

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ AS No.1340 of 1996

% 11-10-2018

C. Obi Reddy

...Appellant/
2nd Defendant

V.

\$ K. Sanjeeva Reddy (died) per LRs

... Respondents/
Plaintiffs & other
defendants

! Counsel for the appellant: Sri C.V. Mohan Reddy

Counsel for the Respondents: Sri O. Manohar Reddy

< Gist:

> Head Note:

? Cases referred:

¹ (1956) 2 An.WR 1004

² (2013) 2 SCC 606

³ (1995) 5 SCC 115

⁴ (1998) 5 ALD 697 (DB)

⁵ (2011) 1 SCC 429

⁶ (2010) 10 SCC 512

⁷ (2000) 2 SCC 428

⁸ AIR 2005 AP 260 = (2009) 17 SCC 27

⁹ (2009) 17 SCC 27

¹⁰ (2000) 6 SCC 685

¹¹ (1997) 2 SCC 200

¹² AIR 1971 SC 1949

¹³ AIR 1983 Bom 1

¹⁴ AIR 1983 SC 684

¹⁵ (1983) 3 SCC 15

¹⁶ (2008) 8 SCC 321

¹⁷ (2009) 14 SCC 294

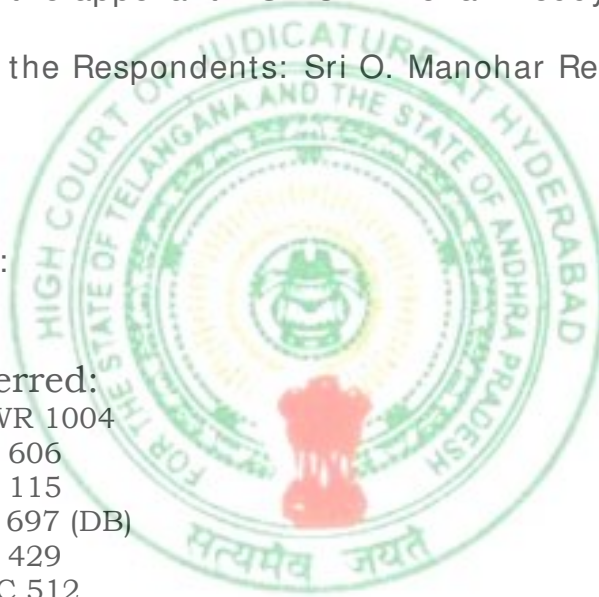
¹⁸ 2005 (6) ALD 802

¹⁹ 1971 (1) SCC 265

²⁰ AIR 1982 SC 948 (1)

²¹ AIR 2013 SC 1732

²² AIR 2009 SC 2367



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**AS No.1340 of 1996****JUDGMENT:**

This appeal is filed by the second defendant questioning the judgment and decree dated 29.02.1996 in the suit OS No.186 of 1983 passed by the Additional Subordinate Judge, Anantapur.

2. For the sake of convenience, as this is a first appeal, the parties are referred to as plaintiffs and defendants only.

3. The suit OS No.186 of 1983 was initially filed by two plaintiffs against the defendants 1 and 2 for specific performance of an agreement of sale. The first defendant was the owner of the property. As per the plaint averments, the first defendant executed an agreement of sale in favour of the plaintiffs on 30.01.1980. However, he sold the same property on 03.05.1982 to the second defendant. Therefore, the suit is filed by the plaintiffs against both the defendants.

4. The averments in the plaint in brief are that on 30.01.1980 the first defendant agreed to sell the lands for a sum of Rs.22,000/-. He received an advance amount of Rs.10,000/- and agreed to receive the balance consideration within three years from the date of the

agreement of sale. Later, the plaintiffs came to realize that the first defendant sold the property to the second defendant. Therefore, after exchange of notices, the present suit is filed.

5. The first defendant filed a written statement denying the complete execution of the document. According to the first defendant, he signed the document thinking that it is an agreement of sale pertaining to the different lands in Survey No.69. The second defendant filed a detailed written statement questioning the entire agreement. It is his contention that the agreement is an ante dated agreement to get over the sale deed in question and that it is created for the purpose of the suit. He urges that he is a *bona fide* purchaser and he has no notice of the agreement of sale.

