

Sri.Kiran Kumar.T vs Smt.Venkatamma on 16 June, 2015

IN THE COURT OF THE XIX ADDL. CITY CIVIL &
SESSIONS JUDGE AT BANGALORE CITY:
(CCH.18)

Dated this 16th day of June, 2015.

Present
SMT.K.B.GEETHA, M.A., LL.B.,
XIX ADDL. CITY CIVIL & SESSIONS JUDGE,
BANGALORE CITY.

O.S.NO.7999/2013

PLAINTIFF : Sri.Kiran Kumar.T,
Aged about 30 years,
s/o Sri.H.Thippa Reddy,
r/at No.466, Rajapalya,
Hoody, ITPL Main Road,
Mahadevapura Post,
Bangalore East Taluk.
(By Sri N.Satish,Advocate)
-VS-

DEFENDANTS : 1. Smt.Venkatamma,
Aged about 57 years,
w/o late Munivenkatappa.
2. Sri.M.Srinivas,
Aged about 42 years,
s/o late Munivenkatappa.
3. Sri.M.Narayan,
Aged about 38 years,
s/o late Munivenkatappa.

All r/at No.285,
"Om Nilaya", 2nd Main,
4th Cross, Nallurahalli Village,
Whitefield Post,
Bangalore East Taluk,
Bangalore-560 066.
(D.1 to D.3 - By Sri.N.K.K. Advocate)

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O.S.No.7999/2013

Date of Institution of the suit : 31/10/2013

Nature of the Suit : Recovery of money.

Date of commencement of
recording of evidence : 12/6/2014

Date on which the
Judgment was pronounced : 16/6/2015

	Year/s	Month/s	Day/s
Total Duration :	01	07	15

JUDGMENT

The plaintiff has filed this suit for recovery of Rs.38,31,391/- with current and future interest at 18% p.a. from defendants; and for court costs.

2. The case of plaintiff in nutshell is that plaintiff entered into an oral agreement with 1st defendant to purchase the property bearing No.65/8B measuring 7 guntas at Nellurahalli Village, Krishnarajapura Hobli, Bangalore East Taluk on 29/11/2012 and gave cheque bearing No.342997 dtd:23/11/2012 drawn on State Bank of Mysore, Marathahalli Branch, Bangalore for 10% of sale consideration amount i.e., Rs.13,40,250/-. On 3/12/2012 Memorandum of Understanding was entered between plaintiff and 1st defendant who purchased the said property, but it was dtd:29/11/2012 because, the oral agreement was finalized on that date. The total sale consideration amount was fixed at Rs.1,33,40,250/-. The balance sale consideration was to be paid only after decree of O.S.No.1286/2009 on the file of FTC-IV, Bangalore Rural District. The plaintiff further contended that 1st defendant represented that she is not the owner of the property, but she had agreement of sale with Smt.Gowramma who is the absolute owner of the above said property and in that regard O.S.No.1286/2009 was filed and that she herself would conduct the case. Her 2 sons i.e., defendant Nos.2 and 3 have also guaranteed the statement in the agreement referred above and guaranteed the sale of the property to plaintiff subject to 1st defendant succeeding the suit filed by her. They have also represented that Smt.Gowramma is the absolute owner of said property and there was agreements between her and 1st defendant on 19/2/1994. They have also told that in continuation of the said agreement, supplementary agreements dtd:1/10/1994 and 10/7/2002 were entered between 1st defendant and Gowramma and also on 23/9/2008 registered agreement was executed in favour of 1st defendant by said Smt.Gowramma. They also represented that as Smt.Gowramma has not executed the sale deed, they have filed O.S.No.1286/2009 for specific performance of agreement and obtained temporary injunction restraining said Smt.Gowramma from alienating the said property. They told that they are interested to sell the property. The plaintiff has immovable property just opposite to this property and it is convenient to him and hence, he entered into Memorandum of Understanding with defendant No.1. According to this Memorandum of Understanding, no further payment was to be made by plaintiff till completion of O.S.No.1286/2009. However, on 7/2/2013 defendants represented that 1st defendant had already finalized compromise with Gowramma and to facilitate the same, they require Rs.20,00,000/-. Believing the representation and inducement of defendants, plaintiff made further part payment of Rs.20,00,000/- through cheque bearing No.999227 dtd:7/2/2013 drawn on SBM, Marathahalli Branch, Bangalore in favour of 1st defendant and it was encashed. After receiving said cheque, 1st defendant made endorsement on Memorandum of Understanding and defendant Nos.2 and 3 signed as witnesses to said endorsement. Recently on 22/7/2013, plaintiff came to know that said Smt.Gowramma had already sold the property on 12/1/2007 to third parties and defendants knew

the same. Only to cheat the plaintiff, 1st defendant entered into Memorandum of Understanding with plaintiff and falsely represented that Gowramma would ready for compromise and took further amount from plaintiff by playing fraud and giving false information to plaintiff. The plaintiff has given police complaint on 22/7/2013 and a case was registered in Crime No.195/2013 alleging offences punishable under Section 406, 420 and 149 of IPC against defendants and others. In Memorandum of Understanding, no interest clause was introduced, but at that time, the litigation was not known. Now, plaintiff found that much earlier, property had been sold by Gowramma and false representation was made that she would compromise and consent for a decree and thus, the amount paid to defendant No.1 is to be returned with interest. The plaintiff through out was ready and willing to perform his part of contract and to pay balance sale consideration to get the sale deed registered. In view of subsequent development of plaintiff coming to know of suppression of material information, he files the present suit. The plaintiff demanded the defendants to return the amount with interest at 18% p.a. But they are evading to return the money. Hence, the suit for appropriate reliefs.

3. The defendant No.1 filed her written statement wherein, she admits the execution of Memorandum of Understanding dtd:29/11/2012, payment of Rs.13,40,245/-. She also admits about her agreements with Smt.Gowramma and filing of O.S.No.1286/2009 by her against Smt.Gowramma for specific performance of registered agreement dtd:23/9/2008. However, she denied the receipt of Rs.20,00,000/- through cheque from plaintiff towards further advance amount of Memorandum of Understanding and endorsement made in the Memorandum of Understanding. The defendant No.1 further contended that the suit filed by plaintiff is not maintainable either in law or on facts. It is an abuse of process of court with an intention to harass her. There is no cause of action for the suit and the cause of action mentioned in the plaint is false and imaginary. The conduct of plaintiff in filing this suit is wholly misconceived, speculative and lacks bonafides. The frame of suit is not in conformity with Order II Rule 2 of CPC. The 1st defendant has no intention to enter into any kind of Memorandum of Understanding. However, plaintiff pestered the 1st defendant to enter into Memorandum of Understanding. The agreement of 1st defendant with Smt.Gowramma, filing of suit, pendency of suit against Smt.Gowramma are all clearly mentioned in the Memorandum of Understanding itself. The 1st defendant has paid the entire sale consideration amount of Rs.12,25,000/- to Smt.Gowramma, but she refused to execute the registered sale deed and thus, without any alternative, 1st defendant filed suit against Smt.Gowramma before I Additional Senior Civil Judge, Bangalore, and it was transferred to FTC Court. The 1st defendant also obtained temporary injunction against Smt.Gowramma from alienating the property in question. In the written statement of O.S.No.1286/2009, Smt.Gowramma contended that fraud played against her by Byas Nambishan and Unnikrishnan Nambishan who had taken her signatures on certain blank papers during 1995 stating that they would got convert the property and develop it as apartment on certain blank papers and thereafter, fraudulently misused those papers and created sale deed dtd:12/1/2007 in favour of one Ramani Mohan. Only after filing such written statement by Smt.Gowramma in said suit, 1st defendant came to know about the fraud played by said Smt.Gowramma. Hence, 1st defendant filed impleading application on 19/11/2011 to implead said M.R.Unnikrishnan Nambisan, Venkataram Iyer, Mrs.Sushila Ramachandra, Smt.S.Brindha and Smt.Ramani Mohan as necessary parties in O.S.No.1286/2009. In the meanwhile, 1st defendant came to know that said M.R.Unnikrishnan Nambisan and Venaktarm Iyer

are dead. Hence, she filed memo dtd:29/9/2011 to delete their names and filed fresh impleading application against the alleged power of attorney holders and subsequent purchasers. The said application was rejected on 14/3/2012 in said suit. 1st defendant filed review application on 2/4/2012 and it was also rejected on 28/9/2013 against which writ petition is to be filed and said suit is still pending for adjudication. The plaintiff requested to execute the Memorandum of Understanding only to have pre-emptive right over the property because he is residing just opposite to said property. Till disposal of O.S.No.1286/2009, there is no question of enforcement of Memorandum of Understanding and temporary injunction order is in force in said suit. The plaintiff in collusion with Smt.Gowramma, alleged purchaser-Smt.Ramani Mohan tried to register the property in his name. When 1st defendant came to know about it, she opposed it. Thus, plaintiff failed in his said attempt, has filed false complaint against defendant Nos.1 to 3. In the said complaint, plaintiff admitted that he had trespassed in to the property on 10/4/2013 which is absolutely in violation and contrary to clause 11 and 12 of the Memorandum of Understanding. He is unauthorizedly, illegally trespassed into the property and thus, 1st defendant had lodged complaint on 7/8/2013 and it was registered in FIR No.210/2013. The jurisdictional police failed to receive the complaint. Hence, 1st defendant directly filed it before D.G. and IGP, Bangalore, ADGP, Bangalore, Karnataka State Schedule Caste and Schedule Tribe Commission, Karnataka State Human Commission, Karnataka State Human Rights Commission, Commissioner of Police, Deputy Commissioner of Police, Inspector of Police on 7/8/2013 and then, it was registered on 12/8/2013. The endorsement on Memorandum of Understanding is forged containing fake signature of 1st defendant and witnesses. After 29/11/2012, no further transaction took place pertaining to said Memorandum of Understanding pertaining to plaintiff and defendant No.1. 2nd defendant's signature appeared on last page of Memorandum of Understanding as witness, but it is concocted entry. The suit is misconceived, vexatious, speculative, false and not maintainable. Hence, prayed for dismissal of suit with exemplary costs.

