THIS R.S.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 18.03.2024, THIS DAY THE COURT PRONOUNCED THE FOLLOWING:

J U D G M E N T

This appeal is filed against the judgment and decree dated 03.11.2007 passed in R.A.No.161/2006, on the file of the Civil Judge (Sr.Dn.) and JMFC, Devanahalli, dismissing the appeal and confirming the judgment and decree dated 24.06.2006 passed in O.S.No.321/1995, on the file of the Civil Judge (Jr.Dn.) and JMFC, Devanahalli

2. The factual matrix of the case of the plaintiff in a suit for specific performance is that defendant No.1 Munichannarayappa entered into an agreement of sale dated 19.02.1987 and received an amount of Rs.23,500/- as kartha of the joint family and he had borrowed loan from PLD Bank, Devanahalli for raising wine yard and it was over due until February 1987. Munichannarayappa's younger brother Venkatesha had left the village long ago and his whereabouts were not known. In order to repay the loan, Munichannarayappa offered to sell the suit properties and received entire sale consideration and executed an agreement for sale on 19.02.1987. On the same day, Munichannarayappa delivered

the possession of the suit properties and agreed to execute the sale deed whenever called upon to do so. The plaintiff has always been ready and willing to perform his part of the contract. Whenever the plaintiff approached defendant No.1, he postponed the execution of sale deed on one pretext or the other. Hence, he got issued the notice dated 14.06.1995, but Munichannarayappa failed to comply with the demand made therein.

3. It is also the case of the plaintiff that subsequent to the filing of the suit, Munichannarayappa's wife Manjulamma got revenue records pertaining to the third item of the suit schedule changed to her name in collusion. Munichannarayappa's younger brother Venkatesha came to the village in the year 1995 and having come to know about the sale agreement, created a sale deed dated 22.05.1995 in favour of C. Kempanna. The purchaser was aware of the sale agreement in his favour and also his possession over the suit properties. C. Kempanna is also bound by the agreement dated 19.02.1987. Since the agreement was executed by Munichannarayappa as the kartha of the joint family for legal necessity, it is binding on all the members of the joint family. It is also the case of the plaintiff

that he filed an application before the Tahsildar, Devanahalli to get his name entered in column 12 of the RTC in respect of the suit property in RRT.CR.646/93-94; the Revenue Inspector, Vijayapura Hobli, visited the suit property, has conducted mahazar dated 07.04.1994. Munichannarayappa issued reply on 14.06.1995 admitted delivery of possession and execution of the agreement. No partition has taken place between Munichannarayappa and Venkatesha. He is entitled to protect his possession over the suit properties by virtue of Section 53-A of the Transfer of Property Act. Manjulamma and Kempanna tried to dispossess him from the suit properties.

4. It is contended in the written statement of defendant Nos.1 and 2 that the plaintiff obtained the signature of defendant No.1 on blank stamp paper as security towards loan of Rs.10,000/- and the same has been concocted and the suit is also not in time. The defendant No.4, who is the purchaser also took the contention in the written statement that he is a bonafide purchaser of suit schedule property. It is also the contention of the plaintiff that there is an interference by the defendants and hence filed a suit for permanent injunction. The

Trial Court in a suit for specific performance filed by the plaintiff in O.S.No.321/1995, framed the following issues:

1. *Whether the plaintiff proves that the defendant executed agreement of sale in his favour dated 19.02.1987 in respect of the suit property agreeing to sell the same for Rs.23,500/-?*

2. *Whether the plaintiff proves that the defendant received entire sale consideration on the date of agreement and put him in possession of the suit property?*

3. *Whether the plaintiff proves that he has always been ready and willing to perform his part of the contract?*

4. *Whether the defendants 1 and 2 prove that the plaintiff obtained 1st defendant's signature on blank stamp paper as security towards loan of Rs.10,000/- and concocted the agreement?*

5. *Whether the suit is in time?*

6. *Whether the plaintiff is entitled for specific performance of the agreement dated 19.02.1987 as prayed?*

