

A K. NANJAPPA (DEAD) BY LRS.

v.

R.A. HAMEED ALIAS AMEERSAB (DEAD) BY LRS. AND
ANOTHER

B (Civil Appeal No. 8224 of 2003)

SEPTEMBER 02, 2015

[M. Y. EQBAL AND C. NAGAPPAN, JJ.]

C *Specific Relief Act, 1963:*

s.20 – Scope of – Held: s.20 preserves discretionary power of court – Discretion must be exercised in accordance with sound and reasonably judicial principles.

D *s.20 – Specific performance of the agreement written in a quarter sheet of paper – High Court relying upon said agreement since the said quarter sheet of paper was produced before the Magistrate in a criminal proceeding – Correctness of – Held: High Court was not correct in relying upon the document although it was executed on a quarter sheet of paper and not on a proper stamp paper – High Court also misdirected itself in law in holding that there was no need for the plaintiff to have sought for the opinion of the expert regarding the execution of the document – The evidence and the finding recorded by the criminal courts in a criminal proceeding cannot be the conclusive proof of existence of any fact, particularly, the existence of agreement to grant a decree for specific performance without independent finding recorded by the Civil Court – It is not a fit case where the discretionary relief for specific performance is to be granted in favour of the plaintiff-respondent.*

H *Oral contract – Suit for specific performance of contract – Held: Can be decreed on the basis of oral contract –*

However, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement.

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Allowing the appeal, the Court

HELD: 1. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immoveable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus *ad idem* between the parties for the concluded agreement for sale of immoveable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immoveable property were concluded between the parties. [Paras 19, 20] [842-C-D, F-G]

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2. In a suit for specific performance of a contract, the Court has to keep in mind Section 20 of the Specific Reliefs Act. This Section preserves judicial discretion to grant decree for Specific performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant. It is equally well settled that Relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance with sound and reasonably judicial principles. [Paras 21, 23] [842-H; 843-A-B, F-G]

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A 3. In the instant case while deciding the issue as to
whether the agreement of 1967, allegedly executed by
the defendants, can be enforced, the Court had to
consider various discrepancies and series of legal
proceedings before the agreement alleged to have been
B executed. In agreement dated 2.9.1967, there is reference
of earlier agreement dated 29.11.1965 whereunder Rs.
18,000/- was paid to the defendant-appellant which was
denied and disputed. Curiously enough that agreement
dated 29.11.1965 was neither filed nor exhibited to
C substantiate the case of the plaintiff. The High Court put
reliance on the agreement dated 2.9.1967 written in a
quarter sheet of paper merely because of the fact that
said quarter sheet of paper was produced before the
D Magistrate in a criminal proceeding. The High Court is
not correct in holding that there is no reason to disbelieve
the execution of the document although it was executed
on a quarter sheet of paper and not on a proper stamp
and also written in a small letter. The High Court also
E misdirected itself in law in holding that there was no need
of the plaintiff to have sought for the opinion of an expert
regarding the execution of the document. Indisputably,
various documents including order-sheets in the earlier
proceedings including execution case were filed to
F nullify the claim of the plaintiff regarding possession of
the suit property but these documents have not been
considered by the High Court. The evidence and the
finding recorded by the criminal courts in a criminal
proceeding cannot be the conclusive proof of existence
G of any fact, particularly, the existence of agreement to
grant a decree for specific performance without
independent finding recorded by the Civil Court. It is
not a fit case where the discretionary relief for specific
performance is to be granted in favour of the plaintiff-
H respondent. The High Court in the impugned judgment

has failed to consider the scope of Section 20 of the Specific Relief Act and the law laid down by this Court. [Paras 28, 29, 30] [847-D-H; 848-A-D] A

Surya Narain Upadhyaya vs. Ram Roop Pandey and others 1995 Supp (4) SCC 542; *Mayawanti vs. Kaushalya Devi* 1990 (2) SCR 350 : (1990) 3 SCC 1; *K. Prakash vs. B.R. Sampath Kumar* (2015) 1 SCC 597; *Zarina Siddiqui vs. A. Ramalingam* 2015 (1) SCC 705 – relied on. B

