

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL NO. 383 OF 1993**

**Vijay Laxmipati Dasari (since deceased))
through his legal heirs & representatives:-)**

**1a) Smt.Vanita Vijay Dasari,)
Age 51 years, Occ.Household,)**

**1b) Pradeep Vijay Dasari,)
Age 33 years, Occ. Business,)**

**1c) Sandeep Vijay Dasari,)
Age 32 years, Occ. Service,)**

**1d) Anup Vijay Dasari,)
Age 28 years, Occ. Service,)
All residing at 201/1, Plot No.38,)
Geenta Nagar, Kamtam Vasahat,)
New Pachha Peth, Solapur – 413 006)**

..... Appellants

VERSUS

**1. Smt.Laxmibai Ramayya Bolabattin,)
Age about 65 years, occupation : Household))
Residing at 1561, Daji Peth, Solapur)**

**2. Laxminarayan Ramyya Bolabattin,)
since deceased by his legal heirs and)
representatives)**

**2a. Laxmibai Ramayya Bolabattin,)
(Respondent No.1))**

**2b. Kalavati Laxminarayan Bolabattin,)
Age adult, Occ.Household,)**

**2c. Radha Shrikant Rachcha,)
Age adult Occ.Household)**

2d. Ramu Laxminarayan Bolabattin,)
Age adult, Occ.)

2e. Prakash Laxminarayan Bolabattin,)
Age adult. Occ.)

2f. Chandrahas Laxminarayan Bolabattin,))
Age adult. Occ.)
All residing at 1561, DajiPeth, Solapur)

3. Shankar Ramayya Bolabattin,)
since deceased by his heirs and legal)
representatives)

3a. Laxmibai Ramayya Bolabattin,)
(Respondent No.1))

3b. Anuradha Shankar Bolabattin,)
Age adult, Occ.Household)

3c. Rajani Shriniwas Balla,)
Age adult, Occ.Household)

3d. Ashwini Shankar Bolabattin,)
Age adult, Occ.Household)

3e. Rajesh Shankar Bolabattin,)
Age adult, Occ.Business)

3f. Naresh Shankar Bolabattin,)
Age adult, Occ.Business)
All Residing at 1561, Daji Peth, Solapur)

..... Respondents

Mr.V.S.Gokhale for the Appellants.

Mr.T.D.Deshmukh for Respondent nos. 1, 2A, 2B, 2D, 2E, 3A, 3B, 3D, 3E and 3F.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 25th AUGUST, 2016

PRONOUNCED ON : 16th SEPTEMBER, 2016

JUDGMENT :

By this second appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants have impugned the order and judgment dated 17th March, 1993 passed by the Additional District Judge, Solapur dismissing the Civil Appeal No.98 of 1990 filed by the appellants (legal heirs and representatives of the original plaintiff). The appellants had impugned the judgment and decree passed by the Special Civil Suit No.106 of 1983 dated 30th September, 1989 passed by the Civil Judge, Senior Division, Solapur dismissing the suit filed by the original plaintiff inter alia praying for specific performance of the agreement of sale dated 1st February, 1983 and in the alternative for refund of the amount paid by the appellants to the defendants. Some of the relevant facts for the purpose of deciding this appeal are as under :-

2. For the sake of convenience, the parties described in this appeal are described as they were described in the proceedings before the trial court. The appellants herein were the original plaintiffs whereas the respondents were the original defendants before the trial court.

3. On or about 1st February, 1983, the plaintiff entered into an agreement for sale in respect of the structure on the northern portion of F.P.No.20, M.H.No.1561, Daji Peth, C.T.S.No.10429 for a consideration of Rs.40,000/-. It was the case of the plaintiff that at the time of execution of the said agreement for sale, the plaintiff paid a sum of Rs.15,000/- as and by way of earnest money and thereafter paid a sum of Rs.4,000/- on 22nd February 1983, Rs.4,000/- on 2nd March 1983 and Rs.4,000/- on 18th April 1983 totalling to Rs.27,000/- to the defendants. On 11th April, 1983, the parties entered into a supplementary agreement. It is the

case of the plaintiff that the defendants handed over the possession of one of the shop premises to the plaintiff on 11th April, 1983 in part performance of the said agreement for sale.

4. It is the case of the plaintiff that on 28th July, 1983 the parties entered into another writing by which the time to make payment by the plaintiff was extended upto 13th August, 1983. It is the case of the plaintiff that the defendants agreed to execute the sale deed before the Registrar on 12th August, 1983. It is the case of the plaintiff that since the defendants did not execute the sale deed on 20th August, 1983 the plaintiff filed a suit for specific performance of the said agreement for sale and in the alternate claimed for refund of the said amount paid by the plaintiff with interest. The defendants filed written statement and resisted the said suit filed by the plaintiff.

