

**In the High Court at Calcutta  
Civil Appellate Jurisdiction  
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya  
And  
The Hon'ble Justice Uday Kumar**

**F.A. No. 87 of 2007  
With  
CAN 3 of 2018  
(Old No: CAN 1383 of 2018)**

**Prasanta Kumar Chakraborty  
Vs.  
Sri Somnath Dutta  
Smt. Sabita Dutta alias Saba Haque**

For the appellants : Mr. Dipankar Dhar,  
Mr. S. Nath

For the respondents : Mr. B. N. Ray,  
Ms. Shetparna Ray

Heard on : 30.01.2025, 13.02.2025,  
20.02.2025

Judgment on : 06.03.2025

**Sabyasachi Bhattacharyya, J.:-**

1. The present first appeal has been preferred by the plaintiff in a suit for specific performance of a contract. In the said suit, the original defendant nos.1 and 3, namely Smt. Gita Dutta and Smt. Sabita Dutta alias Saba Haque respectively, filed with their joint written statement a counter claim for eviction against the plaintiff. The defendant no.2 Somnath Dutta also filed a written statement independently, virtually admitting the plaintiff's case.
2. During the pendency of the suit, however, a separate amended written statement was filed by the defendant no.1, whereby she disowned her

previous joint written statement and counter claim and supported the plaintiff case.

- 3.** The original defendants Smt. Gita Dutta, Sri Somnath Dutta and Smt. Sabita Dutta alias Saba Haque were initially arrayed as respondents in the appeal. Smt. Gita Dutta having died during pendency of the appeal, her name was expunged, as the two other respondents survived her as her only heirs and legal representatives. Sri Somnath Dutta had all along supported the plaintiff case and has not contested the appeal. Since only the Defendant / Respondent No. 3 Smt. Sabita Dutta alias Saba Haque has contested the suit and the appeal, she is being referred as “the respondent” hereunder.
- 4.** According to the plaintiff, an oral agreement was entered into between the plaintiff and one Sukumar Dutta, the predecessor-in-interest of the defendants, on June 12, 1995 whereby the said Sukumar Dutta (since deceased) agreed to sell a garage space (the suit property) to the plaintiff. Rs.10,000/- was paid as a part of the consideration in advance and Rs. 40,000/- paid as loan, on the self-same date, that is, June 12, 1995, for which two separate money receipts have been produced in evidence by the plaintiff, which were marked as Exhibit Nos.1 and 2 respectively.
- 5.** On October 16, 1995, the oral agreement was reduced into writing by entering into an agreement for sale of the said garage space, which has been marked as Exhibit-3. According to the plaintiff, a plan of the garage was also made over by Late Sukumar Dutta to the plaintiff and has been marked as Exhibit-4. On July 21, 1997, non-judicial stamp

paper was purchased, according to the plaintiff for completing the purchase, which has been marked as Exhibit-5, but unfortunately on July 25, 1997 the said Sukumar Dutta died.

- 6.** Subsequently the defendants, in particular defendant nos. 1 and 3, being heirs of the Late Sukumar Dutta, having refused to honour the agreement, the plaintiff filed the suit for specific performance on June 25, 1995, giving rise the Title Suit No. 1085 of 1999.
- 7.** On April 26, 2004, that is, during the pendency of the suit, a registered deed of conveyance was executed by the defendant nos. 1 and 2, namely Gita and Somnath, in favour of the plaintiff in respect of their 2/3<sup>rd</sup> share of the suit property, wherein they admitted that out of the total agreed consideration amount of Rs.1,05,000/-, Rs. 1,00,000/- had already been paid by the plaintiff. The said vendors received their 2/3<sup>rd</sup> share of the balance consideration of Rs.5,000/-. A memo of consideration, showing the break-up of the payments of consideration, was also made a part of the said sale deed.
- 8.** The learned Trial Judge framed issues on all relevant points and arrived at findings on the same upon consideration of the evidence on record and hearing the arguments of both sides, but dismissed the suit on the ground of limitation under Article 54 of the Schedule to the Limitation Act, 1963.
- 9.** On the other hand, the counter claim for eviction was simultaneously decreed against the plaintiff.

