

**HON'BLE SRI JUSTICE M.S.K.JAISWAL**

**A.S.No.965 of 1989**

**31<sup>st</sup> December, 2014**

Between :-

Poturu Seetharaiah and others .. Appellants

And

Bachina Venkayamma and others .. Respondents

**HON'BLE SRI JUSTICE M.S.K.JAISWAL**

**A.S.No.965 of 1989**

**JUDGMENT:-**

The unsuccessful plaintiff is the appellant. On 22-07-1976 he filed the suit for specific performance of the contract directing the respondents/defendants to execute the sale deed in respect of the plaintiff schedule property which comprises of Ac.1-66 cents situated at Kollavaripalem, Parchur, Chirala and a daba house. Alternatively, the appellant sought for a direction to the 1<sup>st</sup> and 2<sup>nd</sup> respondents/defendants to pay Rs.32,000/- with interest from the date of suit till realization as damages.

2. The suit is based on the agreement of sale, dated 24-04-1974, said to have been executed by respondents No.1 and 2/defendants No.1 and 2.

3. The parties shall be referred to as they are arrayed in the original suit. During the pendency of the appeal, the sole appellant/plaintiff died on 01-12-2006 and his daughter-in-law and others are impleaded as appellants No.2, 3 and 4. Respondent No.1/1<sup>st</sup> defendant died on 02-07-2011, and the 2<sup>nd</sup> respondent/2<sup>nd</sup> defendant also died on 09-11-2010 and their legal representatives are impleaded as respondents No.7 to 11. The 4<sup>th</sup> defendant/respondent No.4 died on 12-04-1992 and his legal representatives are impleaded as respondents No.12 to 15. The 5<sup>th</sup> defendant/respondent No.5 also died on 15-06-2011 and his legal representatives are impleaded as respondents No.16 and 17.

4. The averments of the plaint in brief are as under:-

The plaintiff and the defendants No.1 and 4 are residents of Kollavarapalem village, H/o.Parchur. The 1<sup>st</sup> defendant is the daughter of one Anche Subbaiah. The 1<sup>st</sup> defendant was married to one Venkata Subbaiah but they were living with Anche Subbaiah. The 1<sup>st</sup> defendant did not beget any children. Her husband Venkata Subbaiah left the village, went to his native place and married another woman and had children through her. The father of the 1<sup>st</sup> defendant Anche Subbaiah died possessed of considerable properties. Since the 1<sup>st</sup> defendant was the only successor to the estate of Anche Subbaiah, she brought up her nephew the 2<sup>nd</sup> defendant, who is the paternal grandson of the maternal aunt of the 1<sup>st</sup> defendant. Since his childhood it is the 1<sup>st</sup> defendant who has been taking care of defendant No.2.

The 4<sup>th</sup> defendant – Kolla Gangaiah is the husband of the younger sister of the plaintiff. The 1<sup>st</sup> defendant filed O.S.No.6 of 1956 on the file of Sub-Court, Bapatla against the 4<sup>th</sup> defendant on the basis of a will said to have been executed by him. That suit was decreed in favour of the 1<sup>st</sup> defendant. The 4<sup>th</sup> defendant was liable to pay *mesne profits* and other amounts to the 1<sup>st</sup> defendant. For realizing the same, the 1<sup>st</sup> defendant took steps for execution and brought '3' items of the properties of the 4<sup>th</sup> defendant for sale. The 1<sup>st</sup> defendant, with permission of the Court, purchased an extent of Ac.1-66 cents of dry land along with another item. Having purchased Ac.1-66 cents of land in Court auction, the 1<sup>st</sup> defendant could not obtain the possession. Therefore, the 2<sup>nd</sup> defendant along with his elder sister's husband by name Ginjupalli Ankamma approached elders by name Kolla Venkatanarayana, Kolla Venkaiah and Chenchu Ramaiah. These persons have sent for the plaintiff who happened to be the brother-in-law of the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant was also sent for. After discussions, it was decided that the 4<sup>th</sup> defendant should pay certain money to the 1<sup>st</sup>

defendant and 2<sup>nd</sup> defendant. Since the 4<sup>th</sup> defendant had no amounts, the plaintiff came forward to advance the money so as to help the 4<sup>th</sup> defendant who is his sister's husband. After considerable deliberations, settlement was arrived at.

It was decided that the landed property of Ac.1-66 cents and the appurtenant Ac.0-46 cents of land should not be taken by the 1<sup>st</sup> defendant and must be left to the 4<sup>th</sup> defendant for which the 4<sup>th</sup> defendant should pay Rs.32,000/- to the 1<sup>st</sup> defendant in full satisfaction of her claims. In the event of the 4<sup>th</sup> defendant paying Rs.32,000/- to the 1<sup>st</sup> defendant, all the properties of the 4<sup>th</sup> defendant shall belong to him, even though they were sold in the Court auction. However, as D.4 had no money, the plaintiff came forward to take a contract as agreed for Rs.32,000/- on the promise of the 4<sup>th</sup> defendant to adjust the plaintiff at a later date. The plaintiff agreed for the said proposal in view of the interest of his younger sister.

