

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.114 OF 1991

1. Sou. Sharada Nanasaheb Patil
Age 50 years, Occ: Household
Koshti Galli, Kagal, Taluka Kagal.

2. Sou. Aruna Dattajirao Patil,
Age 24, Occ: Household
res. At Koshti Galli, Kagal,
Taluka Kagal, District Kolhapur.

3. Uday Nansaheb Patil
Age 27, Occ: Business
res. At Koshti Galli, Kagal,
District Kolhapur.

4. Ramu Akoba Hanchanle
(deceased) through L.R.
Krishna Ramu Hanchanale.

5. Krishna Ramu Hanchanale,
Age 19, Occ: Education,
res. At Nandgaon, Taluka Karvir,
District Kolhapur.

..Appellants
(Org. Respondent-Defendants
Nos. 3 to 7)

v/s.

1. Appaso Jivappa Chougule
Occ: Service
res. Of 329, "E" Ward,
Shahapari, Kolhapur.

2. Laxmibai w/o. Babu Bondre,
Age 53, Occ: Household
res. Of Kagal, Taluka Kagal,

District Kolhapur

2(a) Mohan Babu Bondre (deleted)

2(b) Dhondibai Mahadev Bodake

(deceased)

..Respondents

Mr. Bhooshan Mandlik I/b.S.S.Patwardhan for the Appellant.

Mr.Tejpal Ingle a/w. Nikhil Pawar, APP for the Respondent/State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
JUDGMENT RESERVED ON : 27th AUGUST, 2019.
JUDGMENT PRONOUNCED ON : 20th SEPTEMBER, 2019.

JUDGMENT.

1. This Second Appeal under Section 100 of CPC is filed by the original defendant nos.3 to 7 and is directed against the judgment and order dated 31.12.1990 in Regular Civil Appeal No. 252 of 1986. By the impugned judgment, the learned Addl. District Judge, Kolhapur has set aside the judgment and decree of the trial court in the Regular Civil Suit No.31 of 1981, and thus decreed the civil suit for specific performance filed by the Respondent no.1-plaintiff.

2. For the sake of convenience, the Respondent no.1-Appaso shall be referred to as the Plaintiff, the Respondent No.2-Lakshmibai and her son Mohan-the deceased Respondent No.2(a) shall be referred to as Defendant nos.1 and 2 respectively, the appellant Nos. 1 to 3 shall

be referred to as Defendant Nos.3 to 5 , and Appellant Nos.4 and 5 shall be referred to as Defendant Nos.6 and 7 respectively.

3. The subject matter of the suit for specific performance is the house property bearing survey nos. 3119 admeasuring 108.6 sq. meter and City Survey No. 3120 admeasuring 31.5 sq. meters situated at Mauje Kagal, which shall be hereinafter referred to as the suit property.

4. The suit property was owned and occupied by Shiva Vithu Yadav. He died leaving behind two daughters i.e. deceased Defendant No.1 Laxmibai and Bayakka. The plaintiff claims that Bayakka died as a spinster on 13.6.1975. Upon her death, the Defendant no.1 became the exclusive owner of the suit property.

5. By agreement dated 17.1.1981 the defendant nos.1 and 2 agreed to sell the suit property to the plaintiff for Rs.7000/-. The Defendant No.1 and Defendant No.2 received Rs. 600/- as earnest money and put the plaintiff in possession of the suit property. As per the agreement, the sale deed was to be executed within 15 days

from the date of the agreement. The Defendant no.1 and.2 expressed their inability to execute the sale deed within the stipulated time and extended the time for execution of the sale deed by one month from 28.1.1981.

6. On 29.1.1981 the plaintiff issued a public notice intimating the public at large about the said transaction and called for objections, if any, in respect of the suit property. On the very next date the Defendant nos.1 and 2 issued a notice of cancellation of the agreement alleging that the plaintiff had not performed his part of the contract within the stipulated time. The defendant also contended that they were not the exclusive owners of the suit property. The plaintiff refuted the contents of the said notice and called upon the defendant nos.1 and 2 to execute the sale deed.

7. The plaintiff claims that the defendant nos.1 and 2 in connivance with the defendant nos.3 to 5 started obstructing and interfering with his possession. The defendant nos.6 and 7 claiming to be the husband and the son of Bayakka, sold western half of the suit property, to the Defendant Nos.3 and 4. Whereas, the

defendant nos.1 and 2 sold the eastern portion of the suit property to the defendant no.5 by Sale Deed dated 18.4.1981.

8. The plaintiff claims that the defendant nos.6 was married to Manjabai and not to Bayakka. The defendant nos.6 and 7 have no concern with Bayakka and they have no right to the suit property. The plaintiff claims that the defendant nos.1 and 2 and defendant nos.6 and 7 have executed the sale deeds only to deprive him of his lawful right under the agreement. The plaintiff therefore filed a suit for specific performance of agreement dated 17.1.1981 and permanent injunction, in the alternative, the plaintiff sought refund of earnest money.

9. The defendants no.1 died even before filing of the written statement. The defendant no.2 denied execution of agreement dated 17.1.1981 and or having received Rs.600/- as earnest money. The defendant no.2 also denied having made endorsement on the agreement extending the time for execution of the sale deed. He claims that taking advantage of their illiteracy and poverty, the plaintiff obtained their thumb impression on a stamp paper without

explaining the contents of the document. The defendant no.2 denied that the plaintiff was put in possession of the suit property. Having learnt that the plaintiff had played fraud upon them, they issued a notice and canceled the agreement for sale. Subsequently by Deed of Sale dated 18.4.1981 they sold the eastern portion to the Defendant No.5.

10. The defendant nos. 3 to 7 denied that Bayakka was a spinster. They claimed that Bayakka was married to the Defendant no.6 on 20.6.1967 and that the defendant no.7 is their son. These defendants claim that Bayakka had half share in the suit property and by mutual agreement she was allotted the western portion of the suit property. Upon the death of Bayakka, the defendant no. 7 acquired right to half share in the suit property. The defendant nos.6 and 7 were not aware of the agreement dated 17.1.1981 between the plaintiff and the defendant nos.1 and 2. They claim that by sale deed dated 16.3.1981 the defendant no.6 on behalf of his son sold the $\frac{1}{2}$ share to the defendant nos.3 and 4. The defendant nos.3, 4 and 5 claim that they are bonafide purchasers of the suit property for value without notice and are in possession of the suit property.

