

**IN THE HIGH COURT OF KARNATAKA  
CIRCUIT BENCH AT DHARWAD**

DATED THIS THE <sup>27</sup>~~29~~<sup>TH</sup> DAY OF MAY 2011.

Before

**THE HON'BLE MR.JUSTICE K.GOVINDARAJULU**

RFA No.1207/2002

BETWEEN:

SADANAND S/O SHANKAR SETH  
35 YEARS, OCC:AGRICULTURIST  
R/O GANGAVATHI  
KOPPAL DIST.

.. APPELLANT

(BY M/S. M G M.ASSOCIATES, PRABHULING K.NAVADGI,  
SHIVARUDRAPPA SHETKAR, ADVS.)


AND

GOPALACHAR S/O RAMACHAR MADINUR  
MAJOR, OCC:AGRICULTURIST  
R/O HALAGERI, KOPPAL TALUK.

... RESPONDENT

(BY M/S. SHASTRI & HEGDE ASSOCIATES, GURURAJ, A  
VIJAYA KUMAR BHAT, N.SURYANARAYAN RAO, ADVS.)

THIS RFA IS FILED U/S 96 R/W ORDER 41 R 1 OF  
CPC AGAINST THE JUDGMENT AND DECREE DT.  
20.8.02 PASSED IN OS NO.15/1997 ON THE FILE OF THE



CIVIL JUDGE (SR.DN.), KOPPAL, DISMISSING THE SUIT FOR SPECIFIC PERFORMANCE.


This RFA coming on for final hearing this day, the Court delivered the following:

JUDGMENT

Plaintiff in OS No.15/1997, on the file of Civil Judge (Sr.Dn), Koppal, is the appellant in this appeal u/s.96 CPC.

2. Parties will be referred to, according to their status in the court below for convenience.

3. The case of the plaintiff is that the defendant has agreed to sell the suit land in Survey No.206/D, measuring 7 acres 16 guntas of Halageri village, for a sum of ₹2,00,000/-, executed an agreement on 23/3/1995 and received a consideration in a sum of ₹30,000/-. Further recital in the agreement is that the defendant has to execute the sale deed within a period of 3 years from the date of agreement, the possession shall be handed over at




the time of the registration of the sale deed. It is the further case of the plaintiff that in spite of payment, there was no progress, so the plaintiff is constrained to file a suit for specific performance, seeking decree of specific performance.

4. In reply, the written statement is filed by the defendant denying the case of the plaintiff in total, contend that the property is an ancestral property. The defendant has six major sons, so, agreement pleaded cannot be executed, so pray for dismissal of the suit.


5. The agreement relied on by the plaintiff is signed by the son of the defendant, as a power of attorney holder of the father. The written statement is filed by the father.

6. After framing of the issues, PW 1 examined is the plaintiff, PW 2 examined is the witness to the agreement of sale. DW-1 examined is the defendant. The learned trial judge has disbelieved the case of the plaintiff on the



ground that a document is confronted, but it is not produced during the course of trial. So, also the plaintiff has not come to the Court with clean hands.

7. The learned advocate for the plaintiff contends that the approach of the learned trial judge is incorrect as the agreement is signed by the son of the defendant. So, the best person, who can deny the signature is the son of the defendant and not by the father. Father alone had entered the witness box. It is the positive case of the plaintiff that the defendant herein is the father of the executant. The father has given power of attorney in favour of the son. The power of attorney is not cancelled even as on the date of giving of the evidence by DW1. Assertion of the plaintiff is that the defendant has received a sum of ₹30,000/- through the power of attorney. It is contended that the power of attorney is produced and it is marked. This subject has not been considered by the Court. So, pray for allowing of the appeal.




