

(2002) 07 AP CK 0019

Andhra Pradesh High Court

Case No: Appeal No's. 753 and 1014 of 1989

T.V. Kameswari

APPELLANT

Vs

V.R. Sudhakara Rao
and Others

RESPONDENT

Date of Decision: July 19, 2002

Acts Referred:

- Transfer of Property Act, 1882 - Section 53A

Citation: (2004) 1 ALT 87

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: M.S.R. Subrahmanyam and Ramamohan, for the Appellant; K.V. Subrahmanya Narsu, for the Respondent No. 1, for the Respondent

Judgement

P.S. Narayana, J.

These two Appeals arise out of a Common Judgment made in O.S.No. 350/82 on the file of II Additional Subordinate Judge, Visakhapatnam and O.S.No. 131/82 on the file of the same Court.

2. One Thangirala Venkata Avadhani filed O.S.No. 131/82 for recovery of possession of the plaint schedule property after evicting the defendants and for the relief of permanent injunction and O.S.No. 350/82 was filed by one Sudhakar Rao as against Thangirala Venkata Avadhani and certain others for the relief of specific performance of an oral agreement of sale relating to the plaint schedule property. The said Thangirala Venkata Avadhani died during the pendency of the said suits no doubt T.A. Kameswari, the appellant in the both the suits had been brought on record as the legal representatives of the said Venkata Avadhani. In O.S.No. 131/82 the said Venkata Avadhani as plaintiff had pleaded as follows:

The Staff of Andhra University formed a Co-operative Society. The said Society purchased from her Highness Janaki Ratnayammajee, CBE, Dowager Rani Saheba of

Gangapur Ac.8.80 cents forming part of T.S.No. 125 (part) of Waltair Ward in Visakhapatnam Municipality. The said Society allotted a plot to the 1st plaintiff i.e., Plot No. 30 in the said layout by means of a registered sale deed dated 30-11-1967 and delivered possession. To the South of the Plot No. 30 there is Plot No. 31. The 1st plaintiff came to learn that this plot was purchased by the defendants. In the plot purchased by the defendants they constructed a building. While constructing the said building, as their plot was having road on three sides, they requested the 1st plaintiff for permission to stock their sand, stone and granite and bricks in the site of the plaintiff and as the site of the 1st plaintiff was vacant he said no objection and in utter good faith gave the said permission. Suddenly on the evening of 10-5-1982 the 1st plaintiff was informed that the defendants were constructing a compound wall on the East and West of the 1st plaintiff's plot No. 30. He also found that the foundations were dug and the stone was laid in the foundation both on Eastern side and Western side. On the early morning he immediately gave a report to the III Town Police Station. Along with the 1st plaintiff a police constable came and the 1st plaintiff found that the Eastern compound wall completed and in the Western compound wall the construction with bricks was started on the basement raised on 10th. The police informed them not to do any construction but later they began construction even in spite of the police warnings. The 1st plaintiff never sold the site nor agreed to sell the same to anybody including the defendants. He is absolute owner of the property.

3. The 1st defendant filed written statement with the following allegations:

The 1st defendant's correct name is I.B.V. Narasimharao and not I.Narasimharao as mentioned in the plaint. It is submitted that this defendant's mother-in-law was one Kotagiri Srivara Manga Tayaramma. She wanted to acquire two plots at Visakhapatnam and asked this defendant to arrange the purchase of two plots at Visakhapatnam. Consequently this defendant approached the plaintiff on behalf of his mother-in-law and it was agreed that the plaintiff should sell 665 sq. yards of the property covered by Plot No. 30 to Manga Tayaramma at Rs. 65/- per sq. yard for a total consideration of Rs. 42,575/-. The said oral agreement of sale was entered into between the plaintiff and Smt.Manga Tayaramma, represented by this defendant as her agent in the last week of November, 1979 at the plaintiffs residence in Visakhapatnam. This defendant paid an amount of Rs. 16,575/-towards part of the sale consideration to the plaintiff on behalf of the vendee, his mother-in-law in the week of November, 1979 and the plaintiff delivered possession of the schedule property to this defendant representing the vendee-his mother-in-law. The plaintiff in fact noted down on a piece of paper and calculated the total sale consideration for 665 sq. yards at Rs. 65/-per sq. yard and arrived at the figure of Rs. 42,575/- He wrote the name of this defendant as "I.Narasingarao" on the top of the said slip of paper and he also noted the sale consideration at the rate of Rs. 40/- per sq. yard. The plaintiff delivered the slip of paper to this defendant at that time. The 1st defendant states that plaintiff required him to obtain a Demand Draft for Rs.