Accordingly, Chenchu Ramaiah wrote a contract of sale on 24-04-1974 for all the three items of properties for Rs.32,000/-, which was duly signed by the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant put her thumb impression and it was attested by Ginjupalli Ankamma, who is the brother-in-law of D.2, and Kolla Venkatanarayana. At that time, out of the consideration of Rs.32,000/-, the plaintiff paid Rs.25,000/- to D.1 and D.2 and the balance of Rs.7,000/- was agreed to be paid by the plaintiff before 05-05-1974, failing which interest at 12% per annum was agreed to be paid to the 1<sup>st</sup> defendant.

In the agreement of sale, two items of properties are mentioned. 'A' schedule comprises of Ac.2-06 cents within the boundaries specified and no other details are mentioned since they were not available. In pursuance to the said contract, 'A' schedule property was delivered to the plaintiff. It is further submitted that out of 'A' schedule land, even though D.1 has purchased Ac.1-66 cents in Court auction, possession was not delivered to her. After the compromise, D.4 delivered the possession to D.1. With regard to the remaining Ac.0-46 cents of land, it was agreed that D.1 should obtain permission from the Court and bid for the said bit of land in the auction and

should purchase the same in her name because at the time of contract, there were some other debts due by the 4<sup>th</sup> defendant to others. In order to obviate future complications, the plaintiff took contract for all the '3' items.

'B' schedule in the agreement comprises of an old tiled house of D.4. In pursuance to the contract, the possession of the said house was also delivered to the plaintiff. Therefore, the contract dated 24-04-1974 executed by D.1 and D.2 was fully given effect to and none anticipated any complications. The plaintiff who entered into possession of that Ac.2-12 cents began cultivating the same and had been paying the land revenue since 1975.

Contrary to the agreement and understanding, D.1 and D.2 did not obtain permission for bidding Ac.0-46 cents of land and in the Court auction, that bit of land was purchased by D.3 who is a close associate of D.1 and D.2. However, in order to get over the Court auction in respect of Ac.0-46 cents, D.4 appears to have sold the said land in favour of the 5<sup>th</sup> defendant, who is the son-in-law of D.4 for Rs.7,000/- and therefore the Court sale in favour of D.3 was not finalized. Aggrieved by the said action of D.4 in selling Ac.0-46 cents of land in favour of D.5, the 3<sup>rd</sup> defendant and one Kolla Yesu filed Insolvency Petition No.14 of 1975 on the file of the Subordinate Judge, Chirala for adjudging the 4<sup>th</sup> defendant as insolvent, which is pending. D.3, Kolla Yesu, D.1 and D.2 have colluded together and created a lease of Indenture Deed for Ac.1-66 cents which D.1 purchased in the Court auction. D.3 filed O.S.No.634 of 1975 on the file of the District Munsif, Chirala and obtained interim injunction orders in respect of Ac.1-66 cents of land. In pursuance to the said orders, the plaintiff was dispossessed from the said extent of Ac.1-66 cents of land. The said interim order was made absolute in favour of D.3 and the same was also confirmed by the Subordinate Judge, Chirala.

It is alleged that the 4<sup>th</sup> defendant, who is no doubt the brother-in-law of the plaintiff, is a scheming person whereas the plaintiff is an innocent rustic man. The 4<sup>th</sup> defendant kept the plaintiff in dark about the Court sale of Ac.0-46 cents of land. These facts came to the knowledge of the plaintiff only after

O.S.No.634 of 1975 was filed. The 4<sup>th</sup> defendant is not having any right either in the house or in the lands till he pays back Rs.32,000/- to the plaintiff.

For the above reasons, the plaintiff is advised to establish his right on the foot of the contract dated 24-04-1974 as the defendants No.1 and 2 are not prepared to execute the sale deed for the property comprised in that contract and hence the suit is filed for specific performance of the contract. The plaintiff from the beginning has always been ready and willing to perform his part of the contract but it is the defendants who were postponing the same on some pretext or the other. D.1 and D.2 are bound to execute the sale deed for the property involved in the suit after receiving the balance consideration of Rs.7,000/-. D.3 to D.5 are also arrayed in the suit as necessary parties.

5. On the other hand, the 1<sup>st</sup> defendant filed a written statement denying the allegations mentioned in the plaint. It is averred in the written statement that the plaintiff is none other than the brother-in-law of 4<sup>th</sup> defendant, who is a chronic litigant; and that the 4<sup>th</sup> defendant attempted to grab her father's property in the year 1956 resulting in filing O.S.No.6 of 1956. The matter went up to this Court and it was held that 4<sup>th</sup> defendant forged the will and later in view of the decree passed in O.S.No.6/56, this defendant brought the properties of the 4<sup>th</sup> defendant to sale i.e., house property and land to an extent of Ac.1.66 cents and she purchased the same in E.P.No.37/72 on 29-03-1973 and the said sale was confirmed on 18-10-1973 and she also obtained sale certificate and took delivery of possession through court on 26-09-1974. After taking delivery of possession, she leased out the said Ac.1.66 of land to the 3<sup>rd</sup> defendant under registered lease deed. It is further averred in the written statement that 4<sup>th</sup> defendant who lost the suit has been threatening this defendant to dispossess him and in order to protect the same, the 3<sup>rd</sup> defendant, being tenant, filed suit O.S.No.634/1975. At that stage, 4<sup>th</sup> defendant created the alleged agreement of contract of sale with the assistance of his relatives and henchmen. The alleged gentlemen's agreement and the mediation by the elders are concocted and falsely created

and other averments mentioned by the plaintiff are all false and the alleged contract of sale is a rank forgery and thus prayed to dismiss the suit with exemplary costs.

