IN THE COURT OF I ADDITIONAL SENIOR CIVIL JUDGE, HUBBALLI.

Present: **Sri. Palled Raveendra Jadiyappa**
B.Com.,LL.B. (Spl.), LL.M.
I ADDL. SENIOR CIVIL JUDGE & JMFC, HUBBALLI.

O.S. No.233/2003
Dated this 28th day of February – 2019

Plaintiffs

1: Shri. Jayaprakash Gangadharappa Tenginkai, Age: 54 years, Occ: Business, R/o. Vijaynagar, Hubballi-580 032.

2: Smt. Savitribai W/o. Late Jagadish Kalyanshetti, Age: 48 years, Occ: Household, R/o. Vijaynagar, Hubballi.

3: Sri. Arvind S/o. Late Jagadish Kalyanshetti, Age: 32 years, Occ: Business, R/o. Vijaynagar, Hubballi.

4: Sri. Reitesh S/o. Late Jagadish Kalyanshetti, Age: 30 years, Occ: Business, R/o. Vijaynagar, Hubballi.

5: Sri. Sachin S/o. Late Jagadish Kalyanshetti, Age: 28 years, Occ: Business, R/o. Vijaynagar, Hubballi.

[By Smt. S.V. Pawar, Advocate]

.Vs.

Defendants : 1: Sri. Jyotiba Krishnappa Benakatti,
Age: 45 years, Occ: Business,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

2: Sri. Ashok Krishnappa Benakatti,
Age: 43 years, Occ: Business,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

3: Sri. Mallappa Krishnappa Benakatti,
Age: 41 years, Occ: Business,
R/o. Near Unkal Late, Unkal village,
Hubballi.

4: Sri. Ramappa Krishnappa Benakatti,
Age: 36 years, Occ: Business,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

5: Sri. Gangappa Krishnappa Benakatti,
Age: 28 years, Occ: Business,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

6: Sri. Maruti Krishnappa Benakatti,
Age: 28 years, Occ: Business,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

7: Smt. Mainnavva W/o. Krishnappa
Benakatti, Age: 68 years, Occ: Household
work, R/o. Near Unkal Lake, Unkal village,
Hubballi.

8: Smt. Subhadra W/o. Ashok Mote,
Age: Major, Occ: Household work,
R/o. Near Unkal Lake, Unkal village,
Hubballi.

9: Smt. Parvatidevi W/o. Parasappa Tammannavar, Age: Major, Occ: Household work, R/o. Near Unkal Lake, Unkal village, Hubballi.

10: Smt. Urmila W/o. Rickbchand Jain, Age: Major, Occ: Household work, R/o. Market Area, Navalgund.

11: Sri. Kishore S/o. Rickbchand Jain, Age: Major, Occ: Business, R/o. Market Area, Navalgund.

12: Sri. Dinesh S/o. Rickbchand Jain, Age: Major, Occ: Business, R/o. Market Area, Navalgund.

13: Smt. Archana W/o. Suresh Shah, Age: Major, Occ: Household work, R/o. Market Area, Navalgund.

[Defts.1, 2, 4, 5 – By Sri. R.S. Patil, Adv., Defts.6 & 7 – By Sri. R.K. Hungund, Advocate, Deft.10 to 12 – By Sri. S.G. Bhadrapur, Adv., Deft.13 – By Sri. S.A. Dani, Adv., Defts.3, 8 & 9 – Exparte]

Parties to I.A. No.XIV

Applicant/ Defendant No.13 : Smt. Archana Suresh Shah.

.Vs.

Respondent / Plaintiffs : J.G. Tenginakai and others.

ORDER ON I.A. No.XIV FILED BY THE APPLICANT/ DEFENDANT No.13 U/Sec.151 OF CPC.

The learned counsel for defendant No.13 has filed the I.A. No.14, U/s. 151 of CPC with a prayer to dismiss the suit of the plaintiffs as regards the relief of declaration and injunction before proceedings further in this case in the interest of justice and equity and for the reasons mentioned in the accompanying affidavit.