26,000/- being the balance of sale consideration payable to him and he also agreed to execute and register the necessary sale deed in favour of the vendee Smt. Manga Tayaramma within a week after the oral agreement of sale and promised to obtain the required clearance for the sale of schedule property under the provisions of the Urban Ceiling Act at the cost of the vendee i.e., Manga Tayaramma. Further, it was agreed that the Demand Draft of Rs. 26,000/- should be handed over to the plaintiff at the time of registration of the sale deed. This defendant's mother-in-law Manga Tayaramma in pursuance of the said oral agreement of sale obtained a draft for an amount of Rs. 26,000/- in favour of the plaintiff. This defendant thereupon approached the plaintiff immediately after 3-12-1979 and had shown to him the Demand Draft and asked him if he obtained the required clearance from the Urban Ceiling Authority. The plaintiff, thereupon stated that he did not obtain the required clearance as yet and promised to execute and register the sale deed as soon as he obtained the clearance. The 1st defendant states that it is only the plaintiff that did not perform his part of the contract till now and caused breach of the terms of the contract and ultimately choose to deny the truth of the contract. On 10-12-1979, the 1st defendant, for Manga Tayaramma purchased plot No. 31. He states that in fact as wall was constructed on the Eastern side for both the plot Nos. 30 and 31 and likewise another wall on the West was constructed to both the said plot Nos. 30 and 31. As both the plots originally belonged to the same owner Manga Tayaramma, no wall was constructed in between the two plots. Further the wooden material for the proposed building was stocked in the site of Sri Gangapur Rani, which is situated to the South of Plot No. 31. It is false to state that the defendants requested the plaintiff for permission to stock their sand and stone in the plaint schedule site. Plaintiff is not entitled either for delivery of possession or for a permanent or mandatory injunctions.

4. The 2nd defendant in the said suit also filed a written statement stating that he was unnecessarily impleaded as a party. On the strength of the above pleadings, the following Issues were settled:

- (1) Whether the plaintiff is entitled to possession?
- (2) Whether the plaintiff is entitled to prohibitory and mandatory injunction as prayed for?
- (3) To what future damages, if any, and at what rate the plaintiff is entitled to?
- (4) Whether the suit is bad for nonjoinder of necessary parties?
- (5) Whether the plaintiff is estopped?
- (6) To what relief?

5. As already stated supra, I.V.R. Sudhakar Rao filed O.S.No. 350/82 for the relief of specific performance on the strength of an oral agreement of sale and the plaintiff in the said suit had pleaded as follows:

Plaintiff's grandmother Manga Tayaramma wanted to acquire two house plots at Visakhapatnam and requested her son-in-law to arrange the purchase of the same for the construction of house at Visakhapatnam. Consequently plaintiff's father approached the 1st defendant on behalf of Manga Tayaramma. The 1st defendant agreed to sell the schedule site at Rs. 65/- per sq. yard for a total consideration of Rs. 42,575/-. The said oral agreement of sale was entered into between the 1st defendant and the plaintiffs maternal grandmother in the first week of November 1979 at the 1st defendant's residence in Visakhapatnam. At the time of oral agreement Sri I.B.V. Narasimharao paid an amount of Rs. 16,575/- to the 1st defendant towards portion of the sale consideration on behalf of vendee Manga Tayaramma in the presence of Sri Rao Venkatarama Narasimharao etc. After the death of Manga Tayaramma plaintiff as legatee has been in possession of the site as per the Will executed by her on 15-4-1980. After receiving the said amount of Rs. 16,575/- the 1st defendant at the time of the said agreement of sale noted down on a piece of paper and calculated the total sale consideration for 655 sq. yards at Rs. 65/-per sq. yard and arrived at the figure of Rs. 42,275/-. He wrote the name of the vendees agent and son-in-law as "I. Narasimharao" on the top of the said slip of paper and he also noted the sale consideration at the rate of Rs. 40/- per sq. yard. As per the terms of the said agreement of sale, it was also agreed that the vendee Manga Tayaramma should obtain a demand draft for the balance of sale consideration of Rs. 26,000/- in favour of the 1st defendant and the 1st defendant should obtain the required permission from the Urban Ceiling Authority and execute the registered sale deed within about a week after the said oral agreement of sale. It was further agreed that the said demand draft should be handed over to the 1st defendant at the time of the registration of the sale deed. In pursuance of the said agreement of sale, Manga Tayaramma obtained a demand draft for an amount of Rs. 25,000/-in favour of the 1st defendant on 3-12-1979. The defendant stated that he did not obtain the permission as yet that it would take some time and promised to execute and register the sale deed as soon as the permission is obtained. Plaintiff also submits that on 10-12-1979 I.B.V. Narasimharao on behalf of late Manga Tayaramma purchased plot No. 31 which is situate to the South of the schedule plot and the said Tayaramma took possession of the same. The 1st defendant filed suit agreement of sale. Since the 1st defendant came forward with as false case denying the agreement of sale in the entirety, the plaintiff filed this suit.

