

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23<sup>RD</sup> DAY OF FEBRUARY, 2024

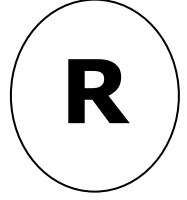
BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

**R.S.A. NO.170/2007 (SP)**

**C/W.**

**R.S.A. NO.171/2007 (SP)**



**IN R.S.A. NO.170/2007:**

**BETWEEN:**

1 . SRI M.K.SHIVAJI RAO  
S/O KUNTA KAREBASAPPA  
AGED ABOUT 64 YEARS  
RESIDING AT CHIRADONI VILLAGE  
CHANNAGIRI TALUK  
DAVANAGERE DISTRICT

SINCE DEAD BY LRS

1(a) SMT.LAKSHMAMMA  
W/O LATE M.K.SHIVAJIRAO  
AGED ABOUT 60 YEARS

1(b) SRI BASAVARAJU  
S/O LATE M.K.SHIVAJIRAO  
AGED ABOUT 32 YEARS

1(c) SRI HANUMANTHAPPA  
S/O LATE M.K.SHIVAJIRAO  
AGED ABOUT 29 YEARS

ALL ARE RESIDENTS OF  
CHIRADONI VILLAGE

CHANNAGIRI TALUK  
DAVANAGERE DISTRICT.

... APPELLANTS

[BY SRI P.M.SIDDAMALLAPPA, ADVOCATE FOR  
APPELLANT NO.1(a - c) -THROUGH V.C.]

**AND:**

- 1 . SRI R.V. SHET  
S/O LATE VANKATESH SHET  
AGED ABOUT 77 YEARS  
RESIDING AT CHIRADONI  
CHANNAGIRI TALUK  
  
SINCE DEAD BY LRS.
- 1(a) SRI R.V.VISHWANATH  
S/O LATE R.V.SHET  
AGED ABOUT 58 YEARS  
RESIDING AT KARKI VILLAGE  
HONNAVARA TALUK  
UTTARA KANNADA DISTRICT  
(SINCE DEAD, REPRESENTED BY LRS  
ALREADY ON RECORD)
- 1(b) SRI GANESH S/O LATE R.V.SHET  
AGED ABOUT 50 YEARS  
RESIDING AT SIRASI VILLAGE  
SIRASI TALUK  
BHAGIRATHA MARUTHI TEMPLE  
RAYARA PETE, SIRASI VILLAGE  
UTTARA KANNADA DISTRICT.
- 1(c) SRI MANJUNATHA R.V.  
S/O LATE R.V.SHET  
AGED ABOUT 52 YEARS  
RESIDING AT BEHIND  
BANNIDIBBA GARAGE  
KARAVARA POST  
KARAVARA DISTRICT.

- 1(d) SRI SOMESHWARA  
S/O LATE R.V.SHET  
AGED ABOUT 45 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(e) SMT.VIJAYA GANESH SHET  
AGED ABOUT 57 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(f) SMT. RAJESHWARI VIMALESHWAR SHET  
W/O VIMALESHWAR SHET  
AGED ABOUT 45 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(g) SMT. CHANDRAKALA  
AGED ABOUT 35 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.

SINCE DEAD BY LRS.

- 1(g)(a) SRI RAVINDRA  
S/O RAMDAS  
AGED ABOUT 22 YEARS  
RESIDING AT HOUSE NO.224  
4<sup>TH</sup> CROSS, 2<sup>ND</sup> MAIN ROAD  
JAYANAGAR, BANGALORE.

1(g)(b) SRI RAMDAS  
AGED ABOUT 55 YEARS  
RESIDING AT HOUSE NO.224  
4<sup>TH</sup> CROSS, 2<sup>ND</sup> MAIN ROAD  
JAYANAGAR, BANGALORE.

1(h) SMT.GEETHA  
W/O SUYARE  
AGED ABOUT 32 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.

2 . SMT. SHARADABAI  
W/O R.V.SHET  
AGED ABOUT 62 YEARS  
R/AT CHIRADONI  
CHANNAGIRI TALUK.