6. The 2<sup>nd</sup> defendant filed a memo adopting the written statement filed by the 1<sup>st</sup> defendant.

7. The 3<sup>rd</sup> defendant filed a written statement denying the material allegations made in the plaint. Further, it is averred in his written statement that he is the cultivating tenant of Ac.1.66 cents of land which is mentioned as item No.1 of the suit schedule property and the plaintiff is not at all in possession of the suit property nor remaining extent of Ac.0.46 cents. The 1<sup>st</sup> defendant executed a registered lease deed dated 21-08-1975 and put him in possession of the property and after raising the crop, the 4<sup>th</sup> defendant and his brother-in-law i.e., the plaintiff started threatening by way of interfering with his peaceful possession and enjoyment of the said land and, therefore, he filed suit O.S.No.634 of 1975 to protect his tenancy rights and obtained injunction order, which was confirmed in C.M.A.No.6 of 1976. Therefore, the alleged agreement of sale, dated, 24-04-1974, so-called gentleman's agreement and delivery of possession to the plaintiff are all false.

8. The defendant Nos.4 to 6 remained ex parte.

9. On the basis of the above pleadings, the following issues were settled for trial by the court below:-

1. Whether the suit contract of sale dated 24-04-1974 is true, valid and binding on the defendants?
2. Whether the suit is framed is maintainable?
3. Whether the alleged gentlemen's agreement is true, valid and binding on the defendants?
4. Whether D-5 is a necessary party, if so whether the sale deed in his favour is true, valid and binding?
5. Whether the suit is bad for misjoinder and cause of action and parties?
6. Whether the suit is barred by Sections 47 and 66 of CPC?
7. Whether the suit is frivolous and vexatious and the defendants are entitled for exemplary costs under Section 35-A of CPC?
8. To what relief?

10. On behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A-1 to A-5 were marked. On behalf of the defendants, Dws.1 to 3 were examined and Exs.B-1 to B-16 and Ex.X-1 were marked.

11. After having perused the oral and documentary evidence on record by the impugned Judgment and Decree, dated 31-12-1988, the learned Subordinate Judge, Chirala, found that the plaintiff is not entitled for the specific performance of the contract of sale dated 24-04-1974 and ultimately dismissed the suit with costs besides exemplary costs of Rs.500/- each to the defendant Nos.1 and 3.

12. Sri B.V.Subbaiah, learned senior Counsel appearing for the appellant/plaintiff submits that the Judgment of the Court below is erroneous and cannot be sustained. Learned trial Court has believed the opinion evidence of DW.3 unauthorised, unlicenced and inexperienced hand-writing expert as against that of PW.3 who is working in the Bureau of Finger Prints and was fully qualified. Learned senior Counsel further submits that the plea of D.1 is one of denial and she stoutly denied having affixed her thumb impression on Ex.A1 which is the suit agreement of sale dated 24-04-1974. In view of that defence, once it is established that the thumb impression on the suit contract Ex.A1 is proved to be that of D.1, the same has to be accepted and the contract has to be specifically enforced. The evidence on record established that Ex.A1 contains the thumb impression of D.1 which is also signed by D.2, who was the person brought up by D.1 and was also looking after all her affairs, and the Court below has committed serious error in disbelieving the evidence on record and dismissing the suit.

13. On the other hand, Sri Venugopal, learned senior Counsel appearing for the contesting respondents/defendants submits that the suit is one for specific performance of contract which dates-back to about 40 years. It being an equitable relief and in order to succeed, the plaintiff has to prove that he was always ready and willing to perform his part of the contract, and that it is the defendants who were avoiding the same. Learned senior Counsel further submits that such material aspects are not mentioned in the plaint and hence, the plaintiff cannot succeed. Learned senior Counsel further submits that even in the evidence it is nowhere spoken to by the plaintiff that he was

always ready and willing to perform his part of the contract. It is further submitted that the agreement of sale alleged to have been executed by D.1 on 24-04-1974 is on a plain paper and is inadequately stamped even though it recites that substantial part of consideration was paid and the physical possession of the contract schedule property was delivered. Learned Counsel further submits that the Court below has properly appreciated the oral and documentary evidence on record and has rightly dismissed the suit.

14. The point that arises for consideration is as to whether the plaintiff proved that he is entitled to the relief of specific performance of contract dated 24-04-1974 in respect of the schedule property?