- 10.** During pendency of the present appeal, the name of the defendant nos. 1 and 2/respondents were expunged and only Sabita Dutta alias Saba Haque remained as the defendant/respondent in the appeal.
- 11.** While arguing the appeal, at the outset, learned counsel for the respondent submits that only one appeal has been preferred against the judgment and decree dismissing the suit and the decree passed in the counter claim, which also has independent status equivalent to a decree in a suit.
- 12.** Thus, it is submitted that in the absence of two separate appeals, the plaintiff/appellant is required to elect as to which of the decrees he had challenged. At this, the Court posed such query to learned counsel for the appellant who, on instruction, submits that the appeal had been preferred against the decree dismissing the suit for specific performance.
- 13.** Accordingly, learned counsel for the respondents, at the commencement of his arguments, submits that the present appeal is not maintainable in the absence of any challenge to the eviction decree granted in counter claim, since even if the present appeal is allowed, thereby granting specific performance of the agreement for sale, the defendant/respondent would still be equipped with the said eviction decree passed on her counter claim and be able to evict the appellant.
- 14.** Learned counsel for the appellant contradicts such submission and argues that even if the dismissal of the suit is set aside independently,

the existence of the eviction decree would not affect the plaintiff/appellant adversely.

- 15.** Learned counsel for the appellant contends that the finding of the learned Trial Judge to the effect that the suit was time-barred is bad in law. It is submitted that the language of the agreement dated October 16, 1995 was ambiguous and did not fix any specific time for execution of the sale deed; thus, time was not the essence of the contract.
- 16.** It is argued that in terms of Clause 1 of the agreement, the vendor was to sell and the purchaser was to purchase the suit property and in the same breath, the said property, being a covered space measuring more or less 140 sq.ft. built-up area on the ground for building, had to be made over to the purchaser after completion of the construction within six months from the date of the agreement for the use and occupation of the purchaser in a habitable condition. In the latter part of Clause 1 of the agreement, it was mentioned that Rs. 50,000/- was being paid on the date of signing of the agreement as earnest money and the rest of the agreed consideration was to be paid at the time of making over possession of the said covered space-in-question to the purchaser. The obligation of the vendor, as per the said agreement, to execute and register a proper deed of conveyance unto and in favour of the purchaser, arose after such handing over of possession.
- 17.** Clause 2 of the agreement, it is argued, provided that the purchaser was to send a draft conveyance to the vendor after such making over of possession and the registration would be completed within one

month of such making over of possession. Thus, there was no time-limit stipulated in the contract for execution of the deed of conveyance in terms thereof within six months from the agreement and the second limb of the third column of Article 54 of the Schedule to the Limitation Act, and not the first limb, would be applicable. Accordingly, the cause of action for the suit arose on the first refusal to perform the agreement on the part of the heirs of Late Sukumar Dutta after his demise on July 25, 1997 and the suit was filed within three years thereafter.

- 18.** Learned counsel appearing for the plaintiff/appellant next contends that in view of execution of a registered sale deed pursuant to the agreement by two out of three of the heirs of Late Sukumar in respect of their  $2/3^{\text{rd}}$  share, admitting the plaint case, it was incumbent upon the remaining defendant also to execute such a deed in respect of her  $1/3^{\text{rd}}$  share.
- 19.** It is submitted that a draft conveyance deed was prepared on July 21, 1997 and the original vendor was all along ready and agreeable to execute the deed during his lifetime, which, however, could not be done only due to the unfortunate demise of the original vendor Sukumar Dutta on July 24, 1997, that is, mere three days after the draft conveyance being prepared.
- 20.** In fact, the original defendant nos.1 and 2, Gita and Somnath, had agreed in principle to execute the sale deed in terms of the agreement in favour of the plaintiff but merely sought a clarification by a written letter regarding the proof of the consideration amount paid, which was

sufficiently furnished by the plaintiff. All these, it is argued, are evidenced by the materials on record.

