K. Nanjappa (D) By Lrs vs R.A. Hameed @ Ameersab (D)By Lrs. & Anr on 2 September, 2015

Equivalent citations: AIR 2015 SUPREME COURT 3389, 2015 AIR SCW 5172, 2015 (4) AIR KANT HCR 332, AIR 2015 SC (CIVIL) 2396, (2016) 2 MAD LW 673, (2016) 130 REVDEC 278, 2016 (1) SCC 762, (2016) 4 MAH LJ 1, (2015) 6 ANDHLD 41, (2015) 5 ALL WC 4942, (2015) 4 RECCIVR 259, (2015) 4 ICC 1040, (2016) 1 UC 481, (2015) 4 JLJR 167, (2015) 4 JCR 230 (SC), (2015) 2 CLR 749 (SC), (2015) 113 ALL LR 307, (2016) 2 CIVLJ 127, (2015) 3 ALL RENTCAS 284, (2015) 4 CIVILCOURTC 30, (2015) 6 MAD LJ 756, (2016) 3 MPLJ 1, (2015) 2 ORISSA LR 1084, (2015) 4 PAT LJR 278, (2015) 9 SCALE 457, (2016) 1 WLC(SC)CVL 143, (2015) 154 ALLINDCAS 27 (SC), (2015) 4 CURCC 144

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Bench: M.Y. Eqbal, C. Nagappan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8224 OF 2003

K. NANJAPPA (Dead) BY LRs. … APPELLANT(S)

VERSUS

R.A. HAMEED alias AMEERSAB (Dead)
BY LRs. AND ANOTHER … RESPONDENT(S)

JUDGMENT

M.Y. EQBAL, J.:

> Aggrieved by the judgment and orders dated 25.6.2003 passed by the High Court of Karnataka in Regular First Appeal No. 201 of 1992, the appellants have preferred this appeal by special leave. By impugned judgment, High Court partly allowed the appeal, set aside the judgment of the trial court and decreed the suit of the plaintiff-respondents herein for specific performance as well as for recovery of possession of suit items I, II and III.

2. The factual background as will appear from the trial court judgment need to be highlighted and reproduced hereunder.

3. The plaintiff-respondent claimed to be the son of Late P. Abdul Rahiman Sab alias Jambusab. The late Jambusab had three wives. The first wife's son was Abdul Sakoorsab, who died in the year 1967. The first plaintiff and his younger brother R.A. Rasheed are the children of Jambusab from his second wife Azizabi. Through the 3rd wife Mahajambi, Jamusab had begotten 4 children namely, A. Abdul Subhan, R. Abdul Majeed, Maqubal Jan and Aktharunnisa. The children of late Jambusab could not agree to divide the properties of late Jambusab. They litigated and ultimately in R.A. 133/49-50 on the file of the High Court, a final decree was passed and the properties described in the Schedule to the plaint fell to the joint share of the first plaintiff and his younger brother R.A. Rasheed. The date of the decree is 22.08.1950. The first plaintiff and his younger brother thus became the exclusive joint owners of the suit schedule property and from the date of the High Court decree namely 22.08.1950. The first item of the suit schedule which was designed as a Cinema building was leased jointly by the first plaintiff and his younger brother R.A. Rasheed to late N.K. Subbaiah Shetty and one Rattanhalli Ramappa jointly by means of a registered lease deed dated 26.02.1951 specifying therein a period of 15 years for the running of the lease. The said lease by the terms provided inter alia for a monthly rent of Rs. 400/- to be paid in equal halves to the first plaintiff and R.A. Rasheed. The lessees had to advance Rs.10,000/- which will be treated as a charge on item no. 1 of suit Schedule. All the equipments such as cinema projector, electric generator, furniture and other accessories were purchased by the said lessees which they had to provide under the contract and the theatre was equipped for showing films. It was also a term under the lease that these equipments projector, generator etc., should become the property of the first plaintiff and his brother R.A. Rasheed on the termination of the lease. While only Rs. 5,000/- was given as advance, the expenses of the balance of Rs. 5,000/- which was retained by N.K. Subbaiah Shetty and Rattanhalli Ramappa has been accounted for and thus only Rs. 5000/- is the actual amount of advance.

