to claim the relief of specific performance. Accordingly, the points are answered.

In the result, the Appeal Suit is dismissed confirming the decree and judgment dated 10.06.1996, passed in Original Suit No.49 of 1992 by the learned Subordinate Judge, Markapuram, Prakasam District.

In consequence, miscellaneous petitions, if any, pending in this appeal, shall stand dismissed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 30-01-2015.
Dsh

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

119

CMSO:11.02.2015

APPEAL SUIT No. 105 OF 1997

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Date. 30-01-2015

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- [\[1\]](#) 2007 (6) ALD 104
 - [\[2\]](#) 2003 (4) ALD 276
 - [\[3\]](#) AIR 1970 SC 1942
 - [\[4\]](#) LAWS (SC) 2014-8-55
 - [\[5\]](#) AIR 1982 SC 133
 - [\[6\]](#) 2010 (1) ALT 228
 - [\[7\]](#) AIR 2013 AP 238
 - [\[8\]](#) AIR 1996 SC 2814
 - [\[9\]](#) AIR 2012 AP 17