Anil Behari vs. Latika Bala Dassi & Others AIR 1955 SC 566 : 1955 SCR 270; *Adi Pherozshah vs. H.M. Seervai* AIR 1971 SC 385: 1971 (2) SCR 863; *Shanti Kumar Panda vs. Shakuntala Devi* 2003 (5) Suppl. SCR 98 : (2004) 1 SCC 438; *State of Bihar vs. Radha Krishna Singh & Others* 1983 (2) SCR 808 : (1983) 3 SCC 118; *Koillipara Sriramulu vs. T. Aswatha Narayana* AIR 1968 SC 1028 : 1968 SCR 387 – referred to. C
D

Case Law Reference E

1955 SCR 270	referred to.	Para 16
1971 (2) SCR 863	referred to.	Para 16
2003 (5) Suppl. SCR 98	referred to.	Para 16
1983 (2) SCR 808	referred to.	Para 16
1968 SCR 387	referred to.	Para 19
1995 Supp (4) SCC 542	referred to.	Para 22
1990 (2) SCR 350	relied on.	Para 24
(2015) 1 SCC 597	relied on.	Para 25
2015 (1) SCC 705	relied on.	Para 26

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8224 of 2003 H

A From the Judgment and Order dated 25.06.2003 of the High Court of Karnataka at Bangalore in Regular First Appeal No. 201/92.

B K. Ramamoorthy, Nikhil Swami, Prabha Swami for the Appellants.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Anirudh, Chinmay Deshpande, Amjid Maqbood, S.N. Bhat, Sheela Goel for the Respondents.

C The Judgment of the Court was delivered by

D **M. Y. EQBAL, J.:** 1. Aggrieved by the judgment and orders dated 25.6.2003 passed by the High Court of Karnataka in Regular First Appeal No. 201 of 1992, the appellants have preferred this appeal by special leave. By impugned judgment, High Court partly allowed the appeal, set aside the judgment of the trial court and decreed the suit of the plaintiff-respondents herein for specific performance as well as for recovery of possession of suit items I, II and III.

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

F 3. The plaintiff-respondent claimed to be the son of Late P. Abdul Rahiman Sab alias Jambusab. The late Jambusab had three wives. The first wife's son was Abdul Sakoorsab, who died in the year 1967. The first plaintiff and his younger brother R.A. Rasheed are the children of Jambusab from his second wife Azizabi. Through the 3rd wife Mahajambi, Jamusab had begotten 4 children namely, A. Abdul Subhan, R. Abdul Majeed, Maqubal Jan and Aktharunnisa. The children of late Jambusab could not agree to divide the properties of late Jambusab. They litigated and ultimately in R.A. 133/49-50 on
H the file of the High Court, a final decree was passed and the

properties described in the Schedule to the plaint fell to the joint share of the first plaintiff and his younger brother R.A. Rasheed. The date of the decree is 22.08.1950. The first plaintiff and his younger brother thus became the exclusive joint owners of the suit schedule property and from the date of the High Court decree namely 22.08.1950. The first item of the suit schedule which was designed as a Cinema building was leased jointly by the first plaintiff and his younger brother R.A. Rasheed to late N.K. Subbaiah Shetty and one Rattanhalli Ramappa jointly by means of a registered lease deed dated 26.02.1951 specifying therein a period of 15 years for the running of the lease. The said lease by the terms provided inter alia for a monthly rent of Rs. 400/- to be paid in equal halves to the first plaintiff and R.A. Rasheed. The lessees had to advance Rs. 10,000/- which will be treated as a charge on item no. 1 of suit Schedule. All the equipments such as cinema projector, electric generator, furniture and other accessories were purchased by the said lessees which they had to provide under the contract and the theatre was equipped for showing films. It was also a term under the lease that these equipments projector, generator etc., should become the property of the first plaintiff and his brother R.A. Rasheed on the termination of the lease. While only Rs. 5,000/- was given as advance, the expenses of the balance of Rs. 5,000/- which was retained by N.K. Subbaiah Shetty and Rattanhalli Ramappa has been accounted for and thus only Rs. 5000/- is the actual amount of advance.