8. In reply, the first contention of the learned advocate is that the defendant has six children, how can the defendant alone can deal with the property. Place reliance on ruling of this Court in Smt.Sheethavva Vs. Hemareddi reported in **ILR 2004 KAR 2105**, wherein this court has held that merely it is lawful suit, specific performance should not be decreed. Portion of the judgment relied by the learned advocate at para 11 reads as follows:

“11. In the instant case, it is not in dispute that the respondent – plaintiff had paid a sum of Rs.40,000/- to the appellant – defendant at the time of the execution of the document Ex.P1. I am of the opinion that the interest of justice would be squarely met if I direct the appellant – defendant to pay a sum of Rs.40,000/- to the respondent-plaintiff together with interest thereon at 14% per annum from the date of the agreement of sale i.e. 14.06.1993 till realisation. Thus, the respondent-plaintiff will be entitled to recover a sum of Rs.40,000/- together with interest thereon at 14% per annum from the date of the agreement of sale i.e. 14.6.1993 till realisation. Thus, the respondent-plaintiff will be entitled to recover a sum of Rs.40,000/- together with

interest thereon at 14% per annum from the date of the agreement of sale i.e. 14.6.1993 to the date of realisation of that amount. There shall be a charge for this amount on the plaint schedule property and the respondent-plaintiff would be at liberty to enforce the decree against the appellant and her property, in case the appellant fails to repay the said sum of Rs.40,000/- with interest at 14% per annum from the date of the agreement. Accordingly, I modify the impugned judgment and decree of the Trial Court to the extent as indicated above”

9. It is also further contended by the learned advocate for the defendant that plaintiff has colluded with the son of the defendant.

10. The learned advocate place reliance on A.C.Arulappan Vs. Smt. Ahalya Naik, reported in AIR 2001 SC 2783 wherein, the lordships of the Apex Court have held that if the terms of the agreement are unfair and the plaintiff is trying to take undue advantage of the defendant, the plaintiff is not entitled for specific performance.



11. In reply, the learned advocate for the plaintiff submits that if it is a case of the defendant that the plaintiff has not come with clean hands or that he has colluded with the son of the defendant, particulars of the same ought to have been mentioned. So, pray for decreeing the suit as prayed for.

12. In the light of the above submissions, carefully considered the evidence recorded. The rulings relied, identity of the parties is not in dispute. Identity of the property is not in dispute. The point that is in dispute, is in regard to the specific performance pleaded by the plaintiff, denied by the defendant.

13. In the light of the above, the points that arise for consideration are :-

- i) Whether the plaintiff proves that the son of the defendant had executed the agreement of sale and received ₹30,000/- as on the date of execution of the agreement of sale dated 23/3/1995?

- ii) Whether the plaintiff is entitled for specific performance?
- iii) Whether the defendant proves that the agreement relied by the plaintiff is without the authority of DW1.?
- iv) What order?

14. POINT NO.3. Point No.3 touches the very maintainability of the case of the plaintiff and also the authority of the son of the defendant. So, it is taken up for consideration before giving a finding on the other points raised by the court.

15. The agreement of sale relied by the plaintiff is registered as document No.1619/1994-95. It is dated 23.3.1995. It is for a consideration of Rs.2 lakhs and Rs.30,000/- is sought to be paid by the plaintiff to the son of the defendant in pursuance of the power of attorney, executed by defendant in favour of his son marked as Ex.P2. DW1 examined in the course of his evidence has not produced any document to show Ex.P2 GPA under




which, his son has executed the agreement being revoked. The evidence of DW1 is recorded on 24.7.2002. Ex.P2, the power of attorney executed by the very same DW1 is dated 22.12.1981. Ex.P2 is also a registered power of attorney. Why a registered document is in force from 1996 till 2002 is not substantiated by DW1. So, the contention of the advocate for the defendant that son of the defendant has no authority to execute agreement of sale as per Ex.P1 is without any merit.

16. Further, the subject can be considered from yet another angle also. A sum of Rs.30,000/- is said to be paid by the plaintiff to the son of the defendant under Ex.P1 dated 23.3.1995. The defendant has entered appearance in the suit on 8.12.1997. The evidence of DW1 is recorded on 24.07.2002. The contention of the plaintiff is that the defendant's son has received Rs.30,000/-. A prudent father's approach would be to state whether money received by his son is 'Vyavaharika' or

‘Avyavaharika’, but no such pleading is found or evidence is adduced. Further, as a prudent father, if his case is that there are six sons, he could have directed his son to deposit or he could have deposited Rs.30,000/- and pleaded for dismissal of the suit. But, it is not done. Rs.30,000/- is with the family of defendant from 1995, till the hearing of the appeal by this court also. So, the actions of defendant and his son would probabilise that the defendant is trying to have use the money of the plaintiff. So, the court holds that the contention of the advocate for the defendant that defendant’s son had no authority to execute Ex.P1 is without any merit. So, it is rejected.