11. Based on the aforesaid pleadings, the trial court framed several issues. Upon considering the evidence adduced by the respective parties, the Trial Court held that in the notice at Exhibit 102 the defendant nos.1 and 2 had admitted having executed the agreement. The trial Court observed that the plaintiff has failed to prove that the defendant nos.1 and 2 had extended the time for execution of the agreement.

12. On the issue of compliance of statutory requirement under Section 16(1)(c) of Specific Relief Act, the trial court observed that the plaintiff has failed to prove that he had requisite money to pay the sale consideration and hence concluded that the plaintiff was not ready and willing to perform his part of the contract. The trial court also recorded a finding that the defendant nos.3 to 5 are bonafide purchasers and are in possession of the suit property. The plaintiff had failed to prove that the defendant nos.3 to 5 had taken possession during pendency of the suit.

13. The trial Court held that the defendant no.6 was already

married to Manjabai and that his marriage with Bayakka was not a valid marriage. The trial court recorded a finding that the defendant no.7 is the son of defendant no.6 and Bayakka and that though born of void marriage, he has right in the property of his parents. The trial court further observed that since the defendant nos.1 and 2 were not the exclusive owners of the suit property, they had no right to transfer the entire suit property in favour of the plaintiff. Based on these findings the trial court dismissed the suit with direction to the defendant no.2 to return Rs.600/- to the plaintiff. Being aggrieved by this judgment the plaintiff preferred Regular First Appeal No.252 of 1986 before the District Court, Kolhapur.

14. The First Appellate Court, upon hearing the respective parties and on considering the evidence on record held that the defendant nos.1 and 2 had agreed to sell the suit property to the plaintiff. The plaintiff was ready and willing to perform his part of the contract, however the defendant nos.1 and 2 avoided executing the sale deed. The plaintiff was put in possession of the suit property but was dispossessed after filing of the suit. The First Appellate Court held

that Bayakka died unmarried, without any children, and hence the defendant nos.6 and 7 have no right to the suit property. The first appellate Court has held that the defendant nos.3 to 5 are not bonafide purchasers. Based on these findings the First Appellate Court decreed the suit and set aside the judgment of the trial court. The first appellate Court directed the plaintiff to deposit the sale consideration of Rs.6400/- before the Court on or before 31.1.1991. The First Appellate Court also directed the respondent no.2 (b), the legal representative of the defendant nos.1 and 2 to execute a registered sale deed in favour of the plaintiff in terms of the agreement dated 17.1.1981, with further direction to the defendant nos.3 and 5 to join the respondent no.2(b)-Dhondubai as executant of the said conveyance. Being aggrieved by this judgment, the defendant nos.3 to 7 have filed this second appeal under Section 100 of CPC.

15. The appeal was admitted on 8.3.1991 on the following substantial question of law :

“Whether the lower Appellate Court is right in granting decree when the plaintiff has not prayed for setting aside sale in favour of the defendant nos.3 to 5, which sale deeds have not been challenged?”

16. By order dated 28.9.2018 this Court (Coram A.M.Dhavale, J.) has framed the following additional substantial questions of law :

“1. Whether the Trial Court erred in proceeding without appointment of guardian-ad-litem for the Defendant No.7 who was a minor?

2. Whether the First Appellate Court erred in reversing finding of the trial Court that the Defendant No.7 was the son of Bayakka and had ½ share in the suit property?

3. If Defendant No.7 had ½ share, whether the plaintiff was ready and willing to perform his part of the contract?

4. Whether the discretion under Section 20 could have been exercised in his favour?”

17. Heard Shri Mandlik, learned Counsel for the defendants/ He contends that the plaintiff had not stepped into the witness box but had authorized his POA, PW1-Ramchandra Horwade to depose on his behalf. Relying upon the decision of the Apex Court in ***Janaki Bhojwani vs. Ind. Bank Ltd (2005) 2 SCC 217*** he contends that the POA could not have deposed on behalf of the Principal.

18. The learned Counsel for the defendants contends that the agreement fixed a specific time limit for performance of the contract. The plaintiff did not pay the sale consideration and complete the transaction within the stipulated period. The learned counsel for the plaintiff urges that the plaintiff has not established that he was continuously ready and willing to perform his part of the contract and on this count alone, the suit for specific performance must fail. In support of this contention, he has relied upon the decision of the Apex Court in *Gamathinayagam Pillai vs. Palaniswami Nadar AIR 1967 SC 868*.

19. The learned Counsel for the defendants contends that the defendant nos.1 and 2 were not the exclusive owners of the suit property. He contends that Bayakka, the sister of defendant no.1 had equal share in the suit property. He submits that the finding of the trial court that the defendant no.6 is the son of Bayakka and defendant no.7 is based on the birth certificate at Exhibit 125 and other surrounding circumstances. He submits that the defendant no.6 being the son of Bayakka had half share in the property. The

defendant nos.1 and 2 who had right to half share could not have entered into an agreement in respect of the entire property. He strenuously urges that the First Appellate Court was not justified in discarding the documentary evidence and reversing the finding of the trial court which is based on the evidence on record. Relying upon the decision in *Niwas Builders vs. Chanchalabe Gandhi 2003 (3) MHLJ 312*, & *Hemanter Mondal vs. Ganesh Chandu Naskar 2016(6) MHLJ 30*, he submits that the defendant nos.3, 4 and 5 are bonafide purchasers. Over 38 years have lapsed since the time they have purchased the property. The price of the property has increased manifold during the pendency of the litigation and this would be one of the grounds not to exercise discretion in favour of the plaintiff.

20. Shri Ingle, the learned Counsel for the plaintiff submits that the defendant nos.1 and 2 had agreed to sell the suit property to the plaintiff. They had extended the time to execute the sale deed but subsequently avoided executing the sale deed. The defendants have purchased the suit property despite having knowledge of the original contract. These defendants therefore cannot be held to be

bonafide purchasers for value and are therefore not protected under Section 19(b) of the Specific Relief Act. Reliance is placed on the judgment of the Apex Court in ***R.K.Mohammed Ubaidullah & Ors. vs. Haji V. Abdul Wahab (2000) 6 SCC 402***. Relying upon the decision of the High Court of Andhra Pradesh in ***K. Raghavendra Raju vs. Sayed Yousuf & Ors 2005 SCC Online AP 158***, he submits that the relief of specific performance can be sought against the subsequent purchasers, without seeking any declaration for cancellation of sale deed.