2. The defendant No.13 represented by her husband being general power of attorney holder has stated in his affidavit that he purchased eastern portion of land measuring 2 acres 5 guntas in RS No.627/3 through a registered sale deed and western portion of land measuring 1 acre 8 annas in RS No.623/A1/4C through a registered sale deed, situated in Unkal village for valuable consideration in the year 2000. Likewise defendants No.10 to 12 have purchased western portion measuring 2 acres in RS No.627/3, through a registered sale deed and eastern portion of 1 acre land in RS No.623/A1/4C for valuable consideration in the same year. So, the four sale deeds registered in the office of the Sub-Registrar in respect of suit properties. The defendants No.10 to 12 have filed written statement adopted by defendant No.13, but the plaintiffs have challenged only two sale deeds in this suit, one in respect of defendants No.10 to 12 and another in respect of defendant No.13 as per para No.21 of the plaint and they have given up

their claim pertaining to other two sale deeds. Therefore, the claim of the plaintiffs is to be dismissed without taking the matter further for full pledged trial.

3. This I.A. is opposed by the plaintiffs by filing statement of objections through their learned counsel contending that the contents of I.A. and affidavit are false, frivolous and not maintainable either in law or on facts. It is contended that the allegation of the defendant No.13 is false, they have not given up any property pertaining to remaining two sale deeds. Their prayer also includes subsequent sub-divisions and changes in A and B schedule properties.

4. It is further specifically contended that the defendants No.10 to 13 cannot ignore that law provides for specific remedies for getting amended the plaint as and when situation, circumstances and contingencies demand and thus, they have reserved their right to move an application for amendment of plaint. Therefore, the claim of the applicant cannot non-suit the plaintiffs. If the suit is dismissed, they will be put to greater hardship than the defendants. Therefore, it is prayed for dismissal of the I.A. with costs.

5. I have heard the arguments of both learned counsels and perused the material on record. The learned

counsel for the applicant/ defendant No.13 has relied upon the following rulings of our Hon'ble High Court and Supreme Court:

1) **AIR 2008 (NOC) 1258 (P & H), (Karam Singh through L.Rs. -vs- Jaswant Singh and others),** wherein it is held as under:

> **"Civil P.C. (5 of 1908), O.7 R.11 and S.151 – Filing of frivolous suit – Amounts to abuse of process of Court – Such suit cannot be dismissed under O.7 R.11 since grounds mentioned in O.7 R.11 are that suit is barred by law or it does not disclose cause of action or proper Court-fees had not been paid – But Court is not helpless and can invoke powers under S.151 and dismiss suit under S.151."**

2) **AIR 2017 Calcutta 98, (Smt. Sumana Venkatesh Nee Sur -vs- Susanta Kumar Sur and others),** wherein it is held as under:

> **"(B) Civil P.C. (5 of 1908), O.7 R.11 (a) – Rejection of plaint – Disclosure of cause of action – Crafty drafting and convoluted pleadings – Creating illusion of cause of action where none exists – Plaint has to be read meaningfully to ascertain cause of action – Subsequent events can also be**

taken into consideration – Approach of Court must be more meaningful than pedantic.

17. If a document has to be looked into to ascertain therefrom whether the cause of action as pleaded in the plaint is justified, and no other material is necessary for such exercise, the court can – or rather, should – complete the exercise in one go rather than postpone the consideration to a trial and invite the attendant time-consuming processes to intervene. But the approach must be cautious and the exercise limited only to such cases where the cause of action is founded on a document and it depends on no other material or further evidence."

3) **2016 (3) KCCR 2581 (DB), (Karnataka Industrial Areas Development Board, Bangalore and others -vs- M/s. Navodaya Industrial and Housing Developers Dharwad and others),** wherein it is held as under:

"B. Specific Relief Act, 1963 – Section 34 – Suit for declaration and consequential reliefs – Allotment of 50 acres of land by KAIDB for housing scheme on 15.07.2003 – Allottee

failed to pay the balance amount within the stipulated time of 180 days – Allottee kept silent for two years – Board passed a resolution to treat the allotment as canceled and accordingly communicated the plaintiff – Plaintiff sought a declaration that the letter cancelling allotment is illegal and for restoration of allotment with revised survey and price etc.