17. POINT NOS.1 & 2: It is true that merely on the proof of the agreement, the plaintiff is not entitled for specific performance. It is also the law declared while interpreting Section 16(c) of the Specific Relief Act that the plaintiff should be always ready and willing to perform his




part of contract, in addition to the above two mandates, the court has also given a finding in consonance with Section 22 of the Specific Relief Act.

18. In the light of the above principle/ratios found in the interpretation of agreement in regard to suit for specific performance, the case of the parties is considered.

19. Ex.P1 marked is the agreement of sale. P2 marked is the GPA executed by defendant in favour of his son. Ex.P3 is the RR. DW1 in the course of his evidence has not produced any document to show GPA as per Ex.P2 is cancelled. So, Ex.P2 prove that defendant has authorised his son to deal with the property.


20. It is contended by the learned advocate for the defendant that a recital in the agreement would show that the consent of the father is required. The consent can be direct in writing or by conduct of the parties. As narrated supra, the father/defendant having kept quite, the



allegation that the son has received Rs.30,000/- for nearly 15 years would probabilise that he has authorised and consented his son to receive money. so, the defence put forth by the learned advocate for the defendant that the consent of the father is required, so the agreement cannot be relied is rejected.

21. The next contention is that plaintiff has colluded with the son of the defendant. Collusion is a fact to be proved with facts. Namely, the date on which the parties have met, the date on which the parties have planned, the manner in which the plan is executed. In the facts of the case, Ex.P2 is relied by the plaintiff as a document executed by the defendant in favour of his son, it is not challenged. So, the submission that there is a collusion, asserted by the learned advocate for the defendant is without any merit.

22. The subject can be analysed from yet another angle also, if it is a case of the father that the son has




colluded with the plaintiff. The defendant could have moved an application under Order 1 Rule 10 to implead the son. The same being not done, the defence put forth would probabalise that the defendant intends to blow hot and cold at the same time, in other words, he wants to approbate in so far as receiving of Rs.30,000/- and reprobate when specific performance is sought. A person cannot approbate and reprobate. So, tested with this principle, the defence of the defendant is without any merit.

23. The subject can be analysed from one more angle. In Armugam (dead by LRs.) Vs. Sundarambal & another reported in **AIR 1999 SC 2216** , their lordships of the Apex Court have held that the burden of proof shifts from stage to stage when the evidence is adduced by both the parties, so tested with this principle also, the burden shifted on the defendant is not discharged is probabalised.

24. The discussion and finding by this court would prove that the plaintiff has placed material to prove that defendant has executed the power of attorney in favour of his son and his son has executed agreement of sale as per Ex.P1 while receiving Rs.30,000/-. So, plaintiff has proved Ex.P1.

25. Coming to the next subject in regard to the eligibility for specific performance. The total sale consideration is fixed at Rs.2 lakhs. The total extent of land i.e. agreed to be sold is 7 acres 20 guntas. So, as on the date of execution of Ex.P1, agreement of sale, the defendant's son has received Rs.30,000/- is proved. If it is calculated, it would amount to the value of one acre of land. The suit agreement is of 1995 and the appeal is heard in the year 2011 i.e. after a span of 15 years. so, it becomes inequitable for the court to ask the defendant to execute the sale deed in favour of plaintiff for 7 acres 16 guntas. But, as the plaintiff has failed to pay the entire sale consideration of Rs.1,70,000/- within three years. So,



plaintiffs suit is decreed partly to an extent of one acre out of 7 acre 17 guntas, with further condition.

26. In the light of the above, the following order is passed:

The appeal is allowed in part. The impugned judgment and decree passed is set aside. The suit of the plaintiff in OS No.15/1997 is decreed directing the defendant to execute the sale deed to an extent of 1 acre with a condition that the plaintiff shall deposit a further sum of Rs.1,50,000/- within two months from this day. On such deposit, the defendant is directed to execute the sale deed. Thereafter, the plaintiff is entitled for filing FDP to carve 1 acre. In the circumstances, the plaintiff is also entitled for the costs throughout.

Sd/-  
JUDGE

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