4. The 2nd defendant filed his written statement separately, wherein he also contended that suit is not maintainable. He contended that he does not aware about the alleged Memorandum of Understanding and not participated in said Memorandum of Understanding transaction with plaintiff by 1st defendant. He contended that he does not know anything about the contents of said Memorandum of Understanding or other pleadings in the plaint. He contended that he never stood as guarantor to the money mentioned in the plaint and thus, suit against him is not maintainable. He contended that his alleged signature on the back side of last page of Memorandum of Understanding is absolutely fraudulent one and it is not his signature and it is forged one. Hence, prayed for dismissal of suit with exemplary costs.

5. The defendant No.3 filed his written statement separately but taken the same contention taken by 1st defendant. He further contended that he was present during negotiations along with 1st defendant and signed as witness to Memorandum of Understanding on 29/11/2012 but, not to alleged endorsement dtd:7/2/2013. He denied the contention that he stood as guarantor for enforcement of Memorandum of Understanding dtd:29/11/2012. He contended that his alleged signature in endorsement on back side of Memorandum of Understanding is not his signature and it is forged one. He further contended that the cheque bearing No.999227 dtd:7/2/2013 drawn on SBM, Marathahalli Branch, Bangalore for Rs.20,00,000/- was paid by one H.Thippareddy in favour

of 1st defendant in a separate transaction between said H.Thippareddy and 1st defendant, and said amount was not paid towards further payment of transaction entered between plaintiff and 1st defendant. The defendant Nos.1 and 3 have money- lending transaction with H.Thippareddy and H.Thippareddy had paid the said amount through cheque in favour of 1st defendant and 1st defendant encashed it. There is no endorsement in the duplicate copy of Memorandum of Understanding dtd:29/11/2012 retained by 1st defendant. The plaintiff deceived defendant and committed an act of cheating, fraud and forgery. The plaintiff after verifying the plaint, written statement, impleading application filed by 1st defendant to implead subsequent purchasers in O.S.No.1286/2009, entered into Memorandum of Understanding with 1st defendant and thus, there is no question of cheating plaintiff by defendant. The complaint filed by plaintiff is a colorable action in collusion with jurisdictional police. The complaint filed by defendants was not considered and the same police have given 'B' Report. He further contended that defendants have never intended to compromise with said Smt.Gowramma. 1st defendant had issued legal notice dtd: 22/10/2008 calling upon Smt.Gowramma to execute the sale deed and on 10/11/2008, Gowramma had given reply admitting the contents of notice and also receipt of advance amount of Rs.11,25,000/- and requested 1st defendant to pay the balance sale consideration of Rs.1,00,000/- within 15 days and accordingly, on 10/11/2008 1st defendant has paid said Rs.1,00,000/- to Smt.Gowramma through account payee cheque. Hence, prayed for dismissal of suit with exemplary costs.

6. From the above facts, the following issues were framed:-

ISSUES

1. Whether the plaintiff proves that the defendant No.1 had entered into oral agreement and executed MOU on 29/11/2012 with her to sell Sy.No.65/8B measuring 7 guntas of Nellurahalli Village, Krishnarajapura Hobli, Bangalore East Taluk, Bangalore for Rs.1,33,40,250/- and received earnest money of Rs.13,40,250/-

by means of cheque drawn on SBM dtd:

23/11/2012? (Deleted as per Order
dtd:28/4/2015)

2. Whether the plaintiff further proves that defendant No.1 again received Rs.20 Lakhs by means of cheque bearing No.999227 dt:7/2/2013 drawn on SBM, Marathahalli Branch, Bangalore?

3. Whether the plaintiff further proves that the said land agreed to be sold by defendant No.1 was already sold by Smt.Gowramma on 12/01/2007 and therefore, he requested defendant to refund the earnest money of Rs.33,42,250/- received by her and defendant No.1 did not repay the same?

4. Whether the plaintiff is entitle for the earnest money of Rs.33,42,250/- and interest on Rs.13,40,250/- from 23/11/2012 till the date of filing the suit to the tune of Rs.2,21,141/- and interest on Rs.20 Lakhs from 7/2/2013 till the date of filing the suit to the tune of Rs.2,70,000/-

totally to the tune of Rs.38,31,390/-?

5. Whether plaintiff is entitle for suit claim amount with interest due thereon?
6. Whether defendant proves that the suit of the plaintiff is not in conformity with the Order 2 Rule 2 CPC as contended in para No.2 of the written statement?
7. Whether defendant further proves that the suit of the plaintiff is premature since O.S.No.1286/2009 filed by Smt.Venkatamma has not been disposed of?
8. What Order or Decree?

ADDITIONAL ISSUES:-

1. Whether the plaintiff further proves that he had paid Rs.20 Lakhs to defendant No.1 on 7/2/2013 towards further advance?
2. Whether defendant No.1 to 3 proves that their signatures on endorsement dtd:06/02/2013 in Memorandum of Understanding are forged?
3. Whether defendant No.1 to 3 proves that suit is not maintainable in law as per their pleadings in para No.1 of their respective written statements?
7. On behalf of Plaintiff, power of attorney holder of plaintiff is examined as P.W.1, got marked Ex.P.1 to Ex.P.10 and closed his side. On behalf of defendants, defendant No.3 is examined as DW-1, defendant No.2 is examined as DW-2, examined 2 other witnesses as DW-3 & 4, got marked Ex.D.1 to Ex.D.23 and closed their side.
8. Heard arguments of both sides.
9. Findings of this court on the above issues are:-

Issue No.1:- Deleted as per Order dtd:28/4/2015 Issue No.2:- In Affirmative;

Issue No.3:- Partly in Affirmative;

Issue No.4:- In Negative;

Issue No.5:- In Negative;

Issue No.6:- In Negative;

Issue No.7:- In Affirmative;

Addl.Issue No.1:- In Affirmative;

Recasted Addl.Issue No.2:- In Negative;

Recasted Addl.Issue No.3:- In Affirmative;

Issue No.8:- As per the final order for the following:-

REASONS ISSUE Nos.2, 3, ADDITIONAL ISSUE No.1 & RECASTED ADDITIONAL ISSUE No.2

10. These issues are considered together as they require common discussion.

11. The admitted facts of the case are that first defendant is the mother and defendant No.2 & 3 are her sons. It is also an admitted fact that property bearing Sy.No.65/8B measuring 7 guntas situated at Nallurahalli Village, Krishnarajapura Hobli, Bangalore East Taluk belongs to one Smt.Gowramma. The 1st defendant is the mother of defendant Nos.2 and 3.

The 1st defendant entered into an agreement of sale dtd:19/2/1994 with said Gowramma to purchase said property for a sum of Rs.75,000/-; subsequently said agreement was renewed and supplementary agreement dtd:1/10/1998 for a sum of Rs.1,50,000/- was executed by said Gowramma in favour of 1st defendant; subsequently, these 2 agreements are renewed and 1st defendant executed 3rd agreement of sale on 10/7/2002 for a sum of Rs.3,50,000/-. Subsequently on 23/9/2008, said Gowramma executed registered agreement of sale in favour of 1st defendant for a sum of Rs.12,25,000/- and in all, totally received Rs.11,25,000/- under the said agreements. Even after execution of all these 4 agreements, Gowramma failed to execute the registered sale deed in favour of 1st defendant. Hence, 1st defendant filed O.S.No.1286/2009 on the file of Senior Civil Judge, Bangalore Rural District, Bangalore for specific performance of the registered agreement of sale dtd:23.09.08. She has also obtained temporary injunction in the said suit restraining said Gowramma from alienating or creating encumbrance on said property.

12. It is also an admitted fact that during pendency of said O.S.No.1286/2009, plaintiff and 1st defendant entered into Memorandum of Understanding (MOU) dtd:29/11/2012 wherein, 1st defendant agreed to execute the registered sale deed in favour of plaintiff for a sum of Rs.1,33,40,250/- in case she succeeds in O.S.No.1286/2009 or it was decreed in her favour. It is also admitted that under said memorandum of understanding, the advance amount of Rs.13,40,250/- i.e., 10% of the sale consideration amount was received by first defendant.

13. The plaintiff contended that 1st defendant approached plaintiff to purchase the property and as it was situated opposite to his residence and as it is convenient for him, he agreed to purchase. However, 1st defendant took specific contention in the written statement that it is plaintiff who approached her. In the Memorandum of Understanding produced by plaintiff as per Ex.P.8, it is specifically narrated at page No.3 as under:-

"The Second Party (plaintiff) has immovable property opposite to the schedule property and found the locality and convenience, the Second Party approached the First Party (1st defendant) for purchase of the schedule property".

14. The above recitals in Ex.P.8 clearly establish that it is plaintiff who approached 1st defendant and not 1st defendant as alleged in the plaint.

15. The plaintiff further pleaded in plaint para No.6 that according to Memorandum of Understanding, no further payment was required to be made till completion of O.S.No.1286/2009.

16. Plaintiff further contended that on 7/2/2013 the defendants represented that the 1st defendant has already finalized compromise of the suit with Smt.Gowramma and that Smt.Gowramma would come, compromise and consent for a decree and then 1st defendant would execute the sale deed in favour of the plaintiff and to facilitate the same, the defendants wanted Rs.20,00,000/-. Believing the said representation and inducement made by defendants, the plaintiff paid further part payment of sale consideration of Rs.20,00,000/- vide cheque bearing No.999227 dtd:7/2/2013 drawn on SBM, Marathahalli Branch, Bangalore, in favour of 1st defendant and it was encashed.

17. In the plaint or in the evidence of GPA Holder of plaintiff, it is not stated that said cheque was not issued from plaintiff's account, but it is paid from the account of one H.Thippareddy. Only in the cross- examination of PW-1, it is elicited that the cheque in question belongs to one H.Thippareddy. Said H.Thippareddy is the father of plaintiff and it is also elicited in the cross-examination of P.W.1.