6. The 1st defendant in the said suit filed a written statement with the following allegations:

7. The allegations that the plaintiff's father approached the 1st defendant for purchase of site and the 1st defendant agreed to sell the site at Rs. 65/- per sq. yard, that the total sale consideration was Rs. 42,575/-, that the oral agreement was entered into between them, are false and denied. The allegations that at the time of oral agreement Narasimharao paid Rs. 16,575/- to this defendant towards a portion

of sale consideration on behalf of Manga Tayaramma, that the plaintiff as a legatee was in possession of the site as per the Will executed by her on 15-4-1980, are not valid and tenable under law. The allegations that after receiving the amount of Rs. 16,575/- at the time of agreement of sale this defendant noted down on a piece of paper and calculated the total sale consideration for 655 sq. yards at Rs. 65/- per sq. yard and arrived at a figure of Rs. 42,575, that he wrote the name of the vendee's agent and son-in-law was I.Narasimharao on the top of the slip of paper, that he also noted the sale consideration at the rate of Rs. 40/- sq. yard, that the 1st defendant delivered the slip of paper to Narasimharao at that time, are false and invented for the purpose of the suit. The allegations that as per the agreement of sale it was agreed that Tayaramma should obtain a demand draft for the balance of sale consideration of Rs. 26,000/- in favour of the 1st defendant, that the 1st defendant should obtain the required permission from the Urban Ceiling Authority for execution and registration of the sale deed, that the defendant promised to obtain the said permission and execute the register sale deed, that he agreed to do so within about a week, are all invented for the purpose of the suit. The further allegations that Thayaramma in pursuance of the agreement of sale obtained a demand draft for an amount of Rs. 25,000/- in favour of the 1st defendant on 3-12-1979, that she sent the same to Narasimharao to approach the 1st defendant to complete the transaction and execute the sale deed duly registered by this defendant, that the 1st defendant stated that he did not obtain the permission yet, that it would takes some time and promised to execute and register the sale deed as soon the permission is obtained, are utterly false. The allegation that on 10-12-1979 Narasimharao on behalf of Thayaramma purchased Plot No. 31 and took possession of the same, that it devolved in I.Ramachandra Rao is denied and the plaintiff is put to strict proof of the same. This suit is only a counter-blast to O.S.No. 131/82 on the file of II Additional Subordinate Judge's Court, Visakhapatnam. The plaintiff is not entitled for any relief whatsoever.

8. On the strength of the respective pleadings, the following Issues were settled in the suit for specific performance:

(1) Whether the alleged oral agreement of sale and payment of Rs. 16,575/-towards portion of sale consideration to defendant No. 1 as pleaded by plaintiff in his plaint are true?

(2) Whether the plaintiff is entitled to sue the defendants?

(3) Whether the plaintiff is entitled to the relief of specific performance of the alleged suit contract as prayed for?

(4) Whether the plaintiff is entitled to claim Rs. 46,000/- towards damages for breach of contract of sale?

(5) To what relief?

9. Since the subject matter of both the suits is one and the same, the suits were disposed of by Common Judgment after recording the evidence of P.W.1 to P.W.3, D.W.1 to D.W.3 after marking Exs.A-1 to A-3 and Exs.B-1 to B-5 and the Court of first instance had believed the oral agreement of sale and had decreed the suit O.S. No. 350/82 and had dismissed the other suit filed for possession and other reliefs i.e., O.S.No. 131/82, and as already stated supra, Thangirala Venkata Avadhani no doubt was examined as P.W.1 and subsequent thereto since he died the legal representative T.A. Kameswari was brought on record and aggrieved by the said Common Judgment and the decree made therein the appellant had preferred these Appeals and since the subject matter is one and the same, both the Appeals are being disposed of by this Common Judgment.