15. After having perused the material on record, the oral and documentary evidence and having heard the submission of the learned senior Advocates, what can be stated at the outset is that the substantial facts insofar as the schedule property and its ownership is concerned is not disputed. The parties are either closely or distantly related.

16. One Anche Subbaiah died possessed of sufficient properties leaving behind Bachina Venkayamma – the 1<sup>st</sup> respondent/defendant as the only sole surviving legal heir. The 2<sup>nd</sup> defendant – Anche Veeraiah is the paternal grandson of the maternal aunt of D.1. In addition to this relationship between D.1 and D.2, D.2 is the person who was fostered by D.1 since there were no male issues. D.2 also happens to be the son of the sister of the appellant/plaintiff. The 4<sup>th</sup> defendant – Kolla Gangaiah is the husband of another younger sister of the plaintiff. The 5<sup>th</sup> defendant is the son-in-law of the 4<sup>th</sup> defendant. The property in question comprises of an extent of Ac.1-66 cents of land and an old tiled daba house. It is not in dispute that the original owner of the said property is the 4<sup>th</sup> defendant. Curiously, both the plaintiff and the contesting defendants brand and accuse the 4<sup>th</sup> defendant of being a scheming person and a Court bird and a person who played fraud on both the plaintiff as well as the 1<sup>st</sup> defendant. D.4 is also the person who has been convicted by a criminal Court as long back as on 31-01-1964 by the Judicial Second Class Magistrate, Chirala, in C.C.No.4 of 1963 for having forged a

will purported to have been executed by Anche Subbaiah, the father of D.1. Ex.B.8 is the Judgment of the Criminal Court. Significantly, D.4 remained *ex parte* throughout in these proceedings.

17. There were civil proceedings in between D.1 and D.4 in the matter of the properties of Anche Subbaiah, the father of D.1. The plaintiff herein filed O.S.Nos.6 of 1956 and 71 of 1956 against D.1 herein. Ex.B7 is the certified copy of the Judgment of the Principal Subordinate Judge, Bapatla in the said suits dated 25-04-1958. The suit was decreed in favour of the plaintiff therein who is the 1<sup>st</sup> defendant herein. The learned Subordinate Judge held that the plaintiff therein (D.1 herein) is entitled to recover a sum of Rs.3391-8-0 towards maktha in respect of the properties over which the title of the plaintiff therein was declared. The Court also directed that the plaintiff therein is entitled to *mesne profits* and also costs of the suit.

18. Subsequent to the decree of the Subordinate Judge in O.S.Nos.6 of 1956 and 71 of 1956, dated 25-04-1958, the 4<sup>th</sup> defendant herein who was the defendant in those suits failed to pay the amounts decreed against him. Therefore, D.1 herein took recourse to execution proceedings by filing E.P.No.36 of 1972 in O.S.No.6 of 1956 and E.P.No.230 of 1968 in O.S.No.71 of 1956. For realizing the said amounts, the agricultural lands of the defendant therein (D.4 herein) and daba house were put to sale. With the permission of the Court, the decree-holder namely the plaintiff in that suit/D.1 herein purchased the daba house and land admeasuring Ac.1-66 cents belonging to D.4 herein. Ex.B1 is the sale certificate, dated 23-04-1970 issued by the Principal Subordinate Judge confirming the sale of the daba house for Rs.8,300/- in favour of Bachina Venkayamma – 1<sup>st</sup> defendant herein. Ex.B2 is the document evidencing delivery of possession. Ex.B3 is the certified copy of the order of the Principal Subordinate Judge, Bapatla, dated 18-10-1973 in E.P.No.36 of 1972 certifying that the land admeasuring 0.669 hectares was purchased by Bachina Venkayamma/D.1 herein for a consideration of Rs.8,600/-. Ex.B4 is the proceedings evidencing delivery of possession.

19. That is how the 1<sup>st</sup> defendant became the owner and possessor of the

land and house which is the subject matter of the suit contract.

20. As against the above documentary evidence, the contention of the plaintiff is that the physical possession of the properties sold in execution proceedings was not delivered to the 1<sup>st</sup> defendant herein and the same continued to be with D.4 herein – the Judgment-debtor in those proceedings. Therefore, a panchayat was convened and the elders decided that if the interest of the 4<sup>th</sup> defendant is to be protected, the 1<sup>st</sup> defendant herein should be paid a sum of Rs.32,000/-. Since D.4 was in an impecunious condition, the plaintiff being the brother-in-law of D.4 and keeping in view the security and interests of his own sister, came forward to help D.4 and accordingly the suit contract was executed. According to the plaintiff, it was agreed that the plaintiff should pay Rs.25,000/- on the said date and the balance of Rs.7,000/- should be paid on or before 05-05-1974 and obtain a registered sale deed from D.1 in respect of the land and house which D.1 herein purchased in Court auction. The further claim of the plaintiff is that on the date of Ex.A1 i.e., 24-04-1974 itself the possession of the property covenanted was delivered to the plaintiff.