Held, allotment had stood canceled automatically on the expiry of 180 days on account of failure of allotee to pay the balance of consideration and plaintiff has not made any request for extension of time or for anything before expiry of 180 days. Impugned communication cannot be treated as letter of cancellation. On the date of communication there was no enforceable contract. The respondents had designedly and cleverly sought the relief which could be granted only in a suit for specific performance. Thirdly, Court fee was intelligently avoided by designating the main relief as a consequential one. In the absence of a prayer for specific performance of a concluded contract, a consequential

relief in the form of a direction to work out the actual area was inconceivable and such a suit was not maintainable. The allotment stood extinguished by efflux of time and default on the part of the allottee. Hence, a prior notice was unwarranted. The trial Court fell in an error and misguided itself by treading into a wrong direction with the issues in its hand. Hence, the conclusions arrived at by the trial Court are perverse and deserve to be set aside.

Appeal allowed. Judgment and decree of trial court set aside. Suit dismissed. Cost of ₹1,00,000/- imposed.

22. Though the plaintiffs have presented their case employing the idiom of an unwilling horse taken to water and made to drink, on a careful perusal of the facts of the case and evidence on record, we are constrained to point out that the right idiom befitting the conduct of respondents is an 'attempt to flog a dead horse' at intervals by indulging in un-wanted correspondence after a lapse of two years and again after further lapse of 36 months. It is no more res

integra that plaintiffs seeking equitable relief should come to Court with clean hands. Plaintiffs-Respondents have unhesitatingly blown hot and cold. They have taken a conscious position in the plaint that the appellants had forced upon them to purchase the land in question. If that is so, there was no necessity for them to file the instant suit. On the aspect of approbation and reprobation, we may usefully refer to the judgment of the Hon'ble Supreme Court in the case of Karam Kapahi and others -vs- Lal Chand Public Charitable Trust and another reported in (2010) 4 SCC 753, wherein it is held as follows:

> **“49. The contentions of the Club cannot be accepted on another legal ground also. It is clear that the Club has taken inconsistent pleas. On the one hand the Club alleged that the Trust is not its lessor and has no right to receive the lease rent and it questions the title of the Trust. On the other hand the Club is seeking the equitable remedy against**

> **forfeiture under Section 114 of the Transfer of Property Act where it has proceeded on the basis that the Trust is its lessor and the Club is the lessee and as a lessee it has to pay the lease rent to the Trust. Therefore, the Club seeks to approbate and reprobate."**

Adverting to the facts of that case, the Hon'ble Supreme Court has further held as follows:

> **"57. Therefore, the common law doctrine of election is a part of our jurisprudence and squarely applies in this case inasmuch as the Club has advanced inconsistent pleas as noted hereinabove."**

23. Applying the ratio of above Judgment of the Hon'ble Apex Court, we are of the view that the Respondents-Plaintiffs shall be disentitled for a discretionary relief of declaration."

6. The learned counsel for the opponents/ plaintiffs has relied upon the following rulings of our Hon'ble High Court and Supreme Court:

1) **2018 (3) KCCR 2816, (Smt. Sonubai and others -vs- Smt. Sushila and others).**

2) 2018 (3) KCCR 264 (SC), (Chhotanben and another -vs- Kiritbhai Jalkrushnabhai Thakkar and others).

3) 2018 (3) KCCR 2325, (B.V. Basavaraj since deceased represented by his L.Rs. -vs- K.L. Kumaraswamy and another).

4) 2018 (2) KCCR 1076, (Sri. K. Bhaskaran -vs- Smt. Ratnamma and others).

5) 2018 (1) KCCR 305, (Chhandsi Abrol and another -vs- M.T. Rangaswamy).

6) 2015 (3) KCCR 2314 (SC), (Zarina Siddiqui -vs- A. Ramalingam alias R. Amarnathan).

7) ILR 2014 Karnataka. 1619, (Mewaram R. Shah and others -vs- Bhawar Lal and another).