... RESPONDENTS

(BY SRI SHREERAM T. NAYAK, ADVOCATE R1(a -f),  
R1(g)(a & b) AND R(h) VIDE ORDER DATED 13.01.2023  
R1(a to f) ARE LRS OF DECEASED R1 & R2)

THIS R.S.A. IS FILED U/S.100 OF CPC AGAINST THE  
JUDGEMENT & DECREE DATED: 27.10.2006 PASSED IN  
R.A.NO.190/2002 ON THE FILE OF THE I ADDL.CIVIL JUDGE  
(SR.DN.), DAVANGERE, DISMISSING THE APPEAL AND  
CONFIRMING THE JUDGEMENT AND DECREE DATED: 31.7.2002  
PASSED IN O.S.NO.307/1990 ON THE FILE OF THE CIVIL JUDGE  
(JR.DN.), CHANNAGIRI AND ETC.

**IN R.S.A. NO.171/2007:**

**BETWEEN:**

- 1 . SRI M.K.CHANDRAPPA  
S/O BASAPPA  
AGED ABOUT 68 YEARS  
RESIDING AT CHIRADONI VILLAGE  
BASAVAPATNA HOBLI  
CHANNGIRI TALUK,  
DAVANAGERE DISTRICT-577231. ... APPELLANT

(BY SRI P.M.SIDDAMALLAPPA, ADVOCATE [THROUGH VC])

**AND:**

- 1 . SRI R.V. SHET  
S/O LATE VANKATESH SHET  
AGED ABOUT 77 YEARS
- 2 . SMT. SHARADABAI  
W/O R.V.SHET  
AGED ABOUT 62 YEARS

BOTH ARE DIED BY THEIR LRS.

- 1(a) SRI R.V.VISHWANATH  
S/O LATE R.V.SHET  
AGED ABOUT 58 YEARS  
RESIDING AT KARKI VILLAGE  
HONNAVARA TALUK  
UTTARA KANNADA DISTRICT  
(SINCE DEAD, BY LRS ALREADY ON RECORD)
- 1(b) SRI GANESH  
S/O LATE R.V.SHET  
AGED ABOUT 50 YEARS  
RESIDING AT SIRASI VILLAGE  
SIRASI TALUK

BHAGIRATHA MARUTHI TEMPLE  
RAYARA PETE, SIRASI VILLAGE  
UTTARA KANNADA DISTRICT.

- 1(c) SRI MANJUNATHA R.V.  
S/O LATE R.V.SHET  
AGED ABOUT 52 YEARS  
RESIDING AT BEHIND  
BANNIDIBBA GARAGE  
KARAVARA POST  
KARAVARA DISTRICT.
- 1(d) SRI SOMESHWARA  
S/O LATE R.V.SHET  
AGED ABOUT 45 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(e) SMT.VIJAYA GANESH SHET  
AGED ABOUT 52 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(f) SMT. RAJESHWARI VIMALESHWAR SHET  
W/O VIMALESHWAR SHET  
AGED ABOUT 45 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT.
- 1(g) SMT. CHANDRAKALA  
W/O RAMDAS  
SINCE DEAD BY HER LRS

- 1(g)(a) SRI RAVINDRA  
S/O RAMDAS  
AGED ABOUT 22 YEARS  
RESIDING AT HOUSE NO.224  
4<sup>TH</sup> CROSS, 2<sup>ND</sup> MAIN ROAD  
JAYANAGAR, BANGALORE.
- 1(g)(b) SRI RAMDAS  
AGED ABOUT 55 YEARS  
RESIDING AT HOUSE NO.224  
4<sup>TH</sup> CROSS, 2<sup>ND</sup> MAIN ROAD  
JAYANAGAR, BANGALORE.
- 1(h) SMT.GEETHA W/O SUYARE  
AGED ABOUT 32 YEARS  
RESIDING AT NO.6  
HONDA CIRCLE MAIN RAOD  
SHIVAJINAGAR  
DAVANAGERE DISTRICT. ... RESPONDENTS

(BY SRI SHREERAM T. NAYAK, ADVOCATE R1(a -f),  
R1(g)(a & b), AND R(h) VIDE ORDER DATED 13.01.2023  
R1(a to f) ARE LRS OF DECEASED R1 & R2

THIS R.S.A. IS FILED U/S 100 CPC AGAINST THE  
JUDGMENT AND DECREE DATED: 27.10.2006 PASSED IN  
R.A.NO.116/2004 ON THE FILE OF THE I ADDL. CIVIL JUDGE  
(SR.DN.), DAVANAGERE, DISMISSING THE APPEAL AND  
CONFIRMING THE JUDGMENT AND DECREE DATED: 8.4.2004  
PASSED IN O.S.NO.236/1993 ON THE FILE OF THE ADDL.CIVIL  
JUDGE (JR.DN.) & JMFC, CHANNAGIRI AND ETC.