21. In Ex.A1, the land that is transacted admeasures Ac.2-06 cents. Admittedly the 1<sup>st</sup> defendant was the auction purchaser only in respect of Ac.1-66 cents. With regard to remaining land, the sale was not finalised. Therefore it continued to vest with D.4 herein namely the Judgment-debtor in the previous litigation who however is said to have sold to his son-in-law (D.5). The plaintiff alleges that his brother-in-law (D.4 herein) promised to take care of that property as well but subsequently deceived him by executing a sale deed in respect of Ac.0-46 cents of land in favour of the 5<sup>th</sup> defendant who is none other than the son-in-law of the 4<sup>th</sup> defendant. However, the contract that is sought to be enforced in the present suit is only in respect of Ac.1-66 cents and the daba house. The plaintiff is not claiming any relief insofar as the remaining Ac.0-46 cents of land, which is part of the suit contract.

22. The suit as well as the present appeal is contested by only D.1 and D.2. D.3 who was a lessee in respect of the schedule lands and D.4 a villain

of peace, and his son-in-law (D.5) remained *ex parte*. The contesting defendants specifically denied that there was any mediation, settlement or compromise between the parties. They never entered into any contract or agreement of sale with the plaintiff. It is D.4 who colluded with the plaintiff and forged and created Ex.A1 in view of the long standing disputes in between D.1 and D.4, which dates-back to D.1 filing the suit bearing O.S.No.6 of 1956. D.2 said to be the person being brought up by D.1, is a person who is looking after the affairs of D.1 who was admittedly a marks woman. Ex.A1 is on a plain paper. It is scribed by PW.2. One of the attesting witnesses to Ex.A1 is Ankamma who happens to be the husband of the sister of D.2. Ex.A1 is affixed with a 10 paise revenue stamp. There is a signature on the revenue stamp which is said to be that of D.2. There is a thumb impression away from the revenue stamp which is said to be that of D.1. Exs.B.6, B.9 and B.10 are the documents which admittedly contain the thumb impressions and signatures of D.1 and D.2 herein.

23. The point therefore boils down to the issue as to whether the plaintiff has proved that (i) Ex.A1 is the document which contains the thumb impression and signature of D.1 and D.2 and whether the plaintiff is entitled to the relief of specific performance, or (ii) the alternative relief that is sought for by the plaintiff for refund of earnest money.

24. **Point No.(i):-** The plaintiff who examined himself as PW.1, after having spoken in detail about the events preceding the execution of Ex.A1, deposed that on the date of Ex.A1 viz., 24-04-1974, PW.2 scribed the document and in the presence of Kolla Venkatanarayana and G.Ankamma, who happens to be sister's husband of D.2 and thereafter D.1 affixed her thumb impression and though not necessary D.2 also signed thereon. He denied the suggestion that Ex.A1 is a forged and fabricated document, brought into existence in collusion with his own brother-in-law/D.4, who had already been found guilty of having forged the will, purported to have been executed by the father of D.1, for which act of mischief, he has been convicted and sentenced therefor. On behalf of the plaintiff, the scribe of Ex.A1 is examined as PW.2. He also referred to the negotiations and deposed that he has scribed Ex.A1 on the date mentioned and in his presence D.1 and D.2 put their thumb impression

and signatures. He also identified his own signature on Ex.A1. The above two witnesses are elaborately cross-examined but nothing concrete is elicited from them for disbelieving their claim that Ex.A1 was executed on 24-04-1974 by D.1 and D.2.

25. As against the above, the 1<sup>st</sup> defendant examined herself as D.W.1 and 2<sup>nd</sup> defendant was examined as D.W.2. Both of them denied the entire case of plaintiff. It is also in their evidence that they did not execute any agreement of sale nor was there any transaction as such as claimed by the plaintiff. However, when Ex.A1 was confronted to the 1<sup>st</sup> defendant when she was in the witness-box as D.W.1, she denied her thumb impression and she denied having received Rs.25,000/- on the date of agreement. A specific question was put to D.W.1 as to whether "is it not true that you entered into a compromise with Kolla Gangaiah (D.4) and executed Ex.A1? she answered that she do not know and wanted this question to be asked to D.2. From this, it is evident that she could not categorically assert the execution of Ex.A1. It appears that all her property affairs were being taken care of by D.2 who was a nephew brought up by her, who also happens to be son of another sister of the plaintiff (whereas D.4 is the husband of other sister of the plaintiff).

26. D.W.2 in his evidence, after having referred to the previous litigation between D.1 and D.4 and the purchase of the schedule property in the Court auction, denied that there was any compromise in between D.1 and D.4 after the Court sale. He also denied that in pursuance to the compromise, D.1 sold the land and house to the plaintiff. He further stated that he has nothing to do with the suit schedule properties. He denied having signed on Ex.A1. He admits that one of the attesting witnesses to Ex.A1 by name Ginjupalli Ankamma is the husband of his sister.