21. The learned Counsel for the plaintiff further submits that the Defendant no.7 who was a minor at the time of the institution of the suit was represented in the suit through his natural guardian, though there was no formal order to that effect. He submits that the interest of the defendant no.7 was adequately protected and the procedural defect, if any, has not prejudiced him. Hence the decree against the minor cannot be set aside solely on the ground of procedural error. In support of his submission, he relied upon the decision of this Court in ***Supdibai Bhadrinarayan Joshi vs. Subhash Shrawak 1973 SCC Online Bom.80***.

22. The learned Counsel for the plaintiff further submits that the First Appellate Court, which is the last fact finding Court, has scanned the entire evidence and recorded a finding that the defendants have failed to prove that Bayakka was a legally wedded wife of Defendant Nos.6 and that the Defendant no.7 is the son of Bayakka and Defendant no.6. He submits that even if it is held that defendant no.7 is the son of Bayakka and has half share in the property, the Court can grant specific performance of remaining half share owned by the defendant nos.1 and 2. In support of this contention, he has relied upon the decision of the Apex Court in *Kamanna Sambamurthy (dead) by LRs vs. Kalipatnamu Atchutamma (dead) & Ors. (2011) 11 SCC 153*.

23. The learned counsel for the plaintiff states that the conduct of the plaintiff from the date of the agreement until filing of the suit would show that the plaintiff was ready and willing to perform his part of the contract. In this regard, he has relied upon the decision of the Apex Court in *A. Kanthamani v/s. Nasreen Ahmed (2017) 4 SCC 654, Nadiminti Suryanarayan Murthy v/s. Kothurthi Krishna*

Bhaskara Rao and ors. (2017) 9 SCC 622 and Ram Kumar Agarwal and anr. vs. Thawar Das (dead) through LRs (1999) 7 SCC 303.

24. The learned counsel for the plaintiff submits that there is no error of law in finding of facts of the first appellate court. He submits that u/s. 100 of CPC, the jurisdiction of this Court to interfere with the judgment of the Court below is confined to hearing on substantial question of law. He submits that the finding of fact recorded by First Appellate Court are based on evidence on record and do not warrant interference.

25. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

26. Before dealing with the question raised in the appeal, it will be appropriate to consider the scope of Section 100 and 103 of CPC which read thus:

“100. *Second appeal*.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is

satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

Section 103 -Power of High Court to determine issues of fact- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court

or Courts reason of a decision on such question of law as is referred to in section 100.

27. While considering the scope of these two provisions, the Apex Court in ***Ramathal v/s. Marutathal AIR 2018 SC 340*** has observed thus :-

" 15. A clear reading of section 100 and 103 of the CPC envisages that a burden is placed upon the appellant to state in the memorandum of grounds of appeal the substantial question of law that is involved in the appeal, then the high court being satisfied that such a substantial question of law arises for its consideration has to formulate the questions of law and decide the appeal. Hence a prerequisite for entertaining a Second appeal is a substantial question of law involved in the case which has to be adjudicated by the high court. It is the intention of the Legislature to limit the scope of second appeal only when a substantial question of law is involved and the amendment made to section 100 makes the legislative intent more clear that it never wanted the High Court to be a fact finding court. However it is not an absolute rule that high court cannot interfere in a second appeal on a question of fact, Section 103 of the CPC enables the High Court to consider the evidence when the same has been wrongly determined by the courts below on

which a substantial question of law arises as referred to in Section 100. When appreciation of evidence suffers from material irregularities and when there is perversity in the findings of the court which are not based on any material, court is empowered to interfere on a question of fact as well. Unless and until there is absolute perversity, it would not be appropriate for the High Courts to interfere in a question of fact just because two views are possible, in such circumstances the High Courts should restrain itself from exercising the jurisdiction on a question of fact.

28. In *Tulsidhara & Anr. vs. Narayanappa & Ors.* (2019) 6 SCC 409

the Apex Court has reiterated that :-

“7.1. ... It cannot be disputed and even as per the law laid down by this Court in the catena of decisions, the jurisdiction of the High Court to entertain Second Appeal under Section 100 of the CPC after the 1976 amendment, is confined only with the Second Appeal involving a substantial question of law. The existence of ‘a substantial question of law’ is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC.

*7.2 As observed and held by this Court in the case of *Kondiba Dagadu Kadam v. Savirtibai Sopan Gujar*, (1999) 3 SCC 722, in the Second Appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous*

being : (i) Contrary to the mandatory provisions of the applicable law;

OR

(ii) Contrary to the law as pronounced by the Apex Court;

OR

(iii) Based on inadmissible evidence or no evidence. It is further observed by this Court in the aforesaid decision that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in Second Appeal.

7.3 When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in the case of Ishwar Dass Jain vs. Sohan Lal (2000) 1 SCC 434. In the aforesaid decision, this Court has specifically observed and held :

“Under Section 100 CPC, after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion

was possible. In either of the above situations, a substantial question of law can arise.” 7.4 Considering the law laid down by this Court in the aforesaid decisions and even considering Section 100 of the CPC, the substantial question of law framed by the High Court in the present case, as such, cannot be said to be a substantial question of law at all.

29. In *Damodar Lal vs. Sohan Das & Ors. (2016) 3 SCC 78*, the Apex Court has held thus:

“8. “Perversity” has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam, it has been held at para 11 that : (SCC pp.192-93)

11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the finding of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect.”

30. When a finding of fact can be said to be perverse, has been explained in *S.R.Tewari vs. Union of India & Anr. (2013) 6 SCC 602*,

wherein the Apex Court has held thus :-

“30. The finding of fact recorded by a court can be held to be perverse if or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn.; Kuldeep Singh v. Commr. Of Police; Gamini Bala Koteswara Rao v. State of A.P; and Babu v. State of Kerala)”

31. It is thus well settled that in second appeal under Section 100 of the Civil Procedure Code, the court has no jurisdiction to interfere with finding of fact on the ground that the finding is erroneous. Interference is possible only if there is any perversity or illegality in the judgments of the Courts below or total absence in considering the evidence available on record or misreading of evidence on the part of the Courts below. The substantial questions of law framed in this appeal need to be answered keeping in mind the aforesaid dictum.