10. Sri Rama Mohan representing Sri M.S.R. Subrahmanyam, the learned Counsel representing the appellants with all vehemence had contended that the whole approach of the trial Court in appreciating the oral and documentary evidence is totally erroneous. The learned Counsel also had taken me through the evidence of P.W.1, P.W.2 and P.W.3 and also the evidence of D.W.1, D.W.2 and D.W.3 and had contended that the trial Court had totally erred in decreeing the suit for the relief of specific performance on the strength of an alleged oral agreement of sale basing on Exs.B-1 and B-2 calculation slip and demand draft. The learned Counsel also would maintain that Ex.B-3 is a Will and the recital in the Will, which is a self-serving document, will not help the plaintiff in the suit for specific performance in any way. The learned Counsel further would maintain that the stand and the explanation given by Thangirala Venkata Avadhani is so clear and categorical in what circumstances the defendant in O.S.No. 131/82 came into possession of the plaint schedule property and inasmuch as oral agreement of sale is set up, if the said oral agreement is not believed, since there is no dispute about the ownership, the suit filed by Thangirala Venkata Avadhani O.S.No. 131/82 is liable to be decreed automatically. The learned Counsel further contended that the relief of specific performance is discretionary relief and when a party is setting up oral agreement of sale, the degree of proof and standard of proof required in such a case is definitely of a higher order and in the present case, except Exs.B-1 and B-2 and certain inferences which had been drawn by the trial Court, there is no clear proof about all the material terms of the contract and hence the trial Court had totally erred in decreeing the suit for specific performance. The learned Counsel had taken me thorough the evidence of P.W1 to P.W-3 and also D.W-1 to D.W.3 meticulously and had commented about Exs.A-1 to A-3 and also Exs.B-1 to B-5. Exs.B-4 and Ex.B-5 are the proceedings of the Assistant Controller of Estate Duty, Guntur and these documents may not be of much help to decide the crucial aspect involved in both the suits. The learned Counsel also contended that it is not their case that in part performance of the agreement of sale, possession was delivered and the learned Counsel also had contended that inasmuch as an oral agreement of sale is set up, such party is not entitled to the protection of Section 53-A of the Transfer of

Property Act and the learned Counsel further would maintain Ex.B-1 does not disclose anything as between Venkata Avadhani and Manga Tayaramma and hence there is absence of consensus ad idem. The learned Counsel also commented that even for the payment of amount of the alleged day of the oral agreement of sale, there is no acceptable evidence and the evidence available is only interested evidence and no independent evidence is available in this regard. The learned Counsel further contended that mere proof of handwriting may not amount to proof of contents of document and hence the approach the trial Court in appreciating Ex.B-1 is definitely erroneous. The learned Counsel placed reliance on [Ramji Dayawala and Sons \(P\) Ltd. Vs. Invest Import](#), . The learned Counsel further contended that the settlement of price is only one of the terms of the contract and several other essential conditions will be there and unless all the terms and conditions are satisfied a suit for specific performance cannot be decreed. There is absolutely no evidence even in relation to the readiness and willingness to perform a part of the contract and at any rate there is no concluded contract between the parties and on the aspect of the heavy burden in proving oral agreement of sale strong reliance was placed on [Ouseph Varghese Vs. Joseph Aley and Others](#), , [Brij Mohan and Others Vs. Sugra Begum and Others](#), ; [Abdul Rasheed and others Vs. Abdul Hakeem](#), , [Rangnath Sharma and Others Vs. Tetari Bibi](#).