4. But, N.K. Subbaiah Shetty and his joint tenant Ratanhalli Ramappa who were astute businessmen found later 2 years that they could not manage the theatre property to earn profits. They both successfully induced the inexperienced 1st plaintiff to enter into a contract dated 05.08.1953 with them which ostensibly appear to be a sub-lease of their rights to the 1st plaintiff. Though the 1st plaintiff and his younger brother

- A had become entitled to be rightfully to the equipments in the cinema theatre as per the terms of the lease date 26.02.1951, they were not even under any liability to pay the same on the termination of the lease. N.K. Subbaiah Shetty astutely got a provision made in the so-called sub-lease dated 05.08.1953
- B that he should get a rent of Rs. 250/- for himself which was in reality interest for sum of Rs. 5000/- given as advance, but which had been recovered by N.K. Subbaiah Shetty during the period the lease was subsisting in his favour. Besides nothing was due to be paid to N.K. Subbaiah Shetty as it was
- C voluntary surrender to ease evidence by the so-called sub-lease. The return of Rs. 250/- per month which could only be demanded as interest on the sum of Rs. 5000/- advanced was usurious Loans Act in force in Mysore. The so called sub-
- D lease dated 05.08.1953 was therefore illegal for want of consideration. Since Rs. 5000/- could not be claimed legally as it has been recovered and also the provisions for payment of Rs. 250/- P.M. to N.K. Subbaiah Shetty, being usurious interest was also not recoverable in law. The so called lease
- E dated 05.08.1953 operated in Law only as a surrender of lease, as the right of lessor as well as lessee became merged in the plaintiff who was a joint owner of item No. 1 of the suit schedule under Section 111(d) of the T.P. Act. He could not be deemed to be a lessee of his own building and the sub-lease
- F was void to the extent that it provided Rs.250/- to be paid as rent to N.K. Subbaiah Shetty, the possession which accrued to the plaintiff on the execution of the deed dated 05.08.1953 was, therefore, free from all liability to pay any amount to N.K. Subbaiah Shetty. R.A. Rasheed, the brother of the 1st Plaintiff
- G executed a pronote dated 24.01.1953 benami in the name of C. Shambulingaiah the real beneficiary being the 1st defendant. The defendant filed a suit in O.S. 1/54 as Power of Attorney Holder of C. Shambhulingaiah against R.A. Rasheed in the then Court of Sub-Judge, Mandya and obtained ex parte decree
- H and in Execution No. 38/54 got the undivided half share of

R.A. Rasheed in the Suit schedule 1st item attached. A
Thereafter, in Ex. No. 5/56 the 1st defendant as Power of
Attorney holder sued out further execution and brought to sale
the half share of R.A. Rasheed and purchased the same in the
name of C. Shambulingaiah in Court auction held on
12.07.1956, the bid amount being Rs. 8359.37. Though the B
half share itself was worth a lakh of rupees at lease R.A.
Rasheed himself was kept in dark throughout as services of
all the processes were made to appear, as though R.A.
Rasheed had refused them. Again in the name of C
Shambulingaiah who was the brother-in-law of the 1st defendant
delivery was sued out and since actual delivery could not be
obtained of the undivided half share of R.A. Rasheed the 1st
defendant maneuver to take symbolic delivery of the said half
share on 02.04.1958 in Misc. 34/56. Thereafter, the first D
defendant arranged to get a sale deed executed by C.
Shambulingaiah in the name of Amruthamma the 2nd
defendant, wife of the 1st defendant. There was no
consideration paid for this deed. It means the representative,
a substitution of one benamidar for another, the motive being E
that the properties should remain with the 1st defendant in the
name of his wife.