4. But, N.K. Subbaiah Shetty and his joint tenant Ratanhalli Ramappa who were astute businessmen found later 2 years that they could not manage the theatre property to earn profits. They both successfully induced the inexperienced 1st plaintiff to enter into a contract dated 05.08.1953 with them which ostensibly appear to be a sub-lease of their rights to the 1st plaintiff. Though the 1st plaintiff and his younger brother had become entitled to be rightfully to the equipments in the cinema theatre as per the terms of the lease date 26.02.1951, they were not even under any liability to pay the same on the termination of the lease. N.K. Subbaiah Shetty astutely got a provision made in the so-called sub-lease dated 05.08.1953 that he should get a rent of Rs. 250/- for himself which was in reality interest for sum of Rs. 5000/- given as advance, but which had been recovered by N.K. Subbaiah Shetty during the period the lease was subsisting in his favour. Besides nothing was due to be paid to N.K. Subbaiah Shetty as it was voluntary surrender to ease evidence by the so- called sub-lease. The return of Rs. 250/- per month which could only be demanded as interest on the sum of Rs. 5000/- advanced was usurious Loans Act in force in Mysore. The so called sub-lease dated 05.08.1953 was therefore illegal for want of consideration. Since Rs. 5000/- could not be claimed legally as it has been recovered and also the provisions for payment of Rs. 250/- P.M. to N.K. Subbaiah Shetty, being usurious interest was also not recoverable in law. The so called lease dated 05.08.1953 operated in Law only as a surrender of lease, as the fight of lessor as well as lessee became merged in the plaintiff who was a joint owner of item No. 1 of the suit schedule under Section 111(d) of the T.P. Act. He could not be deemed to be a lessee of his own building and the

sub-lease was void to the extent that it provided Rs.250/- to be paid as rent to N.K. Subbaiah Shetty, the possession which accrued to the plaintiff on the execution of the deed dated 05.08.1953 was, therefore, free from all liability to pay any amount to N.K. Subbaiah Shettty. R.A. Rasheed, the brother of the 1st Plaintiff executed a pronote dated 24.01.1953 benami in the name of C. Shambulingaiah the real beneficiary being the 1st defendant. The defendant filed a suit in O.S. 1/54 as Power of Attorney Holder of C.Shambhulingaiah against R.A. Rasheed in the then Court of Sub-Judge, Mandya and obtained ex parte decree and in Execution No. 38/54 got the undivided half share of R.A. Rasheed in the Suit schedule 1st item attached. Thereafter, in Ex. No. 5/56 the 1st defendant as Power of Attorney holder sued out further execution and brought to sale the half share of R.A. Rasheed and purchased the same in the name of C. Shambulingaiah in Court auction held on 12.07.1956, the bid amount being Rs. 8359.37. Though the half share itself was worth a lakh of rupees at lease R.A. Rasheed himself was kept in dark throughout as services of all the processes were made to appear, as though R.A. Rasheed had refused them. Again in the name of Shambulingaiah who was the brother-in-law of the 1st defendant delivery was sued out and since actual delivery could not be obtained of the undivided half share of R.A. Rasheed the 1st defendant maneuver to take symbolic delivery of the said half share on 02.04.1958 in Misc. 34/56. Thereafter, the first defendant arranged to get a sale deed executed by C. Shambulingaiah in the name of Amruthamma the 2nd defendant, wife of the 1st defendant. There was no consideration paid for this deed. It means the representative, a substitution of one benamidar for another, the motive being that the properties should remain with the 1st defendant in the name of his wife.