6. Based on the pleadings and the written statements filed, the following issues were framed:

1. Whether the suit sale agreement in favour of plaintiffs is true and valid?
2. Whether the plaintiffs are always ready and willing to perform their part of the contract?
3. Whether the plaintiffs are entitled to enforce specifically the suit sale agreement?
4. Whether 2nd defendant is a bona fide purchaser without notice of prior sale agreement?
5. To what relief?

7. The parties went to trial. For the plaintiffs, Exs.A.1 to A.7 were marked and PWs.1 to 4 were examined. For the defendants, Exs.B.1 to B.14 were marked and DWs.1 to 3 were examined. After the trial was completed, the suit was decreed with costs. The defendants were directed to execute the sale deed. It is this judgment that is challenged in the present appeal.

8. This Court has heard Sri C.V. Mohan Reddy, learned senior counsel appearing for the appellant/second defendant and Sri O. Manohar Reddy, learned counsel for the respondents/plaintiffs.

9. The learned senior counsel for the appellant apart from arguing the appeal at length filed detailed written arguments along with a volume of case law on this subject. The first and foremost submission of the learned senior counsel for the appellant is on issue No.1. Logically this is the correct issue to be taken up viz., whether the suit sale agreement in favour of the plaintiffs is true and valid. The learned senior counsel focused the attention of this Court to this issue and argues that Ex.A.1-agreement of sale is a created agreement.

10. Ex.A.1 is a document dated 30.01.1980. The first defendant in his written statement admits that he has put his signature and thumb mark on the said

document. But he states that the signed document or agreement bona fide believing that the said document is being written for the sale of different land situated in Survey No.69. In the light of this admission, the burden is admittedly on the first defendant to prove the circumstances under which he executed the document. Unfortunately, the first defendant died by the time the evidence commenced. The law on the subject is sufficiently clear. For the sake of clarity, a Division Bench judgment of this Court is being cited, which is reported in ***Alapati Sivaramakrishnayya v. Alapati Kasiviswanatham***¹. The Division Bench held that after considering the case law on the subject that the burden of proving the signatures/thumb marks affixed on a document is admitted, the burden squarely rests upon the plaintiff to prove the circumstances under which he executed the document. If he fails to do so, the presumption will be drawn against him. In the case on hand, as the first defendant was not examined as a witness, the other evidence introduced by other witnesses will therefore have to be scrutinized and seen.

11. The learned senior counsel for the appellant argues that Ex.A.1 is a document that is created for the

¹ (1956) 2 An.WR 1004

suit. He drew the attention of this Court to the document and pointed out that the signature of the first defendant is attested and affixed and it is very close to the schedule of the property on the right side bottom while sufficient space is available for affixing the signature and thumb mark. Therefore, it is the primary contention that the schedule and other details were filled up after the signature and thumb mark were obtained at the right side bottom corner. The learned senior counsel also points out that the signature of the attestors was affixed on the left side corner of the document, despite the availability of the space. It is his contention that witnesses normally sign below the signature of the executant or on the bottom left side corner of the document. He points out that this is another suspicious circumstance.

12. In addition, the learned senior counsel for the appellant points out that the different inks were used to write about Survey Nos.472 and 481. The ink used to write about Survey Nos.174/1 and 174/2 is different according to the learned counsel. He points out that PW.1 admitted that only one pen was used during the course of the execution of the document. In addition, the learned senior counsel also argues that while the witness

deposes that the first defendant affixed his thumb mark with an ink pad. Ex.A.1-document shows that this thumb mark is affixed using cart grease (mandana grease). Therefore, the senior counsel argues that the document is a suspect document and it is created for the purpose of the suit.