27. When PWs.1 and 2 assert that Ex.A1 was executed by D.1 and D.2, both of them as D.Ws.1 and 2, denied the same. Therefore, since the thumb impression and signature of D.1 and D.2 on Ex.A1 was the contentious issue, during the course of trial, the plaintiff sent the disputed document and the admitted thumb impressions and signatures of D.1 and D.2 to the Forensic Science Laboratory for examination. These documents were sent to the

Bureau along with letter of advise by the Court. PW.3 is a Finger Print Inspector working in the Department and at the relevant point of time and this job was entrusted to him by the Department. He deposed that he examined the disputed impression on the agreement, dated 24-04-1974, marked as Ex.A1, a registered indenture deed and the signature contained on it, dated 21-08-1975, the said thumb impression on the second page of the said deed and the specimen thumb impressions of D.1 supplied by the Court, dated 19-07-1979. He further deposed that after his examination, he has furnished the opinion along with the reasons. Exs.A.3, A.4 and A.5 are the documents marked through this witness. They are the negatives and the comparison chart. The opinion given by PW.3 is marked as Ex.A2. It is dated 26-02-1981. It reads as under:-

Finger Print Bureau, CID.,  
Andhra Pradesh, Hyderabad.

C.No.53/U4/FPB/80 Dated: 26-2-1981

Dated: 26-2-1981

REPORT OF THE FINGER PRINT EXPERT (TESTER SUB-INSPECTOR) ON THE EXAMINATION OF THE FINGER IMPRESSIONS CONCERNED IN O.S.NO.33/76 ON THE FILE OF THE SUB-Court, CHIRALA.

The finger impression marked 'D' against the name Bachanna Venkayamma on the agreement dated 24-4-1974 is identical with the admitted finger impression marked 'A' against the name Bachana Venkayamma on the reverse of the first sheet of the Registered Indenture deed dated 21-8-1975 and the specimen Left Thumb impression marked 'S' of Bachana Venkayamma taken on a plain sheet of white paper in open Court on 19-7-1979.

Sd/-  
(S.RAMACHANDRA RAO)  
TESTER SUB-INSPECTOR

28. The finger print expert PW.3 has further deposed as under in his evidence before the Court:-

“.... Reasons for identity of the finger impression marked ‘D’ is with the finger impression marked A and S, in Ex.A3, are as follows:- Pattern:- Loop type of pattern, Point No.1 is a ridge bifurcation below and left to care with four ridge intervening. Point No.2 is a ridge termination below and left to point No.1 with no ridge intervening. Point No.3 is a ridge bifurcation below point

No.2 with three ridges intervening. Point No.4 is a ridge termination right to point No.3 with three ridges intervening. Point No.5 is a ridge bifurcation above and right to point No.4 with no ridge intervening. Point No.6 is a ridge termination below and right to point No.5 with the ridges intervening. Point No.7 is a ridge termination above and right to point No.6 with eleven ridges intervening. Point No.8 is a ridge termination right to point No.7 with 6 ridges intervening. Point No.9 is a ridge termination left to point No.8 with ten ridges intervening. Point No.10 is a ridge bifurcation left to point No.9 with two ridges intervening. All the above mentioned ridge characteristics are collectively occurring in their relative positions in the finger impressions marked D, A and S. Hence, the finger impression marked D, A and S are identical with one another and are made by the same finger of the same person. Bifurcation is where a ridge splits into two and travel for some distance. Termination is the ridge ending. The way to test any impression is the ridge characteristics are available in the impression. D, A and S which we marked in Ex.A3. There is no hard and fast rule about the number of points of identity or non-identity we pronounced about the identity and non-identity of a finger prints, if it is in the same pattern. We are following 10 or 12 points of identity to pronounce about the identity of the finger print provided the pattern in the same. In the present case all the disputed, admitted and specimen impressions are loop type pattern. Hence in the present case there is no doubt about the identity of the finger impression being the same finger of the same person”.

29. The finger print expert has been elaborately cross-examined but no suspicious circumstances are elicited there from so as to suspect the competency or authority of PW.3 in giving in opinion that the disputed document contains the signature and thumb impression of the executants.

30. To counter the above evidence of the finger print expert, it appears that the defendants on their part has subsequently sent the admitted and disputed handwritings and impressions to another private handwriting expert who has been examined as D.W.3. These documents were sent to D.W.3 through their Advocate by name Bhandaru Chandramouli on 19-03-1988. They were not sent through the process of Court. In his evidence D.W.3 admits that he worked as Asst.Director in the Forensic Science Laboratory and retired in October, 1980. He claims to be a graduate in Science and had his training in

handwriting identification for a period of two years. He also claims to be worked as handwriting expert under the Government of Andhra Pradesh. However, insofar as the finger prints is concerned, he claims that he used to sit along with another finger print expert, whenever the finger prints were being examined, he learnt about the finger prints identification. Apparently, he is not a trained finger print expert however he claims to have examined the admitted and disputed thumb impressions of D.1 on Ex.A1 and gave his opinion which is Ex.B.16, dated 24-03-1988. It reads as under:-

"Opinion submitted by Y.Sidda Reddy, Asst.Director (Retd) Forensic  
Science Lab, Hyderabad.

**OPINION**

I have examined the thumb impressions carefully. In my opinion the ridge characteristics marked 1 to 10 available in the specimen thumb impression marked 'S' are not available in the disputed thumb impression marked 'A; as the same is not affixed properly.