7. On rival contentions, the following points arise for my consideration:

1) *Whether the applicant/ defendant No.13 has made out grounds for dismissal of theusit as prayed?*

2) *What order?*

8. My answers to the above points are:

Point No.1 : In the Affirmative

Point No.2 : As per final order and for the following:

R E A S O N S

9. **Point No.1:** This is a suit filed by the plaintiffs against defendants No.1 to 13 for the reliefs that defendants No.1 to 13 be directed to execute sale deeds pertaining to suit A and B properties in their favour by accepting remaining balance sale consideration amount, the defendants No.1 to 13 be directed to handover vacant and actual possession of entire suit properties to them. The prayer No.29(d) runs as under:

> d) Further, this Hon'ble court be pleased to pass an order and decree by way of ancillary reliefs declaring the impugned sale deeds dt: 20.7.2000 and 20.7.2000 respectively pertaining to suit property A and B which have been registered in Book No.1 volume No.1959 on pages ranging from 210 to 215 at serial No.2310 on 21.7.2000 and registered in book No.1, in volume No.1964 on pages ranging from 8 to 12 at serial No.2332 on 22.7.2000 before the sub-registrar executed by defendant No.1 to 9 in favour of defendants No.10 to 13 are as fraudulent, mistaken, null, void and the same

are not binding upon the plaintiffs and entire suit properties in any manner.

10. The suit properties are mentioned in para No.3 of the plaint 3(A) is an agricultural land bearing RS No.627/3, measuring 4 acres 10 guntas, situated in Unkal village, Tq: Hubballi and 3(B) an agricultural land bearing RS No.623/4C/1, measuring 2 acres ½ guntas, situated in same village. The defendants No.1 to 9 being absolute owners and possessor of suit properties, due to their bonafide and legal necessity wanted to sell the same. So, the plaintiff No.1 and late Jagadish Kalyanshetti whose L.Rs. are plaintiffs No.2 to 5 on record with certain terms and conditions entered into an agreement of sale. So, the defendants No.1 to 9 executed two agreement of sale on 12.02.1993 pertaining to suit A and B properties. The valuation per acre was fixed ₹1,25,500/- for 'A' suit property. They received earnest money of ₹5,000/-, and sale consideration amount for 'B' suit property was fixed per acre ₹1,32,500/- and received ₹5,000/- as advance sale consideration amount. Since they committed breach of contract and did not execute sale deed as agreed, so they were constrained to file this suit for the above said reliefs. Moreover, these defendants No.1 to 9 executed general power of attorney in favour of present plaintiff No.1.

11. Before filing of this suit the plaintiffs issued notice to defendant No.1 on 10.01.2001 demanding execution of sale

deed in their favour. But defendants No.1 to 9 through their learned advocate on 19.01.2001 itself, issued reply to the learned Advocate of the plaintiffs stating that as they were going through financial difficulties, they received loan of ₹80,000/- from the plaintiffs and executed deeds of agreement of sale only as a security for repayment of loan and never intended to be acted upon. Moreover, in page No.3 para No.2 it is clearly mentioned that the present defendants No.1 to 9 have already sold the suit property to third parties, on the basis of alleged agreement of sale and power of attorney false notice came to be issued.

12. Even prior to filing of this suit a notice on 08.04.2003 was issued to the defendants No.1 to 9 by the plaintiffs demanding execution of sale deeds in pursuance of their agreements of sale and also contended that any secrete transactions by the defendants No.1 to 9 in favour of third parties details of same should be furnished to them.

13. On 14.04.2003 these defendants No.1 to 9 through their learned counsel issued reply to the notice dated 08.04.2003 stating that already they executed sale deeds in favour of present defendant No.13 and others in the year 2001 itself. Therefore, the defendants No.1 to 9 do not have any kind of interest in the suit properties and alleged transactions have become non-est.

14. The defendants have appeared before this court through their learned counsel and have filed written statement contending that suit of the plaintiff is false, frivolous and not maintainable either in law or on facts. The defendants No.1 to 9 have denied execution of deeds of agreement of sale as contended by the plaintiffs, but claim that they received loan from them as security for repayment of loan, they executed same, they never intended to sell the properties. They have also relied upon the contents of reply notice.