18. In the written statement, defendant No.1 denied the entire contentions made in para 6 of the plaint. Except making denial of averments made in para 6 stating that the allegations made in Para 6 of the plaint are false and are hereby denied and plaintiff be put to strict proof of the same and only denied the contention of plaintiff regarding receipt of Rs.20,00,000/- from plaintiff on 7.2.13; 1st defendant has not taken specific contention pertaining to this allegation of issuance of cheque for Rs.20,00,000/- drawn on SBM, Marathahalli Branch, Bangalore dtd:7/2/2013. The 1st defendant has not stated that this cheque was encashed pertaining to some other transactions between her and H.Thippareddy. But it is only 3rd defendant who had taken such contention in his written statement that this cheque bearing No.999227dtd: 7/2/2013 drawn for Rs.20,00,000/- was paid by H.Thippareddy in favour of 1st defendant in a separate transaction between them and it is not pertaining to the suit transaction.

19. PW-1 has produced the bank account extract as per Ex.P.4 of H.Thippareddy, which reveals that said cheque was encashed on 8/2/2013 and Rs.20,00,000/- was debited from his account to first defendant's account. The 1st defendant has not come forward to the court to enter into witness box and has not denied the receipt of this Rs.20,00,000/-.

20. The pleading of defendant No.3 coupled with Ex.P.4 and non-appearance of defendant No.1 clearly establish that the cheque bearing No.999277 for Rs.20,00,000/- was encashed by 1st defendant.

21. The plaintiff specifically contended that issuance of the above said cheque is pertaining to suit transaction and 1st defendant has made endorsement on Ex.P.8 - MOU in this regard. The defendants strongly denied this fact. But as already discussed above, encashment of cheque for Rs.20,00,000/- issued by father of plaintiff in favour of defendants is also proved. Hence, it is the burden of 1st defendant to establish that there is separate transaction between her and father of plaintiff- H.Thippareddy; and said encashment is not pertaining to suit transaction; but there was separate transaction between 1st defendant and father of plaintiff. However, as already discussed above, 1st defendant has not taken such contention in her written statement.

22. In this regard, the plaintiff's counsel relied on the decision reported in AIR 1989 SC 1242 in "Ram Sarup Gupta (Dead) by LRs v/s Bishun Narain Inter College and Others", wherein, it is held as under:-

"The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise."

23. The plaintiff's counsel further relied on the citation reported in 2008(3) Bom CR 553 in "Central Bank of India, a Body Corporate constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act V of 1970 v/s The Sion Bakers and Confectioners Private Ltd. a Company incorporated under the Companies Act, 1956, T.N.M.Arunachalam, Keki S. Siganpuria and Taj Mohamed Rahimbux", wherein, their Lordship held as under:-

"24. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the advisory party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise."

24. The learned counsel for plaintiff further relied on the decision reported in AIR 2011 SC 1989 in "State of Madhya Pradesh v/s Narmada Bachao Andolan and another", wherein, their Lordships held as under:-

"Civil - Maintainability of Proceedings

- Improper pleadings - Held, it is a settled proposition of law that a party has to plead its case and produce/adduce sufficient evidence to substantiate the averments made in the petition and in case the pleadings are not complete the Court is under no obligation to entertain the pleas - In the instant case, in the writ petition, an impression was given that some drastic steps would be taken by the authorities which would cause great hardship to a large number of persons - However, the writ petition did not disclose the factum of how many persons had already vacated their houses and handed over the possession of their land -There were no pleadings before the High Court on the basis of which the writ petition could be entertained/decided. Thus, it was liable to be rejected at the threshold for the reason that the writ petition suffered for want of proper pleadings and material to substantiate the averments/allegations contained therein. Even in the case of a PIL, such a course could not be available to the writ petitioners."

25. In all the above said citations, their Lordships clearly held that when there is no specific pleading, any the amount of evidence on it, it cannot be looked into.

26. In the instant case also, as discussed above, 1st defendant has not taken any specific contention regarding lending of amount by her to H.Thippareddy. Hence, the above pleading and evidence of defendant No.3 in the absence of pleading by 1st defendant cannot be looked in to.

27. Even then, 3rd defendant has taken said contention who is none other than son of 1st defendant. To substantiate said contention, he himself examined as D.W.1 and examined DW-3 & 4, the witnesses for alleged money lent by 1st defendant to father of plaintiff H.Thippareddy.

28. In the written statement, defendant No.3 contended that 1st defendant and 3rd defendant had money-lending transaction with H.Thippareddy and H.Thippareddy has paid the said amount through cheque in favour of 1st defendant and 1st defendant presented it and encashed it. However, he has not mentioned that what was the money-lending transaction between them and H.Thippareddy; who paid Rs.20,00,000/- to whom on which date and for which purpose. Hence, this pleading is too vague. In this regard in his affidavit evidence, this defendant No.3 who is examined as DW-1 has stated in para No.6 that on 7/12/2012 H.Thippareddy borrowed Rs.20,00,000/- from his mother in presence of attesting witness Munirathnamma and Shobha and executed cash receipt agreeing to repay the said amount within 2 months with interest at 18% p.a. He further contended that said cash receipt was with his mother up to 7/2/2013 and on that day, H.Thippareddy repaid the said amount and his mother returned the cash receipt to H.Thippareddy.

29. Defendant No.3 has also examined DW-3 and 4 said to be attestors to said cash receipt. As original cash receipt was not available with defendants, neither DW-1 nor DWs.3 and 4 identifies said document. In the affidavit evidence, DWs.3 and 4 stated that in their presence H.Thippareddy borrowed Rs.20,00,000/- from 1st defendant and then 1st defendant, H.Thippareddy and they signed the cash receipt. They further stated that during January 2013, H.Thippareddy paid cash of Rs.30,000/- towards interest and also on 7/2/2013 paid Rs.30,000/- towards interest for the month of February 2013 and repaid the principal amount on 7/2/2013.

30. In the cross-examination, DW-3 has deposed that she has not gone to anybody and told that whatever written in her affidavit evidence are true and she puts signature to said affidavit when 1st defendant was paying money to H.Thippareddy. This shows that D.W.3 does not know anything about the recitals of her affidavit evidence.

31. DW-4 who is cross-examined subsequent to cross-examination of DW-3, has deposed that she told before Notary that whatever written in her affidavit evidence is true and puts her signature before him. She also denied the suggestion regarding issuance of cheque by H.Thippareddy and loan to H.Thippareddy and also payment of cash of Rs.30,000/- twice to 1st defendant by H.Thippareddy.

32. After examining these witnesses, defendants' counsel has taken steps to H.Thippareddy to produce the cash receipt. However, said H.Thippareddy through PW-1 files memo stating that there was no transaction of whatsoever between him and 1st defendant and he never received any amount from 1st defendant. He has stated that he is aged about 75 years and unable to move around and come to the court, consequently, he authorized Chetan Kumar on his behalf that the document which is summoned does not exist and he does not possess any such alleged document and thus, he cannot produce it before the court.

33. With this background, cross-examination of DW-1 is to be looked into. DW-1 has deposed that his mother paid Rs.20,00,000/- to H.Thippareddy as loan through cash on 7/12/2012 and he was present at that time. According to him, his mother was in possession of said Rs.20,00,000/-. His mother is doing money- lending business and he does not know whether she was having money-lending license and he does not know whether she is an income-tax assessee and he should enquire with her and submit. Rs.20,00,000/- is not a small amount and if really, 1st defendant lent Rs.20,00,000/- to H.Thippareddy, then definitely as money-lender, 1st defendant ought to have maintained accounts in that regard and according to Income-Tax Act, such heavy amount cannot be paid in cash and it should be paid through cheque or DD.

34. According to DW-3, his mother had Rs.15,00,000/- from sale of some agricultural property during 2007; out of which, she had kept some amount in the house and some amount in bank and she had received Rs.13,00,000/- under Memorandum of Understanding as per Ex.D.1 and adjusted the remaining Rs.7,00,000/- and then paid to H.Thippareddy.

35. Thus, according to this witness, even though, the amount is very huge, 1st defendant has retained such amount in her house. According to DW-1, she kept some amount from sale of property during 2007 till 2013 in the house idle. Such an evidence of DW-1 cannot be accepted as it is against the attitude of prudent man. Furthermore, D.W.2 another son of first defendant has deposed that his mother was not possessed any immovable property at any time. D.W.1 has no specific details of agricultural property sold by his mother during 2007.

36. Virtually payment of Rs.13,00,000/- and odd was through cheque. If really, it was encashed; first defendant would have produced documents to show that on which date, it was encashed. However, no such documents are produced. Furthermore, this D.W.1 even does not know whether

his mother was having money lending amount and whether she was an income-tax assessee or not. DW-2 in the cross- examination deposed that he does not know whether his mother was doing any business or not and whether she is an income-tax assessee.

37. DW-3 has deposed that there is sale deed to prove that his mother sold the property during 2007. But 1st defendant has not made any efforts to produce any such sale deed.

38. In this regard, the plaintiff's counsel relied on citation reported in ILR 1994 Kar 2728 in "Management of State Bank of India v/s V.M.Mahapurush", wherein, their Lordships held as under:-

"In fact the authorities though they maintained the record, they admit that they have not produced it without any reason either before the Labour Court or before the learned Single Judge, as such it is beyond doubt that presumption under Section 114 of the Evidence Act did arise against the Bank and in favour of the workman and therefore, the difference of wages was and could be computed on the basis of that presumption, by accepting the claim as made in the application by the workman."