11. Sri Subramanya Narsu, the learned Counsel representing the respondents in both the Appeals would maintain that here is a case where a highly placed person like Thangirala Venkata Avadhani had taken a false defence and had come forward to the Court with a false case and the learned Counsel had taken me through the evidence of P.W.1 and also the evidence of P.W.2 and P.W.3 and the evidence of D.W.1, D.W.2 and D.W.3 and had commented that when Thangirala Venkata Avadhani was in witness box it became inevitable for him and ultimately he had to admit Ex.B-1 and it is not in dispute that Ex.B-1 is in the handwriting of Thangirala Venkata Avadhani and the stand taken by this party is one of total denial and there is no explanation about Ex.B-1 at all. The learned Counsel also had contended that Manga Tayaramma in fact executed a Will Ex.B-3 and the attesor of the Will also was examined as D.W.3. D.W.2 is the brother of Manga Tayaramma and D.W.1 is Narasimharao, the father of the plaintiff in O.S.No. 350/82. The learned Counsel also commented that in Ex.B-1, the plot number, the extent, the price fixed per square yard and the basic value of the calculations are available and Ex.B-2 is the demand draft taken for Rs. 26,000/- within a short time thereafter to the aforesaid transaction of Ex.B-1 and the learned Counsel also had contended that these parties reposed their confidence in view of high position of Thangirala Venkata Avadhani but taking advantage of the absence of a written contract, the said Thangirala Venkata Avadhani intended to avoid the contract. The learned Counsel also further contended that in the suit for possession and other reliefs filed by Avadhani, a written statement was filed in detail narrating and explaining Ex.B-1 but no rejoinder atleast was filed by the said Avadhani. The learned Counsel had taken me

through the evidence of P.W.1 meticulously and had contended that this witness is not a truthful witness at all. The learned Counsel further contended that it is Avadhani who had to obtain clearance from the U.L.C. authorities and no doubt that was not done. The Will executed by Manga Tayaramma - Ex.B-3, also lent support to the stand taken by the plaintiff in the suit for specific performance. The learned Counsel also further contended that in the light of the clear and categorical evidence relating to the proof of oral agreement of sale the trial Court on appreciation of both the oral and documentary evidence had arrived at the correct conclusion in granting such relief of specific performance and negating the relief of possession and other ancillary reliefs to the opposite parties and the learned Counsel placed strong reliance on [Moturi Seeta Ramabrahmam Vs. Bobba Rama Mohana Rao and others,](#) in this regard.

12. Heard both the counsel at length.

13. The following Points arise for consideration in these Appeals:

(1) Whether there was an oral agreement of sale and payment of Rs. 16,575/- towards a portion of the sale consideration as contended by the 1st respondent in A.S. No. 753/89?

(2) Whether the appellant in A.S.No. 1014/89 is entitled to the relief of possession and the other ancillary reliefs prayed for in the said suit O.S.No. 131/82?

(3) Whether the plaintiff in O.S.No. 350/ 82 is entitled to the discretionary relief of specific performance?

(4) Whether the plaintiff in O.S. No. 350/82 is entitled to the alternative relief of Rs. 46,000/-towards damages for breach of contract of sale?

(5) If so to what reliefs the parties are entitled to?

14. Points 1, 3 and 4, for the purpose of convenience can be discussed together since they relate to oral agreement of sale.

15. It is not in dispute that Thangirala Venkata Avadhani was the owner of the plaint schedule property. No doubt, the plaintiff in O.S.No. 350/82, a subsequent suit filed for the relief of specific performance, is claiming relief on the strength of oral agreement of sale and the stand taken by him is that Thangirala Venkata Avadhani agreed that the price should be Rs. 65/-per sq. yard and the total consideration will be Rs. 42,575/- and an amount of Rs. 16,575/-was paid as advance and received by Thangirala Venkata Avadhani, hereinafter referred to as "Avadhani" for the purpose of convenience. It is also the case of the plaintiff in O.S.No. 350/82 that inasmuch as Manga Tayaramma died having executed a Will on 15-4-1980, marked as Ex.B-3, he is entitled to the relief of specific performance. Avadhani himself was examined as P.W.1 and no doubt subsequent thereto he died. Manga Tayaramma also died and by virtue of the Will Ex.B-3, the plaintiff was claiming the relief in O.S.No. 350/82. It is