13. In reply thereto, the learned counsel for the respondents/plaintiffs argues that as the first defendant admitted his signature on the document, the burden was upon the defendants to prove that this document was created. The learned counsel argues that if the document was created and used, they would not have left the blank spaces etc., below the schedule. He also submits that if the document was deliberately created, the signatures of the attestors would have been put in the gap that is available in the bottom of the document and not in the left corner of the same. The fact that the document is signed in the manner in which it is done with a gap at the bottom and that the signatures of attestors are on the left side makes it clear that it was genuinely executed and attested, but signed on the left side of the document. He also argues that once the first defendant admitted in his written statement that he affixed his signature on the document, the question whether the thumb mark was

put with the ink or with cart grease is not very relevant. The signature is admittedly that of the first defendant. The learned counsel also argues that the evidence of witnesses does not disclose that the document is created. It is his argument that the entire theory of ante dated document etc. is an after thought, which is brought into the suit by way of amendment.

14. In view of the fact that the defendants raised the plea that this document is an ante dated document and the first defendant has died, this Court has looked into the depositions of the witnesses to see whether this point is proved either in the chief-examination or in the cross-examination of the witnesses. In the entire chief examination of DW.1, there is virtually no statement about the creation of Ex.A.1. He deposed in the chief-examination that the first defendant informed him that he was paid Rs.500/- at the time of obtaining the signature and thumb impression on the stamped paper. He did not depose anything else. DW.2 was examined to prove the sale deed in favour of the first defendant viz., Ex.B.11. DW.2 on the other hand deposed that he was informed by the first defendant that on a ready drafted document produced by Lakshmi Narayana Reddy and

others, he put his signature and thumb mark. This is the oral evidence of the defendants.

15. Coming to the cross-examination of the plaintiff's witnesses by the first defendant, it is clear that in the cross-examination of PW.1, it has been elicited that the agreement has been executed by the first defendant with 'specific boundaries'. The witness states that the boundaries are not shown in Ex.A.1. It is also clear that there is cross-examination with regard to the thumb impression on Ex.A.1. It is stated that it has been affixed with cart grease. The witness states that as the ink pad was not containing the ink, cart grease was used. PW.1 also admitted that in an earlier suit, he had deposed that an ink pad was used. Similarly, PW.2, who according to the appellant is a villain of the piece, was also cross examined on the contents of Ex.A.1. He admits that normally the attester's sign on the document at the foot of the document and he does not remember whether any space was available beneath the contents of the document. He also admits that only one pen was used throughout the scribing of Ex.A.1. He further states that he does not know what pen the attestors and executant of Ex.A.1 used for signing the document. In the light of these facts, which amount to clear discrepancies, as per

the learned senior counsel, it is argued that Ex.A.1 is a created document. As mentioned earlier, the learned counsel for the respondents argues that these so called discrepancies do not have take away the intrinsic worth of the document and that the admission of the signature and thumb impression by the first defendant in his written statement adds to the intrinsic worth of the document.

16. This Court after hearing the submissions of both the learned counsel notices the following:

a) the affixing of the thumb mark and the signature by the first defendant is admitted in his written statement itself. Similarly, in the reply notice-Ex.A.5 through his lawyer, the first defendant admitted that he affixed his signature on the document. Therefore, the usage of ink pad or cart grease for putting the thumb mark is not really relevant or important at this stage.

b) This Court also notices the written statement filed by the first defendant wherein he clearly admits in para-4 as follows:

“When the plaintiffs prevailed upon this defendant to purchase the above mentioned land, this defendant accordingly subscribed his signature to the agreement already prepared, bona fide believing the representations made by Lakshmi Naryana Reddy.”

Therefore, from a reading of this written statement, it is clear that by the time the first defendant signed on the document, it was fully prepared.

c) This Court also notices the oral evidence of DW.3 wherein in her chief-examination she deposed that Lakshmi Reddy insisted to execute some documents. The said Lakshmi Reddy and others had a document readily drafted, at last the first defendant put his signature and thumb impression on the said document.