32. In the instant case, the trial Court had declined to grant the relief of specific performance mainly on the ground that the plaintiff was not ready and willing to perform his part of the contract. The trial Court has also held that the Defendant No.7, is the son of Bayakka and the Defendant no.6, and has thus inherited half share of Bayakka in the suit property. The First Appellate Court, which is the last fact finding Court, has reversed the findings of fact recorded by the trial court on these two issues holding that the plaintiff was ready and willing to perform his part of the contract and that the defendant no.7 is not proved to be the son of Bayakka. These are two main issues which go to the root of the matter and take precedence over other questions of law framed by this court.

33. The first question is whether the plaintiff had satisfied the statutory requirement of section 16 (c) of the Specific Relief Act, as it stood prior to 2018 amendment. This section envisages that in a suit for specific performance, the plaintiff must plead and prove that he has always been ready and willing to perform his part of the contract. The factum of readiness and willingness to perform his part

of the contract, under section 16 (c) is to be adjudged with reference to the conduct of the party and the attending circumstances. The scope and ambit of this provision has been considered and explained in Gomathi Nayagam Pillai, Govindprasad Chaturvedi, and Ramkumar Agarwal (supra). In ***A. Kanthimani v. Nasreen Ahmed (2017) 4 SCC 654*** the Apex Court has held thus :-

“24. The expression "readiness and willingness" has been the subject matter of interpretation in many cases even prior to its insertion in Section 16 (c) of the Specific Relief Act, 1963. While examining the question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract/agreement, the Privy Council in a leading case which arose from the Indian Courts (Bombay) in Bank of India Limited & Ors. Vs. Jamsetji A.H. Chinoy and Chinoy and Company, AIR 1950 PC 90, approved the view taken by Chagla A.C.J., and held inter alia that " it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness.”

25) The following observations of the Privy Council are apposite: “21.....Their Lordships agree with this conclusion and the grounds on which it was based. It is true that the plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and

in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:

“In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion ' that plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to ' work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury--if the matter was left to the jury in England--would have come to the conclusion that a man, " in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants 1 and 2."

For the foregoing reasons, their Lordships answer question(4) in the affirmative.” (Emphasis supplied)

30) This Court in Sukhbir Singh & Ors. Vs. Brij Pal Singh & Ors., AIR 1996 SC 2510=(1997) 2 SCC 200 followed the aforesaid principle with these words:

“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 the 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.”

34. In the present case, undisputedly the plaintiff and the defendant nos.1 and 2 had entered into an agreement for sale dated 17.1.1981 at Exh.105. Under the said agreement, the defendant no.1 and 2 had agreed to sell the suit property to the plaintiff for sale consideration of Rs.7000/-. The plaintiff had paid earnest money of Rs.600/- on the date of execution of the agreement. The sale deed was to be executed within 15 days from the date of the agreement and the balance sale price was to be paid on the date of execution of the sale deed. In paragraph 4 of the plaint, the plaintiff has averred that he was ready to complete the sale transaction at his own cost as per the agreement dated 17.1.1981. However, on 28.1.1981 the defendant nos.1 and 2 expressed their inability to execute the deed and sought extension of further period of one month. Upon extension of time, the plaintiff issued a public notice in daily "Sakal" dated 29.1.1981 informing the public at large about the said transaction and calling for objections, if any.

35. In paragraph 6 of the plaint, the plaintiff has specifically

averred that he was and is ready and willing to abide by the agreement dated 17.1.1981. The plaintiff has asserted that he had kept the money ready and requested the defendant nos.1 and 2 to execute the sale deed. However, the defendant nos.1 and 2 avoided executing the sale deed on one pretext or the other and later issued a notice dated 5.3.1981, canceling the agreement for sale. The plaintiff replied to the said notice and once again expressed his willingness to remain present in the office of the Sub Registrar at Kagal for execution of the sale deed. The plaintiff has averred that the defendants did not respond to the said reply, despite having received the same.

36. The evidence of PW1 Ramchandra Hirwade, which is consistent with pleadings, indicates that the plaintiff was ready with the money and was at all time willing to complete the sale transaction. He has specifically deposed that on 27.2.1981 the plaintiff had approached the defendant Nos.1 and 2 with cash of Rs.7,000/- and requested them to execute the sale deed. The defendants did not deny the statement that the plaintiff had approached them with an amount of Rs.7000/-. It was merely suggested to this witness that the

defendants had told the plaintiff that their signatures on the agreement were obtained by fraud, which in my considered view is altogether a different question. As regards the issue of 'readiness', there is a tacit admission that the plaintiff had approached the defendants with the money and requested them to execute the sale deed. The Trial Court was therefore not justified in discarding the evidence of PW1 for failure to adduce corroborative evidence by examining the witnesses from whom the plaintiff had borrowed the money.

37. As regards competency of PW1 to depose, in the case of Janaki Bhojwani (supra) the Apex Court has held that the Power of Attorney cannot depose on behalf of the principal. He can depose on behalf of the principal only in respect of such acts done by him on behalf of the principal in exercise of powers granted by the instrument.

38. In the light of the aforesaid principles, there can be no dispute that PW1 was not competent to depose on behalf of the plaintiff. It is to be noted that though the plaintiff had failed to step in the witness box, the first appellate court had refrained from drawing an adverse inference and raising a presumption under section 114 (g) of the

Indian Evidence Act holding that the defendant had not filed an application calling upon the plaintiff to subject himself to cross examination. Suffice it to say that section 114 (g) does not envisage such procedure. As it has been reiterated by the Apex Court in Catena of judgments, generally it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114 (g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. In *Iswarbai C. Patel & Bachubhai Patel v. Harihar Behera & Anr.* **1999 Vol . 3 SCC 457** the Apex Court has referred to the judgment of the Privy Council in *Sardar Gurbax Singh vs. Gurdial Singh* AIR 1927 Privy Council 230, wherein the practice of not examining the party as a witness and leaving it to the other party to call that party was considered as bad, degrading and vicious practice. Similarly, in the case *Pirgonda v. Vishwanath* AIR 1956 Bom. 251 it was observed that normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness box, it would be open to the trial Court to draw an inference

against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons.