pertinent to note that none of the defendants in O.S.No. 131/82 figured as plaintiffs in O.S.No. 350/82. However, incidentally, the plaintiff in O.S.No. 350/82 is the son of the 1st defendant, the brother of 2nd defendant in O.S.No. 131/82. The plaint schedule property in O.S.No 131/82 is Plot No. 30, T.S.No. 125/V, Block No. 16, Andhra University Staff Co-operative Building Society and certain details are given how the Society got this property and how the layout was approved and Plot No. 30 was allotted to Avadhani. No doubt it is his stand that Plot No. 31 was purchased by them and it is to the South of his plot and they had constructed a building in Plot No. 31 and while constructing the said building, they had requested for permission only to store granite, sand etc., in the said site and he gave permission and suddenly on 10-5-1982 they began to construct a compound wall and began to raise hut-cum-shed in his plot. However, the case setup by the succeeding parties in the trial Court is that Manga Tayaramma wanted to acquire two plots in Visakhapatnam and requested D.W.1 to look into the same and D.W.1 approached P.W.1 and P.W.1 agreed to sell 655 sq. yards of site covered by Plot No. 30 to Manga Tayaramma at the rate of Rs. 65/- per sq. yard and D.W.1 paid an amount of Rs. 16,575/-towards part sale consideration to P.W.1 on behalf of Manga Tayaramma in the first week of 1979 and P.W.1 delivered possession of land to D.W.1 representing Manga Tayaramma and subsequent thereto Manga Tayaramma purchased Plot No. 31 on 10-12-1979 from another Professor B.S. Siva Rao and thus Manga Tayaramma got constructed a building in Plot No. 31. Inasmuch as possession already was delivered, there is no question of taking permission from Avadhani for putting the stone, granite, sand etc. As far as the aspect of delivery of possession is concerned, it is needless to say that since the contract was not reduced to writing Section 53-A of the Transfer of Property Act will not come to the aid of the plaintiff in O.S.No. 350/82 and hence it cannot be said that in pursuance of the said oral agreement of sale possession had been delivered and hence the plaintiff in O.S.No. 350/82 is entitled to protect that possession by using Section 53-A of the Transfer of Property Act as a shield. Ex.B-1 is in the handwriting of P.W-1. It is no doubt true that P.W.1 had admitted Ex.B-1 to the effect that it is in his handwriting and the explanation given by P.W.1 relating to Ex.B-1 was that one Prof. B.S. Siva Rao had sought and interview with him in connection with sale of his Plot No. 31 and he wanted to help to calculate the value of the plot and hence in that context Ex.B-1 came into existence. It is pertinent to note that the extent of Plot Nos. 30 and 31 are almost same. But is also essential to note that in Ex.B-1 there are calculations and the extent of 655 sq. yards had been mentioned and it was shown to be in Plot No. 30 and the extent of plot No. 31 is 647 sq. yards. Ex.A-2 is the sale deed executed by Andhra University Teachers Co-operative House Building Society in favour of P.W.1 and Ex.A-3 is the letter written by Siva Rao. Ex.A-3 was marked independently with a view to explain Ex.B-1 and to connect the same to the said Siva Rao. Ex.A-3 is the letter dated 14-12-1979 addressed by Prof. B.S. Siva Rao to P.W.1. Ex.A-1 is the office copy of the complaint given by P.W.1 to S.I. of Police. The evidence of P.W.1 relating to Ex.B-1 is very peculiar and a person of such a stature had given several evasive

answers. It is no doubt true that a careful reading of the deposition of P.W.1 will definitely make any prudent man to feel that this witness was not deposing all the facts clearly and at any rate he was not speaking total truth. The trial Court had discussed about the evidence of P.W.1 and also Ex.B-1 in detail and had appreciated the same along with the respective pleadings of the parties also and had arrived at a conclusion that in the light of the evidence of P.W.1 and D.W.2 and also Exs.B-1 and B-2, the calculation slip and the demand draft for Rs. 26,000/- and further recitals in Ex.B-3, the oral agreement of sale as pleaded by the Plaintiff in O.S.No. 350/82 had been well established. In fact, a careful perusal of the deposition of P.W.1 of clearly reveals that for reasons best known, P.W.1 was not inclined to speak the truth and several questions were posed and several answers had been recorded in the deposition of P.W.1 and hence on appreciation of the evidence the trial Court had recorded a finding that in the light of the evidence of D.W.1 and D.W.2, in fact in connection with the transaction of Ex.B-1 Avadhani had received a sum of Rs. 16,575/- out of the total sale price of Rs. 42,575/-. It is also very essential to note that the stand taken by P.W.1 is one of total denial and the explanation and the stand taken by P.W.1 - Avadhani, is definitely not believable and hence I do not think that the finding that Avadhani had received Rs. 16,575/-, recorded by the trial Court, is a well considered finding arrived at on appreciation of both oral and documentary evidence and such finding needs no disturbance in this Appeal. No doubt, several probabilities had been pointed out by both the parties to substantiate their respective contentions. No doubt, apart from the evidence of P.W.1 and P.W.2, the evidence of P.W.3 also is available on record. Likewise, the evidence of D.W.1, the father of the plaintiff in O.S.No. 350/82 and the evidence of D.W.-2 who supports the case of the plaintiff in O.S.No. 350/82 and D.W.3, the attester of Ex.B-3 also is available on record. It may be a fact that there might have been a recital in Ex.B-3 relating to the transaction in connection with Plot No. 30. But however, it is to be seen that this is a suit for specific performance and it is not in dispute that there is no written agreement between the parties and no doubt it was strenuously contended by the counsel for the appellant that there is no consensus ad idem and there is no concluded contract and the mere fixation of the price alone cannot be said to be sufficient for a concluded contract since there will be several other material terms and unless all the terms of the contract are well established, the relief of specific performance on the strength of the said oral agreement of sale cannot be enforced. No doubt, an attempt was made to show that the plaintiff in O.S.No. 350/82 was never ready and willing to perform his part of the contract and certain comments had been made even in this direction.