5. The first plaintiff had executed a demand pronote for
Rs.1335/- dated 10.05.1952 in the name of one Krishna
Shastry, who was also a benamidar for first defendant. It is F
learnt that a suit was got filed in O.S.449 of 1953 on the file of
the Munisiff, Srirangapatna, and getting refusal endorsement
made on the summon keeping this 1st plaintiff ignorant of the
said proceedings. The first defendant got an ex-parte decree G
behind the back of the plaintiff. It is learnt that the said decree
was got transferred to the name of 1st defendant and the 1st
defendant sued out execution in Ex.No.217/61 on the file of
the Munsiff, Srirangapatna and got attached the half share of
the first plaintiff in the suit schedule items 1 to 3. Of course, all H

A the processes of the Court were got done in secret by the 1st defendant who has vast experience in court work, and the 1st plaintiff was throughout ignorant of the same. After attachment, the first defendant induced N.K. Subramanya Shetty to lend his name, thus gave an assignment to the name of N.K. Subramanya Shetty with the conveyance of his brother N.K. Subbaiah Shetty of the decree in O.S.449/52. This again was maneuvered without any consideration to please the multi-millionaire N.K. Subbaiah Shetty, who himself was anxious to get a share in illegal gains. It is learnt that the 1st defendant, however, got a general power of attorney from N.K. Subbaiah Shetty and continued further execution proceedings suppressing the facts that only half the share of the first plaintiff at least worth Rs.1,50,000/- in items 1 to 3 could be brought to sale. The 1st defendant put up the entire schedule item for sale and bid at the court auction on 14.02.1962 for a paltry sum of Rs.325/-. Thus stabbing at the back of the 1st plaintiff and got the same confirmed on 06.04.1962. The sale and subsequent confirmation is vitiated and void as only half share was attached, but against the attachment itself the full properties including the properties which were not subject matter of the attachment were brought to sale and purchased.

6. Since the first defendant openly boasted that he had in reality become the owner of the entire properties of the first plaintiff, the first plaintiff made inquiries and came to know about the treacherous and illegal acts of the 1st defendant who through abuse of processes of court had maneuvered to get the sale held and confirmed including the half share of this first plaintiff, and the first plaintiff, therefore, got filed Misc.No.49 of 1962 to set aside the sale on the ground of fraud. There was protracted litigation which ended in a compromise petition dated 17.02.1966 being filed whereby the first plaintiff agreed to pay Rs.7000/- within three months from the date of compromise and if such payment was made within time the

petition to stand allowed and in default the petition to stand dismissed. The first plaintiff thereafter paid the amount in 3 installments. The first installment being Rs.2000/-, in all Rs.7000/- within three months as per compromise petition, to the counsel for the first defendant. The first defendant has acknowledged the receipt of the above payments to his counsel in a letter dated 10.05.1966 written by him to the first plaintiff and again in another letter of first defendant to first plaintiff dated 31.07.1967. However, it is learnt that the first defendant treacherously kept quite without getting the payment in full reported to court with ulterior motives. Also, the first defendant who had got half the share of Abdul Rasheed conveyed benami to the name of his wife Amruthamma, the second defendant entered into an agreement with the first plaintiff's wife on 29.11.1965 executed by the 1st defendant as power of attorney holder of the 2nd defendant whereby he agreed to convey half the share of and another house which is described as 4th item in suit schedule for a sum of Rs18,000/- The consideration of Rs.18,000/- for this agreement has been paid by the first plaintiff on behalf of 2nd plaintiff as follows:-

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

(b) As per receipt dated 09.02.1966 executed by 1st defendant, Rs.5500/- has been paid thus totalling Rs.13,500/- out of Rs.18,000/-.