17. The admission in the pleading in the opinion of this Court deserves great importance. No evidence to explain this admission in the pleading is forthcoming. On the contrary DW.3 also supports the same by stating that Lakshmi Reddy came with a prepared document on which the signature and thumb impression were affixed by the first defendant. Therefore, this Court is of the opinion that the entire submissions on the question of gaps, different inks etc., pale into insignificance. Admittedly, both as per the written statement of the first defendant and as per the deposition of DW.3, a fully prepared document was produced for signature. The document on which the first defendant affixed his signature in the opinion of this Court is an already prepared document.

18. The only question that survives for consideration is whether the first defendant affixed his signature thinking that he was proposing to sell the land in Survey No.69 and not the suit schedule property. No positive evidence is available to show that Ex.A.1 was prepared surreptitiously and that the first defendant is made to believe that the agreement was for sale of the land in Survey No.69 and not the sit schedule land.

19. On the other hand, PW.2 is the scribe of Ex.A.1. He clearly states that after scribing Ex.A.1, the contents were read over to the first defendant, the plaintiffs and other persons who were present at that time. Thereafter, only the first defendant signed the document and affixed his thumb mark. He further deposed that the attestors signed on Ex.A.1 in his presence and in the presence of the first defendant. Even in the cross-examination, the witness clearly deposed that the plaintiffs 1 and 2 and the first defendant came to him and the terms of the agreement were decided before Ex.A.1 was scribed. He also states that as per the instructions of the executant only, the document was prepared. The witness also denied the submissions that for knocking away the land in Survey No.69, the signatures were obtained on the blank papers. PW.2 is an

attesting witness to Ex.A.1. The witness clearly deposed that after Ex.A.1 was drafted, the scribe read over the contents to all the persons and after accepting the contents as true, the first defendant executed the agreement and affixed his thumb impression. Even in the cross-examination, the witness said that the scribing of the document took up to one to one-and-half hours time. He denied the suggestion that Ex.A.1 was not attested in the manner spoken by him. PW.4 is a witness whose talks of the oral discussions and negotiations prior to the execution of Ex.A.1. Hence, there is no evidence for concluding that Ex.A.1 was signed basing on a misrepresentation/or in the circumstances as stated by the first defendant.

20. In addition, the evidence of DW.1 or DW.2 is not really important for this point, since they were not present on that day. DW.3 on the other hand clearly talks of a transaction, she allegedly witnessed in the house of the first defendant. She clearly deposed that Lakshmi Reddy and others had a document which is readily drafted and the first defendant signed on the document.

21. Therefore, a reading of the entire oral evidence including the evidence of plaintiffs' witnesses and of the

defendants does not lead to inescapable conclusion that Ex.A.1 was created or that the first defendant affixed his signature under the mistaken belief that the land in Survey No.69 was being sold. The sequence of the events, the oral evidence and the admission in the written statement that a readily drafted document was signed leads to a conclusion that Ex.A.1 was in fact executed as stated and not as urged by the defendants. The cross-examination of PWs.2 and 3 does not in any way take away the intrinsic worth of Ex.A.1.

22. This Court concurs with the findings of the lower Court that if at all Ex.A.1 was to be created as suggested subsequent to the sale deed Ex.B.11, it would have been created in the manner that does not give rise to any doubt at all. The mere fact that the attestors signed on the bottom left corner in the margin or some gap was left below the schedule is not therefore very relevant. This Court on a review of the entire evidence is of the opinion that Ex.A.1 is a genuine document and is not created. The circumstances that are mentioned in the written statement of first defendant are not borne out by the oral evidence. The learned counsel for the respondents also argued relying on **Gian Chand and**

Brothers v. Rattan Lal² that the first defendant did not deny the receipt of the advance sale consideration as mentioned in the plaint. He relies on para-24 of this reported judgment and states that the written statement of first defendant is bereft of details and that the statements in the plaint are to be treated as admitted. This Court finds force in this contention.

23. Even if Ex.A.1 is held to be genuine, the important question that arises in this suit for specific performance is whether the plaintiffs are ready and willing to perform their part of the contract and whether the plaintiffs are entitled to a decree of specific performance.