7. *Whether the plaintiff is entitled for recovery of Rs.23,000/- with interest at 18% p.a. in the alternative?*

8. What order or decree?

Additional issue:

1. Whether the 4th defendant proves that he is a bonafide purchaser of the suit property?

5. The plaintiff examined himself as P.W.1 and examined two witnesses as P.W.2 and P.W.3 in support of his case and got marked the documents at Exs.P.1 to 12. On the other hand, defendant No.1 examined his son, GPA holder as D.W.1 and the subsequent purchaser as D.W.2 and examined other two witnesses as D.W.3 and D.W.4 and got marked the documents at Ex.D.1 to 36. The Trial Court having taken note of both oral and documentary evidence placed on record comes to the conclusion that the sale agreement was executed and defendant No.1 received the entire sale consideration and delivered the possession in favour of the plaintiff and the plaintiff was always ready and willing to perform his part of the contract and answered point No.4 in the negative in coming to the conclusion that defendant Nos.1 and 2 have not proved that signature was taken on blank stamp paper as security for loan of Rs.10,000/-. The Trial Court also comes to the conclusion that the suit is in time and the plaintiff is entitled for specific

performance answering issue No.6 in the affirmative and in view of answering issue No.6, answered issue No.7 as does not arise. The Trial Court answered the additional issue in the negative in coming to the conclusion that defendant No.4 is not a bonafide purchaser.

6. Being aggrieved by the judgment and decree of the Trial Court, defendant No.4 filed an appeal in R.A.No.161/2006. The First Appellate Court, on re-appreciation of both oral and documentary evidence placed on record and keeping in view all the grounds urged in the appeal memo, formulated the point whether the Trial Court erred in coming to the conclusion that the respondent No.4/plaintiff is entitled for the decree of specific performance of sale agreement dated 19.02.1987 against the appellant and respondent Nos.1 to 4/defendant Nos.1 to 4 and for permanent injunction against them? The First Appellate Court having re-assed the material on record, dismissed the appeal concurring the judgment of the Trial Court. Hence, the present appeal is filed before this Court.

7. The main grounds urged in the second appeal is that the Courts below inspite of the best possible and oral evidence

led by the appellant and R1 that Ex.P.1 dated 19.02.1987 stands vitiated with vitiating factors, the Appellate Court has ignored the same and has held it is valid affirming the finding of the Trial Court. Ex.P.1 is a got up document stands proved with overwhelming evidence led by R1 and both the Courts below without bestowing their attention on the evidence led by R1 and that of the oral evidence of R4 have held otherwise. Both the Courts below have overlooked the fact that the appellant has purchased the ½ extent of all the suit schedule properties from R3 after he got the same in the partition between him and R1 vide the registered sale deed and as such R4 is not entitled to the relief of specific performance. The findings of the Trial Court on issue Nos.1 to 6 ought not to have been in the affirmative, but the Trial Court has rendered in its judgment affirmative findings thereon and the finding on additional issue No.1 ought to have been in the affirmative, but the said Court has rendered negative finding thereon. The First Appellate Court without properly appreciating the oral and documentary evidence, erroneously upheld the judgment of the Trial Court.

8. This Court having considered the grounds urged in the appeal memo, at the time of admission, framed the following substantial questions of law for consideration:

1. *Whether in the suit filed by the plaintiff – 4th respondent only against Munichannarayappa seeking to enforce specific performance of the alleged agreement between them, were not the other members of the joint family including the appellant, necessary parties?*

2. *Was the suit filed by the plaintiff – 4th respondent for specific performance of the agreement against only the kartha of joint family maintainable, without seeking declaration that the deed of sale dated 22.05.1995 in favour of the appellant was not binding on him (plaintiff) in view of Section 34 of the Specific Relief Act?*