THESE APPEALS HAVING BEEN HEARD AND RESERVED  
FOR JUDGMENT ON 13.02.2024 THIS DAY, THE COURT  
PRONOUNCED THE FOLLOWING:

**J U D G M E N T**

R.S.A.No.170/2007 is filed challenging the judgment and decree dated 27.10.2006 passed in R.A.No.190/2002 and R.S.A.No.171/2007 is filed challenging the judgment and decree dated 27.10.2006 passed in R.A.No.116/2004.

2. These appeals are heard together and reserved for judgment.

3. The parties are referred to as per their original rankings before the Trial Court to avoid confusion and for the convenience of the Court.

4. In R.S.A.No.170/2007, the factual matrix of the case of the plaintiff before the Trial Court that the defendants are husband and wife and they have executed an unregistered agreement of sale dated 18.07.1977 in favour of the plaintiff and thereby agreed to sell the property bearing Sy.No.82/A measuring 2 acres of Chiradoni village, Basapatna hobli, Channagiri taluk for valuable consideration of Rs.17,402/-. On the date of the said agreement, the entire sale consideration was



paid and the said land was granted land to the defendants. In the said grant, there was a condition for not to alienate the property for a period of 15 years. Hence, immediately, after the lapse of the period of non-alienation clause which was going to be expired on 16.01.1985, the sale deed was not executed by the defendants and hence, the plaintiff had approached and requested the defendants to execute the sale deed, when they failed to execute the sale deed, a suit has been filed in O.S.No.307/1990. The defendants appeared and filed the written statement denying the claim of the plaintiff stating that the agreement becomes void and the suit is barred by limitation. The defendants have also made the counter claim of possession and the plaintiff took the contention that the counter claim is barred by limitation. Hence, the defendants prayed for dismissal of the suit.

5. The Trial Court after hearing the parties, framed the following Issues:

1. Whether plaintiff proves that since the date of grant he and his brother were cultivating the suit land as contended?

2. Whether the plaintiff proves that the defendants agreed to sell the suit land on 18.07.1977 for Rs.17,402/- and the execution of agreement of sale by the defendant on the same date?
3. Whether plaintiff proves that he has paid the entire sale consideration of Rs.17,402/- as contended by him?
4. Whether the defendants prove that the agreement of sale is a void document as contended?
5. Whether the plaintiff is entitled to the relief of specific performance of the suit agreement as prayed for?
6. What decree or order?

**Additional Issues**

1. Whether the defendant proves that the suit is barred by limitation?
2. Whether the plaintiff proves that counter claim made by the defendants is barred by limitation?
3. Whether the defendants are entitled to recover the possession of the suit schedule property as prayed in their counter claim?
  
6. The Trial Court allowed the parties to lead their evidence and accordingly, the plaintiff examined himself as PW1

and also examined two witnesses as PW2 and PW3 and got marked the documents at Ex.P1 to P20. On the other hand, defendant No.1 examined himself as DW1 and got marked the documents at Ex.D1 to D13. The Trial Court having considered both oral and documentary evidence placed on record answered that there was a sale agreement and entire sale consideration has been paid by answering Issue Nos.2 and 3 and answered Issue No.4 as affirmative in coming to the conclusion that the agreement is void and dismissed the suit in coming to the conclusion that the plaintiff is not entitled for the relief of specific performance since the suit is barred by limitation and counter claim is also dismissed in coming to the conclusion that the counter claim is also barred by limitation and the defendants are also not entitled for the relief of counter claim. Accordingly, the suit of the plaintiff as well as counter claim made by the defendants are dismissed by the Trial Court.

7. Being aggrieved by the judgment and decree of the Trial Court, an appeal was preferred by the plaintiff in R.A.No.190/2002 as well as the defendants also preferred an

appeal in R.A.No.183/2002. The First Appellate Court having considered the grounds urged in the appeal memo, formulated the following Points:

1. Whether the judgment and decree passed by the Trial Court in respect of the relief of specific performance of contract is calls for interference by this Court and liable for set aside?
2. Whether the judgment and decree passed by the Trial Court in respect of the relief of counter claim is calls for interference by this Court and liable for set aside?
3. What order?