24. The learned senior counsel for the appellant argues that the continuous readiness and willingness are necessary to be proved for a decree of specific performance which is admittedly a discretionary relief in this case. The learned senior counsel points out that the plaintiffs in the suit has failed to prove that they were continuously ready and willing to perform their part of the contract. He relied upon the following case law to argue that continuous readiness and willingness is not proved.

² (2013) 2 SCC 606

1. ***N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao***³;
2. ***Sardar Amarjeet Singh v. Nandu Bai***⁴;
3. ***J.P. Builders v. A. Ramadas Rao***⁵;
4. ***Man Kaur v. Hartar Singh Sangha***⁶;
5. ***Ram Awadh v. Achhaibar Dubey***⁷;
6. ***Rajamani v. Mrs. Azhar Sultana***⁸;
7. ***B. Rajamani v. Azhar Sultana***⁹; and
8. ***Ram Niwas v. Bano***¹⁰.

25. Against the legal backdrop of these seven cases, it is the contention of the learned senior counsel for the appellant that the agreement was entered into January, 1980 and the first communication was addressed only 2 ½ years later by Ex.A.2. It is also his contention that readiness implies the possession of adequate money to pay the balance sale consideration. In the case on hand, the learned counsel submits that the plaintiffs did not prove that they were ready and willing to pay the balance sale consideration. He also argues that the suit was filed one year after the issuance of legal notice Ex.A.2. Therefore, it is the contention of the learned counsel that the continuous continue readiness and willingness is not proved. In addition, he

³ (1995) 5 SCC 115

⁴ (1998) 5 ALD 697 (DB)

⁵ (2011) 1 SCC 429

⁶ (2010) 10 SCC 512

⁷ (2000) 2 SCC 428

⁸ AIR 2005 AP 260 = (2009) 17 SCC 27

⁹ (2009) 17 SCC 27

¹⁰ (2000) 6 SCC 685

also points out that the term in the contract which granted a period of three years to the plaintiffs to get a sale deed is an unusual term and despite the existence of such an unusually long term, the plaintiffs could not prove his readiness and willingness.

26. In reply thereto, the learned counsel for the respondents argues that the contents of Ex.A.1 are genuine and once the parties agreed for three years period, the entire period is available for the plaintiffs to seek specific performance. It is the case of the defendants that in this three year period, there was no need for them to continuously issue notices to prove their readiness and willingness. The learned counsel states that after coming to realize that the property was sold to the second defendant, a notice was issued viz., Ex.A.2 asking the first defendant to receive the balance sale consideration and execute the sale deed on 21.07.1982. He also points out that in the said notice it is mentioned that if any earlier date is also informed, his clients are willing to come to the Sub-Registrar's office to take the necessary sale deed. Hence, his contention is that the plaintiff showed their readiness/willingness.

27. This Court after examining the respective contentions and the case law on the subject notices that

the cross-examination of PW.1 itself makes it clear that his financial capacity is established. The witness stated in the cross-examination that anticipating some failure of crops, a period of three years was fixed for payment of the balance sale consideration. Further cross-examination reveals that PW.1 is in possession of the part of the land known as 'eethamanu chenu', which is partitioned among him, his father and brothers. He states that in 1980 he got a good yield for the property. He also states that he purchased some land with the said money from one Narayanamma. Further cross-examination of PW.1 reveals that 12 acres of land fell to his share in the partition and it also includes garden land. Some lands in Survey No.484/2 are also in the name of his wife. Therefore, the financial capacity of PW.1 is fairly clear.