39. In view of the above, the reasons recorded by the first appellate court for not drawing an adverse inference cannot be sustained. Be that as it may, the word 'may' in the section suggests that adverse inference or presumption for non production of evidence is optional. There is no general rule of law that in every such case the court must draw an adverse inference; notwithstanding the fact that the party could prove his case through a competent witness other than himself, who could depose to the case based on his personal knowledge. In ***Rattan Dev vs. Pasam Devi (2002) 7 SCC 441*** the Apex Court taking note of the previous decision in ***Iswar Bhai (supra)*** has held that-

‘withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross- examination of himself results into an adverse inference being drawn against the plaintiff. That proposition of law is undoubtable. However, as we have already said, that is a fact to be kept in view and taken in to consideration by the Appellate Court while appreciating other oral and documentary evidence available on record. May be that from other evidence - oral and documentary-produced by plaintiff, or otherwise brought on record, the plaintiff has been able to discharge the onus which lay on him,

and, subject to the court forming that opinion, a mere abstention of plaintiff himself from the witness box may pale into insignificance."

40. Similarly in *Pandurang Jivaji Apte versus Ramchandra Gangadhar Ashtekar AIR 1981 SC 2235*, the Apex Court has held that the question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record. It is thus evident that the question whether failure of the plaintiff or the defendant to depose in the matter would result into an adverse inference against the party or not has to be decided by the Court taking into consideration other oral and as well as documentary evidence adduced by the respective parties.

41. In the instant case, the evidence of PW1 indicates that he had personal knowledge about the transaction right from the date of negotiation until filing of the suit. He was therefore competent to depose as a witness in his personal capacity. The evidence of this witness clearly indicates that the plaintiff was at all time ready with the balance sale consideration and intended to complete the sale transaction. There is nothing on record to doubt credibility of this witness and there are no reasons to disbelieve his evidence.

42. The plaintiff has also examined PW2-Babu Narayan Banne, the witness to the agreement at Ex. 102, PW3-Ajij Gafoor Sarekhwas and PW4- Dadu Ranoji Jadhav who are the bond writers. The evidence of these witnesses also proves execution of the agreement, extension of time and readiness and willingness on the part of the plaintiff to pay the balance sale consideration and perform his part of the contract.

43. Furthermore, the evidence of PW5 also proves that upon execution of the agreement, the defendant no.1 had told the plaintiff to clear the arrears of municipal tax in respect of the suit premises. He has stated that the plaintiff had handed over to him Rs.250/- and had requested him to deposit the same in the municipal office. He had gone to the Municipal Office along with the defendant no.2 and paid the Municipal taxes and obtained the receipt at Exh.101. He has also confirmed that upon payment of the said taxes the defendant no.1 had handed over the keys of the suit premises to the plaintiff and that the store premises was used by the plaintiff for storing timber.

44. The evidence on record also indicates that the in a bid to make the factum of agreement known to the general public, the plaintiff got a public notice published in Daily Sakal dated 29.1.1981 and called for objections, if any. He also lodged complaint Exh.106 against the defendant nos.3, 4 and 5 for trespassing in the suit premises and disturbing his possession. The plaintiff had also addressed a letter dt.18.4.1981 to the Sub-Registrar informing that Laxmi Babu Bondre and Mohan Babu Bondre (defendant nos.1 and 2) had agreed to sell the suit property to him. The plaintiff had further stated that he had learnt that the defendant nos.1 and 2 were proposing to sell the suit property to some other person. He requested the Sub-Registrar not to register and agreement/sale deed in respect of the suit property. Immediately thereafter i.e. on 29.4.1981, the plaintiff filed a suit for specific performance of the said agreement. The conduct of the plaintiff from the date of the agreement until filing of the suit is a clear expression of his readiness and willingness to perform his part of the contract.

45. The pleadings coupled with conduct of the plaintiff from the

date of the agreement until filing of the suit shows that the plaintiff had financial capacity as well as intention to execute the sale deed. Thus, notwithstanding the fact that the plaintiff had abstained from depositing, there is categorical evidence to prove compliance of statutory requirements of Section 16 (c) of the Specific Relief Act. Hence, the factual finding of the first appellate Court on this question, which are based on pleadings as well as oral and documentary evidence, cannot be interfered with in the second appeal.

46. It is well settled that in the case of agreement of sale relating to immovable property, time is not of the essence. *In Govind Prasad Chaturvedi v. P. Hari Dutt Shashtri (1977) 2 SCC 539*, the Apex Court has held that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. In the instant case, the defendant nos.1 and 2 denied execution of agreement at Exh.105 and averred that the contents of the said contract were false and fabricated. There was no specific

plea that time was the essence of contract. As a consequence thereof, no issue was framed regarding time being of the essence of the contract, and no evidence was adduced to dispel the normal presumption that time is not the essence of the contract of sale of immovable property. There being no discussion in the judgments of both the courts below on this question and no ground raised in the appeal memo, this court had not set out the question of time being essence of the contract as one of the points for determination. Under the circumstances, the defendants cannot be allowed to raise the question that the time was of essence of the contract.

47. It is said that maternity is a fact and paternity is a matter of opinion. In the present case, the plaintiff having denied that the defendant no.7 is the son of Bayakka, the Court was required to give an opinion on the issue of maternity. While considering this issue, both the courts below have recorded a finding that the defendant no.6 and Manjabai were married in the year 1944. The marriage certificate at Exh.126 substantiates these finding.

48. Relying upon the marriage certificate at Exh. 129, and the birth

certificate of the defendant no.7 at Exh.125 and the other surrounding circumstances, the trial Court has recorded a finding that defendant no.6 had married Bayakka during the subsistence of the first marriage, and hence the second marriage with Bayakka is not valid in the eyes of law. The trial Judge has held that defendant no.7 is the son of Bayakka and defendant no.6, and even though the marriage of defendant no.6 and Bayakka is not valid, the child born from such marriage would have right in the property of his parents. The first Appellate Court has reversed these findings holding that the defendants had not proved that Bayakka was married to the Defendant No.6. The first Appellate Court also held that the Birth Certificate at Exh.125 does not disclose the name of the mother and hence does not prove that the defendant no.7 is the son of Bayakka.

49. The courts below have given divergent findings on the question whether the defendant no.7 is the son of Bayakka. Under the circumstances, this Court is required to examine the facts and decide the issue, keeping in mind scope and ambit of Section 100 and 103 CPC.