8. The First Appellate Court having considered the grounds urged in the appeal and also re-analysing the material available on record, answered Point 1 as negative and confirmed the order of dismissal of the suit of the plaintiff for the relief of specific performance and answered Point No.2 as affirmative by reversing the finding of the Trial Court with regard to the counter claim and allowed the appeal filed by the defendants and dismissed the appeal filed by the plaintiff. Being aggrieved by

the judgment and decree of the First Appellate Court, the plaintiff has filed this second appeal before the Court.

9. The main contention of the learned counsel for the appellant that the impugned judgment and decree of the First Appellate Court is highly arbitrary in nature and suffers for want of proper and convincing reasoning and the reason one assigned by the First Appellate Court is one sided and erroneously comes to the conclusion that the defendants are entitled for the counter claim. The First Appellate Court has misread the evidence of PW1 to PW3 though their evidence has fully corroborated with the documentary evidence at Ex.P1 to P20. Both the Courts have committed an error in not granting the relief of specific performance and the First Appellate Court has erred in believing the evidence of DW1 in the absence of corroborative evidence in proof of Ex.D1 to D13. The counsel also would vehemently contend that no dispute with regard to the agreement and no dispute with regard to the payment of entire sale consideration and fails to consider non-alienation clause for 15 years and fails to take note of the fact that notices were exchanged between

the parties and only the possession can be obtained by due process of law.

10. In R.S.A.No.171/2007, the factual matrix of the case of the plaintiff before the Trial Court that the defendants are the husband and wife and the land described in the suit schedule is granted to defendant No.1 by the Government under Saguvalli Chit dated 02.08.1976 issued by the Tahsildar, Channagiri. Ever since from the date of said grant, the plaintiff and his brother – M.K.Shivaji Rao were cultivating the said land on contract basis by paying money to defendant Nos.1 and 2 annually at the rate fixed from time-to-time by mutual agreement. The plaintiff and his brother cultivated the suit schedule property till 08.03.1979 and so also they have cultivated another 2 acres of land granted to defendant No.2 from the year 1976-77 up to 18.07.1977. It is also contended that in the meanwhile, defendants expressed desire to sell the suit schedule property as they had to repay certain loans of PLD Bank and needed money for their family necessity and also for education of their children. Since the plaintiff and his brother were already cultivating the suit

schedule property and were in possession of the same, they agreed to sell the same to the plaintiff. After negotiation, it was agreed between the plaintiff and the defendants on 08.03.1979 to sell the suit schedule property for sale consideration of Rs.17,600/- and the plaintiff had paid the entire sale consideration. It is also contended that there was a non-alienation clause for 15 years, hence, agreed to execute the sale deed after expiry of 15 years and the possession of the property was continued with the plaintiff. The sale agreement was executed on 08.03.1979 and the plaintiff was ever ready to have the sale deed and defendant No.1 should have executed the registered sale deed after the expiry of 15 years from the date of Saguvali Chit which expires on 02.08.1991. The plaintiff demanded defendant No.1 during last week of May 1993 to come and execute the registered sale deed but he failed to do the same. It is also contended by the plaintiff that defendant No.2 has filed a suit against the plaintiff in O.S.No.35/1990 for permanent injunction.

11. The defendants appeared and filed the written statement admitting that the land was granted under Dharkasth and denied the contention that the plaintiff and defendants jointly cultivating the suit schedule property. It is also even denied the very execution of the sale agreement stating that they have not expressed any desire to sell the property. It is contended that in the first week of February 1994, the defendants have been disposed from the suit schedule property by the plaintiff after the dismissal of the suit in O.S.No.35/1990 and hence, sought for the relief of possession.

12. The Trial Court having considered the pleadings of the parties, framed the following Issues:

1. Whether the plaintiff proves that the defendants have agreed to sell the suit schedule property for a consideration of Rs.17,600/- and the defendants have executed the agreement of sale by receiving the entire consideration amount by the plaintiff on 08.03.1979?
2. Whether the plaintiff proves that since the date of purchase, he is in peaceful possession and enjoyment of the schedule property openly, continuously and without any obstruction with the



knowledge of the defendants and thereby perfected his title by way of adverse possession?