The thumb impression marked 'A' could not be compared with any of the admitted specimen thumb impressions as the portion which is clear in the disputed thumb impression is not clear in the specimen thumb impression and vice versa.

Sd/-  
(Y.SIDDA REDDY)"

31. It is manifest that D.W.3 could not conclusively say that the thumb impression that is found on Ex.A1 is not that of D.1 as alleged by the plaintiff and claimed by the 1<sup>st</sup> defendant. In his evidence as D.W.3, he deposed as under:-

"..... The specimen and disputed thumb impressions are already marked as A and S respectively and after thorough comparison of the thumb impression, I am of the opinion that in my opinion the ridge characteristics marked 1 to 10 available in the specimen thumb impressions already marked as S are not available in the disputed thumb impressions marked A as the same is not affixed properly. The thumb impressions marked A i.e., the disputed one could not be compared with any of the admitted specimen thumb impressions as the portion which is clear in the disputed thumb impressions is not clear in the specimen thumb impression and vice-versa."

32. Not only D.W.3 is not a professional finger print expert but even his

opinion do not help the defendants in substantiating their contention that Ex.A1 do not contain the thumb impression of D.1. When PW.3 could give specific reasons for opinion that Ex.A1 contains the thumb impression of D.1, D.W.3 could not give any such opinion and stated that the thumb impression on Ex.A1 is not affixed properly and that the thumb impressions, which is clear in the disputed thumb impression is not clear in the specimen thumb impression. Therefore, what follows is that the opinion evidence of PW.3 needs to be given weight as against that of D.W.3. I have also compared the thumb impression on Ex.A1 with that of the admitted thumb impression of D.1 as contained in the record. Having done so, I am inclined to accept the evidence of PW.3 that Ex.A1 contains the thumb impression of D.1.

33. Once it is established that the document in dispute has been executed by D.1, what follows is that the case of the plaintiff stands established that on the date of Ex.A1, the suit contract was entered into in between him and D.1 in the presence of 3 witnesses namely Ankamma, Venkatanarayana and D.2 himself who also signed the document. It was scribed by PW.3. Except for saying that Ex.A1 is a forged document, no substantial assertion is made by D.1 to deny the execution of Ex.A1. Since the evidence on record proved that Ex.A1 contains the thumb impression of D.1, it has to be held that the suit contract was entered into on the date, time and place and in the presence of people as claimed by the plaintiff. The learned trial Court has relied upon the evidence of D.W.3 as against that of PW.3 and held that Ex.A1 is a forged document. The said finding is not based on proper appreciation of the material on record.

34. In view of the foregoing discussion, it is held that the plaintiff proved that on 24-04-1974 Ex.A1 was executed by D.1 in the presence of D.2 and 2 others by receiving a part of consideration amounting to Rs.25,000/- as against the total consideration of Rs.32,000/- and agreed to execute the sale deed in favour of the plaintiff who was required to pay the balance amount of Rs.7,000/- within a fortnight thereafter namely by 05-05-1974. The point is accordingly answered.

35. **Point No.(ii):-** It is by now a well settled proposition that granting or refusing a decree for specific performance is in the discretion of the Court but

the discretion should not be refused arbitrarily and that the discretion should be exercised on sound principles of law. The party who seeks to avail the equitable jurisdiction of a Court and specific performance being equitable relief must come to the Court with clean hands. In other words, the party who makes false allegations would not entitle to the equitable relief. While exercising the said discretion, 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 but this discretion shall not be exercised in an arbitrary or unreasonable manner. If the terms of the contract are such that the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff so also the specific relief may not be granted if it is inequitable to do so. In adjudicating the rival claims, one cannot approach the matter exclusively bearing in mind the rights of the parties but must take into account the relative hardship in granting or refusing the relief prayed for.

36. In the above backdrop of the legal position, what is required to be seen is as to whether it is a fit case where the defendants can be directed to execute the sale deed in favour of the plaintiff by receiving the balance consideration of Rs.7,000/- together with interest thereon at 12% per annum from 05-05-1974 till the date of payment or whether it will be inequitable to direct the specific performance of the contract which took place on 24-04-1974.

37. The property covered by Ex.A1 is still in possession of the defendants. The plaintiff is therefore praying for recovery of possession as well. The defendants came in possession of the property through the process of law by executing the decree which D.1 obtained against D.4 in 1970 and 1973. The property originally belong to D.4 and D.1 purchased the same on two different occasions in the Court auction for Rs.8,600/- and Rs.8,300/-. The properties of D.4 was sold in order to satisfy the liability of D.4 against D.1 in respect of the maktha and *mesne profits* of the properties belonging to D.1 which was said to be in the enjoyment of D.4 prior to O.S.Nos.6 of 1956 and 71 of 1956 were decreed. The agreement of sale is dated 24-04-1974 and in respect of a residential house and also an extent of Ac.2-12 cents of land. However, the