28. As far as the willingness is concerned, this Court notices that the learned counsel for the respondents cited a judgment reported in **Sukhbir Singh v. Brij Pal Singh**¹¹. In this case also, the Hon'ble Supreme Court noticed that the plaintiffs attended the Sub-Registrar's office, got a drafted sale deed executed for registration and waited for the defendants to come. The

¹¹ (1997) 2 SCC 200

Hon'ble Supreme Court in para-5 of this judgment clearly held as follows:

“5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law. (emphasis supplied)

29. In the case on hand, after realization of the sale deed executed in favour of the first defendant, Ex.A.2-notice was specifically issued stating that the plaintiffs are ready to get the sale deed executed. This notice dated 10.07.1982 demanded the first defendant to be present in the Sub-Registrar's office, Dharmavaram by 1.00 p.m. to receive the balance sale consideration and for execution of the sale deed. It is also intimated that a prior date can also be fixed by the first defendant for the execution of the sale deed. In the notice, it is very clearly mentioned that the balance sale consideration of Rs.12,000/- is ready to be paid. Therefore, this Court is of the opinion that the plaintiffs exhibited their readiness and willingness. It is also commented that the suit is filed

in August 1983. When the Ex.A.2-notice was issued on 10.07.1982 and the readiness is emphasized, this Court is of the opinion that the delay till August, 1983 is not too inordinate or too long to non-suit the plaintiff. PW.1 also gave an explanation for this delay in his cross-examination and stated that the agreement was kept with the advocate, who was of the opinion that stamp duty and penalty have to be paid on the same. In addition, he deposed that in this period post Ex.A.2-notice, they were pursuing the matter through elders and that about 10 times, a request was made to the defendant to sort out this issue.

30. This Court after a review of the entire evidence in this case is of the opinion that Ex.A.1 itself has given a period of three years time for the completion of transaction. Ex.A.1 is executed on 30.01.1980. A large part of the sale consideration viz., Rs.10,000/-, out of Rs.22,000/- was paid. The balance payable was Rs.12,000/-. The plaintiffs came to realise that there is a sale deed executed for the same property in favour of the second defendant. Thereafter, a notice was issued in July 1982 fixing the date for execution of the agreement and asking the defendants to appear in the Sub-Registrar's office. The defendants did not appear. The suit was filed

in August 1983. This Court is therefore of the opinion that the said delay is not inordinate so as to defeat the rights of the plaintiffs. Hence, this Court holds that issues 2 and 3 are also to be decided in favour of the plaintiffs and against the defendants/appellants. The plaintiffs exhibited their readiness and willingness to perform their part of the contract and as a consequence, they are entitled to specific performance.

31. The last question that survives for consideration is issue No.4 and point No.3. According to the second defendant, he is a bona fide purchaser for the value without notice of the prior agreement of sale. Therefore, the second defendant pleads that he is entitled to the benefit u/s.19 (b) of the Specific Relief Act. He stated that in the circumstances of the case, the plaintiffs are not entitled to the specific relief. It is the case of the plaintiffs that immediately after executing Ex.A.1 agreement of sale, the second defendant was informed of the same on the same day. This is specifically pleaded in para-7 of the plaint. The second defendant denied the same. In the chief-examination, PW.1 stated that soon after the execution of Ex.A.1, the second defendant was informed about Ex.A.1 transaction. In the cross-examination, suggestions were put stating that the entire

theory is false. PW.3, who is the attestor, also clearly deposed that on the date of agreement itself, PWs.1 and 2 informed the second defendant about Ex.A.1 transaction. In the cross-examination, suggestions were put to these witnesses that this theory is not correct.

32. DW.1 in his evidence denied this knowledge and took the plea that on that day in January 1980 he was present in the University, since he was doing M.Phil course; that he was not at all present in the village. He clearly stated that 30.01.1980 was a working day for the University. This witness was examined in chief examination on 24.02.1995. Later he was recalled and a letter dated 25.02.1995 with an endorsement was filed and marked as Ex.B.14. According to the endorsement on this letter, the appellant/ second defendant was in the University on that day.

33. The learned counsel for the appellant argues that this is a document issued by a responsible officer of the University. Therefore, he contends that the presence of the second defendant on 30.01.1980 at the village is totally ruled out. As per the learned senior counsel, in view of the endorsement of the responsible officer on Ex.B.14, the second defendant was present in the

University and the Department on that day and not in the village.