3. Whether the plaintiff proves that the plaintiff was ever ready and willing to perform his part of contract as stated in the plaint?
4. Whether the plaintiff proves the cause of action for this suit?
5. Whether the suit is barred by limitation?
6. Whether the plaintiff is entitled to the relief's as prayed for?
7. What decree or order?

**Additional Issue**

1. Whether the defendant is entitled to get possession of the suit schedule property from the plaintiff?

13. The Trial Court allowed the parties to lead their evidence and accordingly, the plaintiff examined three witnesses as PW1 to PW3 and got marked the documents at Ex.P1 to P12. On the other hand, the defendants examined one witness as DW1 and got marked the documents at Ex.D1 to D13. The Trial Court answered Issue No.1 as affirmative in coming to the conclusion that the plaintiff has proved that the defendants have

agreed to sell the suit schedule property by executing the agreement on 08.03.1979 for valuable sale consideration of Rs.17,600/-; answered Issue No.2 as negative with regard to the adverse possession is concerned; answered Issue No.3 as affirmative with regard to the readiness and willingness of the plaintiff to perform his part of contract; answered Issue No.4 as negative in coming to the conclusion that the plaintiff has not proved the cause of action for the suit; answered Issue No.5 as affirmative with regard to the limitation is concerned and answered Issue No.6 as negative in coming to the conclusion that the plaintiff is not entitled for the relief of specific performance and answered additional issue as affirmative in coming to the conclusion that the defendants are entitled to get possession of the suit schedule property from the plaintiff. Thereby, the Trial Court dismissed the suit of the plaintiff and allowed the counter claim of the defendants. Being aggrieved by the judgment and decree of the Trial Court, the plaintiff has preferred an appeal in R.A.No.116/2004.

14. The First Appellate Court having considered the grounds urged in the appeal, formulated the Points which read as follows:

1. Whether the judgment and decree passed by the Trial Court is calls for interference by this Court and liable for set aside?
2. What order?

15. The First Appellate Court on re-appreciation of both oral and documentary evidence placed on record answered Point No.1 as negative in coming to the conclusion that the judgment and decree of the Trial Court does not require any interference and thereby dismissed the appeal filed by the plaintiff/appellant. Hence, the present second appeal is filed before this Court by the plaintiff.

16. The main contention of the learned counsel for the appellant that both the Courts have committed an error in not appreciating the evidence on record in a proper perspective and both the Courts have misread the evidence of PW1 to PW3 though their evidence has fully corroborated with the

documentary evidence. The counsel would vehemently contend that the Trial Court committed an error in relying upon the documents at Ex.D1 to D13 and the defendants have examined only one witness and both the Courts believed the evidence of DW1 and also failed to consider Article 54 of the Limitation Act wherein it is clear that the limitation provided for specific performance of contract is three years period. If that has been considered, the finding of both the Courts is unsustainable. The counsel further contend that alleged agreement of sale is dated 08.03.1979 and hence, both the Courts erroneously comes to the conclusion the counter claim is within limitation. Hence, it requires interference.

17. Per contra, the learned counsel appearing for the respondents in both the appeals would vehemently contend that the very contention of the appellant counsel that possession has to be taken under due process of law cannot be accepted. The counsel submits that there was a lease deed prior to the alleged sale agreement i.e., on 01.05.1977 and sale agreement came into existence on 08.03.1979. The counsel further submits that

the sale agreement is not signed by all the children of the respondents/defendants. The counsel also submits that notice was issued by the defendants and not by the respective plaintiffs and the plaintiffs kept quiet and reply was given by the plaintiffs. The counsel also submits that the counter claim was made in both the suits for possession. In O.S.No.307/1990, the counter claim was rejected but the First Appellate Court rightly reversed the said finding and granted the relief of possession. In O.S.No.236/1993, the Trial Court as well as the First Appellate Court comes to the conclusion that the suit is barred by limitation and the Trial Court also granted the relief of counter claim and the same has been confirmed by the First Appellate Court. The counsel also would vehemently contend that O.S.No.236/1993 is concerned, the owners themselves have filed the suit in O.S.No.35/1990 and the same was dismissed and thereafter the original owners were dispossessed and the suit was filed in the year 1993 and other suit filed by the respondents was dismissed in the year 1994. The counsel would vehemently contend that both the Courts have not committed any error in granting the counter claim as well as confirming the

same and dismissing the suit of the plaintiff for the relief of specific performance.