39. The learned counsel for plaintiff further relied on the decision reported in AIR 1981 SC 977 in "Khushalbai Mahjibhai Patel v/s A Firm of Mohamadhussaian Rahimbux", wherein their Lordships held as under:-

"10. If the case propounded by the defendant firm at the trial is correct, its account books must be containing entries to the effect that the agreement of purchase by 225 bags of tobacco was entered into with firm R.K.Patel and not with the plaintiff and that some time in December, 1955, the account of firm R.K.Patel was credited with the amount of the price of the goods. Entries would further be available therein indicating unmistakably the periods for which Khudabux was admittedly employed with the defendant firm. The non- production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and presumption has therefore to be raised against it that if such evidence had been produced, the same would have gone against the case propounded by it. The matter does not end there. The failure of the defendant firm to bring Chhotabhai and Khudabux into the witness-box and the fact that it made no attempt to have the account books of firm R.I.Patel (the entries in which account would perhaps have clinched the matter in dispute) must be similarly construed and a Presumption drawn that this evidence also would have gone against the defendant firm."

40. The learned counsel for the plaintiff relied on the citation reported in AIR 1999 SC 1441 in "Vidhyadhar v/s Manikrao & another", wherein their Lordships held as under:-

"15. It was defendant No.1 who contended that the sale deed, executed by defendant No.2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus

transaction as only Rs.500 were paid as sale consideration to defendant No.2. He further claimed that payment of R.4,500 to defendant No.2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No.1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross-examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No.2 and the plaintiff was a bogus transaction."

" 16. Where a party to the suit does not appear in to the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v.

Gurdial Singh an Anr.

MANU/PR/0049/1927. This was followed by the Lahore High Court in Kirpa Singh v.Ajaipal Singh and Ors.

MANU/LA/0495/1929 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh MANU/MH/0063/1930 :

(1930) 32BOMLR924. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat MANU/MP/0042/1970 : AIR 1970MP225 also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. MANU/UP/0007/1971 :

AIR1971 All29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. MANU/PH/0133/1974, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

41. In the instant case also, DW-1 has deposed that his mother is doing money-lending business, however, he himself is not sure that whether she is having money-lending license or she is an income-tax assessee and 1st defendant has not produced such records. He has also not produced sale deed executed by his mother during 2007 to prove that first defendant has capacity to lend Rs.20,00,000/-.

42. Cross-examination of DW-1 further reveals that since about 10 years, 1st defendant is residing separately from her two sons i.e., from defendant No.2 & 3; 1st defendant is residing alone in her house and she cooks for herself. First defendant cooks for herself reveals that she is hale and

healthy. If that being so, there is no bar for 1st defendant to give evidence. She is competent to depose about the alleged transaction with H.Thippareddy and not this 3rd defendant. Nowhere in the written statement, 1st defendant has stated that she is suffering from any illness. Under these circumstances, it was 1st defendant who has to come forward to give evidence and not 3rd defendant who is only a witness to Memorandum of Understanding and not party to it.

43. In the further cross-examination at para No.28, DW-1 has deposed that his mother has not taken any security from H.Thippareddy at the time of giving loan of Rs.20,00,000/-. Further, it was suggested to P.W.1 in the cross-examination that he is having 14 acres of property in Chinnappanahalli village, Marthahalli post, which is situated at the prime place in Bengaluru. Thus, H.Thippareddy is having huge property and apparently, he is not having necessity to obtain loan of Rs.20,00,000/- from first defendant. The person who lends Rs.20,00,000/- through cash without obtaining any security cannot be accepted as correct. Further, the person who lent the amount also not comes forward to plead or depose so.

44. The above discussion reveals that 1st defendant has not taken any contention regarding encashment of Rs.20,00,000/-; but it is proved through Ex.P.4-the account extract of H.Thippareddy that said amount was credited to first defendant's account. It is only defendant No.3 who is not residing with 1st defendant since 10 years, has given evidence regarding said payment of Rs.20,00,000/- through cheque of H.Thippareddy towards loan transaction, cannot be accepted as correct.

45. The plaintiff strongly contended that defendant No.1 has received Rs.20,00,000/- on 7/2/2013 towards further sale consideration amount and to settle the dispute between 1st defendant and Smt.Gowramma. However, this fact is denied in toto by defendants. The plaintiff contended that when 1st defendant has received said cheque, she has made an endorsement in Ex.P.8 and she signed it.

46. Ex.P.8 is the Memorandum of Understanding between plaintiff and first defendant executed on 29/11/2012 and at that time, it was duly signed by defendant No.3 as a witness and 2 more witnesses i.e., N.R.Murthy and S.Srinivas are also witnesses to this Memorandum of Understanding. This portion of memorandum of understanding is clearly admitted by both parties.

47. The endorsement is signed by defendant No.1 and the same witnesses i.e., N.R.Murthy and S.Srinivas and it is also signed by defendant Nos.2 and 3 as witnesses. This fact is denied by defendants. This endorsement is marked as Ex.P.8(l).

48. DW-2 - the 2nd defendant who is the son of 1st defendant has not signed Memorandum of Understanding on 29/11/2012, but for endorsement, his signature is forthcoming.

49. The 2nd defendant in his written statement contended that he does not know anything about the transaction between plaintiff and 1st defendant and he never stood as guarantor to it. He reiterated the same facts in his affidavit evidence and in the cross- examination, he has deposed that he does not know the transaction between his mother and Smt.Gowramma; transaction between his mother

and H.Thippareddy. He does not know whether his mother is doing any business and whether she is an income- tax assessee. He further deposed that he has not seen his mother signing any paper till the time of his deposition and thus, he cannot recognize her signature.

50. According to DW-2, his mother is getting pension of Rs.400/- from Government. Pension of Rs.400/- p.m. means, it ought to be given to old aged persons as pension. This pension would be given only to the poor and destitute and not to the able persons and not to the people who are having good earnings. Without good earnings, one cannot lend Rs.20,00,000/- to any one. It is also the specific contention of plaintiff that this payment of Rs.20,00,000/- through cheque of his father was only towards the Memorandum of Understanding transaction and not towards loan transaction between plaintiff's father and 1st defendant.

51. The say of defendant No.2 in his cross- examination that his mother is getting pension of Rs.400/- p.m. is not disputed either by 1st defendant or by 3rd defendant. According to DW-2 i.e., 2nd defendant, he is not paying any maintenance to his mother, but he would fulfill her demands during festivals or ceremonies if she come to his house and made demands. DW-2 further deposed that he does not know whether his mother is doing any business for her livelihood because, he is residing far away from her.

52. The 3rd defendant has denied his signature at Ex.P.8(j) i.e., when endorsement was confronted to him and also denied the signature of his mother on it at Ex.P.8(f).

53. The defendant's counsel argued that if really payment of Rs.20,00,000/- is towards further sale consideration amount, then endorsement as per Ex.P.8 ought to have been found even in Ex.D.1. Ex.D.1 is the duplicate copy of Ex.P.8 and both Ex.D.1 and Ex.P.8 are duly registered on the same day before the Sub-Registrar. Ex.P.8 was considered as original and thus stamp duty of Rs.13,350/- is paid and Ex.D.1 is considered as duplicate and Rs.500/- is paid towards registration charges. However, both Ex.P.8 and Ex.D.1 were duly signed by plaintiff, defendant No.1 and witnesses.

54. Plaintiff's counsel submitted that when cheque for Rs.20,00,000/- was given to 1st defendant on 7/2/2013, 1st defendant had not brought her duplicate copy as per Ex.D.1 and hence, the endorsement was written only in Ex.P.8 and it was not written and not signed by parties in Ex.D.1.

55. Generally, parties believe each other and do transactions and without belief, no transaction can be completed. Hence the arguments of learned counsel for plaintiff appears to be more probable when 1st defendant told that she has not brought her duplicate Memorandum of Understanding, believing her words, plaintiff might have issued the cheque for Rs.20,00,000/- by taking endorsement in Ex.P.8. Hence, this argument of defendant's counsel is not acceptable one.

56. Defendant's counsel further submitted that in the cross-examination, PW-1-GPA Holder of plaintiff has deposed that Ex.P8(l) is in the handwriting of plaintiff and hence, plaintiff ought to have been entered into the witness box to substantiate that it was written by him, but he did not do so. However, this argument is also not admissible because, in the GPA, plaintiff specifically stated that PW-1 was present all along in the transaction and he knows very well about the transaction and

hence, he has executed this GPA in favour of PW-1. Under these circumstances, merely because, the endorsement is in the handwriting of plaintiff and he has not come forward, it cannot be held that endorsement in Ex.P.1 is forged one.

57. The learned counsel for plaintiff and defendant Nos.1 to 3 both relied on the decision reported in AIR 1999 SC 1441 in "Vidhyadhar v/s Manikrao & another", wherein their Lordships held as under:-

"15. It was defendant No.1 who contended that the sale deed, executed by defendant No.2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs.500 were paid as sale consideration to defendant No.2. He further claimed that payment of Rs.4,500 to defendant No.2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No.1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross-examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No.2 and the plaintiff was a bogus transaction."

" 16. Where a party to the suit does not appear in to the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v.

Gurdial Singh and Anr.

MANU/PR/0049/1927. This was followed by the Lahore High Court in Kirpa Singh v.Ajaipal Singh and Ors.

MANU/LA/0495/1929 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh MANU/MH/0063/1930 :

(1930) 32BOMLR924. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat MANU/MP/0042/1970 : AIR 1970MP225 also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. MANU/UP/0007/1971 :

AIR1971 All29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. MANU/PH/0133/1974, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

58. The learned counsel for defendant Nos.1 to 3 relied on the citation reported in ILR(KAR) 2014-631 in "R.Sandhya v/s S.R.Raju", wherein, their Lordships held as under:-

"16. Hence, non- examination of Smt.Meena will give raise to draw an adverse inference against the plaintiffs u/s 114(g) of Evidence Act. Apart from what has been allotted under Ex.P.1 to plaintiffs and their mother is just and equitable."

59. In the instant case, though plaintiff is not examined, PW-1 deposed that he was all along present and hence, mere non-examination of PW-1 is not fatal to the case of plaintiff. However, this ruling also applies against defendants. Non-examination of 1st defendant is very fatal to the case of defendant No.1, because in the cross-examination, defendant No.3 has specifically deposed that since 10 years, he is residing separately from his mother and defendant No.2 has deposed that he does not know what his mother is doing for her livelihood. Under these circumstances, examination of 1st defendant was very relevant to prove the contention of defendants.