5. The first plaintiff had executed a demand pronote for Rs.1335/- dated 10.05.1952 in the name of one Krishna Shastry, who was also a benamidar for first defendant. It is learnt that a suit was got filed in O.S.449 of 1953 on the file of the Munisiff, Srirangapatna, and getting refusal endorsement made on the summon keeping this 1st plaintiff ignorant of the said proceedings. The first defendant got an ex-parte decree behind the back of the plaintiff. It is learnt that the said decree was got transferred to the name of 1st defendant and the 1st defendant sued out execution in Ex.No.217/61 on the file of the Munsiff, Srirangapatna and got attached the half share of the first plaintiff in the suit schedule items 1 to 3. Of course, all the processes of the Court were got done in secret by the 1st defendant who has vast experience in court work, and the 1st plaintiff was throughout ignorant of the same. After attachment, the first defendant induced N.K. Subramanya Shetty to lend his name, thus gave an assignment to the name of N.K. Subramanya Shetty with the conveyance of his brother N.K. Subbaiah Shetty of the decree in O.S.449/52. This again was maneuvered without any consideration to please the multi-millionaire N.K. Subbaiah Shetty, who himself was anxious to get a share in illegal gains. It is learnt that the 1st defendant, however, got a general power of attorney from N.K. Subbaiah Shetty and continued further execution proceedings suppressing the facts that only half the share of the first plaintiff at least worth Rs.1,50,000/- in items 1 to 3 could be brought to sale. The 1st defendant put up the entire schedule item for sale and bid at the court auction on 14.02.1962 for a paltry sum of Rs.325/-. Thus stabbing at the back of the 1st plaintiff and got the same confirmed on 06.04.1962. The sale and subsequent confirmation is vitiated and void as only half share was attached, but against the attachment itself the full properties including the properties which were not subject matter of the attachment were brought to sale and purchased.

6. Since the first defendant openly boasted that he had in reality become the owner of the entire properties of the first plaintiff, the first plaintiff made inquiries and came to know about the treacherous and illegal acts of the 1st defendant who through abuse of processes of court had maneuvered to get the sale held and confirmed including the half share of this first plaintiff, and the first plaintiff, therefore, got filed Misc.No.49 of 1962 to set aside the sale on the ground of fraud. There was protracted litigation which ended in a compromise petition dated 17.02.1966 being filed whereby the first plaintiff agreed to pay Rs.7000/- within three months from the date of compromise and if such payment was made within time the petition to stand allowed and in default the petition to stand dismissed. The first plaintiff thereafter paid the amount in 3 installments. The first installment being Rs.2000/-, in all Rs.7000/- within three months as per compromise petition, to the counsel for the first defendant. The first defendant has acknowledged the receipt of the above payments to his counsel in a letter dated 10.05.1966 written by him to the first plaintiff and again in another letter of first defendant to first plaintiff dated 31.07.1967. However, it is learnt that the first defendant treacherously kept quite without getting the payment in full reported to court with ulterior motives. Also, the first defendant who had got half the share of Abdul Rasheed conveyed benami to the name of his wife Amruthamma, the second defendant entered into an agreement with the first plaintiff's wife on 29.11.1965 executed by the 1st defendant as power of attorney holder of the 2nd defendant whereby he agreed to convey half the share of and another house which is described as 4th item in suit schedule for a sum of Rs.18,000/-. The consideration of Rs.18,000/- for this agreement has been paid by the first plaintiff on behalf of 2nd plaintiff as follows:-

(a) As per agreement dated 29.11.1965 as acknowledged therein Rs.8000/- has been paid to the 1st defendant.

(b) As per receipt dated 09.02.1966 executed by 1st defendant, Rs.5500/-

has been paid thus totalling Rs.13,500/- out of Rs.18,000/-.

7. Thereafter, the first defendant alleged to have executed a fresh agreement dated 02.09.1967 for himself and as power of attorney holder of both 2nd defendant and N.K. Subramanya Shetty, agreeing to convey by a separate sale deed also item 1 of suit schedule in full and also item 2 of suit schedule (house in Gowligara Street) and item 3 land, item 4 house for consideration of Rs.25,000/-which was fully paid as detailed below:-

(a) Rs.7000/- paid to 1st defendant as recounted in para-9 supra and acknowledged in letters dated 10.05.1966 and 31.07.1967 towards compromise petition in Misc.49 of 1962.

(b) Rs.4500/- paid before witnesses on 02.09.1967 when the agreement was executed.

(c) Rs. 8000/- paid to first Defendant as per agreement dated 29.11.1965.

(d) Rs.5500/- paid as per receipt dated 9.2.1966 wherein the amount of Rs.8000/- as per (a) above have also been acknowledged.