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

- A (a) Rs.7000/- paid to 1st defendant as recounted in para-9 supra and acknowledged in letters dated 10.05.1966 and 31.07.1967 towards compromise petition in Misc.49 of 1962.
- B (b) Rs.4500/- paid before witnesses on 02.09.1967 when the agreement was executed.
- (c) Rs. 8000/- paid to first Defendant as per agreement dated 29.11.1965.
- C (d) Rs.5500/- paid as per receipt dated 9.2.1966 wherein the amount of Rs.8000/- as per (a) above have also been acknowledged.

8. The first plaintiff allegedly running a cinema theatre item No.1 of the suit schedule all along, as he was in possession of the same ever since 01.08.1953. However, in the morning of 05.09.1967, the first plaintiff was surprised to find himself under arrest along with his sons and another Pasha, a relative, by the police authorities. It was learnt that the first defendant had lodged a complaint to the police that he had been dispossessed of item No.1 of suit schedule Cinema Building even though he had no possession. There were account books and other important papers and several materials forming part of the cinema building belonging to the first plaintiff and kept within the premises of item No.1 of the suit schedule. The first defendant with whom K.N. Subramanya Shetty and N.K. Subbaiah Shetty were in collusion with the help of police got the first plaintiff dislodged from item No.1 of suit schedule with the cinema equipment, furniture etc. The papers included among others receipt executed by defendant No.1 and N.K. Subbaiah Shetty for monies paid by the plaintiff from time to time and the accounts books contained entries in respect of this payment. The first and N.K. Subbaiah Shetty, thus, were successful in laying their hands on valuable evidence and it is believed that show of force by the police and

subsequently dispossession of the first plaintiff from item No. 1
maneuvered to get these valuable records into their custody
for being hushed up. The police did not even get the mahazar
written at the time of their forcible entry into item No.1. The
complaint of the first defendant became subject matter in C.C.
1758/67 and C.C. 370/68 before the Special First Class
Magistrate, Srirangapatna and in the said cases the plaintiff
and other accused were also acquitted. The finding is that the
so called delivery taken by the 1st defendant in the civil court is
only a paper delivery and not amount to dispossession of the
plaintiff of the first item of the suit schedule. The Magistrate
also directed return of the key of the first theatre for the lock
which had been kept by the police at the time of illegal seizure
to the first plaintiff. This was symbolical delivery of the actual
possession to which the 1st plaintiff was entitled in law. The 1st
plaintiff has filed an application for actual possession being
delivered in pursuance of the judgment before Special 1st Class
Magistrate, Srirangapatna, which was pending. The plaintiffs
have also included in this suit claim for damages, caused to
them by illegal arrest and distraint of their articles and account
books and papers and also mesne profit accruing due to
dispossession which has occurred on 05.09.67. Since the
defendant nos. 1 and 2 and N.K. Subramanya Shetty have
failed to execute a sale deed in accordance with the terms of
the agreement dated 02.09.67 entered into by the first
defendant for himself and on behalf of defendant no.2 and N.K.
Subramanya Shetty in respect of item No. 1 of suit schedule,
the suit was filed for specific performance of contract dated
02.09.67. As some of the documents have been produced by
the first plaintiff in criminal cases before the Special 1st Class
Magistrate, Srirangapatna, certified copies of the same were
produced along with the original documents in the custody of
the plaintiff with document list in triplicate for perusal of this
Court. N.K. Subbaiah Shetty has been included so as to give
a binding decree against him also.