18. This Court would like to refer the common substantial question of law framed by this Court at the time of admitting the appeal, which reads as follows:

“Whether the lower appellate Court was justified in granting a decree for possession on the ground that the purchaser who was put in part performance of the agreement of sale lost his right to sue for specific performance when his suit came to be dismissed as barred by time??

19. Now, the question before this Court is with regard to the substantial question of law that whether the original owners can seek for the relief of possession of the property when the plaintiffs are unsuccessful in the suit for specific performance. Having perused the material available on record, it discloses that in O.S.No.236/1993, it is contended that there was no sale agreement and possession was taken in the year 1994 illegally and sought for possession. The Trial Court in both the suits has given finding that there was a sale agreement. The fact that the

properties which were involved in both the suits are granted by the Government and the same is not in dispute. It is also important to note that there is a concurrent finding from both the Courts that the suit of the plaintiff is barred by limitation. It is also important to note that in O.S.No.236/1993, the sale agreement is dated 08.03.1979 for sale consideration of Rs.17,600/- and entire sale consideration was also paid and the Trial Court also answered Issue No.1 as affirmative in coming to the conclusion that there was a sale agreement and entire sale consideration was paid and also comes to the conclusion that the plaintiff was always ready and willing to perform his part of contract. It is also not in dispute that in both the suits, the land was granted with a condition that not to alienate the property for a period of 15 years. It has to be noted that in O.S.No.236/1993, the defendant also made the counter claim of possession of the suit schedule property from the plaintiff contending that they were dispossessed and the Trial Court but comes to the conclusion that the plaintiff came into possession of the suit schedule property based on the agreement of sale and the plaintiff filed the suit for specific performance based on

agreement of sale. Hence, the plea of adverse possession and retaining possession by operation of Section 53A of Transfer of property Act is inconsistent with each other and hence, the question of hostile possession does not arise. The Trial Court while answering Issue No.5 with regard to the period of limitation is concerned taken note of the fact that the defendants themselves have issued legal notice on 14.12.1989 and in the notice itself they have sought for the delivery of possession of the suit schedule property in favour of the defendants. It is also admitted by the plaintiff in his evidence that the defendants themselves have filed a suit in O.S.No.35/1990 on 05.01.1990 for the relief of permanent injunction wherein they have denied the very execution of the sale agreement at Ex.P2. The Trial Court and the First Appellate Court taken note of the fact that notice was issued in the year 1989 and the suit was filed in the year 1990 for permanent injunction and also taken note of appearance of the plaintiff in O.S.No.35/1990 is on 29.01.1990 and rightly comes to the conclusion that the suit is not filed within three years.



20. In O.S.No.307/1990 also the Trial Court comes to the conclusion that there was an agreement of sale and the entire sale consideration was paid and taken note that the agreement is dated 18.07.1977 as well as non-alienation clause and also taken note that notices were also exchanged between the parties. Thus, the Trial Court and the First Appellate Court taken note of the fact that the evidence of witnesses also very clear with regard to the issuance of notice but plaintiff claims that the suit is in time from the date of issuance of notice dated 14.12.1989. The Trial Court taken note of the evidence of PW2 and PW3 in this regard. The First Appellate Court also considered that immediately after expiry of the period of 15 years, that is from 16.01.1985, limitation starts and also even taken note of the fact that within one year from the date of expiry of the period, a demand was made and the same was refused. Hence, it is taken the year from 1986 and hence, the suit is not filed within three years even from that date and suit was filed only in the year 1990. In detail discussed with regard to the fact that the suit ought to have been filed within three years from the date of refusal and given finding that the suit is barred by

limitation. Hence, both the Courts come to the conclusion that the suits are barred by limitation and no steps have been taken by the plaintiffs, though 15 years has been elapsed immediately after the completion of non-alienation condition. The defendants themselves have given notice, till then, the plaintiffs have not taken any steps in their respective suits.

21. Now, the question before this Court is that whether the possession can be taken by due process of law as contended by the respective plaintiffs or whether the defendants are entitled for taking of possession on account of unsuccessful in getting the relief of specific performance by the respective plaintiffs. Both the Courts are come to the conclusion the respective plaintiffs are not entitled for the relief of specific performance on the ground of limitation, since both the suits are not filed within three years and also invoked Article 54 of the Limitation Act, since notices were exchanged between the parties and also the suit was filed for the relief of permanent injunction by the defendants and the defendants can seek the relief of possession and the defendants can claim the counter

claim. The Trial Court in O.S.No.307/1990, rejected the counter claim but the First Appellate Court reversed the said finding in coming to the conclusion that the counter claim is within time and the Trial Court in O.S.No.236/1993 granted the relief of counter claim.