8. The first plaintiff allegedly running a cinema theatre item No.1 of the suit schedule all along, as he was in possession of the same ever since 01.08.1953. However, in the morning of 05.09.1967, the first plaintiff was surprised to find himself under arrest along with his sons and another Pasha, a relative, by the police authorities. It was learnt that the first defendant had lodged a complaint to the police that he had been dispossessed of item No.1 of suit schedule Cinema Building even though he had no possession. There were account books and other important papers and several materials forming part of the cinema building belonging to the first plaintiff and kept within the premises of item No.1 of the suit schedule. The first defendant with whom K.N. Subramanya Shetty and N.K. Subbaiah Shetty were in collusion with the help of police got the first plaintiff dislodged from item No.1 of suit schedule with the cinema equipment, furniture etc. The papers included among others receipt executed by defendant No.1 and N.K. Subbaiah Shetty for monies paid by the plaintiff from time to time and the accounts books contained entries in respect of this payment. The first and N.K. Subbaiah Shetty, thus, were successful in laying their hands on valuable evidence and it is believed that show of force by the police and subsequently dispossession of the first plaintiff from item No.1 maneuvered to get these valuable records into their custody for being hushed up. The police did not even get the mahazar written at the time of their forcible entry into item No.1. The complaint of the first defendant became subject matter in C.C. 1758/67 and C.C. 370/68 before the Special First Class Magistrate, Srirangapatna and in the said cases the plaintiff and other accused were also acquitted. The finding is that the so called delivery taken by the 1st defendant in the civil court is only a paper delivery and not amount to dispossession of the plaintiff of the first item of the suit schedule. The Magistrate also directed return of the key of the first theatre for the lock which had been kept by the police at the time of illegal seizure to the first plaintiff. This was symbolical delivery of the actual possession to which the 1st plaintiff was entitled in law. The 1st plaintiff has filed an application for actual possession being delivered in pursuance of the judgment before Special 1st Class Magistrate, Srirangapatna, which was pending. The plaintiffs have also included in this suit claim for damages, caused to them by illegal arrest and distraint of their articles and account books and papers and also mesne profit accruing due to dispossession which has occurred on 05.09.67. Since the defendant nos. 1 and 2 and N.K. Subramanya Shetty have failed to execute a sale deed in accordance with the terms of the agreement dated 02.09.67 entered into by the first defendant for himself and on behalf of defendant no.2 and N.K. Subramanya Shetty in respect of item No.1 of suit schedule, the suit was filed for specific performance of contract dated 02.09.67. As some of the documents have been produced by the first plaintiff in criminal cases before the Special 1st Class Magistrate, Srirangapatna, certified copies of the same were produced along with the original documents in the custody of the plaintiff with document list in triplicate for perusal of this Court. N.K. Subbaiah Shetty has been included so as to give a binding decree against him also.

9. The trial court formulated the following issues for determination:-

1) Whether the 1st defendant was the Power of Attorney Holder of the 2nd Defendant?

2) Whether the 1st defendant for himself and as Power of Attorney Holder of 2nd defendant executed an agreement of sale dated 2.9.1967 agreeing to convey the plaint schedule properties in favour of the plaintiff?

3) Whether under the said agreement the plaintiff paid the amount to the 1st defendant as mentioned in para 11(a) (b) (c) (d) of the plaint?

4) Whether the plaintiffs are entitled to the specific performance of the agreement of the sale and for possession of the schedule properties?

5) Whether the plaintiffs are entitled to Rs.93,600/- towards the mesne past profits?

6)(a) Whether the proceedings in Ex. No.217/61 and Misc. No.34/69 and orders thereon are fraudulent and without jurisdiction and as such they are void, illegal and wrongful as stated in para ¼ of the plaint?

(b) Whether the defendants are estopped in challenging the suit agreement dated 2.9.67 by their conduct for the reasons stated in para 16 of the plaint?

(c) Whether the plaintiffs prove that they are ready and willing to perform their part of contract of sale as per agreement dated 2.9.1967?

(7) Whether the defendants are entitled to compensatory costs under Section 35(a) of C.P.C.?

(8) To what reliefs are the parties entitled?