50. In consonance with the pleadings, the defendant No.6 has deposed that he was married to Bayakka and that defendant no.7 is his son born from the marriage with Bayakka. He has deposed that defendant no.7 was born at Kagal. The defendants have relied upon the marriage certificate at Exh.129 and birth certificate at Exh.125. The marriage certificate at Exh.129 proves that Defendant 6 was married to Bayakka on 20.7.1967. This Certificate serves as conclusive proof of the marriage between defendant no.6 and Bayakka, albeit the marriage was invalid having been performed during the subsistence of the first marriage of defendant no.6 with Manjabai. The marriage certificate at Exh.129, falsifies the case of the plaintiff that Bayakka died as a spinster. The first Appellate Court has discarded this certificate without assigning any reasons. The finding of the first Appellate Court is therefore vitiated by non-consideration of relevant evidence.

51. The plaintiff has not disputed the genuineness as well as the correctness of the birth certificate, at Exh.125, issued by the competent Birth and Death registering Authority. The said birth certificate records that a male child by name Prakash was born on

12.6.1968. The said certificate records the name of the defendant no.6 as the father of the said child Prakash. The Birth Certificate at Exh.125 conclusively proves that the defendant no.6 is the father of the child Prakash.

52. The first Appellate Court has discarded the birth certificate at Exh.125 as the same does not record the name of the mother. It is pertinent to note that Manjabai, the first wife of Defendant no.6 has no issues. This has come on record through the evidence of PW2 Babu Banne. The evidence on record indicates that during the subsistence of the first marriage, defendant no.6 has married Bayakka on 20.7.1967. The child Prakash, the son of Defendant No.6 was born on 12.6.1968. There is absolutely no assertion or evidence to indicate that Defendant no.6 has any other child/son by name Prakash through any other woman. These facts and circumstances lead to an inference that the defendant no.7 Krishnat @ Prakash is the son of Bayakka and Defendant No.6.

53. Furthermore, the birth certificate at Exh.125 records the place of birth as " Baichya Wadya Samor, Banne ghari at Kagal." i.e. as

infront of Baicha Wada, in the house of one Banne, at Kagal. The Death Certificate at Exh.100 also records that Bayakka had died on 13.6.1975 and the place of death is recorded as "near Baicha Wada, Kagal". PW1 has also admitted in his cross-examination that the suit premises is near the premises known as Baicha wada.

54. It is the case of the defendants that defendant no.6 was born in the suit house originally owned by Shiva Yadav, who was also known as Shiva Banne. PW1 had denied that Shiva Yadav, father of Bayakka was also known as Shiva Banne. It is however to be noted that PW2-Babu , the cousin of Shiva Yadav has stated his surname as Banne. This fact fortifies the contention of the defendant that Shiva Yadav was also known as Shiva Banne and that the defendant no.7 was born in the house of Banne.

55. PW2 had stated in his examination in chief that Bayakka had no issues, however, in his cross examination he has stated that he does not know whether Bayakka had given birth to the defendant no.7 in the suit house. He has further stated that he does not know whether the defendant no.6 is the father of defendant no.7. There

is thus no specific denial of the fact that the defendant no.7 is the son of Bayakka and defendant no.6 and that he was born in the suit house.

56. The evidence of DW4-Babu Sankpal indicates that he was occupying portion of the suit premises during the lifetime of Bhivrabai, the mother of the defendant no.1 and Bayakka. He has deposed that the defendant no.6 is the husband of Bayakka. He has further deposed that Bayakka had given birth to a male child in the house of Bhivrabai at Kagal. He has stated that the house of Bhivrabai is at a distance of 10 to 15 meters from Baicha wada. Apart from a bare denial nothing has been brought on record to impeach his credibility.

57. A cumulative reading of the evidence reveals that the suit house which was owned by Shiva Yadav @ Shiva Banne is situated near Baicha Wada at Kagal. Bayakka had given birth to a male child in the suit house, about a year after her marriage with Defendant No.6. The birth certificate at Exh.125 records that Defendant no.6 is the father of the male child Prakash. The address recorded in the

birth certificate is the same as that of the suit house. These facts and circumstances are consistent with only one conclusion that the defendant no.7 is the son of Bayakka and the defendant no.6.

58. The trial court extensively dealt with the oral and documentary evidence on record and took note of the aforesaid facts and circumstances, and recorded a specific finding that Bayakka was the second wife of defendant no.6 and that the defendant no.7 is the son of Bayakka and defendant no.6. The trial court further held that though the second marriage is not valid in the eyes of law, the child born from the said second marriage cannot be deprived of his rights to the property of his parents. The first appellate court has reversed the well-reasoned finding of facts by ignoring the settled principle that in civil cases the standard of proof is of preponderance of probabilities. The findings recorded by the first Appellate Court on the question whether the defendant no.7 is the son of Bayakka are not based on evidence on record and are therefore perverse.

59. By agreement at Exh.105 the defendant nos.1 and 2 had agreed to sell the entire suit property. As it has been observed, the

half share of Bayakka in the suit property had devolved upon defendant no.7. The defendant no.6 being the natural guardian of the defendant no.7 has already sold half share of the property to the defendant nos.3 and 4. The defendant nos.6 and 7 were not parties to the agreement at Exh.105, and as such are not bound by the agreement. As a corollary thereof, the agreement at Exh.105 cannot be specifically enforced against the defendant no.7 and or the subsequent purchasers i.e the defendant nos.3 and 4.