60. The defendants would have taken the admitted and disputed signature of defendant Nos.1 to 3 to the handwriting expert for comparison, if really they are 100% sure that Ex.P.8(f) is not the signature of 1st defendant. Furthermore, first defendant has not come forward to witness box to dispute signature as per Ex.P.8(f).

61. When 1st defendant is unable to lend Rs.20,00,000/-; when it is not proved that she is doing money-lending business; when receipt of cheque for Rs.20,00,000/- from the father of plaintiff is admitted and when defendants failed to prove that it is towards separate transaction between 1st defendant and plaintiff's father and when 1st defendant has not taken any specific contention in the written statement that there was separate transaction between her and plaintiff's father-H.Thippareddy and when there is an endorsement on Ex.P.8 duly signed by defendant No.1 and 2 & 3; it is to be held that said payment of Rs.20,00,000/- is towards further sale consideration amount and not for any other purpose.

62. Both parties admitted the execution of Ex.P.8 and the conditions enumerated in the said document. 1st defendant is the 1st party and plaintiff is the 2nd party in said Memorandum of Understanding. Conditions Nos.1, 2, 4, 5, 6, 9 and 10 in memorandum of understanding are very relevant and hence, they are reiterated as follows:-

1. The First Party explained in full details the pendency of the suit in O.S.No.1286/2009 on the file of Fast Track Court-IV, Bangalore Rural District at Bangalore to the Second Party.

2. Despite pendency of the suit O.S.No.1286/2009, the Second Party agreed to purchase the Schedule Property after the suit in O.S.No.1286/2009 decreed/succeeded in favour of the First Party.

3.

4. The Second Party in view of the Memorandum of Understanding requested the First Party that he would conduct the case on behalf of the First Party before Fast Track Court-IV, Bangalore Rural District at Bangalore.

For which the First Party do not agree and refuse to transfer the pending suit in favour of Second Party and the First Party agreed that she herself would conduct the case in O.S.No.1286/2009 before the Court of Fast Track Court-IV, Bangalore Rural District at Bangalore. The First Party also further indemnified that under no circumstances she would transfer the pending case to the Second Party.

5. The Second Party do not approach and do not entered into any kind of documents with the said Smt.Gowramma regard to dealing with any kind of enter into Agreement of Sale, Sale Deed, General Power of Attorney, Affidavit, Compromise and any other documents without the consent and without knowledge of the First Party in respect of the schedule property.

6. The Second Party agreed and indemnified that based on this Memorandum of Understanding, he would do not approach the Private or Public Financial Corporations for availing financial assistance by securing the Schedule Property or this Memorandum of Understanding that and do not execute any Agreement of Sale, General Power of Attorney, Mortgage, Lease, Affidavit and any other documents.

9. In case, The First Party is not/failed to succeeded/decreed the suit in O.S.No.1286/2009, the Second Party on the happening of that day he is entitled to claim only Rs.13,40,250/- (Rupees Thirteen Lakhs Forty Thousand Two Hundred and Fifty Only) and not entitled for any kind of interest, loss or any compensation and the First Party agreed and indemnified that she would refund of Rs.13,40,250/- (Rupees Thirteen Lakhs Forty Thousand Two Hundred and Fifty Only) to the Second Party and when the First Party is not/failed succeeded the suit O.S.No.1286/2009 this Memorandum of Understanding is automatically stands cancelled without recourse to the law.

10. The Second Party restrained from interfering in the conduct of proceedings in O.S.No.1286/2009 pending on the file of Fast Track Court-IV, Bangalore Rural District at Bangalore. And also restrained from filing any such impleading applications taking advantage of this Memorandum of Understanding and the First Party made it clear that for the purpose of executing this Memorandum of Understanding that in the event of the First Party succeeded/decreed the suit in O.S.No.1286/2009 the Second Party has the preferential right to purchase the schedule property for the total sale consideration of Rs.1,33,40,250/-

(Rupees One Crore Thirty Three Lakhs Forty Thousand Two Hundred and Fifty Only) without making any untenable explanations and the said explanations will not be entertained and considered by the First Party."

63. On careful perusal of the above conditions, this court found that it is crystal clear that 1st defendant has reserved her right to file suit for breach of contract, but not plaintiff. Furthermore, the pendency of O.S.No.1286/2009 and its full details were clearly explained to plaintiff before

entering in to Memorandum of Understanding.

64. The learned counsel for defendant Nos.1 to 3 further relied on the decision reported in (2013) 5 Supreme Court Cases 470 in "Rajasthan State Industrial Development and Investment Corporation and another v/s Diamond & Gem Development Corporation Limited and another"

wherein, their Lordships held as under:-

"F. Contract and Specific Relief - Construction/Interpretation of Contract

- General principles - Words contained in contract must be given literal meaning unless there is some ambiguity therein - Terms or nature of contract not to be varied /altered while interpreting the same - Contract to be construed strictly without any outside aid - It is not permissible for court to make a new contract, howsoever reasonable, if the parties have not made it themselves - Evidence Act, 1872, Ss.91 and 92."

65. Ruling of the above citation and recital in Memorandum of Understanding are considered as it is and no further interpretation is given to them.

66. PW-1 in his cross-examination clearly admitted that before entering into Memorandum of Understanding, 1st defendant had explained plaintiff about pendency of O.S.No.1286/2009 and only after disposal of said suit and getting sale deed from Gowramma, she can execute the sale deed to plaintiff. There is clear recitals of the above terms in memorandum of understanding that 1st defendant shall not demand further advance amount until disposal of O.S.No.1286/2009. The plaintiff contended that even though there is such condition in the agreement, as 1st defendant told that she would get compromise with Gowramma if Rs.20,000/- is paid, he paid the said amount to 1st defendant.

67. The above discussion reveals that the payment of Rs.20,00,000/- through cheque of father of plaintiff to 1st defendant is only pertaining to Memorandum of Understanding transaction and not as a separate transaction as contended by defendant No.3. But even then, it is the burden of plaintiff to establish that 1st defendant made such demand for settlement with Gowramma and only to fulfill the demand, this Rs.20,00,000/- was paid. In the endorsement as per Ex.P.8(l), there is no mention that this Rs.20,00,000/- is paid as per demand of 1st defendant and Gowramma agreed to compromise with 1st defendant.

68. The plaintiff has not made any efforts to examine the attestors to this endorsement to prove the above contention.

69. The defendant No.3 has produced the registered sale agreement between 1st defendant and Gowramma as per Ex.D.3; plaint, written statement, order sheet of O.S.No.1286/2009 as per Ex.D.4, 5 and 9. On perusal of them, it is clear that Gowramma entered into appearance in said suit and filed written statement wherein she denied the entire averments of present 1st defendant

regarding execution of 4 sale agreements, receipt of Rs.12,25,000/- and each and every aspect. In the said written statement, Gowramma took contention that the present 1st defendant is her relative and her son i.e., present 3rd defendant along with one Venkatappa played fraud upon her. She further contended that Byas Nambishan and Unnikrishnan Nambishan have fabricated the sale agreement and power of attorney dtd:18/7/1995; at that juncture, Son of first defendant i.e., 3rd defendant with Venkatappa came into picture stating that they would help her and they got created all the documents; based on this alleged power of attorney, said Byas Nambishan and Unnikrishnan Nambishan have created registered sale deed dtd:12/1/2007 in favour of one Ramani Mohan.

70. The above contention of 1st defendant in her written statement in O.S.No.1286/2009 reveals that Gowramma is contesting the suit filed by 1st defendant. Based on the said pleadings in written statement of Gowramma, the present 1st defendant has filed I.A. under Order I Rule 10 CPC to implead M.R.Unnikrishnan Nambisan, Venkataram Iyer, Mrs.Sushila Ramachandra, Smt.S.Brindha and alleged purchaser Smt.Ramani Mohan as necessary parties in O.S.No.1286/2009 on 19/11/2011 and said application was dismissed on 14/3/2012.

71. There is specific recital in Memorandum of Understanding as per Ex.P.8 that 1st defendant explained the full details regarding the pendency of O.S.No.1286/2009 to plaintiff and even then, plaintiff came forward to get this Memorandum of Understanding. This Memorandum of Understanding came in to existence on 29/11/2012 i.e., after dismissal of I.A.No.VIII under Order I Rule 10 CPC in O.S.No.1286/2009. After its dismissal, present 1st defendant had filed review petition in O.S.No.1286/2009. It should be inferred from these facts that all these facts were explained to plaintiff before executing the present Memorandum of Understanding.

72. The above set of facts establish that the pleading in the plaint at para 5 that defendants represented Gowramma is the absolute owner of the property in question and plaintiff was not known about the litigation, cannot be accepted as correct. Their further pleadings in para 9 of the paint that now plaintiff learnt that much earlier to Memorandum of Understanding, the property had been sold by Smt.Gowramma also cannot be accepted as correct. It is also the burden of plaintiff to look into papers of O.S.No.1286/2009 including its order sheet and other relevant matters before entering into Memorandum of Understanding. As it is, already there is specific contention taken by Smt.Gowramma in the written statement of O.S.No.1286/2009 regarding execution of sale deed to one Ramani Mohan on 12/1/2007 and I.A. filed by present 1st defendant to implead her was rejected.

73. In Clause 11 of Memorandum of Understanding, it is specifically stated that 1st defendant shall not deliver or hand over vacant possession of schedule property to plaintiff and in Clause Nos.4 and 5, it is clearly stated that though the present plaintiff expressed his intention that he would conduct the case of O.S.No.1286/2009, 1st defendant made it clear that she will not give such right to present plaintiff and she herself would continue to prosecute the said suit.

74. Clause No.5 in Memorandum of Understanding further made it very clear that 1st defendant restrained plaintiff from entering in to any agreement with original owner Smt.Gowramma.

75. These Clauses are to be considered along with copies of complaint lodged by plaintiff and defendants, FIRs Ex.P.6 and Ex.P.9 and Ex.D.17 and Ex.D.18.