Issue No.1 has been answered in affirmative holding that defendant- appellant no.1 was the P.O.A. holder of his wife defendant no.2.

10. While deciding issue Nos. 2-4 together, the trial court came to the conclusion that the plaintiff-respondent failed to prove that the agreement of sale dated 2.9.1967 was executed by the defendants-appellants and, therefore, got entitled to the specific performance of agreement to sell. The reasoning given in deciding the issues inter alia are that the alleged agreement was executed in a quarter sheet of paper written in small letters. No reason has been attributed as to why a small piece of paper was used for writing the agreement ExP-1. The relevant portion of the finding arrived at by the trial court can be extracted hereunder :-

"If we carefully go through the document at Ex. P.4 it is clearly stated that the defendant 1 as the power of attorney of the 2nd defendant and Subramanya Shetty as executed Ex.P.1 in favour of the first and the 2nd plaintiff, after taking Rs.4,500/- this documents has been written on very old quarter sheet piece of paper which is written in very small letters. Ex.P.1 is not at all written in usual course. No reasons are assigned in the evidence of the PW.1,2 and 5 as to why a small piece of paper is

used for writing Ex.P.1. Ex.P.1 is written in a city like Mysore. It is not written in a remote small village, wherein the scarcity of paper can be expected. It is further pertinent to note here that the shop premises of the first defendant was situate admittedly in Santhepete which is very near to Devaraja Market and Srirampet, which are heart of business centers of Mysore. Further, Ex.P.1 is admitted written before Noon. ..... time P.W.1 has stated that between 9 a.m. to 1 p.m. he has written Ex.P.1. Further P.W.5 has stated by about 2-30 p.m. Ex. P.1 is written, P.W.2 has stated by about 12 noon Ex.P.1 is written, that means Ex.P.1 is written in a broad day light. If the handwriting contained in Ex.P.1 in small letters reduced to writing atleast the same will cover 2 full sheets of papers meaning thereby it may go to cover 4 pages of hill size papers. No reasons are assigned as to why Ex.P.1 is written in such a congested manner. Non availability of the paper to write Ex.P.1 cannot at all be expected nor anticipated in a city of Mysore, that too near the first defendants shop which is in the business centre of Mysore City. It is admitted by all the witnesses that there are several shops of stamps vendors and advocates offices. If that be the case, that would not have been any difficulty to secure the required paper to write Ex.P.1. Further, if we carefully go through the contents of Ex.P.1, it goes to show that all the suit properties are agreed to have been sold for Rs.25,000/- and the amount of Rs.20,500/- has been paid to the defendant earlier to 02-09-67. Further, it is also clear that the amount of Rs.4,500/- was also paid to the defendant 1. That means only the stamp papers to get the registered sale deed were required to be obtained. No reasons are assigned the any of the plaintiffs witnesses as to what was the difficulty in purchasing the stamp paper to execute the reg. Sale deed regarding the sale mentioned in Ex.P.1. It is not the case of the plaintiff, that they were unable to purchase required stamp papers on the date of Ex.P.1 due to paucity of the funds. If it was really a genuine sale or tried to be depicted before Court, definitely the reg. Sale deed itself would have been got executed since except appearing before the sub-registrar the first defendant is not required to do anything else but to sign the reg. Sale deed and if the sale was really a genuine sale nothing prevented the plaintiff to take the first defendant to the office of the Sub-Registrar and to get executed the reg. Document in the office of the concerned/Sub-registrar Pandavapura but no reasons assigned as to why the reg. Sale deed is not got executed from the 1st defendant who is admittedly the holder of the general power of attorney from the 1st defendant and Subramanya Shetty, who were the owners of the suit schedule properties on 02-09-67. Further, it is pertinent to note here that though it is mentioned in Ex.P.1 that the plaintiffs were required to make some arrangements regarding the amount to purchase the stamp papers and the registration fees etc. but none of the witnesses P.Ws. 1,2 and 5 speak about this aspect of the case."

11. On the question of payment of the consideration amount, the trial court gave finding against the respondents. Finally, the trial court held that since issue nos. 2 to 4 have been decided against the plaintiffs, the relief for specific performance cannot be granted.