22. The very contention of the counsel for the respective appellants that possession has to be sought under due process of law and the said contention cannot be accepted when the counter claim made in the very same suits filed by the plaintiffs and the same is itself also is an under due process of law and counter claim can be entertained in a suit filed by the plaintiffs and the same is also invoking counter claim as provided under the CPC. Both the Courts have taken note of the said fact into consideration. When the plaintiffs themselves have not entitled for the relief of specific performance, the question of continuing with the possession does not arise and the same has been discussed in detail by both the Courts that equity cannot be claimed by the respective plaintiffs and the relief of equity is applicable to both. Both the Courts in detail discussed taking into

consideration of protection under Section 53A of Transfer of Property Act and comes to the conclusion that the plaintiffs are not entitled for the benefit of said Section because they have filed suits for the relief of specific performance after the limitation period. When they loose their right of specific performance, cannot remain in possession of the suit property, they cannot resist the suit of the true owner for possession of the suit schedule property. Section 53A also incorporates doctrine of equity therefore in order to invoke the protection under the doctrine of part-performance and the said possession must be valid and when he lost his right and if the right under the agreement is lost by law of limitation, even if it is lost during the pendency of the suit, it is open to the party to take advantage of the same and the Court to take note of it. When the person is in possession of the suit schedule property, loses his right to remain in possession, he cannot resist the suit of the true owner for possession. It is also important to note that once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a

transferee can avail of Section 53A only as a shield but not as a sword and the same is held in the decision of the Apex Court reported in **AIR 1996 SC 910** in the case of **MOHAN LAL (DECEASED) THROUGH HIS LRS. KACHRU AND OTHERS vs MIRA ABDUL GAFFAR AND ANOTEHR**. This Court also in the judgment reported in **ILR 1992 KAR 429** held that the person in possession losing right cannot resist the suit of the owner for the possession.

23. In the case on hand, no doubt, both the plaintiffs have filed the suits for the relief of specific performance and both of them have failed to get the decree for specific performance hence, they cannot defend their possession under Section 53A of Transfer of Property Act. When the plaintiffs loose their right to remain in possession of the suit schedule property, they cannot retain the possession contending that possession must be under due process of law. I have already pointed out that the defendants have made counter claim in both the suits contending that the suit is barred by limitation and hence, the plaintiffs are not entitled for any relief and the defendants are

entitled for possession and the same has been considered by both the Courts in one suit and appeal and in another appeal, reversed the finding of the Trial Court regarding the counter claim rejection. Though the counter claim not considered in O.S.No.307/1990 by the Trial Court, the same was reversed by the First Appellate Court having reassessed the material available on record and allowed the appeal in R.A.No.183/2002 and rightly dismissed the suit filed by the plaintiff/appellant in R.A.No.190/2002 and so also in other appeal, the First Appellate Court rightly confirmed the judgment and decree of the Trial Court passed in O.S.No.236/1993 in an appeal filed in R.A.No.116/2004 having reassessed the material available on record and also considering both the question of law and question of fact. Having considered the substantial question of law framed by this Court while admitting the appeal, this Court is of the opinion that the First Appellate Court in R.A.No.183/2002 and 116/2004 and the Trial Court in O.S.No.236/1993 have not committed any error in granting the relief of possession since both the plaintiffs/purchasers have lost their right to sue for specific performance and the same has been attained finality and

concurrent finding was made by both the Courts for the relief of specific performance is concerned. When the suits of the plaintiffs are barred by limitation, First Appellate Court was justified in granting the relief of decree for possession in other suit which was rejected. Hence, I answer the substantial question of law as affirmative in coming to the conclusion that the First Appellate Court was justified in granting a decree for possession on the ground that the purchasers though put in possession in part performance of the agreement, they lost their right to sue for specific performance on the ground of limitation and they cannot be remain in possession when they lost their valuable right of specific performance.

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

**ORDER**

The appeals are dismissed.

**Sd/-  
JUDGE**

SN