60. The next question that arises, is whether the agreement can be enforced against the defendant nos.1 and 2 to the extent of their half share in the suit property, without challenging the sale deed executed by them in favour of defendant no.5. In this regard it would be advantageous to refer to the decision of the Apex Court in **Kamanna Sumamurti** (supra). In the said case, the husband of the defendant no.1 (vendor) had entered into an agreement with the appellant (vendee) for sale of the house representing that he was the absolute owner of the property. The wife of the vendor had sought cancellation of the agreement alleging that she had half share in the property, which had devolved upon her on the death of her

son and that she was not willing to sell her share and was in fact ready to purchase the share of the vendor i.e. her husband. The trial court had decreed the suit for specific performance filed by the vendee. In the appeal, the High Court held that the agreement of sale although covered the entire property, the vendor had only half share and interest in the property and that the decree for specific performance would only be granted to the extent of the vendors share in the property, while considering the question whether the agreement could be enforced against the vendor to the extent of his half share in the property, the Apex Court has observed thus:

"21. [Section 12](#) of the Specific Relief Act, 1963 reads as follows:

S.- 12. Specific performance of part of contract.- (1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

21. Section 12 prohibits specific performance of a part of a contract except in the circumstances under sub-sections (2), (3) and (4). The circumstances mentioned in these sub-sections are exhaustive. Is Section 12 attracted in the facts and circumstances of the present case? We do not think so. The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the

vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract. In kartar Singh v. Harjinder Singh & Ors, this Court was concerned with a case where vendor--brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before this Court was whether agreement could be enforced against the vendor--brother to the extent of his half share. This Court considered Section 12 and held as under :

“5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.”

61. In the instant case, though the agreement covers the entire property, the half share of the defendant no.1 and 2 is identifiable as well as severable from the remaining half share, which has devolved upon the defendant no.7. The said agreement is binding on defendant nos.1 and 2 and the agreement can be enforced against the defendant nos.1 and 2 as a whole without being fractured. Such enforcement of specific performance, as far as the defendant no.1 and 2 are concerned, would neither amount to segregation or separation of contract nor create a new contract and hence the same is not covered by Section 12 of the Specific Relief Act.

62. The defendant nos.1 and 2 had subsequently sold the eastern half of the suit property to the defendant no.5. The plaintiff has sought relief of specific performance without challenging the sale deed executed by the defendant nos.1 and 2 in favour of the defendant no.5. It is pertinent to note that Clause (a) and (b) of Section 19 of the Specific Relief Act provides that specific performance of a contract can be enforced against either party thereto; and any other person claiming under him by a title arising

subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

63. In *R.K.Mohammed Ubaidullah & Ors.* (supra) the Apex Court whilst considering the scope of Section 19(b) of the Act has observed thus :-

"that Section 19(b) protects the bonafide purchaser in good faith for value without notice of the original contract. This protection is in the nature of exception to the general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is a innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasizes due care and attention in relation to the good faith. In the General Clauses Act emphasis is laid on honesty.

Notice is defined in Section 3 of the Transfer of Property Act. It may be actual where the party has actual knowledge of the fact or constructive. "A person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Explanation II of said Section 3 reads :

"Explanation II - Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

...

Hence with reference to subsequent purchaser it is

essential that he should make an inquiry as to title or interest of the person in actual possession as on the date when sale transaction was made in his favour. The actual possession of a person itself is deemed or constructive notice of the title if any, of a person who is for the time being in actual possession thereof. A subsequent purchaser has to make inquiry as to further interest, nature of possession and title under which the person was continuing in possession on the date of purchase of the property..."

64. In **Raghavendra Raju** (supra) the Andhra Pradesh High Court after considering the decisions of the Apex Court in ***Durga Prasad vs. Deep Chand AIR 1954 SC 75*** has held that in a suit for specific performance of an Agreement for sale, it is not obligatory on the plaintiff to seek for cancellation of Sale deed executed in favour of the subsequent purchaser, but he can join him as defendant for directing him to execute the sale deed along with the vendor in favour of the plaintiff as per the agreement of sale entered into by him with the vendor of the said defendant, provided the said agreement of sale in favour of the plaintiff is prior to sale deed of subsequent purchaser. The only exception to sub-Section (b) of Section 19 is that if the transferee has paid money in good faith and without notice to the original contract, the plaintiff has to seek declaration for cancellation of such sale deed.

65. In the instant case, Uday Nanasaheb Patil, (D5) has deposed that his mother and sister had purchased the western portion of the suit property from defendant no.7 whereas he had purchased the eastern half of the suit property from the defendant nos.1 and 2. He claims that he was not aware that the defendant no.1 had agreed to sell the suit property to the plaintiff. Apart from this bare statement, he had not adduced any evidence to indicate that he had made an enquiry about the title of the defendant no.1 in respect of the suit property. He had not ascertained whether the defendant no.1 had created any encumbrance over the suit property.

66. As stated earlier, the plaintiff had got a notice published in a local daily disclosing that he had entered into an agreement with the defendant no.1 in respect of the suit property. The plaintiff has claimed that upon execution of the agreement he was put in possession of the suit property. The records indicate that the plaintiff had lodged a complaint dt.3.3.1981 at Kagal Police Station (Exh. 106). The plaintiff had disclosed in the said complaint that he had entered into an agreement with the defendant no.1 to purchase the

suit property. He had further stated that he was put in possession of the suit property and that he had stored timber and firewood worth Rs.2000 to 3000 in the suit property. He had complained that the defendant No.5 Uday and his father Nanaso had trespassed in the suit property and were damaging goods stored by him in the suit property. The records indicate that the police had inquired into the said complaint and had also recorded statement of the father of the defendant no.5. Under the circumstances, it is difficult to accept that the defendant no.5 was not aware of the execution of the agreement in favour of the plaintiff.

67. It is also to be noted that the defendant no.5 has admitted in his cross-examination that his house is at a distance of about 300 meters from the suit property. He has stated that he was running a grocery shop in the premises of his mother-in-law, which is at a distance of about 35 feet from the suit premises. It is therefore not probable that he had no knowledge about the agreement and /or possession of the plaintiff in respect of the suit premises.

68. The records indicate that the plaintiff had disclosed to the Sub-

Registrar that he had entered into an agreement in respect of the suit property. He had expressed his apprehension that the defendant no.1 was likely to sell the suit property in breach of the agreement. He had therefore requested the Sub-Registrar not to register any sale deed in respect of the suit property. It is seen that the defendant no.5 had entered into the sale transaction hurriedly on the same date i.e. on 18.4.1981. The defendant no.5 had not issued a public notice disclosing that he intended purchasing the suit property. The defendant no.5 entered into sale transaction notwithstanding the fact that the defendant no.1 had already executed an agreement for sale and had put the plaintiff in possession of the suit property. These circumstances clearly indicate that the defendant no.5 had knowledge of execution of the agreement in favour of the plaintiff. He had entered into a sale deed only to defeat the rights of the plaintiff under the agreement for sale. It is therefore clear that the defendant no.5 is not a bonafide purchaser for value without prior notice of the original contract. The defendant no.5 therefore cannot seek protection under Section 19(b) of the Specific Relief Act. Consequently, the plaintiff can seek relief of specific performance against the defendant no.5 without seeking cancellation of the sale

deed executed in his favour by the defendant nos.1 and 2.