76. As already discussed above, there is specific mention in Memorandum of Understanding that possession will not be delivered to plaintiff by 1st defendant. 1st defendant's counsel has produced the certified copy of the registered sale agreement between 1st defendant and Smt.Gowramma as per Ex.D.3. The recitals of Clause No.4.1 of said agreement are as follows:

"The seller shall deliver vacant possession of the schedule property to the purchaser on the date of registration of sale deed and the seller at present not delivered the vacant possession of the schedule property."

77. Earlier agreements are not produced by 1st defendant. Hence, as it is, though 1st defendant claims to be in possession of 7 guntas property, as per agreement between her and Gowramma, possession was not delivered to her. Under these circumstances, plaintiff cannot claim to be in possession of the property in question.

78. The plaintiff has lodged complaint against defendants as per Ex.P.5, Ex.P.6 FIR and Ex.P.7 charge sheet. This complaint is dated 22.07.12 and lodged against defendant Nos.1 to 3, Smt.Gowramma and Ashwathaiah. According to it, on 10/4/2013 at 10 a.m. plaintiff had gone to the Sy.No.64/8B measuring 7 guntas at Nellurahalli Village, Krishnarajapura Hobli, Bangalore East Taluk to remove the waste in the said property and at that time, she learnt that this land was sold by Gowramma and Ashwathaiah to 3rd parties and defendant Nos.1 to 3 are not giving proper answer for this sale when enquired with them. Ex.P.9 is the 'B' Report pertaining to the complaint lodged by defendant No.1 as per Ex.D.17 and Ex.D.18.

79. When possession of the property was not delivered to plaintiff under Memorandum of Understanding, plaintiff was not supposed to go the land in question to remove the waste. In this regard, in the cross-examination in page No.21 para No.4, PW-1 clearly admitted that possession was not delivered. However, in the further cross-examination, at page No.25, Para No.13, he has deposed that possession was delivered after i.e., at the time of payment of Rs.20,00,000/-. However, there is no pleading on this point in the plaint and it is not stated in the affidavit evidence of PW-1 and further in the endorsement as per Ex.P.8(l) there is no mention that possession was delivered to plaintiff. Hence, the say of PW-1 in his cross-examination that possession was delivered is incorrect.

80. Ex.D.17 is the complaint lodged by 1st defendant against plaintiff, his father, Gowramma and Ashwathaiah to DIG, IGP, ADGP and others and it was registered in FIR No.210/2013.

81. The above set of facts i.e., though there is specific mention in the agreement that possession was not delivered, the evidence of PW-1 that it was delivered subsequently and though there is specific recital in the Memorandum of Understanding that plaintiff shall not ask for impleading himself as party in O.S.No.1286/2009 have made efforts to prosecute the said suit. The plaintiff tried to enter the property in question and lodged complaint against defendants and original owners Gowramma

and Ashwathaiah; clearly establish that in enthusiasm, plaintiff might have violated the terms of the Memorandum of Understanding.

82. The plaintiff has not issued any legal notice calling upon the defendants to refund the earnest money of Rs.33,40,250/-. The plaintiff contended in para 7 of the plaint that only to cheat the plaintiff, 1st defendant had entered into Memorandum of Understanding for sale of the property and defendants knew that Gowramma had already sold the property on 12/1/2007 to third parties. However, the above discussion clearly establishes that the registered agreement of sale between defendant No.1 and Smt.Gowramma is dtd:23/9/2008 i.e., subsequent to 12/1/2007. If really, 1st defendant had knowledge about this sale during 2007, definitely during 2008, 1st defendant would not enter into agreement of sale with Gowramma by paying additional cash of Rs.8,00,000/- and subsequently, as per request of Gowramma she would not have paid Rs.1,00,000/- through cheque before filing O.S.No.1286/2009. Hence, the contention of plaintiff that defendants knew this fact earlier and even then, they hide this fact and induced plaintiff to get execution of the Memorandum of Understanding cannot be accepted as correct.

83. In Para No.11 of the plaint, plaintiff pleaded that he demanded defendants to return the entire amount with interest at 18% p.a., but defendants are evading returning the money. It is not pleaded that on which date, plaintiff made such demand with defendants. Even in the cause of action column, plaintiff has not stated when cause of action arose i.e., he demanded for return of money. Till today, the plaintiff has not made efforts to cancel the Memorandum of Understanding between him and 1st defendant. But he is praying only for return of money on the ground that Gowramma cannot execute the sale deed and contract has become frustrated. However, as already stated above, knowing fully well all these facts, plaintiff willfully entered into Memorandum of Understanding with 1st defendant, hence, he is estopped from saying that Gowramma cannot execute the sale deed.

84. In para No.4 of the plaint, plaintiff stated that 1st defendant and her children i.e., defendant Nos.2 and 3 have also guaranteed the statement in the agreement referred to above and guaranteed sale of the property to plaintiff herein subject to the 1st defendant succeeding the suit filed by her.

85. The defendant No.3 is one of the attestators to the Memorandum of Understanding. But, defendant No.2 is not the attestator to the said document. It is not noted in Memorandum of Understanding that defendant Nos.2 and 3 are stood as guarantors to the agreement between plaintiff and 1st defendant.

86. In the cross-examination at para No.8 page No.22 PW-1 admitted that defendant Nos.2 and 3 are not parties to Ex.P.8 and there is no recital in Ex.P.8 that if for any reason 1st defendant fails to payback the money, her children would pay it. But he volunteered that she was told orally on that point. Without any written agreement, the above statement of PW-1 in his cross-examination cannot be considered to say that defendant Nos.2 and 3 stood as guarantors for the transaction took place between plaintiff and defendant No.1 that too when 2nd defendant does not signed the agreement.

87. In the cross-examination, at para 24, 3rd defendant denied the suggestion that at the time of execution of Memorandum of Understanding, he guaranteed plaintiff that they will see that

Memorandum of Understanding shall be complied with. Hence, the contention of plaintiff that defendant Nos.2 and 3 stood as guarantors for the transaction between plaintiff and 1st defendant cannot be accepted as correct and plaintiff failed to prove it.

88. The above discussion clearly reveals that plaintiff has proved that defendant No.1 again received Rs.20,00,000/- by means of cheque No.999227 dtd:7/2/2013 drawn on SBM, Marathahalli Branch, Bangalore. He failed to prove that plaintiff demanded for refund of earnest money. The plaintiff further proved payment of Rs.20,00,000/- to 1st defendant is towards further advance consideration amount on Memorandum of Understanding and defendant Nos.1 to 3 failed to prove their signatures on endorsement taken on 6/2/2012 on Memorandum of Understanding are forged. Accordingly, issue No.2 and additional issue No.1 are answered in affirmative, issue No.3 is answered partly in affirmative and recasted issue No.2 is answered in negative.

ISSUE No.6

89. In the written statement defendant No.1 at para 2 has taken plea that suit is not in conformity with Order 2 Rule 2 CPC.

"Order 2 Rule 2 CPC : suit to include the whole claim. Every suit shall include the whole of the claim which plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the same within the jurisdiction of any court.

If the plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

90. As per Memorandum of Understanding, right to plaintiff accrues only after 1st defendant succeeds in O.S.No.1286/2009 to get the property which stood in his name. A Clause is also there in the said agreement that in case, 1st defendant fails in her efforts to succeed in O.S.No.1286/2009 and fails in her attempt, then, the plaintiff is entitled to receive Rs.13,40,250/- without any interest on it.

91. Now the plaintiff has filed the suit for recovery of Rs.33,40,250/- from defendants. However, suit in O.S.No.1286/2009 is still pending. Under such circumstances, compliance of Order 2 Rule 2 CPC does not arise. Accordingly issue No.6 is answered in Negative.

ISSUE No.7 & RECASTED ADDITIONAL ISSUE No.3

92. In the written statement at para 1, defendant Nos.1 and 3 have taken contention that suit filed by plaintiff against them for recovery of money with interest is not maintainable and it is abuse of process of court with an intention to harass them. The 3rd defendant further contended that he is only a witness to Memorandum of Understanding and not a guarantor and has not played any fraud and did not give any false information. The 1st defendant further contended that the conduct of

plaintiff in filing the suit speaks volume and intention that suit is wholly misconceived, speculative and lacks bonafides and thus, suit is liable to be dismissed.

93. The 3rd defendant further contended that copies of plaint, written statement, order sheet in O.S.No.1286/2009, agreement of sale dtd:19/2/1994, 1/10/1998, 10/7/2002 and 23/9/2008 were supplied to plaintiff and explained in detail and only after verifying them, Memorandum of Understanding was entered between plaintiff and 1st defendant. He has further stated the facts of the suit in the said para, but not stated anything about the maintainability of the suit.

94. The above pleadings only reveal that defendant Nos.1 and 3 have taken contention that suit filed by plaintiff is abuse of process of law. While discussing issue Nos.2, 3, additional issue No.1 and recasted issue No.2, this court already hold that defendant No.3 is not a guarantor to Memorandum of Understanding, but he is only a witness to it. Hence, the suit against defendant No.3 is not maintainable. Furthermore, defendant No.2 is not even a witness to Memorandum of Understanding dtd:29/11/2012 and he is stated to be witness to endorsement dtd:6/2/2013, but he specifically denied his signature to this endorsement. It was not even confronted to 2nd defendant. Under these circumstances, at any stretch of imagination, it cannot be said that defendant Nos.2 and 3 are guarantors to the Memorandum of Understanding dtd:29/11/2012 or endorsement dtd:6/2/2013. Hence, definitely, suit against them for recovery of money is not at all maintainable in law.