16. In the decision referred (1) supra, it was held that undoubtedly mere proof of handwriting on a document would not tantamount to proof of all the contents or the facts stated in the document and if the truth of the facts stated in a document is in issue, mere proof of handwriting and execution of the document would not furnish evidence of truth of the facts or contents of the document and the truth or

otherwise of facts or contents so stated would have to be proved by admissible evidence i.e., by the evidence of those persons who can vouchsafe for the truth of the facts in issue. On the strength of the ratio laid down in this decision, it was clearly contended that there is no independent evidence to establish Ex.B-1 transaction and hence on the strength of Ex.B-1, the relief should not have granted by the trial Court. Here is a case where Ex.B-1 is only a piece of evidence so as to establish the oral agreement of sale and it is not an agreement by itself. Apart from it, though D.W.2 may be an interested witness, the trustworthiness of D.W.2 cannot be disbelieved and he had supported the case of the plaintiff in O.S.No. 350/82 in toto and hence in the light of the evidence of D.W.1 and D.W.2, so far as the payment of Rs. 16,575/- is concerned, there cannot be any doubt at all. Relating to Ex.B-2 demand draft for Rs. 26,000/-, no doubt the same was revalidated for some time and however the fact remains that Avadhani had not obtained the U.L.C. permission and meanwhile it appears that Avadhani passed away and the legal representative is further prosecuting the litigation. In the decision referred (2) supra, it was held that in a suit for specific performance of oral agreement to reconvey the property, the burden of proof on plaintiff is very heavy. In the decision referred (3) supra, it was held that where specific performance of contract of sale of immovable property on the basis of oral agreement alone had been sought for, heavy, burden lies on the plaintiff to prove consensus ad idem. In the decision referred (4) supra, while dealing with the aspect of the relief of specific performance of an oral agreement of sale, it was held that the law recognizes oral agreement of sale of immovable property and it does not require it to be put in writing but however heavy burden lies on the plaintiff to prove that there is consensus ad idem for a concluded oral agreement and whether there was concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case and the plaintiff has to succeed on the strength of his own case rather than the weaknesses or deficiencies in the case of defendants. In the decision referred (5) supra, in a suit for specific performance where oral agreement was not proved and the plaintiff was not shown to be ready and willing to perform his part of the contract and necessary permission for sale from the concerned authority also was not obtained, refusal to grant decree for specific performance was held to be proper. In the decision referred (6) supra, it was no doubt held that an agreement of sale need not be in writing and decree for specific performance can be passed when as oral agreement is proved. Reliance also was placed on [Ganesh Shet Vs. Dr. C.S.G.K. Setty and Others](#), to show how in the present case it cannot be said to be a concluded contract. In [Forum for a Better Hyderabad Vs. Government of Andhra Pradesh and Others](#), it was held that for the plea of part performance there should be a written agreement of sale from which the terms can reasonably be ascertained.