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- A 9. The trial court formulated the following issues for determination:-
- 1) Whether the 1st defendant was the Power of Attorney Holder of the 2nd Defendant?
- B 2) Whether the 1st defendant for himself and as Power of Attorney Holder of 2nd defendant executed an agreement of sale dated 2.9.1967 agreeing to convey the plaint schedule properties in favour of the plaintiff?
- C 3) Whether under the said agreement the plaintiff paid the amount to the 1st defendant as mentioned in para 11(a) (b) (c) (d) of the plaint?
- 4) Whether the plaintiffs are entitled to the specific performance of the agreement of the sale and for possession of the schedule properties?
- D 5) Whether the plaintiffs are entitled to Rs.93,600/- towards the mesne past profits?
- E 6) (a) Whether the proceedings in Ex. No.217/61 and Misc. No.34/69 and orders thereon are fraudulent and without jurisdiction and as such they are void, illegal and wrongful as stated in para ¼ of the plaint?
- (b) Whether the defendants are estopped in challenging the suit agreement dated 2.9.67 by their conduct for the reasons stated in para 16 of the plaint?
- F (c) Whether the plaintiffs prove that they are ready and willing to perform their part of contract of sale as per agreement dated 2.9.1967?
- G (7) Whether the defendants are entitled to compensatory costs under Section 35(a) of C.P.C.?
- (8) To what reliefs are the parties entitled?
- H Issue No. 1 has been answered in affirmative holding that

defendant-appellant no.1 was the P.O.A. holder of his wife
defendant no.2. A

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

"If we carefully go through the document at Ex. P.4 it is clearly D
stated that the defendant 1 as the power of attorney of the
2nd defendant and Subramanya Shetty as executed Ex.P.1
in favour of the first and the 2nd plaintiff, after taking Rs.4,500/
- this documents has been written on very old quarter sheet
piece of paper which is written in very small letters. Ex.P.1 E
is not at all written in usual course. No reasons are assigned
in the evidence of the PW.1,2 and 5 as to why a small piece
of paper is used for writing Ex.P.1. Ex.P.1 is written in a city
like Mysore. It is not written in a remote small village, wherein
the scarcity of paper can be expected. It is further pertinent F
to note here that the shop premises of the first defendant
was situate admittedly in Santhepete which is very near to
Devaraja Market and Srirampet, which are heart of business
centers of Mysore. Further, Ex.P.1 is admitted written before
Noon. time P.W.1 has stated that between 9 a.m. to 1 G
p.m. he has written Ex.P.1. Further P.W.5 has stated by
about 2-30 p.m. Ex. P.1 is written, P.W.2 has stated by about
12 noon Ex.P.1 is written, that means Ex.P.1 is written in a
broad day light. If the handwriting contained in Ex.P.1 in H

A small letters reduced to writing atleast the same will cover 2 full sheets of papers meaning thereby it may go to cover 4 pages of hill size papers. No reasons are assigned as to why Ex.P.1 is written in such a congested manner. Non availability of the paper to write Ex.P.1 cannot at all be expected nor anticipated in a city of Mysore, that too near the first defendants shop which is in the business centre of Mysore City. It is admitted by all the witnesses that there are several shops of stamps vendors and advocates offices. If that be the case, that would not have been any difficulty to secure the required paper to write Ex.P.1. Further, if we carefully go through the contents of Ex.P.1, it goes to show that all the suit properties are agreed to have been sold for Rs.25,000/- and the amount of Rs.20,500/- has been paid to the defendant earlier to 02-09-67. Further, it is also clear that the amount of Rs.4,500/- was also paid to the defendant 1. That means only the stamp papers to get the registered sale deed were required to be obtained. No reasons are assigned the any of the plaintiffs witnesses as to what was the difficulty in purchasing the stamp paper to execute the reg. Sale deed regarding the sale mentioned in Ex.P.1. It is not the case of the plaintiff, that they were unable to purchase required stamp papers on the date of Ex.P.1 due to paucity of the funds. If it was really a genuine sale or tried to be depicted before Court, definitely the reg. Sale deed itself would have been got executed since except appearing before the sub-registrar the first defendant is not required to do anything else but to sign the reg. Sale deed and if the sale was really a genuine sale nothing prevented the plaintiff to take the first defendant to the office of the Sub-Registrar and to get executed the reg. Document in the office of the concerned/Sub-registrar Pandavapura but no reasons assigned as to why the reg. Sale deed is not got executed from the 1st defendant who is admittedly the holder of the general power of attorney from the 1st defendant and

Subramanya Shetty, who were the owners of the suit schedule properties on 02-09-67. Further, it is pertinent to note here that though it is mentioned in Ex.P.1 that the plaintiffs were required to make some arrangements regarding the amount to purchase the stamp papers and the registration fees etc. but none of the witnesses P.Ws. 1,2 and 5 speak about this aspect of the case.”