95. The learned counsel for defendant Nos.1 to 3 further relied on the citation reported in (2012) 8 Supreme Court Cases 706 in "Church of Christ Charitable Trust and Educational Charitable Society Represented by its Chairman v/s Ponniammam Educational Trust represented by its Chairperson/Managing Trustee.", wherein their Lordships held as under:-

"A. Specific Relief Act, 1963 - Ss.9, 10, 15 and 19 - Suit for specific performance of agreement to sell immovable property - Maintainability of - Privity of contract between plaintiff and defendant - Cardinal necessity of

- Buyer S (D-2) entering into agreement for sale (Deed 1) with appellant owner of property as seller which never culminated in sale and was validly terminated - Thereafter S entering in to further agreement for sale (Deed 2) of same property to R-1 herein - Deed 1 had been validly terminated prior to Deed 2 being entered into - R-1 filing suit for specific performance of Deed 2 against appellant as D-1, and S as D-2 - S had entered into Deed 2 on basis of registered power of attorney (PoA) executed in favour of S by appellant owner of property - But said PoA had been executed for limited purpose of permitting S to represent appellant before statutory authorities to obtain various clearances for sale under Deed 1 - Said PoA, also validly revoked before Deed 2 entered into - Held, trial court rightly rejected plaint against appellant under Or.7 R. 11(a) CPC for not disclosing any cause of action against appellant, as there was no privity of contract between plaintiff (R-

1) and appellant (D-1) as there was no subsisting contract between them -

Furthermore, S(D-2) had no authority under the said PoA to enter into any sale agreement on behalf of appellant (D-1) - [Ed.: Furthermore, neither appellant D-1 nor plaintiff R-1 fell under any class of person under Ss.15 and 19, SRA, 1963] -

Powers of Attorney Act, 1882 - Ss.1-A and 2 - Contract Act, 1872 -Ss.186 to 188 -

Civil Procedure Code, 1908, Or.7 R.11(a)."

96. Relying on the above said citation and as plaintiff failed to plead that defendant Nos.2 and 3 are guarantors for the transaction between plaintiff and defendant No.1, the suit against defendant Nos.2 and 3 are not maintainable.

97. Though defendant No.1 has not taken specific contention in the written statement that how the suit is not maintainable in law, while discussing the above issue Nos.2, 3, additional issue No.1, recasted additional issue No.2, this court holds that both plaintiff and 1st defendant were fully aware about pendency of O.S.No.1286/2009, contention taken by defendant in that suit, her alleged GPA has executed registered sale deed in favour of one Smt.Ramani Mohan during 2007 and the application under Order I Rule 10 CPC filed by present defendant No.1 to implead one Smt.Ramani Mohan as party in said suit was dismissed. Thus, there was no question of hiding the fact before entering into Memorandum of Understanding.

98. Learned counsel for plaintiff submitted that memorandum of understanding is contingent contract. Chapter III of Indian Contract Act i.e., Section 31 to 36 deals with Contingent Contracts.

99. Section 31 of the Contract Act defines Contingent Contract as follows:-

"A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

100. In the instant case, the contract between plaintiff and 1st defendant under Memorandum of Understanding is a Contingent Contract, because, there is specific averment in Memorandum of Understanding that in the event when 1st defendant succeed in O.S.No.1286/2009, plaintiff agreed to purchase the said property for a total consideration of Rs.1,33,40,250/-. It is also mentioned in this Memorandum of Understanding that if 1st defendant fails or not succeeded in the said suit, then plaintiff is entitled for refund of advance money of Rs.13,40,250/- without interest. Thus, the contract between plaintiff and 1st defendant is definitely Contingent Contract.

101. At the time of arguments, learned counsel for plaintiff vehemently submitted that enforcement of contract became impossible, because 1st defendant could not implead the purchaser of property Smt.Ramani Mohan as party in suit filed by her against Gowramma for specific performance of agreement. Under these circumstances, when Gowramma lost her right over the property in question, the enforcement of this Contingent Contract became impossible. However, as already discussed above, plaintiff was fully aware of about all these facts before entering this Memorandum of Understanding.

102. Under Section 36 of the Indian Contract Act, Contingent Contract became void if an impossible event happens, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. Thus, if the arguments of learned counsel for plaintiff is to be accepted, then Memorandum of Understanding is void and thus, it is unenforceable in law.

103. The said arguments of learned counsel for plaintiff are not acceptable for the following reasons:-

104. The defendant has produced the certified copy of the plaint and order sheet in O.S.No.43/2010 as per Ex.D.11 and Ex.D.12. They reveal that Gowramma had filed suit against her alleged power of attorney holders and purchaser Smt.Ramani Mohan praying for the relief that the alleged sale deed dated 12/1/2007 executed by Unnikrishnan as her alleged power of attorney holder in favour of Ramani Mohan is void and for declaration that she is the owner of the suit schedule property. She contended in the said suit that she continued to be in possession of the above said property. The defendants have produced RTC of said property as per Ex.D.2 which stands even today in the name of Gowramma and this fact is admitted by PW-1 in his cross-examination.

105. As already discussed above, the suit filed by 1st defendant against Gowramma in O.S.No.1286/2009 is still pending though her plea to implead the purchaser Ramani Mohan in her suit was rejected. The ownership of Gowramma will be decided in the above said 2 suits i.e., in O.S.No.1286/2009 and O.S.No.43/2010 and that is not the scope of present suit. Until said fact is decided, the say of plaintiff that the Memorandum of Understanding between plaintiff and 1st defendant is unenforceable cannot be accepted as correct.

106. The plaintiff has not revoked or cancelled the Memorandum of Understanding and has directly filed the suit to return the amount with interest stating that fraudulently by inducing plaintiff, 1st defendant had taken further sum of Rs.20,00,000/- from plaintiff stating that there is settlement between 1st defendant and Gowramma. However, it is to be noted here that the sale deed in favour of Ramani Mohan by the alleged power of attorney holder of Gowramma was also registered and thus, it would find place in encumbrance certificate. Thus, there is every chance for plaintiff to verify these documents as it is public document. But his say that it was suppressed by 1st defendant cannot be accepted as correct. Moreover, while discussing issue Nos.2, 3, additional issue No.1 and recasted additional issue No.2, this court already held that plaintiff failed to prove that 1st defendant has wrongfully induced plaintiff to pay further sum of Rs.20,00,000/- through cheque stating that there is already compromise between 1st defendant and Smt.Gowramma. Further, plaintiff has not made any efforts to examine the witnesses to endorsement to substantiate his said plea. Hence, the say of plaintiff that defendants fraudulently made him to pay said Rs.20,00,000/- is not proved.

107. The learned counsel for defendant Nos.1 to 3 further relied on the citation reported in ILR 2004 Kar 575 in "Kendra Upadhyaya Sangha ® Rep.by General Secretary, Basavanagudi v/s Smt.Muniyappa and others" wherein it is held as follows:

"(A) Suit for Specific performance -

Maintainability - suit is maintainable if the Agreement cast any obligation on the part of the land owner to execute the sale deed - If there is no term or condition in the agreement as to the obligation on the part of the land owner to execute the sale deed, the suit is not maintainable."

In the said judgment, it is further held as under:-

"17. The plaintiff has to indicate the cause of action in the suit and particularly, in a suit for specific performance as to the nature of the agreement, as to what obligations are on the parties and as to how each party has complied his part of the obligation under the agreement. That the matter had not gone to trial, the defendant having not disputed the two agreements based on which the suit was brought, and the entire issue with regard to the grant of relief in favour of the plaintiff being dependent on the terms and clauses of this agreement, it cannot be said that any prejudice is caused to the plaintiff by the Trial Court having disposed of the suit even without the parties going to trial on any other aspect of the matter. In fact, no controversy or dispute had arisen in the context to the existence of the agreement. Job of the Court was made easy and the plaintiff's burden got reduced to that extent. We have perused the contents of the agreement."

"20. In fact, on the other hand, the agreement at the best can be said to be a contingent agreement for certain performance on the part of the parties to the agreement on the happening of certain future events such as, the issue of notifications under the Land Acquisition Act and the culmination of the acquisition proceedings. Even assuming it to be so, a contingent contract can be sought to be enforced, if the event has occurred. If the event itself has become impossible of performance, such a contract becomes void. Therefore, in respect of contingent contracts on reading of Section 31 and 32 of the Contract Act together, it is obvious that if the future uncertain event has occurred, then only the contract becomes enforceable and not till then and the contract itself becomes void, if the future event becomes impossible."

108. In the instant case also, as already discussed in Issue Nos.2, 3, additional issue No.1 and recasted additional issue No.2, in the recitals of Memorandum of Understanding, it is only noted that only after disposal of O.S.No.1286/2009, the cause of action for plaintiff would arise for execution of sale deed or if 1st defendant failed in said suit, for refund of the earnest money. Hence, at this juncture, the suit is not maintainable and it is pre-matured one.

109. In this regard, the learned counsel for defendant Nos.1 to 3 relied on the citation reported in (2012) 12 Supreme Court Cases 573 in "Cantonment Board & another v/s Church of North India" wherein their Lordships held as under:-

"15. As far as this submission of Mr.Singla is concerned, Mr.Venkataramani submitted that this objection ought to have been raised at the earliest opportunity so that the appellant could have met the same earlier. It is undoubtedly true that

objection to the maintainability of a proceeding must be raised at the earliest but an objection that the authority did not have the jurisdiction to entertain the proceedings over the subject-matter goes to the root of the proceeding. In a number of judgments, this Court has held that a defect, with respect to the lack of inherent jurisdiction is basic and fundamental and validity of such an order can be challenged at any stage, even in execution or in collateral proceedings (for reference see a judgment of a Bench of three Judges of this Court in Balvant N.Viswamitra v/s Yadav Sadashiv Mule). However, such an eventuality does not arise in this case for the reason that the case of the appellant has been that the hospital premises of the respondent belong to the Union of India and are only under the management of the appellant, and therefore, are the "public premises", under Section 2(e) of the Public Premises Act, 1971."

110. In the instant case, defendants have not specifically pleaded that how the suit is not maintainable. But learned counsel for defendants in the arguments submitted about it. As already discussed above, the suit is pre-mature one. Anyway, defendants No.1 & 3 have already taken the plea of non-maintainability and the plea of pre-maturity in the written statement.