9. The learned counsel for the appellant would vehemently contend that there was a sale agreement dated 19.02.1987 and the same was executed and possession was delivered by receiving sale consideration of Rs.23,500/-. The learned counsel would contend that the appellant had purchased the property from defendant No.3 and the defendant No.3 had sold the property for a valuable consideration based on the

registered partition deed dated 03.08.1994. In terms of the partition, Sy.No.71/3 vested with defendant No.1 along with Sy.No.69/13. Sy.Nos.71/4 and 69/14 were allotted in favour of defendant No.3. The learned counsel would contend that the Courts below failed to consider this aspect and there was no any prayer in the suit for cancellation of the said partition deed, since already there was a partition among themselves in the year 1994. The learned counsel submits that defendant No.3 had executed the sale deed in favour of defendant No.4 vide sale deed dated 22.05.1995. The learned counsel would contend that when the plaintiff examined P.W.3 as witness to the sale agreement, the same has not been proved, but the Trial Court committed an error in coming to the conclusion that in the reply admitted the delivery of the possession. The learned counsel would contend that defendant No.3 is not a signatory to the said sale agreement and the sale agreement is not by defendant Nos.1 and 3. No doubt, there was a loan transaction and P.W.1 also clearly deposes about the same and the document of Ex.P.2 cannot be believed and the very approach of both the Courts and findings are erroneous.

10. The learned counsel for the appellant relied upon the judgment of the Apex Court in the case of **B. VIJAYA BHARATHI v. P. SAVITRI AND OTHERS** reported in **(2018) 11 SCC 761** and brought to the notice of this Court paragraph No.17, wherein the Apex Court discussed with regard to the High Court was clearly right in finding that the bar of Section 16(c) was squarely attracted on the facts of the present case, and that therefore, the fact that defendant Nos.2 and 3 may not be bonafide purchasers would not come in the way of stating that suit must be dismissed at the threshold because of lack of readiness and willingness, which is a basic condition for the grant of specific performance.

11. The learned counsel referring this judgment would contend that the suit is filed belatedly almost after seven years of the alleged sale agreement.

12. The learned counsel also relied upon the judgment of the Apex Court in the case of **SHANMUGHASUNDARAM AND OTHERS v. DIRAVIA NADAR AND ANOTHER** reported in **(2005) 10 SCC 728** and brought to the notice of this Court paragraph No.30, wherein the Apex Court discussed with regard

to Section 12 of the Specific Relief Act. The learned counsel contend that the Apex Court observed that in the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two brothers with a right to force partition on the sisters who were not parties to the agreement of sale. Such a relief under Section 12 cannot be obtained by a vendee, on purchase of an undivided share of the property of some of the co-owners, against other co-owners who were not parties to the sale agreement.

13. The learned counsel referring this judgment would contend that the other co-owners are not parties to the agreement and there cannot be any specific performance of the decree.

14. The learned counsel also relied upon the judgment of the Apex Court in the case of **SHENBAGAM AND OTHERS v. K.K. RATHINAVEL** reported in **2022 SCC Online SC 71** and brought to the notice of this Court paragraph No.36, wherein it is held that the Court has to take note of the conduct of the

parties. The Apex Court discussed about Section 20 of the Specific Relief Act with regard to granting of an equitable remedy. The learned counsel also brought to the notice of this Court paragraph No.41, wherein it is held that time is not of the essence in an agreement for the sale of immovable property. In deciding whether to grant the remedy of specific performance, specifically in suits relating to sale of immovable property, the Courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree.

15. In the present case, three decades have passed since the agreement of sale was entered into between the parties. The learned counsel referring this judgment would contend that the Trial Court ought not to have granted the relief of specific performance.

16. The learned counsel for the respondents would contend that defendant No.1 has not entered the witness box, instead he examined his son as power of attorney holder as D.W.1 and admittedly he was eight years old. The learned counsel contend that in the sale agreement there was no any

time limit and untenable reply was given and immediately filed the suit. The learned counsel would contend that since concurrent finding is given, there is no any substantial question of law to be considered. The Courts below have given the finding that admittedly the entire sale consideration is paid and the same is only in order to clear the bank loan and the same is also admitted. The learned counsel would contend that the possession was delivered as on the date of the agreement and Section 53A pressed into service in favour of the plaintiff and possession is also proved and these factors have been considered by the Trial Court and the First Appellate Court. The learned counsel would contend that when the Courts below have applied their judicious mind, the question of any perversity does not arise and against the fact finding, no substantial question of law arises and only when perversity is found in the appreciation of evidence, then only the Court can exercise the substantial question of law.