plaintiff is claiming only Ac.1-66 cents. For the remaining Ac.0-46 cents of land, D.1 is not even the owner of the said land, even though it was made part of the contract Ex.A1. Ex.A1 acknowledges the receipt of Rs.25,000/- by D.1 from the plaintiff. Balance of Rs.7,000/- was payable within a fortnight thereafter and in default, that amount was agreed to be payable with interest at 12% per annum till payment. The agreement of sale is dated 24-04-1974 and the suit in hand came to be filed on 22-07-1976. The plaintiff has not specifically pleaded as to when he demanded the defendants to accept the balance consideration and execute the sale deeds. What is all that is averred in the plaint is that the plaintiff from the beginning has always been ready and willing to perform his part of the contract but it is the defendants that were putting it off on some pretext or the other. Even in the evidence of PW.1 what is all that is spoken to by PW.1 is that he demanded D.1 to execute the registered sale deed, that the 1<sup>st</sup> defendant did not execute the sale deed even though he is ready to pay the balance sale consideration of Rs.7,000/- and hence he filed the suit for specific performance of the contract. No specific evidence has been produced to show that for nearly two years in between the date of agreement and filing of the suit, there was any specific demand from the plaintiff calling upon the defendants to accept the balance consideration and execute the sale deed. Neither any oral nor any documentary evidence is produced in that direction. The suit of the plaintiff was dismissed by the trial Court on 31-12-1988. The property that has been purchased by D.1 in Court sale, in 1970 and 1973, was agreed to be sold to the plaintiff on 24-04-1974. At no point of time, the plaintiff is shown to have made any endeavour to pay the balance sale consideration of Rs.7,000/- out of the total consideration of Rs.32,000/-.

38. The original plaintiff, D.1, D.2 and D.4 who are the main contesting parties are all dead and their legal representatives came on record. The suit transaction is said to have taken place in pursuance to the compromise effected by the elders. Even according to the plaintiff, the properties which belong to D.4 were purchased by D.1 in Court auction in pursuance to a decree for realizing the maktha amounts and *mesne profits* in respect of the properties which originally belonged to D.1 but were in possession of D.4

during the course of previous round of litigation namely O.S.Nos.6/1956 and 71/1956. It is also the case of the plaintiff that even though D.1 purchased the schedule properties in Court auction, they were facing some difficulties in recovering possession. When the matter was placed before the elders, they have called for the plaintiff since he happened to be the brother-in-law of D.4. It appears that the decision that was taken before the elders was that if the properties that were purchased by D.1 in Court auction are to be allowed to be left to D.4, D.4 has to pay Rs.32,000/- to the 1<sup>st</sup> defendant. It is also the case of the plaintiff that since D.4 was not in a position to pay the said amount, the plaintiff has come forward to pay the same, keeping in view the interest of D.4 and his family, namely the sister of the plaintiff. Accordingly, on 24-04-1974, the plaintiff paid Rs.25,000/- to the 1<sup>st</sup> defendant and obtained Ex.A1. It is pertinent to mention here that in Ex.A1, at more than one place, it is mentioned as "STHIRASTHI VIKRAYA CONTRACT RASEEDU" (*receipt for contract for sale of immovable property*). The scribe who is examined as PW.2 in his evidence admits that in the suit agreement Ex.A1, it is original written as promissory note but that is struck off and that he cannot give the reason as to why that was struck off. Ex.A1 is not executed on a stamp paper. Underneath Ex.A1, there was 0.20 paise revenue stamp affixed. The cumulative effect of the above circumstances go to show that the intention of the parties was to execute a deed evidencing acknowledgment of the amount that was being paid by the plaintiff to D.1 for and on behalf of D.4 and therefore the necessary covenants that are usually found in agreement of sale are not mentioned. It is also mentioned in Ex.A1 that the balance amount of Rs.7,000/- should be paid by the plaintiff to D.1 within 15 days i.e., by 05-05-1974, failing which the said amount will carry interest at 12% per annum.

39. The plaintiff in his plaint has prayed for three reliefs. Firstly, he sought for specific performance of the contract directing the defendants to execute the sale deed; secondly, he sought for the relief of recovery of possession of the property covered there under; and alternatively, the plaintiff sought for refund of Rs.32,000/- with interest from the date of suit till realization as

damages. Taking into consideration the facts and circumstances of the case, I am of the opinion that it is a fit case where the alternative relief sought for by the plaintiff can be granted instead of the relief of specific performance of the contract. The point is accordingly answered.

40. In the result, the appeal is allowed in part. The Judgment and decree of the trial Court is set aside. The suit of the plaintiff i.e., O.S.No.33 of 1976 on the file of the Subordinate Judge, Chirala, stand decreed for a sum of Rs.32,000/- together with interest thereon at 12% per annum from the date of the suit till realization. The plaintiff is also entitled to the costs of the proceedings throughout.

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**M.S.K.Jaiswal, J**

Date: 31<sup>st</sup> December, 2014

smr

**HON'BLE SRI JUSTICE M.S.K.JAISWAL**

**A.S.No.965 of 1989**

**Dated: 31<sup>st</sup> December, 2014**

**Smr (pd)**