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

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

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

“17. The conclusion drawn by the Criminal Court with regard to the document – Ex.P.1 in regard to its execution etc. are certainly relevant and it can be relied upon as a piece of evidence by the plaintiffs in support of their case. The observations made by the Criminal Court regarding

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A execution of agreement – Ex.P.1 in its judgment – Ex. P.4
are certainly admissible U/s 13 of the Indian Evidence Act
in support of the claim of the plaintiffs regarding execution
of the document – Ex.P.1 by defendant No.1. Therefore,
B the Trial Court was not at all justified in ignoring such
evidence on the ground that the judgment of the Criminal
Court is not binding on the Civil Court. May be, that the
judgment of the Criminal Court is not binding on the Civil
Court. But, the observations made by a competent Court
C with reference to certain document would certainly be
relevant even in a civil case, where the very same document
was a subject matter of challenge.

18. In the instant case, it is not in dispute that the very same
document – Ex.P.1 was produced before the Criminal Court
D wherein, plaintiff No.1 was prosecuted on the charge of
trespass and the Criminal Court having examined the said
document has made certain observations with reference
to such document and that being so, when the very same
document sought to be questioned in a civil case, the
E observations by a Criminal Court will certainly have
relevance. In fact, the learned counsel for the respondents
had advanced a contention that this document was created/
concocted for the purpose of defence in the criminal case.
F In view of such contention raised on behalf of the
respondents, the observations made with reference to this
document by the Criminal Court in its judgment – Ex. P.4
will certainly have relevance in the present case. The
observations made by the Criminal Court in its judgment –
G Ex.P.4 regarding the execution of the document – Ex.P.1
lends credence to the evidence of PWs 1,2 & 5. There
could be no serious dispute that the plaintiffs were the
original owners of the suit properties and that the same were
lost in a series of litigation and ultimately the said properties
H which were once lost to the plaintiffs were sought to be

reconveyed to the plaintiffs by virtue of this agreement – A
Ex.P.1, executed in their favour by defendant No.1. Under
the circumstances, there is no reason to disbelieve the
execution of the document – Ex.P.1 in favour of plaintiffs.
No doubt it was executed on a quarter sheet of paper and
not on a proper stamp paper and that further the contents of B
the document – Ex.P.1 have been written in small letters.
But then it cannot be said, that is not a document. It has to
point out that the document is defined under the Indian
Evidence Act and it means, “any matter expressed or C
described upon any substance by means of letters, figures
or marks or by more than one of those means intended to
be used or which may be used for the purpose of recording
that matter”. A writing is a document, whether writing is
made on a quarter sheet or paper or a full sheet, it is a D
document within the meaning of the Evidence Act and that
merely because the writing is on a quarter sheet of paper, it
does not cease to be a document. The only requirement is
that the party relying upon a document must prove the same
in accordance with law. The mode of proving the contents E
of a document has been dealt with, in Sections 61 to 66 of
the Indian Evidence Act. The contents of a document may
be proved either by the primary or secondary evidence.
Primary evidence means, the document itself produced for
the inspection of the Court. In the instant case, it is not in F
dispute that the original agreement itself was produced for
the inspection of the Court as per Ex. P.1. The document in
question being an agreement of sale or a reconveyance
agreement, it does not require attestation. Section 67 of
the Evidence Act refers to document other the document G
required by Law to be attested. It shows that the signature
of the person alleged to have signed a document i.e.
execution must be proved by the evidence with the signature
purporting to be that of the executants is in his handwriting
and the other matter in the document i.e. its body must also H

A be proved by proof of handwriting of a person purporting to
have written the document. In the instant case, the
agreement – Ex.P.1 was stated to have been written by its
scribe – PW.1 at the instructions of defendant No.1 and
B after the document was written, it was signed by defendant
No.1. Therefore, what was required to be proved in the
instant case by the plaintiffs to prove the execution of
document – Ex.P.1 was that it contains the signature of
defendant No.1.”