5. It was the case of the defendants that the suit plot was taken on lease by the deceased Ramayya and his two brothers Irayya and Rajbabbaiyya. There was a partition between Ramayya and his two brothers. It was the case of the defendants that the defendant nos. 1 to 3 had formed a joint Hindu family. The father of the plaintiff Laxmipati Narasayya Dasari was a famous politician from Eastern Region of Solapur in the Co-operative sector i.e. Dayanand Yantramag Industrial Weaving Society Ltd. situated at Municipal House No.1550 which was in existence from the year 1966.

6. The father of the plaintiff Laxmipati Narasayya Dasari was on the Board of Directors of the said society. He was the chairman or vice-chairman of the said society for a considerable period. On the date of filing suit by the plaintiff also his father was the chairman of the said society. The defendant no.2 was

working as a secretary of the said society from 1974-75. Vasudev Dandi was working as the accountant of the said society and was having in his custody the cash amount of the said society. It was the case of the defendants that the said Mr.Vasudev Dandi while working as the accountant committed misappropriation of the amount of Rs.7,749.89 of the said society. The chairman and the secretary of the said society was required to sign the books of accounts as per the provisions of the society. The father of the plaintiff and the defendant no.2 had accordingly signed on the kird.

7. It was the case of the defendants that the chairman of the said society Laxmipati Narasayya Dasari or the defendant no.2 had no concern with such defalcation committed by Vasudev Dandi. The said Mr.Vasudev Dandi had no property and thus there was no chances of any recovery of any amount of defalcation of the said Mr.Vasudev Dandi. The father of the plaintiff and the defendant no.2 were residing in the same lane opposite to each other. It was the case of the defendants that the father of the plaintiff had thus knowledge that the defendant no.2 had possessed immoveable property.

8. According to the defendants, in order to save his own claim, the father of the plaintiff and other directors of the said society started giving threats to the defendant no.2 of criminal action and at that time, the father of the plaintiff took in his custody the partition deed of the partition between Ramayya, Irayya and Rajababhai. On the basis of the original partition deed, proceedings in the Co-operative Court bearing Co-operative Case No.519 of 1977 was instituted. In the said proceedings Mr.Vasudev Dandi and the father of the plaintiff were not joined as defendants. The defendants herein were joined as the defendants in those proceedings.

9. It was the case of the defendants that the father of the plaintiff gave threats to the defendants to file criminal case and compelled the defendants to admit the claim in the Co-operative case. An award was passed in the said proceedings filed by the society against the defendants herein for payment of Rs.10,000/- with future interest and costs. An encumbrances were created on the suit property in respect of the said award delivered against the defendants.

10. It was the case of the defendants that the father of the plaintiff had planned to grab the property of the defendants by paying the nominal price and he took the undue advantage of the situation. It is the case of the defendants that the defendants were under tremendous pressure of placing the criminal case in future as threatened by the father of the plaintiff. The father of the plaintiff represented that he was a man of the obliging nature and would give to the defendants loan to enable the defendants to honour the said award in the proceedings filed by the society. The defendant nos. 1 to 3 were in need of Rs.15,000/- at that time and agreed to pay interest at the rate of 2% per month on the said amount of Rs.15,000/-.

11. According to the defendants, the market price of the suit property was about Rs.1,50,000/- to Rs.1,50,275/-. The father of the plaintiff insisted that the defendants shall sign an agreement for sale in favour of the plaintiff and the same shall be kept as a security and was not to be acted upon. The defendants required money and thus the plaintiff got executed the supplementary agreement for sale of Rs.27,000/- from the defendants and paid the loan of Rs.27,000/- to the defendants through his father. It was not possible for the defendants to repay the said loan in lumpsum and thus the father of the plaintiff got the documents of 'extension of time' from defendant no2. alone. The defendant nos. 1 and 3 refused to sign on

such documents seeking extension of time.

12. It was the case of the defendants that the defendant nos. 1 and 3 showed their readiness to repay the amount of Rs.10,000/-. The father of the plaintiff however refused to accept the said amount of Rs.10,000/- and insisted for payment of the entire amount of Rs.27,000/-. It was the case of the defendants that the father of the plaintiff broke open the lock of the premises which was in possession of the tenant of the defendant i.e. Mohan Consumers Society.