12. High Court being the first appellate court, re-appreciated the evidence and came to the conclusion that the findings recorded by the trial court are perverse in law. The appellant court discussed the evidence of PW-1, the scribe of the document, who deposed that the agreement was written as per instructions given by appellant No.1 and the said document was signed by him. The appellate court further discussed the evidence of other PWs who have attested the document Ex.P1. The Appellate Court found that in a criminal proceeding between the parties, the witness gave evidence and produced the agreement Ex.P1 which was marked by the criminal Court as Ex.D.

13. The Appellate Court dealt with the relevancy of the evidence and the judgment recorded by the Criminal Court and held as under:

> "17. The conclusion drawn by the Criminal Court with regard to the document – Ex.P.1 in regard to its execution etc. are certainly relevant and it can be relied upon as a piece of evidence by the plaintiffs in support of their case. The observations made by the Criminal Court regarding execution of agreement – Ex.P.1 in its judgment – Ex. P.4 are certainly admissible U/s 13 of the Indian Evidence Act in support of the claim of the plaintiffs regarding execution of the document – Ex.P.1 by defendant No.1. Therefore, the Trial Court was not at all justified in ignoring such evidence on the ground that the judgment of the Criminal Court is not binding on the Civil Court. May be, that the judgment of the Criminal Court is not binding on the Civil Court. But, the observations made by a competent Court with reference to certain document would certainly be relevant even in a civil case, where the very same document was a subject matter of challenge.
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> 18. In the instant case, it is not in dispute that the very same document – Ex.P.1 was produced before the Criminal Court wherein, plaintiff No.1 was prosecuted on the charge of trespass and the Criminal Court having examined the said document has made certain observations with reference to such document and that being so, when the very same document sought to be questioned in a civil case, the observations by a Criminal Court will certainly have relevance. In fact, the learned counsel for the respondents had advanced a contention that this document was created/concocted for the purpose of defence in the criminal case. In view of such contention raised on behalf of the respondents, the observations made with reference to this document by the Criminal Court in its judgment – Ex. P.4 will certainly have relevance in the present case. The observations made by the Criminal Court in its judgment – Ex.P.4 regarding the execution of the document – Ex.P.1 lends credence to the evidence of PWs 1,2 & 5. There could be no serious dispute that the plaintiffs were the original owners of the suit properties and that the same were lost in a series of litigation and ultimately the said properties which were once lost to the plaintiffs were sought to be reconveyed to the plaintiffs by virtue of this agreement – Ex.P.1, executed in their favour by defendant No.1. Under the circumstances, there is no reason to disbelieve the execution of the document – Ex.P.1 in favour of plaintiffs. No doubt it was executed on a quarter sheet of paper and not on a proper stamp paper and that further the contents of the document – Ex.P.1 have been written in small letters. But

then it cannot be said, that is not a document. It has to point out that the document is defined under the Indian Evidence Act and it means, "any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter". A writing is a document, whether writing is made on a quarter sheet or paper or a full sheet, it is a document within the meaning of the Evidence Act and that merely because the writing is on a quarter sheet of paper, it does not cease to be a document. The only requirement is that the party relying upon a document must prove the same in accordance with law. The mode of proving the contents of a document has been dealt with, in Sections 61 to 66 of the Indian Evidence Act. The contents of a document may be proved either by the primary or secondary evidence. Primary evidence means, the document itself produced for the inspection of the Court. In the instant case, it is not in dispute that the original agreement itself was produced for the inspection of the Court as per Ex. P.1. The document in question being an agreement of sale or a reconveyance agreement, it does not require attestation. Section 67 of the Evidence Act refers to document other the document required by Law to be attested. It shows that the signature of the person alleged to have signed a document i.e. execution must be proved by the evidence with the signature purporting to be that of the executants is in his handwriting and the other matter in the document i.e. its body must also be proved by proof of handwriting of a person purporting to have written the document. In the instant case, the agreement – Ex.P.1 was stated to have been written by its scribe – PW.1 at the instructions of defendant No.1 and after the document was written, it was signed by defendant No.1. Therefore, what was required to be proved in the instant case by the plaintiffs to prove the execution of document – Ex.P.1 was that it contains the signature of defendant No.1."