34. In response thereto, the learned counsel for the respondents argues that this document is not pleaded and it is produced for the first time during the course of the evidence. The learned counsel also submits that the document is created for the suit. A mere endorsement on a letter; after 15 years by an official of the University, who has not even been examined, cannot be said to be correct. The learned counsel submits that every year hundreds of students will study in a University and for the officials to certify that one particular student was present in the University on a particular day without any other supporting document or data is next to impossible. It is his submission that this document is created for the suit.

35. This Court notices the case law on the subject which says that when the truth of the contents of a document is in issue, the author of a document must be examined. The case reported in **Bishwanath Rai v. Sachhidanand Singh**¹² and **Om Prakash Berlia v. Unit Trust of India**¹³. In this case, nobody from the University was examined nor was any other document produced to

¹² AIR 1971 SC 1949

¹³ AIR 1983 Bom 1

show the attendance of the second defendant on that day in the University. The basis for this endorsement is not proved. The attendance register which is admitted to be available is not produced. It is also clear that as per settled law reported in **State of Bihar v. Radha Krishna Singh**¹⁴, documents which are prepared subsequent to the suit must be analyzed more carefully. The element of a bias or a plan in creating a document to suit the defence cannot be shut out totally. Post-litigation documents are to be carefully scrutinized. Therefore, for all these reasons, this Court holds that Ex.B.14-certificate is not a document that is proved as required under law.

36. This Court after analyzing the oral evidence and after seeing the probative value that can be attached to Ex.B.14 is of the opinion that this entire theory of alibi is created to get over the oral evidence by which the plaintiffs have shown that the second defendant was informed in January, 1980 itself of the agreement of sale (Ex.A.1). Therefore, this Court is of the opinion that the second defendant had prior notice of the agreement of sale and was not a bona fide purchaser for the value, who had no notice of the agreement of sale. This Court

¹⁴ AIR 1983 SC 684

after examination of the oral and documentary evidence and the submissions agrees with the findings and the reasons given by the lower Court on issues 1, 2, 3 and 4.

37. The last issue that survives for consideration is about the first defendant and the legal representatives-defendants 3 and 4. The first defendant died during the pendency of the suit. The defendants 3 and 4 were added as his legal representatives. During the course of the evidence of DW.3, it is mentioned that both defendants 1 and 4 have died. The learned counsel also points out that IA No.770 of 1994 was filed in the lower Court and the trial Court, vide its order dated 09.11.2014 granted exemption to the plaintiffs to bring the legal representatives of the third defendant on record. On the other hand, even though the fourth defendant died according to the senior counsel, no such application was filed and no permission was sought to continue the suit without bringing on record the legal representatives of fourth defendant. Therefore, the learned senior counsel for the appellant relying upon the following three cases argues that the suit has abated:

- a) ***Madan Naik v. Hansubala Devi***¹⁵;
- b) ***Perumon Bhagavathy Devaswom v. Bhargavi Amma***¹⁶;
- c) ***T. Gnanavel v. T.S. Kanagaraj***¹⁷;

38. The learned counsel for the appellant also argues that as the proper and necessary parties (viz., the legal representatives of the defendants 3 and 4) are not on record, the sale deed cannot be executed as sought for and the relief cannot be granted. It is his submission that the entire suit abated. The learned counsel points out that in such circumstances particularly as the suit is for specific performance, the defendants will be first called upon to execute the sale deed only on their failure; the Court will execute the deed. In the case on hand, as per the learned senior counsel, nobody is available for the purpose of executing the sale deed.

39. In response thereto, the learned counsel for the respondents argues that the term 'legal representative' does not merely include the legal heir. According to the learned counsel, the term legal representative has defined in Section 2 (11) CPC means any person, who represents the estate of the deceased and includes a person who intermeddles with the estate