13. It was the case of the defendants that the open plot bearing nos. 181 and 191 were taken on lease by Ramayya Chandrayya Bolabattin, Irayya Chandrayya Bolabattin from Dnyaneshwar Naran Nirgude. The three brothers thereafter paid the sum of Rs.26,000/- and constructed a big hall on the said open plot and installed 20 handlooms. Ramayya and Irayya thereafter expired. The heirs of Ramayya and Irayya and Rajababhaiyya partitioned the said property. Plot no.181 was given to Laxmibai Bolabattin. Plot no.191 was given to Rajababhaiya Bolabattin.

14. It was the case of the defendants that the financial position of the defendants was deteriorated and thus the defendant no.2 had to accept the employment in the said society.

15. Dnyaneshwar Naran Nirgude thereafter executed a registered sale deed on 29th October, 1987 in respect of the said two plots in the name of Tulsidas, son of Rajababhaiya. The father of the plaintiff in order to surrender the rights of the defendants got the sale deed of the said open plots in the name of the plaintiff. It was the case of the defendants that there was no sale transaction in respect of the

suit property in favour of the plaintiff but the said agreement to sale was executed in view of the threats given by the father of the plaintiff though the real transaction between the parties was of a loan.

16. The learned trial judge framed 15 issues. The plaintiff examined himself and another witness in support of his case and also produced various documents. The defendants examined defendant no.2 and two more witnesses and also produced various documents.

17. Learned trial judge passed a judgment and decree dated 30th September, 1989 and dismissed the said suit for specific performance filed by the plaintiff. The learned trial judge however permitted the plaintiff to recover amount of Rs.27,000/- from the defendant nos. 1 to 3 as refund of the earnest money. The defendants did not challenge the said judgment and decree. The plaintiff however impugned the said judgment and decree dated 30th September, 1989 by filing an appeal (Civil Appeal No.98 of 1990) before the learned District Judge.

18. The Additional District Judge, Solapur by an order and judgment dated 17th March, 1993 partly modified the said decree insofar as payment of Rs.27,000/- is concerned. The Additional District Judge directed the defendant nos. 1 to 3 to pay to the plaintiff the said amount of Rs.27,000/- with interest at the rate of 6% per annum from the date of filing of the suit till filing of the suit till realization. The said amount was treated as charge on the suit property till realization of the entire amount. The learned Additional District Judge dismissed the appeal insofar as claim for specific performance of the agreement for sale is concerned and confirmed that part of the judgment and decree passed by the learned trial judge. This judgment dated 17th March, 1993 passed by the learned

Additional District Judge, Solapur has been impugned by the plaintiff in this appeal filed under section 100 of the Code of Civil Procedure, 1908. The defendants did not challenge the modified decree passed by the appellate court by filing any second appeal.

19. By an order dated 4th August, 1993, this second appeal was admitted on the following substantial question of law formulated by this Court :-

- 1) Whether the approach of the lower Courts was legal and proper to presume that the suit house was a joint family property ?
- 2) Whether both the Courts below erred in proceedings on the footing that the suit house was a joint family property and therefore the suit failed for non-joinder of necessary parties ?
- 3) Whether a part delivery of possession in favour of the plaintiff – appellant was a crucial factor which both the lower Courts failed to consider resulting into the perverse finding of fact ?
- 4) Whether the Appellate Court was right in concluding that no such agreement to sell was executed on the basis of the fact that the appellant – plaintiff did not inquire into the fact as to the legal necessity for sale of the suit house on the part of the defendants ?
- 5) Whether legal necessity on the part of the defendants had any relevants when the defendants never proved that the suit house was a joint family property ?

20. Mr.Gokhale, learned counsel appearing for the plaintiff invited my attention to the copy of the agreement which was the subject matter of the suit, supplementary agreements, some of the findings recorded by the learned trial Judge and by the appellate Court. It is submitted by the learned counsel that

admittedly the plaintiff had paid a sum of Rs. 27,000/- to the defendants under the agreement for sale dated 1st February, 1983 as against the consideration of Rs.40,000/- mentioned in the said agreement. On 19th April, 1983 the supplementary agreement was executed between the parties thereby extending the time for making balance payment. He submits that on 29th April, 1983, the defendants handed over possession of the shop premises, which was part of the suit premises to the plaintiff. On 28th July, 1983, the time to make balance payment was further extended till 13th August, 1983. He submits that on 12th August, 1983, the plaintiff called upon the defendants to execute the sale deed before the Sub-registrar and since the defendants failed to execute the sale deed, the plaintiff filed a suit for specific performance on 20th August, 1983 and in the alternate prayed for refund of the amount paid by the plaintiff with interest. He submits that on 3rd November, 1983, the plaintiff has already purchased the entire plot by a registered document from the original owner thereof.