14. On the issue of execution of the agreement, the Court came to the conclusion that there are consistent evidence of all the three witnesses that the agreement was executed by the 1st defendant. Accordingly, the appeal was allowed and the judgment of trial court was set aside.

15. Hence, this appeal by special leave by the legal representatives of defendant no.1.

16. Mr. K. Ramamurthy, learned senior counsel appearing for the appellant, assailed the impugned judgment passed by the High Court as being erroneous in law and suffers from serious mis-

appreciation of evidence. Learned Counsel, firstly, submitted that issue nos. 6(a) to 6(c) framed by the Trial Court relates to validity and effect of the orders passed in execution proceeding and miscellaneous proceeding. The Trial Court recorded the finding that in execution of decree in execution case no. 216 of 1961 the defendant-appellant was put in possession and objection raised by the plaintiff-

respondent herein were rejected. These findings of issue nos. 6(a) to 6(c) were not challenged in appeal before the High Court by the respondents. Further, the High Court held that findings of issue

nos. 6(a) to 6(c) need no interference. Having held so, the High Court ought not to have allowed the appeal and decreed the suit. Mr. Ramamurthy, learned senior counsel, submitted that although, the defendant-appellant denied and disputed the existence of agreement, but the High Court, on the basis of evidence recorded in a criminal proceeding decided the suit for specific performance. Learned senior counsel, therefore, submitted that, in the alleged agreement dated 02.09.1967, there is a reference of earlier agreement dated 29.11.1965, but the same was neither produced nor proved in the case which itself is sufficient to disentitle the plaintiff from seeking a decree for the specific performance. It was contended that although, the alleged agreement in question was executed in a quarter sheet of paper without affixing any stamp, but the High Court has erroneously relied upon the said agreement on the basis of the evidence given in the criminal case. Learned senior counsel further submitted that the High Court has committed grave error of law in applying the provisions of Section 13 of the Evidence Act. Learned senior counsel relied upon catena of decisions including decisions rendered by this Court in Anil Behari vs. Latika Bala Dassi & Others., AIR 1955 SC 566; Adi Pherozshah vs. H.M. Seervai, AIR 1971 SC 385; Shanti Kumar Panda vs. Shakuntala Devi, (2004) 1 SCC 438; and State of Bihar vs. Radha Krishna Singh & Others (1983) 3 SCC

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17. Mr. Basava Prabhu S. Patil, learned senior counsel appearing for the respondents, on the other hand, submitted that the only issue that was to be decided by the High Court was as to whether there was a binding agreement executed by the defendants-appellants. Learned senior counsel submitted that the High Court after considering the evidence of the scribe and other witnesses and also considering the evidence produced in a criminal proceeding and the finding recorded in the said proceeding has come to the right conclusion that the agreement was executed by the defendants. The High Court further came to the finding that payment of consideration amount to the defendants has been proved and that the signature on the agreement was admitted by Nanjappa, who was a signatory of the agreement. According to the learned senior counsel, the finding recorded by the High Court is based on appreciation of evidence and, therefore, such finding of fact needs no interference by this Court.

18. Before we express our view on the findings recorded by both the trial court and the High Court while passing a decree for specific performance, we would like to discuss first the settled proposition of law in this regard.

19. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. Lord Du Parcq in a case (AIR 1946 Privy Council) observed, while deciding a suit for specific performance, that an oral contract is valid, binding and enforceable. A decree for specific performance could be passed on the basis of oral agreement. This view of a Privy Council was followed by this Court in the case of Koillipara Sriramulu vs. T. Aswatha Narayana, AIR 1968 SC 1028, and held that an oral agreement with a reference to a future formal contract will not prevent a binding bargain between the parties.

20. However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immoveable property on the basis of an oral agreement or a written contract,

heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immoveable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immoveable property were concluded between the parties.