17. There cannot be any quarrel as far as the propositions of law laid down in the different decisions specified supra are concerned. It is no doubt true that except the oral evidence of D.W.1 and D.W.2 who are concerned with payment of the advance

amount of Rs. 16,575/- and except Ex.B-1, a small slip, there is no other evidence, except several probabilities. The trial Court on appreciation of all the facts and circumstances had linked one with another and had drawn an inference that there should have been an oral agreement of sale in relation of Plot No. 30 only. It is pertinent to note that apart from the payment of Rs. 16,575/- several other essential aspects are necessary and as already observed by me, in the case of an oral agreement of sale, the defence u/s 53-A of the Transfer of Property Act is not available to a party who alleges to be in possession of the property.

18. Apart from this aspect of the matter, it is also not in dispute that Avadhani had not even secured the requisite permission from the U.L.C. authorities and no doubt the legal representative of Avadhani is alone contesting these litigations. As can be seen from the material available on record, it may be that Avadhani at a particular point of time was inclined to dispose of his property, but subsequent thereto, he had changed his mind. All the terms and conditions unfortunately are not clear, but however as per the material available on record, one has to arrive at the irresistible conclusion that the payment of advance amount, in fact, was made to Avadhani, and as far as this aspect is concerned there cannot be any two opinions though except the oral evidence there is no other material available on record relating to the other essential terms of the contract. Further in the light of the conduct of the parties it appears that by denying Ex.B-2 the plaintiff in O.S.No. 350/82 wanted to further proceed with the transaction. But however inasmuch as except Ex.B-1 and the oral evidence of D.W.-1 and D.W.2, there is no other clear proof relating to the other terms and conditions of the contract which can be termed as essential conditions, like delivery of possession and also the obtaining of permission from the U.L.C. authorities, it cannot be said that all the essential terms and conditions of a well concluded contract had been well established in the case on hand.

19. Point 2: The husband of Kameswari -Avadhani, instituted O.S.No. 131/82 for the relief of recovery of possession and certain ancillary reliefs like permanent injunction etc. It is not in dispute that Avadhani was the owner of the property and subsequently his legal representative Kameswari is the owner of the plaint schedule property and in case this Court arrives at a conclusion that on the strength of the oral agreement of sale the relief of specific performance granted by the trial Court cannot be sustained, then automatically the suit O.S.No. 131/82 has to be decreed. As already observed by me, the relief of specific performance is a discretionary relief and except the oral evidence there is no clear evidence to prove of the essential terms which had been referred to supra. However, I made it clear that as far as the payment of an amount of Rs. 16,575/- is concerned, there cannot be any doubt at all hence the plaintiff in O.S.No. 131/82 i.e., the appellant in A.S.No. 1014/89, no doubt is bound to succeed in the said suit relating to relief of recovery of possession and ancillary reliefs, but however, at the same time she is bound to pay an amount of Rs. 16,575/- which was received by her husband, with interest at 12% per annum from the date of receipt of the said amount till the date of payment and she is bound to

do so both is law and also in equity since she cannot take advantage of the situation and derive benefit by way of unjust enrichment.

20. Point 5: In the light of the discussion in detail and the finding given by me that relating to the essential terms of the contract and to establish the concluded contract relating to all the terms, evidence is not of a very clear proof but however the payment of advance amount of Rs. 16,575/- had been clearly established, I am inclined to grant the alternative relief in favour of the plaintiff in O.S.No. 350/82 the refund of Rs. 16,575/-with interest @ 12% per annum from the date of payment of the said amount till the date of realisation and there shall be a charge over the plaint schedule property for the realization of the said amount. However, inasmuch as only alternative relief of refund of the advance amount with interest thereon had been granted in the suit for specific performance, in the other suit O.S.No. 131/ 82 the appellant in A.S.No. 1014/89 is bound to succeed and accordingly the suit O.S.No. 350/82 for the relief of specific performance is decreed only to the extent of refund of an amount of Rs. 16,575/- with interest @ 12 % per annum from the date of payment of the same to the plaintiff till the date of realization by creating charge over the plaint schedule property of realization of the same. The appellant in A.S.No. 1014/89, i.e., the plaintiff in O.S.No. 131/82, is entitled to the decree of possession and ancillary reliefs as prayed for in O.S.No. 131/82.

21. Thus, the Appeal A.S.No. 753/89 is partly allowed to the extent indicated above and A.S.No. 1014/89 is allowed as prayed for. In view of the peculiar facts and circumstances of the case, this Court makes no order as to costs.