15. The defendants No.10 to 13 are the purchasers of the suit properties, they have filed written statement denying all the averments of the plaint and specifically in para No.20 it is contended that the defendants No.10 to 13 have purchased the suit A and B properties in the year 2000 through sale deeds on 21.7.2000 and 22.07.2000, but suit came to be filed on 16.08.2003. Therefore, it is time barred against them. Moreover, they are in possession and enjoyment of the properties purchased under sale deeds and they are renumbered and now agricultural land bearing RS No.627/3, which is renumbered as non-agricultural use, RS No.627/3A to 627/3L and another land bearing survey No.623/4C/1 numbered as 623/A1/4K. In para No.23 they have specifically contended that the reply given by them dated 19.01.2001 and 14.04.2003 through their learned Advocate Sri. S.M. Laxmeshwar, Advocate, is part and parcel of their written

statement. They have prayed for dismissal of the suit with costs.

16. Issues came to be framed. The plaintiff No.1 has filed his affidavit, examined as PW.1, 25 documents came to be marked as Ex.P.1. to 25. Since marking of agreement of sale was questioned by the defendants No.10 to 13, on the ground of insufficiently stamped, but their objections were ruled out and they came to be marked.

17. The defendant No.13 challenged the same by filing Writ Petition No.65798/2010, but our Hon'ble High Court of Karnataka, Dharwad Bench dismissed the same on 10.03.2017.

18. But this instant I.A. No.14 came to be filed on 04.08.2010 itself. Even though it is not an application filed U/o.7 Rule 11 of CPC for rejection of the plaint, since filed U/s.151 of CPC to invoke inherent power of this court, it is necessary to consider the evidence of plaintiffs on record. The certified copies of two sale deeds came to be marked as Ex.P.16 and 17, both were registered on 21.07.2000 and 22.07.2000 respectively. So, through these two sale deeds the present defendants No.1 to 9 executed one sale deed in favour of defendants No.10 to 12 pertaining to land bearing survey No.627A/3, measuring 4 aces 10 guntas, out of the same

western side 2 acres of land were sold to them. As per Ex.P.17 it was executed by defendants No.1 to 9 in favour of defendant No.13 pertaining to land bearing RS No.423A1/4C, out of 2 acres 8 annas land, western side 1 acre and 8 annas land was sold to her. As per Ex.P.16, remaining 2 acres 5 guntas of eastern side land was sold on the same day in favour of defendant No.13. As per Ex.P.17 remaining 1 acre eastern side land was sold in favour of defendants No.10 to 12 on same day. Ex.P.19 and 20 are agreements of sale pertaining to entire suit property.

19. Even after clearly intimating the sale of entire suit properties in favour of defendants No.10 to 13 by defendants No.1 to 9 through above said reply notices which are marked as Ex.P.2 and 4 and it is also clearly contended by the defendants No.10 to 13 in their written statement that after purchase of A and B properties in the year 2000 itself, RS No.627/3 numbered as 627/3A to 627/3L and another land is numbered as 623/A1/4K, but for the reasons best known to the plaintiffs, by producing only two certified copies of sale deeds prayed to hold that these sale deeds pertaining to suit properties are null and void and not binding on them and thereby they have not at all pleaded anything as regards remaining properties and sale deeds.

20. So, on perusal of above said rulings relied upon by the applicant, it appears that the plaintiffs have given up their

claim against remaining two sale deeds which have remained unchallenged. The plaintiffs could have moved an application for amendment of their plaint soon after filing of the written statement, but they have not done so. At this juncture, an amendment if sought, if such an application is allowed and prayer of the plaintiffs is amended as regards remaining two sale deeds, certainly it is a time barred relief, which cannot be granted by this court.

21. Admittedly, the plaintiffs have not sought leave of this court as contemplated U/o.2 Rule 2 of CPC that they could only able to trace out these two sale deeds and unable to trace out remaining two sale deeds and would take separate action or amend the plaint whenever they trace another two sale deeds.