21. In a suit for specific performance of a contract, the Court has to keep in mind Section 20 of the Specific Reliefs Act. This Section preserves judicial discretion to grant decree for Specific performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

22. In the case of Surya Narain Upadhyaya vs. Ram Roop Pandey and others, 1995 Supp (4) SCC 542, this Court while considering Section 20 of the Specific Relief Act held as under:-

> "4. Though the decree for specific performance is a discretionary power, yet the court is not bound to grant such a 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 of law and capable of correction by a court of appeal. Therefore, the discretion should be properly exercised keeping in view the settled principles of law as envisaged in Section 20 of the Act. This case demonstrates that the High Court took irrelevant consideration into account to refuse to grant the decree for specific performance. It also committed manifest illegality in reversing the concurrent finding of facts recorded by the trial court as well as the first appellant court, namely the appellant has always been ready and willing to perform his part of the contract."

23. It is equally well settled that relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonably judicial principles. The cases providing for a guide to courts to exercise discretion one way or other are only illustrative, they are not intended to be exhaustive, In England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions.

24. In the case of Mayawanti vs. Kaushalya Devi, (1990) 3 SCC 1, this Court observed as under:-

> "8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of

specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

25. In the case of K. Prakash vs. B.R. Sampath Kumar, (2015) 1 SCC 597, this Court held:

"13. Indisputably, remedy for specific performance is an equitable remedy. The court while granting relief for specific performance exercises discretionary jurisdiction. Section 20 of the Act specifically provides that the court's jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

14. The King's Bench in Rooke's case said:

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others, allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with."

15. The Court of Chancery in Attorney General v. Wheate followed Rooke's case and observed: (ER p. 666) "... the law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And though proceedings in equity are said to be secundum discretionem boni viri, yet, when it is asked, vir bonus est quis? The answer is, qui consulta patrum, qui leges juraque servat. And as it is said in Rooke's case, that discretion is a science not to act arbitrarily according to men's wills and private affections; so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigour of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this, nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every Judge."

> 16. The principle which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists upon a condition precedent to the grant of decree for specific performance: that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing. Normally, when the trial court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree are established then the court has to exercise its discretion in favour of granting relief for specific performance."

26. Reference may also be made by this Court in the case of Zarina Siddiqui vs. A. Ramalingam, 2015 (1) SCC 705, this Court observed as under:-

> "33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance."

27. In the light of the principles laid down by this Court in the number of decisions referred hereinabove, we have to consider as to whether the decision arrived at by the High Court can be sustained in law.

28. In the instant case while deciding the issue as to whether the agreement of 1967, allegedly executed by the defendants, can be enforced, the Court had to consider various discrepancies and series of legal proceedings before the agreement alleged to have been executed. In the agreement dated 2.9.1967, there is reference of earlier agreement dated 29.11.1965 where under Rs. 18,000/- was paid to the defendant-appellant which was denied and disputed. Curiously enough that agreement dated 29.11.1965 was neither filed nor exhibited to substantiate the case of the plaintiff. The High Court put reliance on the agreement dated 2.9.1967 written in a quarter sheet of paper merely because of the fact that said quarter sheet of paper was produced before the Magistrate in a criminal proceeding. In our view, the High Court is not correct in holding that there is no reason to disbelieve the execution of the document although it was executed on a quarter sheet of paper and not on a proper stamp and also written in a small letter. The High Court also misdirected itself in law in holding that there was no need of the plaintiff to have sought for the opinion of an expert regarding the execution of the document.

29. Indisputably, various documents including order-sheets in the earlier proceedings including execution case were filed to nullify the claim of the plaintiff regarding possession of the suit property but these documents have not been considered by the High Court. In our considered opinion the evidence and the finding recorded by the criminal courts in a criminal proceeding cannot be the conclusive proof of existence of any fact, particularly, the existence of agreement to grant a decree for specific performance without independent finding recorded by the Civil Court.

30. After examining the entire facts of the case and the evidence produced on record, we are of the definite opinion that it is not a fit case where the discretionary relief for specific performance is to be granted in favour of the plaintiff-respondent. The High Court in the impugned judgment has failed to consider the scope of Section 20 of the Specific Relief Act and the law laid down by this Court.

31. For all these reasons, this appeal is allowed and the impugned judgment passed by the High Court is set aside. Consequently, the judgment of the learned trial court is restored. Hence, the suit is liable to be dismissed.

.....J. (M.Y. Eqbal) .....J. (C. Nagappan) New Delhi September 02, 2015