17. In reply, the learned counsel for the appellant would contend that both the Courts ought to have taken note of that the suit is barred by limitation and the very approach of the Courts below are erroneous.

18. Having heard the learned counsel for the appellant and the learned counsel for the respondents and also keeping in view the substantial question of law framed by this Court, whether the plaintiff can maintain a suit against defendant No.1 seeking to enforce specific performance of the alleged agreement when the other members of the joint family including the appellant are necessary parties. Whether the suit for specific performance of the agreement against only the kartha of joint family is maintainable without seeking declaration that the deed of sale dated 22.05.1995 in favour of the appellant was not binding on him in view of Section 34 of the Act. This Court would like to extract Section 34 of the Specific Relief Act, 1963 which reads as follows:

> ***34. Discretion of court as to declaration of status or right.—*** *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

19. Having perused the proviso of Section 34, it is very clear that discretion has to be exercised on well settled principles and the Court has to take note of the nature of obligations in respect of which performance is sought. The conduct of the parties and the effect of the Court granting the decree is also very important. The Court also has to look into the contract between the parties, has to ascertain whether there exists an element of mutuality in the contract and then the Court has to come to a conclusion whether the relief of declaration is necessary or not. The relief under Section 34 of the Specific Relief Act is a discretionary relief and the plaintiff cannot claim the relief as right, but the Court has to examine that the plaintiff must have a present interest or right as distinguished from mere chance or vague expectancy. No doubt, in the case on hand, no relief is sought for the relief of declaration to declare that the sale deed executed in favour of the plaintiff as null and void. The prayer is only to direct defendant Nos.1 to 4 to execute the

valid sale deed in favour of the plaintiff in respect of the suit schedule property and in the alternative to pass the decree for refund of the amount. It is important to note that in this appeal also no relief of declaration is sought. But the Court has to take note of the material on record and factual aspects and nature of relief to be sought.

20. It is important to note that though defendant No.1 took the specific contention in the written statement that, his signature was obtained on blank stamp paper as security towards loan of Rs.10,000/- and concocted the same, the same has not been proved. The person who takes the said defence must come before the Court and depose, but he did not step into the witness box. On the other hand, he examined his son and admittedly he was eight years old and was not having any acquaintance with the facts of the case and agreement of sale is of the year 1987. It is important to note that D.W.1 in his cross-examination admits that his father and his uncle Venkatesha had raised loan from PLD Bank and it was repaid in the year 1987 i.e., when the agreement was entered in the year 1987 itself. He also categorically admits that affidavit was prepared on the instructions of Munichannarayappa and Venkatesha, but

Munichannarayappa, who is his father and executant of sale agreement had not chosen to enter into the witness box or to summon bank records to establish that he had repaid the loan even before 1987. It is not in dispute that defendant No.1 was the kartha of the family at that point of time. Admittedly, Venkatesha i.e., defendant No.3 was not residing in the village. Both the brothers have not stepped into the witness box. D.W.1 claims during his cross-examination that the said Venkatesha was residing in his wife's house, but no document is placed before the Court. It is important to note that the partition was taken place in the year 1994 and no partition was taken place prior to 1987. D.W.2 categorically admits that defendant No.1 was managing the affairs of the joint family. D.W.3 admits that prior to 1987, Venkatesha was very much present in the village and also categorically admits that defendant No.1 was not having any bad vices and he was kartha of the family.