22. The learned counsel for the applicant/ defendant No.13 has relied upon the provisions of Order 2 Rule 2 of CPC. Our Hon'ble Apex Court and High Court in catena of decisions have held that the object behind the enactment of the provisions of Order 2 Rule 2 of CPC that seeks to avoid multiplicity of litigations on the same cause of action. That true object of the law would not stand fully subserved by holding that the provisions of Order 2 Rule 2 of CPC will apply only if the first suit is disposed off and not in a situation where the second suit has been filed during the pendency of the first suit. Order 2 Rule 2 of CPC will apply to both the aforesaid situations. But

U/o.2 Rule 1 of CPC, which contains provisions of mandatory nature the requirement is that plaintiffs are duty bound to claim the entire relief. The suit has to be so framed as to afford grounds for a final decision upon the subjects in dispute and to prevent further litigation concerning them. Rule 2 further enjoins the plaintiff to include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. If the plaintiff omits to sue of intentionally relinquishes any portion of his claim, it is not permissible for him to sue in respect of the portion so omitted or relinquished, afterwards.

23. In the instant suit the plaintiffs have not sought leave of the court as regards remaining 2 sale deeds, though it was perfectly within their knowledge. The cause of action as pleaded by the plaintiffs in para No.26 of the plaint, it reveals that it arose on 08.04.2003 when a legal notice came to be given finally and conclusively, it also arose on 14.04.2003 when a reply notice came to be issued by the learned counsel for the defendants. It also arose on 23.07.2003 when the plaintiffs came to know fraud and mistake committed by defendants No.1 to 13. But defendants have contended in their written statement as discussed above that sale deeds came to be executed on 21.07.2003 and 22.07.2003, but the suit filed after lapse of 3 years i.e. on 16.08.2003. So, suit is time barred. So, instant cause of action pleaded by plaintiffs cannot be split up, it is only one cause of action. Therefore, the rulings relied upon by the applicant/ defendant No.13 are squarely made

applicable to his version. On the other hand, with due respect to the rulings relied upon by the learned counsel for the plaintiffs, since facts and circumstances of instant suit are different, those rulings are distinguishable, so they are not made applicable.

24. So, the doctrine of election is a branch of rule of estoppel in terms where of a person may be precluded by his action or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. In the instant suit the plaintiffs claim their right, title or interest over the suit property under two agreements of sale on entire suit A and B properties. So, they must adopt the whole contents of that instruments. They must conform to all its provisions and renounce all rights that are inconstant with it, but they cannot approbate and reprobate, at their whims and fancies. Thus, I am convinced by the applicant that it is a waiver of rights by the plaintiffs. Waiver is the abandonment of a right and is either express or implied from conduct. So, considering their reliefs on one cause of action against defendants No.1 to 13, they have abandoned their rights as regards renouncing two sale deeds.

25. Therefore, this court is of the view that considering inseparable cause of action, so there is no point in taking this suit for trial. Thus, I am of the view that suit is manifestly

vexatious and meritless and hence, I answer point No.1 in the **Affirmative**.

26. **Point No.2:** In view of the above, I proceed to pass the following:

O R D E R

I.A. No.XIV filed by the applicant/defendant No.13 U/s.151 of CPC, is hereby allowed.

In consequence of the same, the suit of the plaintiffs is hereby dismissed with costs.

Draw up a decree accordingly.

*(Dictated to the Stenographer, transcribed and computerized by her, script corrected and then pronounced by me in the Open Court on this the **28th day of February - 2018.**)*

(Palled Raveendra Jadiyappa)
I Addl. Senior Civil Judge,
Hubballi.

28.02.2019
Plff. – SVP
D.1, 2, 4, 5 - RS
D.6 & 7 - RKH
D.10 to 12 – SGB
D.13 – SAD
D.3, 8 & 9 - Exparte
For Judgment

Judgment prepared separately and pronounced in the Open court, its operative portion reads thus:

O R D E R

I.A. No.XIV filed by the applicant/defendant No.13 U/s.151 of CPC, is hereby allowed.

In consequence of the same, the suit of the plaintiffs is hereby dismissed with costs.

Draw up a decree accordingly.

(Palled Raveendra Jadiyappa)
I Addl. Senior Civil Judge,
Hubballi.