21. It is submitted by the learned counsel that the defendants had admittedly not disputed the execution of the agreement for sale and the receipt of payment of Rs.27,000/- from the plaintiff. He submits that the defendant no.2 was admittedly working with the society and the Co-operative Court had passed an award in favour of the society and against the defendant no.2. The Co-operative Court had passed an order of attachment of the suit property in the execution proceedings. He submits that the defendant no.2 was admittedly in need of money and thus defendant nos.1 to 3 sold the suit property to the plaintiff. The need of money of the defendant nos.1 to 3 was proved before the learned trial Judge by the plaintiff. The relationship of debtor and creditor was not proved by the defendants before the learned trial Judge. The defendants had also failed to prove that the plaintiff was doing any money lending business.

22. It is submitted by the learned counsel for the plaintiff that even if there were other co-sharers in respect of the suit property other than the defendants, the learned trial Judge could have passed a decree for specific performance to the extent of the share of the defendant nos.1 to 3. The other co-sharers could resist the decree in execution.

23. It is submitted by the learned counsel for the plaintiff that though there was a charge created on the suit property in view of the award made by the Co-operative Court in favour of the society, the plaintiff was ready and willing to purchase the suit property with such an encumbrance. He submits that though the suit property was put to auction in execution of the decree passed by the Co-operative Court and the plaintiff had participated in the said auction, as the plaintiff wanted a clear title in respect of the suit property, there was no bar against the trial court for passing a decree for specific performance in favour of the plaintiff.

24. It is submitted that the plaintiff was always ready and willing to comply with his obligations under the agreement for sale and had actually complied with his obligations and thus the learned trial Judge ought to have exercised the discretion under section 20 of the Specific Relief Act, 1963 in favour of the plaintiff. He submits that the entire approach of the two Courts below in refusing to grant the relief of specific performance in favour of the plaintiff was totally wrong. He submits that the findings rendered by the two Courts below are perverse and thus this Court has ample power to interfere with such perverse findings of fact in this appeal filed under section 100 of the Code of Civil Procedure, 1908.

25. Mr.Deshmukh, learned counsel appearing for the defendants on the other hand submits that the plaintiff had tried to improve his case in the oral evidence by alleging that the Estate Agent had introduced the plaintiff with the defendants though there was no such averment made in the plaint filed by the plaintiff. He submits that the defendants were not the only owners of the suit property. He submits that the open plot of land was taken on lease by the deceased Ramayya, his two brothers Irayya and Rajbabbaiyya. There was a partition between Ramayya and his two brothers. The defendant nos.1 to 3 formed a joint Hindu family. The father of the plaintiff was a famous politician and was the Chairman of Dayanand Yantramanav Industrial Weaving Society Limited. The said society had filed a dispute against the defendant no.2 and others. An award was made by the Co-operative Court against the defendant no.2. There was a charge created in respect of the suit property in the execution proceedings filed in execution of the said award. The defendant nos.1 to 3 were in need of money to honour the said award and took a loan from the father of the plaintiff.

26. It is submitted that the father of the plaintiff had got the agreement for sale executed from the defendants which was executed as a security to secure the said loan. He submits that the defendants had offered to repay the said loan to the father of the plaintiff, who refused to accept the said amount. The father of the plaintiff had also threatened the defendant nos.1 to 3 of dire consequences if the agreement to sell was not executed. He submits that the market price of the suit property was at the relevant time in the range of Rs.1,50,000/- to Rs.1,50,275/-. He submits that the said agreement for sale was not to be acted upon.

27. Learned counsel for the defendants submits that there were seven

legal heirs and representatives of said Ramayya and each of them having 1/7th share. The three daughters and one more son of the said Ramayya had no knowledge in respect of the said agreement for sale and were admittedly not the parties to the suit transaction. He submits that the defendants alone had no absolute right to sell the suit property in any manner to the plaintiff. The suit was thus not maintainable only against the defendant nos.1 to 3 and was bad for non-joinder of necessary and proper parties.

28. It is submitted by the learned counsel for the defendants that since the plaintiff did not disclose the true and correct facts to the defendants and before the court, the suit for specific performance was fatal and thus no relief of specific performance could be even otherwise granted by the learned trial Judge. In support of this submission, the learned counsel for the defendants placed reliance on the judgment of the Supreme Court in case of ***Zarina Siddiqui vs. A. Ramlingam @ R. Amarnathan (2015) 1 SCC 705*** and in particular paragraphs 33 and 34.