21. On the other hand, the plaintiff in order to prove the sale agreement examined P.W.2, who identifies his father's signature on Ex.P.1 and the same is marked as Ex.P.1(a). P.W.1 clearly says that Venkatesha had left the village two years before he paid the sale consideration to Munichannarayappa in the year

1987. P.W.3, who is the witness to said agreement, identifies his signature as Ex.P.1(b). It is important to note that during the course of cross-examination of the witnesses, no suggestion is made with regard to the passing of consideration as well as delivery of possession of the suit schedule property in favour of the plaintiff denying the same. It is important to note that from Ex.D.2 sale deed dated 15.12.1980, it is clear that both defendant Nos.1 and 3 have jointly acquired the properties. It is important to note that the evidence of D.W.1 and D.W.2 and the reply notice Ex.P.11, is very clear that the family continued to be joint during the year 1987 and defendant No.1 was kartha of the family. The fact that loan was raised in PLD Bank for growing wine yard and loan amount was paid in 1987 is in consonance with the pleadings of the plaintiff. The person who contends that the document is obtained fraudulently, has to come and depose before the Court and the same has not been found in the case. D.W.1 categorically admits that the boundaries mentioned in respect of Sy.No.69/13 includes the land in Sy.No.69/14, the fourth item of the plaint schedule. The relinquishment deed dated 03.08.1994 is executed by Venkatesha in favour of defendant No.1 and mother Nanjamma and he had received an

amount of Rs.1,00,000/-. D.W.1 admits that the affidavit was prepared as per the instructions given by his father and junior uncle Venkatesha. When such being the case, there is no explanation on the part of defendant Nos.1 and 3, as to what prevented them from entering the witness box. These factors are taken note of by the Trial Court while appreciating the material on record. The mahazar was drawn in terms of Ex.P.2 and possession was with the agreement holder and no material to show that the possession of item Nos.1 and 3 was taken back from Pillappa and Manjulamma and put in possession subsequent to the execution of the agreement. Only revenue documents are got mutated in the name of Manjulamma and Venkatesha. D.W.3 categorically deposes that he does not know who is in possession of Sy.No.71/2 i.e., item No.2 of the suit schedule. D.W.4 deposes that item No.4 is in possession of Munichannarayappa and item No.1 is in possession of Munichannarayappa and Kempanna and he claims to be not knowing who is in possession of Sy.No.69/13 i.e., item No.3. These factors are taken note of by the Trial Court.

22. The First Appellate Court while appreciating the material on record has given a categorical finding having re-

assessed both oral and documentary evidence placed on record. The First Appellate Court taken note of defendant No.3 is not a party to the sale agreement and no doubt, when the other joint family members are not parties to the sale agreement, the Court has to take note of the material on record. It is not in dispute that defendant No.3 had sold 1 acre 1 gunta of land in Sy.No.71/4 and 12 guntas in Sy.No.69/14 in favour of defendant No.4 under the sale deed dated 22.05.1995. The fact that loan was borrowed prior to 1987 is not in dispute and the averments made in the agreement is very clear that in order to clear the loan, sale agreement Ex.P.1 dated 19.02.1987 came into existence. The recital is very clear that he had agreed to sell the properties for Rs.23,500/- in order to clear the debt of the joint family and he has received the entire sale consideration on the date of agreement itself and put the suit property in his possession. It is the recital that he is going to clear the loan and get the clearance certificate for registration. Hence, the Court has to take note of the reason for entering into the sale agreement. This fact is taken note of by the First Appellate Court in paragraph No.40. The defendant Nos.1 and 2 in the written statement admitted that the defendants had borrowed

the loan from PLD Bank, which was repaid earlier to 1987. Further averment is found in Ex.P.11 reply notice issued to the plaintiff dated 05.07.1995, that it is true that they obtained loan from PLD Bank. The evidence of D.W.1 and D.W.2 as well as reply notice is very clear with regard to the purpose for which the property was agreed to be sold. The defendant Nos.1 and 2 in the written statement have clearly stated that the brother of defendant No.1 had left the house long back and in Ex.P.11 also very same averment is found and the same has been discussed in paragraph Nos.41 and 42 by the First Appellate Court. It is also observed that both defendant Nos.1 and 3 have not entered into the witness box. The appreciation by the Trial Court and the First Appellate Court is very clear with regard to the payment of Rs.23,500/- and handing over the possession and also recital is very clear that possession is with the plaintiff in terms of the sale agreement.