69. The next question to be decided is as to whether the plaintiff is entitled to the discretionary relief of specific performance. Section 20 of the Specific Relief Act as it stood prior to 2018 amendment, stipulates that jurisdiction to decree specific performance is discretionary. The Court is not bound to grant such relief merely because it is lawful to do so. The discretion of the court cannot be exercised in an arbitrary manner but is to be exercised on sound and reasonable considerations, guided by judicial principles, and is capable of correction by the court of appeal. Sub-section 2 of Section 20, which stipulates the cases where the court may exercise its discretion not to grant relief of specific performance reads thus :---

20. Discretion as to decreeing specific performance.—

(1) ...

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

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

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

70. In *Jayakantham & ors. vs. Abaykumar, 2017 Vol. 5 SCC 178* the Apex Court has considered the previous decisions on the subject and held thus:

“ 9 The precedent on the subject is elucidated below :

(i) In Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and Ors[1], this Court held that:

“...14. Section 20 of the [Specific Relief Act, 1963](#) preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff...”

(ii) A similar view was adopted by this Court in [Sardar Singh v. Smt. Krishna Devi and another](#)[2] :

“...14. Section 20(1) of the [Specific Relief Act](#), 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract.”

(iii) Reiterating the position in [K. Narendra v. Riviera Apartments \(P\) Ltd](#)[3], this Court held thus :

“...29. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature , shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in [Lourdu Mari David v. Louis Chinnaya Arogiaswamy](#) by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.”

(iv) These principles were followed by this Court in [A.C. Arulappan v. Smt. Ahalya Naik](#)[4], with the following observations :

“.....7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be

granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.”

“.....15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court.....”

(v) A Bench of three Judges of this Court considered the position in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors.[5], and held thus :

“.....6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the

decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen....”

71. In the instant case, the original vendor i.e. the defendant no.1 and 2 had agreed to sell the entire suit property to the plaintiff for sale consideration of Rs.7000/-. In breach of the said agreement, the defendant no.1 and 2 executed a sale deed in favour of the defendant no.5, whereby she sold half of the suit property to the defendant no.5 for total sale consideration of Rs.3500/-. Since the defendant nos.1 and 2 have already transferred their rights in favour of the defendant no.5, these defendants or their legal representatives will not suffer monetary loss, damage or any hardship by the decree of specific performance. The records indicate that the defendant no.5 is not a bonafide purchaser, and further that he had obtained forcible possession from the plaintiff. Hence, the defendant no.5 cannot invoke the discretionary jurisdiction in his favour on the

ground of steep rise in the price of the land. The case is not covered by any of the clauses of sub Section 2 of Section 20 of the Specific Relief Act as to exercise discretion not to decree a specific performance. On the contrary, the equity is in favour of the plaintiff, who had taken prompt action by filing a suit as soon as he learnt that the defendant no.1 was likely to enter into a sale deed in favour of the defendant no.5. and who has been litigating since last over 35 years to enforce the contract. Refusal to exercise discretion in favour of the plaintiff will cause greater hardship to the plaintiff, who will have to pay a much higher price for a similar property. Considering the facts and circumstances of the case, the first appellate court was justified in exercising discretion in favour of the plaintiff.

72. The defendants have also impugned the judgment on the ground that the trial court had proceeded with the suit without appointment of guardian ad-litem . It has already been held that the defendant no.7 is not bound by the agreement at Exh.102. It is also on record that the defendant no.6, the father of the defendant no.7 has already sold half share of the defendant no.7 in favour of defendant nos.3 and 4. This being the case, the question of law, as

formulated is only of academic importance. Be that as it may, a decree cannot be a nullity if there is substantial representation and no prejudice is caused to the minor defendant. Reliance is placed on the decision in ***Supdabai Badrinarayan Joshi*** (supra) wherein this Court has observed that:

“It is clear from this rule that a guardian for the suit has to be appointed by a Court for a minor. The appointment has to be made by the Court after notice to the minor or any guardian of the minor or to the father or other natural guardian of the minor. Therefor there is no doubt that when the defendant is a minor and when he is not represented by any guardian, the Court shall appoint a proper person to be guardian for a suit for such a minor. The provisions of this rule therefore appear to be that when a minor defendant is not represented at all, he obviously cannot be a party to the suit and therefore the decree against him under O. XXXII, R.3 will be a nullity. Such non-representation however, should be distinguished from substantial representation. When a Court has recognized a guardian-ad-litem but has made no formal appointment or has made an appointment which is open to objection owing to some defect of procedure, that would be a different matter. The rule in such cases is different, for a decree in those cases will bind a minor unless it is shown that the defect of procedure has prejudiced him. The distinction between non-representation and substantial representation is one between want of jurisdiction and irregular exercise of jurisdiction.”

73. In the instant case, though there was no formal order

appointing the defendant no.6 as a guardian of his minor son - the defendant no.7, he was described in the cause title as a natural guardian of the defendant no.7. The defendant no.6 had represented the defendant no.7 and safeguarded his interest.. It is also to be noted that the defendant no.7 who has now attained majority has neither challenged the sale deed executed by the defendant no.6 on his behalf, nor has he alleged prejudice due to procedural defect. Under the circumstances, this is not a case of non-representation, resulting in want of jurisdiction.

74. Hence the following order:

- (i) The appeal is partly allowed.
- (ii) The decree for specific performance of western portion of the suit property is set aside.
- (iii) The respondent no.2(b) Dhondibai Bodake is directed to execute the sale deed in respect of the eastern half portion of the suit property in favour of the plaintiff- Appaso Jivappa Chougule .
- (iv) The defendant No.3- Uday Nanasaheb Patil is directed to join in the conveyance to the extent indicated above.

- (v) The amount of Rs.6,400/- deposited by the plaintiff in the trial court shall be paid to the defendant no.2(b) upon execution of the conveyance.
- (vi) The decree drawn by the First Appellate Court in Regular Civil Appeal 252 of 1986 stands modified accordingly.

(ANUJA PRABHUDESSAI, J.)