29. Learned counsel for the defendants placed reliance on section 9 of the Specific Relief Act, 1963 and submits that the defendants could raise all the pleas by way of defence, which are available to the defendant under any law relating to the contracts. He submits that since the transaction between the parties was a loan transaction and not the transaction of sale and was executed in view of the threats and coercion made by the father of the plaintiff of dire consequences and in any event with an assurance that the said agreement for sale was to be only kept as a security and was not to be acted upon, the defendants were entitled to raise such plea in the written statement.

30. It is submitted by the learned counsel for the defendants that the

learned trial Judge could not have passed a decree for specific performance in favour of the plaintiff even otherwise on the ground that the defendants were not ready and willing to comply with his part of the obligations under the alleged agreement for sale in view of the plaintiff having participated in the auction of the suit property. He submits that even if the learned trial Judge would have rendered a finding that the agreement for sale in respect of the suit property was entered into and the transaction between the parties was a transaction of sale, the onus was on the plaintiff to prove that readiness and willingness on the part of the plaintiff was continuous all through out i.e. from the date of execution of such alleged agreement for sell till the decree was passed by the learned trial Judge. In support of this submission, the learned counsel for the defendants placed reliance on the judgment of the Supreme Court in case of ***J.P. Builders and Another vs. A. Ramdas Rao & Another (2011) 1 SCC 429*** and more particularly paragraphs 20 to 27 thereof.

31. It is submitted by the learned counsel for the defendants that while passing a decree for specific performance and while exercising the discretion under section 20 of the Specific Relief Act, 1963, the Court has to consider the circumstances in which the agreement for sale came to be executed by the defendants in favour of the plaintiff. In support of this submission, he placed reliance on the judgment of the Supreme Court in case of ***Kallathil Sreedharan & Another vs. Komath Pandiyala Prasanna & Another (1996) 6 SCC 218*** and in particular paragraphs 7 to 9 thereof.

32. Learned counsel for the defendants placed reliance on section 16(b) of the Specific Relief Act, 1963 and would submit that in view of the plaintiff having participated in the auction of the suit property, the plaintiff had violated essential

term of the alleged agreement for sale on his part and had willfully acted in variance with the relationship intended to be established by the agreement for sale.

33. Learned counsel for the defendants placed reliance on the judgment of the Supreme Court in case of ***R. Janakiraman vs. State, Represented by Inspector of Police, CBI, SPE, Madras (2006) 1 SCC 697*** and in particular paragraph 24 in support of his submission that section 92 of the Indian Evidence Act is supplementary to section 91 and thus bar under section 92 would not apply since the defendants who were parties to the agreement for sale had sought to establish that the said transaction itself was different from what it purported to be and thus oral evidence to disprove the terms of the agreement for sale or that the evidence of show that the document was not intended to be acted upon or that the intention of the parties was totally different could be led by the defendants.

34. Insofar as the submission of the learned counsel for the plaintiff that even if there were several co-owners of the suit property, the learned trial Judge could have passed a decree at least to the extent of the shares of the defendant nos.1 to 3 is concerned, learned counsel placed reliance on section 12 of the Specific Relief Act, 1963 and would submit that there were seven co-owners of the suit property and thus even if the said agreement for sale was to be construed as an intention to sell the suit property, the defendants could not have entered into in the said transaction for sale of the entire property. He submits that in any event the defendants having not complied with the ingredients of section 12 of the Specific Relief Act, 1963, no decree for part of the property could have been passed by the learned trial Judge. He submits that neither any such plea was raised by the plaintiff in the plaint nor the same was urged before the two Courts below.

35. It is submitted by the learned counsel for the defendants that the findings recorded by the two Courts below are recorded after considering oral as well as documentary evidence and are concurrent findings of fact and the findings being not perverse, cannot be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in case of ***Pakeerappa Rai vs. Seethamma Hengsu, Dead by L.Rs. & Ors. (2001) 9 SCC 521*** and in particular para 2.

36. Mr.Gokhale, learned counsel appearing for the plaintiff in re-joinder submits that the defendants had failed to prove before the two Courts below that the defendants had taken a loan from the plaintiff or his father. He submits that the defendants had admitted the receipt of Rs.27,000/- from the plaintiff, which was a consideration amount under the said agreement for sale. He submits that the defendants also failed to prove any coercion on the part of the father of the plaintiff or the plaintiff in execution of the agreement for sale. He submits that merely because the plaintiff had participated in the auction sale, it cannot be urged that the plaintiff had given up the claim for specific performance of the said agreement for sale.