111. The learned counsel for defendant Nos.1 to 3 further relied on the citation reported in (2003) 4 Supreme Court Cases 86 in "M.V.Shankar Bhat & another v/s Claude Pinto since (deceased) by LRs. And others" wherein, their Lordships held as under:-

"31. When an agreement is entered into subject to ratification by others a concluded contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.

32. The word "subject to "has been defined in Black's Law Dictionary, 5th Edn., at p.1278, inter alia, as:

"subservient, inferior, obedient to; governed or affected by ' provided;

answered for". In Collin's English Dictionary the words "subject to "have been stated to mean as: "under the condition that: we accept, subject to her agreement".

33. The said agreement for sale, therefore, was not enforceable in a court of law."

112. The learned counsel for defendant Nos.1 to 3 further relied on the citation reported in AIR 2011 Supreme Court 3234(1) in "Mrs.Saradamani Kanadappan v/s Mrs.S.Rajalakshmi and others", wherein their Lordships held as under:-

"50. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to

creating an encumbrance. The MOUs said to have been executed by respondents 1 to 3 provide that agreements of sale with mutually agreed terms and conditions will be entered between the parties after clearance of all pending or future litigations.

Therefore, the MOUs are not even agreements of sale. In these circumstances, it is not possible to hold that the respondents have created any encumbrances or violated the order dated: 11.11.2002. Hence, these contempt petitions are liable to be rejected."

113. The facts and circumstances of the present case and the above said rulings are entirely different and hence, not applicable to the present case.

114. The learned counsel for defendant Nos.1 and 3 further relied on the citation reported in (2010) 15 SCC 601 in "Pawan Kumar Dutt and another v/s Shakunthala Devi & others", wherein it is held as under:-

"A. Contract and Specific Relief - Specific Performance of Contract - Uncertainty/Vagueness in description of property in agreement -

Unenforceability - Trial Court, first appellate court and High Court holding that suit could not be decreed for want of certainty as to description of suit property - Sustainability of - Held, a portion out of the total larger extent was agreed to be sold, but without specification of area agreed to be sold - It is clear from agreement in question that no boundaries of suit property which was sold were specified therein - There is no clear identity of property agreed to be sold - Courts are not expected to pass a decree which is not capable of enforcement in courts of law

- Specific Relief Act, 1963 -Ss.9 and 14(b) - Civil Procedure Code, 1908, Or.7 R.1"

115. This ruling is not applicable to present case as plaintiff is not seeking specific performance of contract and there is no vagueness in Memorandum of Understanding regarding schedule of the property. The identity of the property in question is not in dispute in present case.

116. The above discussion clearly reveals that the suit filed by plaintiff is pre-matured one since O.S.No.1286/2009 filed by Smt.Venkatamma has not been disposed off and for that reason, suit is not maintainable. Accordingly, issue No.7 and Recasted additional issue No.3 are answered in affirmative.

117. These issues are considered at this stage together for sake of convenience and clarity as they require common discussion. The plaintiff contended that he is entitled for recovery of Rs.33,42,250/- paid by him to defendant No.1 along with interest because Smt.Gowramma cannot execute the sale deed and the contract between plaintiff and 1st defendant became frustrated. However, while discussing issue No.7 and recasted additional issue No.3, this court already held that till disposal of O.S.No.1286/2009 and O.S.No.43/2010, it cannot be held that Gowramma cannot

execute the sale deed in favour of 1st defendant or not and the suit is not frustrated.

118. For the reason that the suit becomes frustrated, the plaintiff is praying for interest at 18% p.a. on the entire advance amount paid by him.

119. In this regard, plaintiff's counsel relied on the citation reported in AIR 2000 SC 2003 in "Ghaziabad Development Authority v/s Union of India & another" wherein, their Lordships held as under:-

"(i) Property - refund - provision contained in brochure issued by development authority that it shall not be liable to pay any interest on occasion arising for return of amount - provision held to be applicable only to cases in which claimant himself responsible for creating circumstances providing occasion for refund - fault found with Authority - authority therefore cannot justify resisting of refund of amount with interest".

9.However, it was observed:-

"There was no contract between the parties regarding payment of interest on delayed deposit or on account of delay on the part of the opposite party to render the services. Interest cannot be claimed under Section 34 of the Civil Procedure code as its provisions have not been specifically made applicable to the proceedings under the Act. We, however, find that the general provisions of Section 34 being based upon justice, equity and good conscience would authorize the Redressal Forums and Commissions to also grant interest appropriately under the circumstance of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds.

The State Commission as well as the National Commission were, therefore, justified in awarding the interest to the appellant but in the circumstances of the case we feel that grant of interest at the rate of 12% was inadequate as admittedly the appellant was deprived of the user of a sum of Rs.One lakh for over a period of seven years. During the aforesaid period, the appellant had to suffer the winding-up proceedings under the Companies Act, allegedly on the ground of financial crunch. We are of the opinion that awarding interest at the rate of 15 per cent per annum would have served the ends of justice. "

120. The learned counsel for the plaintiff further relied on the citation reported in AIR 1953 SC 235 in "Trojan & Co.,Ltd., v/s Rm.N.N.Nagappa Chettiar" wherein, their Lordships held as under:-

"23. The next point canvassed in the courts below was in respect of the claim of the plaintiff regarding interest on the amount found due to the plaintiff from 5th April, 1937, to the date of the suit. It was contended that no interest could be allowed on damages because to do so would amount to awarding damages on damages which is

opposed to precedent and principle. Clark J., however awarded interest by placing reliance on certain English decisions which enunciate the rule that an agent who receives or deals with the money of his principal improperly and in breach of his duty or who refused to pay it over on demand is liable to pay interest from the time when he so receives or deals with the same or from the time of the demand. We think it is well settled that interest is allowed by a court of equity in the case of money obtained or retained by fraud. As stated in article 423 of volume I of Halsbury, the agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his agency. Their Lordships of the Privy Council in *Johnson v. Rex* [1904] A.C.817 observed as follows:-

"In order to guard against any possible misapprehension of their Lordships' views they desire to say that in their opinion there can be no doubt whatever, that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a court of equity, or a court of law, or in a court, which has jurisdiction both equitable and legal."

121. These two citations are not applicable to the present case at this stage, because, this court already held that suit itself is not maintainable as it is pre- matured one. Hence consideration of the fact that whether the plaintiff is entitled for interest or not on the earnest money does not arise.

122. In view of findings on issue Nos.2, 3, 6, 7 and additional issue No.1, recasted additional issue Nos.2 and 3, this court holds that plaintiff is not entitled for suit claim with interest. Accordingly, issue No.4 & 5 are answered in negative.

ISSUE No.8

123. In view of findings on issue Nos.2 to 7; additional issue No.1, recasted additional issue Nos.2 and 3, this court proceeds to pass the following:-

ORDER Suit is dismissed, as pre-matured one. Under facts and circumstances of the case, both parties are directed to bear their own costs.

(Dictated to the Judgment Writer, transcribed and computerized by her, corrected and then pronounced by me in the open Court on this the 16th day of June, 2015).

(K.B.GEETHA) XIX ADDL.CITY CIVIL & SESSIONS JUDGE, BANGALORE CITY.

ANNEXURE I. List of witnesses examined on behalf of :

(a) Plaintiff's side :

P.W.1 - K.Chetan Kumar

b) Defendants' side :

D.W.1 - M.Narayan D.W.2 - M.Srinivas D.W.3 - Smt.Munirathnamma D.W.4 - Smt.Shobha II. List of documents exhibited on behalf of :

(a) Plaintiff's side :

Ex.P.1	GPA
Ex.P.2	Certified copy of the cheque

Ex.P.3 & Ex.P.4 Bank statements of SBI Ex.P.5 Certified copy of the complaint filed before Police Inspector, White Field Ex.P.6 Certified copy of the FIR in Crime No.195/2013 Ex.P.7 Certified copy of the charge sheet in the above Crime No. Ex.P.8 Memorandum of Understanding dtd: 29/11/2012 Ex.P.8(a) to Signatures Ex.P.8(k) Ex.P.8(l) Endorsement on Ex.P.8 Ex.P.9 Certified copy of the 'B' Report Ex.P.10 Certified copy of the sale deed dtd:

12/1/2007

(b) Defendants' side : -

Ex.D.1 Memorandum of Understanding dtd: 29/11/2012 Ex.D.2 RTC Ex.D.3 Certified copy of the sale agreement dtd: 23/9/2008 Ex.D.4 Certified copy of the plaint in O.S.No.1286/2009 Ex.D.5 Certified copy of the written statement in the said case Ex.D.6 Certified copy of I.A.No.8 filed in O.S.No.1286/2009 Ex.D.7 Objections to I.A.No.8 in O.S.No.1286/2009 Ex.D.8 Objections to I.A.No.8 by proposed defendant No.3 in O.S.No.1286/2009 Ex.D.9 Certified copy of the Order sheet in O.S.No.1286/2009 Ex.D.10 Certified copy of the issues in O.S.No.1286/2009 Ex.D.11 Certified copy of the plaint in O.S.No.43/2010 Ex.D.12 Certified copy of the order sheet in O.S.No.43/2010 Ex.D.13 Certified copy of the Regd.Sale deed dtd: 27/7/2009 Ex.D.14 Certified copy of the objections filed by Gowramma in RRT Dispute No.30/2008 Ex.D.15 Certified copy of the review petition in O.S.No.1286/2009 Ex.D.16 Certified copy of the objections filed to the Review petition Ex.D.17 & Certified copy of the complaint & Ex.D.18 FIR No.210/2013 Ex.D.19 RTC of survey NO.65/8B for 2014- 2015 Ex.D.20 Certified copy of the petition in W.P.No.2960/2014 Ex.D.21 Certified copy of the order sheet in W.P.No.2960/2014 Ex.D.22 Synopsis in W.P.No.2960/2014 Ex.D.23 Endorsement issued by KR Puram Revenue Sheristedar (K.B.GEETHA) XIX ADDL.CITY CIVIL & SESSIONS JUDGE, BANGALORE CITY.

GVU/-