¹⁵ (1983) 3 SCC 15

¹⁶ (2008) 8 SCC 321

¹⁷ (2009) 14 SCC 294

of the deceased. The learned counsel points out that the entire land has been transferred to the second defendant. The second defendant is therefore representing the estate of the first defendant. The learned counsel submits that both defendants 1 and 2 were called upon to execute the sale deed. The lower Court also exempted the plaintiff from bringing on record the legal representatives of third defendant, as per the order in IA No.770 of 1994. He also relied upon the fact that the cause title to the present appeal also, defendants 3 and 4 are not shown as dead persons. Both in the plaint filed in the original suit and in the appeal filed before this Court, defendants 3 and 4 are added as respondents/defendants. The appeal was filed and continued as if they are alive. He submits that no objection was raised about this exception the oral arguments. The learned counsel for the respondents relies upon the following decisions:

- i) ***Velamala Appa Rao v. Baggu Appayya***¹⁸;
- ii) ***Mahabir Prasad v. Jage Ram***¹⁹;
- iii) ***Mohammad Arif v. Allah Rabbul Alamin***²⁰;
- iv) ***Sushil K. Chakravarty (dead), through LRs v. M/s. Tej Properties Pvt. Ltd.***²¹; and
- v) ***T. Gnanavel v. T.S. Kanagaraj***²².

¹⁸ 2005 (6) ALD 802

¹⁹ 1971 (1) SCC 265

²⁰ AIR 1982 SC 948 (1)

²¹ AIR 2013 SC 1732

i) In **Velamala Appa Rao's** case (18 supra), a learned single Judge of this Court held in para-7 as follows:

“7. Whenever the death of one of the defendants is to result in the abatement of the suit as a whole, the court is under an obligation to record a finding to that effect. In the absence of the same, the suit would survive, vis-a-vis the other defendants. Even when the court does not record a finding to that effect, the remaining defendants can put forward their contentions on this aspect. Once the suit is permitted to be proceeded with despite the death of one of the defendants, the objections in this regard cannot be permitted to be raised at a later stage in appeal or revision. The reason is that if such an objection has been raised at the earliest, the other party would have an opportunity to take necessary steps. The principle of estoppel gets attracted.”

ii) Similarly, in **Mahabir Prasad's** case (19 supra), the Hon'ble Supreme Court held that if one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application. Even if there are other heirs and the legal representatives were not impleaded, it was held 'the case will not abate'.

iii) Similarly, in **Mohammad Arif's** case (20 supra) also, the Hon'ble Supreme Court held that when a party is already on record representing the property of the deceased-respondent, there was no necessity to bring the other legal representatives on record.

iv) In **Sushil K. Chakravarty's** case (21 supra), the Hon'ble Supreme Court noticed that an application was

²² AIR 2009 SC 2367

filed by a party under Order 22 Rule 4 (4) CPC to exempt the plaintiff from substituting the legal representative. The application was left on the file and the order was not passed, but the Court however proceeded with the matter. The Hon'ble Supreme Court held that as the Court allowed the case to proceed without consciously bringing on record the legal representatives, there was no further necessity for passing an order. In para-26, it was held that a trial Court can proceed with a suit under Order 22, Rule 4(4) CPC without impleading the legal representatives of a defendant, who filed a written statement, but has failed to appear and contest the matter.

40. This Court after an examination of the legal position in this case is of the opinion that a) the estate of the deceased, the first defendant is sufficiently represented qua the property by the second defendant. An application was filed in the Court in IA No.770 of 1994 which granted exemption to the plaintiffs from bringing the legal representatives on record for third defendant. The second defendant is the purchaser of the entire suit schedule property from the deceased first defendant and he is contesting the matter. Therefore, this

Court is of the opinion that the entire appeal has not abated.

41. In this view of the matter, this Court holds that the appellant has failed to prove that the judgment and decree passed by the lower Court are contrary to law.

42. In the result, the appeal is dismissed. The judgment and decree dated 29.02.1996 passed in OS No.186 of 1983 passed by the Additional Subordinate Judge, Anantapur are confirmed. The defendants are directed to execute the sale deed in favour of the plaintiffs within two months from today. The plaintiffs shall deposit the balance sale consideration within two months. If the defendants do not execute the sale deed, the plaintiffs can take required steps. In the circumstances of the case, there shall be no order as to costs.

43. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 11.10.2018

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Note: LR copy marked.