REASONS AND CONCLUSIONS :

37. It is not in dispute that the father of the plaintiff was a politician and was an influential person in the locality and was the Chairman of the society, with whom the defendant no.2 was working. The said society had filed a dispute in the Co-operative Court in which the defendant no.2 was also a party. There was an award made by the Co-operative Court in the said dispute bearing Case No.519 of 1997 and in execution of the said award, there was a charge created on the suit

property. It was the case of the defendants that the father of the plaintiff who had adjoining property had pressurized, coerced and threatened the defendant no.2 of dire consequence of filing criminal cases against him and had compelled to admit the claim of the society in the Co-operative Court. The father of the plaintiff had also offered assistance of providing a loan to the defendants who were in need of money to honour the said award. Though there was a charge created on the suit property in execution of the award made by the Co-operative Court to the knowledge of the father of the plaintiff who was the Chairman of the said society, he got the agreement for sale executed in respect of the said property from the defendants in favour of his son. In my view, the learned trial Judge has rightly believed the case of the defendants that the said agreement for sale was not to be acted upon and that it was not a sale transaction but was a loan transaction.

38. A perusal of the judgment and decree passed by the learned trial Judge clearly indicates that a finding is rendered that the defendants could at the most enter upon an agreement for sale of the property only to the extent of their 1/3rd share each. The plaintiff had failed to prove that the defendants had agreed to sell the suit house to the property for Rs.40,000/- The plaintiff also failed to prove that the defendants had accepted a sum of Rs.15,000/- as an earnest money and on executing the agreement for sale of the suit property in part performance or that the defendants had accepted a sum of Rs.4000/- by way of earnest money under the said agreement for sale. The learned trial Judge has also held that the plaintiff had failed to prove that the defendants had delivered the possession of the western side shop premises to the plaintiff by way of part performance. The plaintiff also failed to prove that the defendant no.2 had agreed to execute the sale deed on 28th July, 1983 in favour of the plaintiff in respect of the suit property.

39. Insofar as the issue as to whether the plaintiff was ready and willing to perform his part of the alleged agreement or not, the learned trial Judge has rendered a finding that the plaintiff had failed to prove his alleged readiness and willingness to perform his part of the alleged agreement. The learned trial Judge has held that the plaintiff was not entitled to claim a decree for specific performance. The suit also suffered from non-joinder of necessary parties.

40. The learned trial Judge has held that the witness examined by the plaintiff admitted in his deposition that he did not make any enquiry with the defendants as to why and for what purpose the defendants had required money and as to why they were selling the suit property. It is held that it was difficult to believe that the plaintiff who had passed 10th standard examination would not make any enquiry into the legal necessity of the intended seller and would blindly purchase the property. It is held that admittedly the father of the plaintiff was the Chairman of the said society and it was difficult to believe that the plaintiff was not aware of the encumbrance of the said society on the suit property before entering into the agreement for sale. The award was already passed by the Co-operative Court in the said proceedings filed by the said society prior to the execution of the agreement between the parties. There was no mention of the said encumbrance in the agreement to sell. The learned trial Judge accordingly held that the said agreement for sell was thus not a real transaction.

41. The learned trial Judge also rightly took cognizance of the fact that the plaintiff was having in his possession a registered partition deed of the suit property which clearly indicated that there were seven co-owners of the suit property and not the defendants alone, had inherited the property from Ramayya. The plaintiff however, did not join all the legal heirs as parties to the said

agreement and also parties to the suit though were necessary and proper parties. The learned trial Judge in my view, has rightly come to the conclusion that it was not the real transaction of agreement for sale, after considering the entire evidence and more particularly various admissions made by the witness examined by the plaintiff.

42. The learned trial Judge has also held that within a short span of six months from the date of execution of the agreement, four documents came to be executed between the parties for extension of time for payment and execution of the sale deed and that there was no necessity for extension of time for execution of the sale deed. The plaintiff on his own had accorded extension for execution of the sale deed.

43. The learned trial Judge after perusing the entire evidence has rightly come to the conclusion that the father of the plaintiff was the Chairman of the said society and he was insisting for payments from the defendant no.2 as was apparent from the letters at Exhibits 90 and 91 and he had got the encumbrances created on the suit property. It is held that date of the payments made by the plaintiff to the defendants was corresponding to the dates of payment of money by the defendant no.2 to the society, of the amount of defalcation made by him. The plaintiff had admitted his participation in the auction fixed in the Regular Darkhast No.193 of 1983 and gave bid of Rs.32,000/- for purchase of the suit property. The learned trial Judge accordingly held that the plaintiff did not bring to the notice of the Executing Court that when he participated in the auction, an agreement for sale was already executed between the plaintiff and the defendants in respect of the same property. The plaintiff was fully aware of the other legal heirs of Ramayya, who had share in the suit property.