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

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

E 16. Mr. K. Ramamurthy, learned senior counsel appearing
for the appellant, assailed the impugned judgment passed by
the High Court as being erroneous in law and suffers from
serious mis-appreciation of evidence. Learned Counsel, firstly,
submitted that issue nos. 6(a) to 6(c) framed by the Trial Court
relates to validity and effect of the orders passed in execution
F proceeding and miscellaneous proceeding. The Trial Court
recorded the finding that in execution of decree in execution
case no. 216 of 1961 the defendant-appellant was put in
possession and objection raised by the plaintiff-respondent
herein were rejected. These findings of issue nos. 6(a) to 6(c)
G were not challenged in appeal before the High Court by the
respondents. Further, the High Court held that findings of issue
nos. 6(a) to 6(c) need no interference. Having held so, the
High Court ought not to have allowed the appeal and decreed
the suit. Mr. Ramamurthy, learned senior counsel, submitted
H that although, the defendant-appellant denied and disputed the

existence of agreement, but the High Court, on the basis of evidence recorded in a criminal proceeding decided the suit for specific performance. Learned senior counsel, therefore, submitted that, in the alleged agreement dated 02.09.1967, there is a reference of earlier agreement dated 29.11.1965, but the same was neither produced nor proved in the case which itself is sufficient to disentitle the plaintiff from seeking a decree for the specific performance. It was contended that although, the alleged agreement in question was executed in a quarter sheet of paper without affixing any stamp, but the High Court has erroneously relied upon the said agreement on the basis of the evidence given in the criminal case. Learned senior counsel further submitted that the High Court has committed grave error of law in applying the provisions of Section 13 of the Evidence Act. Learned senior counsel relied upon catena of decisions including decisions rendered by this Court in *Anil Behari vs. Latika Bala Dassi & Others.*, AIR 1955 SC 566; *Adi Pherozshah vs. H.M. Seervai*, AIR 1971 SC 385; *Shanti Kumar Panda vs. Shakuntala Devi*, (2004) 1 SCC 438; and *State of Bihar vs. Radha Krishna Singh & Others* (1983) 3 SCC 118.

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17. Mr. Basava Prabhu S. Patil, learned senior counsel appearing for the respondents, on the other hand, submitted that the only issue that was to be decided by the High Court was as to whether there was a binding agreement executed by the defendants-appellants. Learned senior counsel submitted that the High Court after considering the evidence of the scribe and other witnesses and also considering the evidence produced in a criminal proceeding and the finding recorded in the said proceeding has come to the right conclusion that the agreement was executed by the defendants. The High Court further came to the finding that payment of consideration amount to the defendants has been proved and that the signature on the agreement was admitted by Nanjappa,

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A who was a signatory of the agreement. According to the learned senior counsel, the finding recorded by the High Court is based on appreciation of evidence and, therefore, such finding of fact needs no interference by this Court.

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

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

E 20. However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was
F consensus *ad idem* between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental
G terms for sale of immovable property were concluded between the parties.

H 21. In a suit for specific performance of a contract, the Court has to keep in mind Section 20 of the Specific Reliefs Act. This Section preserves judicial discretion to grant decree for Specific

performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant.

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

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

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

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

B “8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation.”

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

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

H 14. The King’s Bench in *Rooke’s case* said:

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

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15. The Court of Chancery in *Attorney General v. Wheate* followed *Rooke’s case* and observed: (ER p. 666)

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

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A constitution entrusted with. This description is full and judicious, and what ought to be imprinted on the mind of every Judge.”

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

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

H “33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to

be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misleads the court then such discretion should not be exercised by refusing to grant specific performance."

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

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

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29. Indisputably, various documents including order-sheets in the earlier proceedings including execution case were

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

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

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