23. P.W.2 is the son of the original agreement holder and nothing is elicited with regard to the agreement is concerned. The plaintiff also examined the witness to the agreement and the very execution was proved and the executant did not enter the witness box and denies the same. The very

contention that the document was created and obtained the signature on blank stamp paper, was not accepted by the Trial Court and the First Appellate Court. It is also observed by the First Appellate Court that defendant No.1 had not chosen to enter the witness box to substantiate that he had borrowed an amount of Rs.10,000/- from the plaintiff and put his thumb impression on Rs.10/- stamp paper. The First Appellate Court also taken note of the fact that the father of D.W.1 and his uncle had raised loan at PLD Bank and also admission was found that prior to 1994, all of them were living together and his father was taking care of the joint family. When such admissions are available and also not signing the document is clear that defendant No.3 was not in the village at that time and loan was availed for the benefit of the family and loan was obtained by both of them jointly. In order to clear the loan only, transaction was taken place and by entering into the agreement of sale, received entire sale consideration and the possession was delivered and the same is for the benefit of the family. When such being the case, the very contention of the learned counsel for the appellant that the Courts below committed an error cannot be accepted. No doubt, the principles laid down by the

Apex Court in the judgments referred supra that when the other family member is not a party to the sale agreement, there cannot be any relief of specific performance, is not applicable to the facts of the case on hand, since the material on record discloses that kartha was taking care of the family and loan was availed by defendant Nos.1 and 3 together and there is an admission to that effect. Prior to 1994, when the other documents came into existence, partition deed and sale deed, it is clear that defendant Nos.1 and 3 were living jointly in the joint family and the executant of the sale agreement was kartha of the family. When such material is available on record and sale consideration also used for the benefit of the family in order to clear the loan, which was availed by defendant Nos.1 and 3 and the document of partition deed came into existence subsequently and then only cause of action arises for the plaintiff to file the suit and immediately he had issued legal notice and when untenable reply was given, the suit was filed.

24. The other contention that the suit is barred by limitation cannot be accepted, when the time is not the essence of contract. Only on refusal, cause of action arises and immediately suit was filed. Hence, the very principles laid down

in the judgments referred supra by the learned counsel for the appellant will not come to the aid of the appellant to come to other conclusion. There is a force in the contention of the learned counsel for the respondents that in the absence of any perversity in the finding of the Trial Court and First Appellate Court, the question of exercising discretion in favour of the appellant does not arise. Hence, I answer both the substantial questions of law accordingly. The plaintiff can seek the relief against defendant No.1 for the specific performance when the other members of the joint family not included since the sale consideration is used for the benefit of the joint family and for clearing the loan availed by defendant Nos.1 and 3. Since defendant No.4 is only a subsequent purchaser and there is a clear material that defendant No.3 was not in the village when the agreement was entered into, but he was party to the loan availed jointly and without seeking relief of declaration, the Court can grant the relief of specific performance since the sale deed is also subsequent one in order to avoid the sale transaction. Having taken note of the material on record, the document of partition and sale deed came into existence with an intention to avoid the sale agreement. This Court relied upon

Section 34 of the Specific Relief Act and even in the absence of the relief of declaration, the Court can come to the conclusion that the subsequent document, which came into existence are not binding on the plaintiff and he can seek for the relief of specific performance without seeking any declaration in respect of subsequent document and the transaction goes back to date of agreement of the year 1987 as well as sale consideration is paid for clearance of loan availed by the joint family members and in the absence of signature of other joint family members, the Court can grant specific performance and the judgment relied upon by the appellant will not come to the aid of the appellant and each facts of the case to be taken note of while applying the principles in the judgment. The other contention that the plaintiff was not ready and willing also cannot be accepted, since having come to know about the subsequent documents only, the plaintiff immediately taken action for seeking the relief of specific performance and already paid entire sale consideration and in part performance of contract, possession also delivered. Hence no grounds are made out.

25. In view of the discussions made above, I pass the following:

ORDER

The appeal is dismissed.

Sd/-
JUDGE

MD