44. The learned trial Judge has also rendered a finding that there was no possibility of the plaintiff possessing the amount as paid by him on the date of agreement of sale and also on the subsequent dates to the defendants after perusal of the accounts which were produced by the plaintiff. The learned trial Judge in my view, rightly held that in such circumstances, the defence of the defendants that the father of the plaintiff was playing a role behind the curtain and was the person who wanted to purchase the suit property appeared probable. The learned trial Judge also rendered a finding that the defendants had proved that the plaintiff had agreed not to act upon the suit agreement. The father of the plaintiff had asked the society to file the execution application on the basis of the award and to put the suit property for sale. The father of the plaintiff also instructed his son to submit his bid during the sale of the suit property in execution proceedings. It is held that the said agreement was kept as a security for the amount of Rs.27,000/- given by the plaintiff to the defendants.

45. The appellate Court also framed various points for determination and have discussed the oral and documentary evidence and the pleadings of the parties in great detail in the impugned order and judgment and has rendered various findings of fact independently and have dismissed the appeal filed by the plaintiff.

46. Insofar as the submission of the learned counsel for the plaintiff that the defendants had failed to prove the money lending transaction between the parties is concerned, the evidence produced by the parties before the learned trial Judge clearly indicate that the transaction between the parties was a loan transaction. The father of the plaintiff was admittedly the Chairman of the said society who had filed a dispute against the defendant no.2 and had obtained an

award. There was an attachment on the suit property to the knowledge of the father of the plaintiff. There was no reference to the said attachment in the agreement for sale.

47. Insofar as the submission of the learned counsel for the plaintiff that merely because the plaintiff had participated in the auction and the plaintiff had not given up his right to claim specific performance and that the learned trial Judge could not have refused to exercise the discretion under section 20 of the Specific Relief Act, 1963 is concerned, in my view, there is no substance in this submission of the learned counsel for the plaintiff. A party who seeks specific performance has to prove his continuous readiness and willingness to perform his part of the contract all through out i.e. from the date of the execution of the agreement till the date of decree. The plaintiff has to establish his readiness and willingness in terms of section 16(c) of the Specific Relief Act, 1963, which is a condition precedent for obtaining a relief of specific performance.

48. In this case the plaintiff had failed to prove that there was any sale transaction between the parties in respect of the suit property. It was specific case of the defendants in the written statement that the transaction between the parties was a loan transaction and not a sale transaction and the said document was executed in view of coercion and threat given by the father of the plaintiff, who was the Chairman in the society, who had obtained an award against the defendant no.2. The plaintiff however, did not choose to examine his father as a witness before the learned trial Judge. On the contrary, the plaintiff participated in the auction of the suit property which was held in execution. The award was made by the Co-operative Court in favour of the said society of which the father of the plaintiff was the Chairman. The plaintiff suppressed from the Executing Court that

the agreement for sell had already been entered into between the plaintiff and the defendants.

49. Since the plaintiff had participated in the auction of the suit property, in my view, the plaintiff had given up his claim for specific performance of the said agreement and was not ready and willing to perform his part of contract. The plaintiff not having satisfied the condition of section 16(c) of the Specific Relief Act, 1963, which was a condition precedent for grant of relief of specific performance, the learned trial Court as well as the appellate Court rightly exercised their discretion not to grant specific performance of such an agreement for sell. The judgment of the Supreme Court in case of ***J.P. Builders & Another*** (supra) squarely applies to the facts of this case. I am respectfully bound by this judgment.

50. Insofar as the submission of the learned counsel for the plaintiff that even if there were other co-owners of the suit property, the learned trial Judge could not have refused to grant specific performance of the agreement insofar as the shares of the defendants in the suit property is concerned, it is not in dispute that the plaintiff had not pleaded for specific performance of the part of the contract. The plaintiff had neither agreed to pay the entire consideration for part of the property nor had relinquished all his claims for performance of the remaining part of the contract. No such submissions were urged by the plaintiff either before the learned trial Judge or before the appellate Court invoking section 12 of the Specific Relief Act, 1963. In my view the plaintiff thus cannot be allowed to urge this submission for consideration of this Court for the first time. Unless conditions of Section 12 of the Specific Relief Act, 1963 are satisfied, no specific performance of part of the contract can be granted.

51. The Supreme Court in case of **Zarina Siddiqui** (supra) has held that while exercising equitable discretionary jurisdiction of the Court under section 20 of the Specific Relief Act, 1963, the Court has to consider the conduct of the parties. The parties must come before a Court with clean hands. It is held that the remedy for specific performance is an equitable remedy. The Court's discretion to grant the decree of specific performance is discretionary but not arbitrary and has to be exercised in accordance with the sound and reasonable judicial principles. Necessary ingredients has to be proved and established by the plaintiff so that the discretion shall be exercised judicially in favour of the plaintiff.

52. In my view, the plaintiff not having approached the Court with clean hands and the transaction between the parties being not a genuine transaction as reflected in the agreement for sale, the learned trial Judge has rightly not exercised the discretion under section 20 of the Specific Relief Act, 1963 in favour of the plaintiff and has rightly rejected the claim for specific performance. The principles laid down by the Supreme Court in case of **Zarina Siddique** (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

53. The Supreme Court in case of **Kallatjhil Sreedharan & Another** (supra) has held that under section 20 of the Specific Relief Act, 1963, the discretionary jurisdiction of the Court to decree specific performance should be exercised on sound, reasonable and judicial principles. The Court is not bound to grant such relief merely because it is lawful to do so but at the same time it enjoins that the discretion of the Court should not be arbitrary but shall be sound and reasonable, guided by the judicial principles and capable of correction by a Court of appeal. The principles laid down by the Supreme Court in case of **Kallatjhil Sreedharan & Another** (supra) applies to the facts of this case.

54. The Supreme Court in case of **R. Janakiraman** (supra) has construed section 92 of the Indian Evidence Act, and has held that section 92 is supplementary to section 91 and corollary to the rule contained in section 91. It is held that bar under section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what it purports to be. To put it differently, the bar is to the oral evidence to disprove the terms of a contract, and not to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different. In my view, the defendants in this case were entitled to prove that the said agreement to sell was not intended to be acted upon and that the transaction between the parties was loan transaction and not the agreement for sale. The defendants had thus made out a case under section 92 of the Indian Evidence Act and had proved beyond reasonable doubt that the transaction between the parties was not a transaction of sale. The principles laid down by the Supreme Court in case of **R. Janakiraman** (supra) squarely applies to the facts of this case.

55. Under section 20(2)(a) the Court while exercising discretion not to decree specific performance can exercise discretion where the conduct of the parties at the same time entering into contract or circumstance under which the contract was entered into were such that the contract though not voidable, gives the plaintiff an unfair advantage over the defendant. In my view, the defendants had proved beyond reasonable doubt that the father of the plaintiff who was the Chairman of the society had obtained an award from the Co-operative Court

against the defendant no.2 and had got an attachment issued on the suit property and thereafter had offered financial assistance to the defendants to pay the said amount and had coerced the defendants to execute the agreement for sale. The trial Court having come to a conclusion that such coercion was made by the father of the plaintiff upon the defendants was right in not exercising the discretion in these circumstances to grant specific performance of the agreement for sale in favour of the plaintiff. In my view, the section 20(c) of the Specific Relief Act, 1963 also has to be considered by the Court while exercising the discretion not to decree specific performance if it is satisfied that grant of specific performance would be inequitable to enforce specific performance.

56. A perusal of the record clearly indicates that both the Courts below have dealt with the evidence led by both the parties, and also the provisions of law and have rendered various findings of fact in the detailed judgments which in my view, are not perverse and thus cannot be interfered with by this Court under section 100 of the Code of Civil Procedure, 1908. The Supreme Court in case of ***Pakeerappa Rai*** (supra) has held that even if the findings recorded by the Courts are erroneous findings of fact, the same cannot be interfered with by a Court under section 100 of the Code of Civil Procedure, 1908. The judgment of the Supreme Court squarely applies to the facts of this case. I am respectfully bound by the said judgment.

57. For the reasons recorded aforesaid, I answer the substantial questions of law formulated by this Court as under :

Question No.1 is answered in affirmative. Question No.2 is answered in negative. Question No.3 is answered in negative. Question No.4 is answered in affirmative. Question No.5 is

answered in affirmative.

58. In my view the appeal is devoid of merits. I, therefore, pass the following order :-

- a) Second Appeal No.383 of 1993 is dismissed.
- b) No order as to costs.

[R.D. DHANUKA, J.]