- 21.** It is submitted that the citation relied on by the learned Trial Court is not applicable in the facts of the present case, since no time has been fixed in the present case in the agreement itself, for performance of the same.
- 22.** Learned counsel for the appellant cites *Ahmadsahab Abdul Mulla v. Bibijan and Others*, reported at (2009) 5 SCC 462, where it was held that the expression “date fixed for the performance” in Article 54 is a crystallized notion which is clear from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when a date is fixed, it means that there was a definite date fixed for doing a particular act. Even in the second part the stress is on “when the plaintiff has notice that performance is refused” which also speaks about a definite point of time. In that sense, both the parts refer to definite dates; so there is no question of finding out an intention from other circumstances. In the present case, as argued earlier, since no date was fixed for the performance of the agreement, Article 54 is not applicable at all.
- 23.** Learned counsel for the appellant also relies on *Madina Begum and another v. Shiv Murti Prasad Pandey and others*, reported at (2016) 15 SCC 322, where a similar construction of Article 54 was given by the Supreme Court.
- 24.** In the said case, the Supreme Court further observed that in a first appeal under Section 96 of the Code of Civil Procedure, the Appellate

Court must consider all issues and evidence led by the parties before recording its findings. On the facts of the case, it was held by the Supreme Court that the High Court in the said case had erred in deciding only a preliminary issue by holding that the suit was barred by limitation and accordingly taking the view that consideration of the other issues were unnecessary.

- 25.** It is thus contended that this Court, sitting in first appeal, ought to adjudicate on all the other issues as well, along with the limitation point, for which the evidence available on record is sufficient. It is also submitted that the learned Trial Judge discussed all issues.
- 26.** Learned counsel appearing for the defendant/respondent Smt. Sabita Dutta alias Saba Haque argues that there were interpolations by hand in the purported agreement dated October 16, 1995 (Exhibit-3). Thus, the very existence of the said agreement is doubted.
- 27.** In Exhibit-5, which is a purported draft deed of conveyance executed on a stamp paper, contains no date except the year 1997 and as such, the date of execution of the same cannot be ascertained.
- 28.** It is further argued that there is contradiction in the plaint case inasmuch as the proposed draft deed of conveyance allegedly sent by the plaintiff was between the heirs of the late original vendor Sukumar Dutta and one Munmun Chakraborty, wife of the plaintiff. This, it is submitted, was in contradiction with the agreement which contemplated that the deed was to be executed in favour of the plaintiff himself. Also, in the purported draft deed, the consideration was mentioned as Rs.75.000/-, in contradistinction with the amount

of Rs.1,05,000/-, which was mentioned as the total consideration in the disputed agreement.

- 29.** It is argued that as per the plaint case, the oral agreement dated June 12, 1995 was reduced into writing on October 16, 1995, which relates back to June 12, 1995. Hence, the limitation period began to run from six months after June 12, 1995, the date of the alleged verbal agreement. Learned counsel for the respondent places heavy reliance on the language of the agreement dated June 16, 1995, to argue that same is unambiguous as to six months from the date of the agreement being the stipulated time for the parties to execute a deed of conveyance in terms of the agreement. Hence, the suit filed in 1999 was rightly held by the learned Trial Judge to be barred by limitation.
- 30.** The expression “after completion of the construction” in the agreement was disjunctive from the provision in Clause 1 thereof that the vendor shall sell and the purchaser shall purchase the disputed property within six months from the date of the agreement.
- 31.** Thus, the learned Trial Judge, it is submitted, was justified in holding that the suit was time-barred.
- 32.** It is submitted that Exhibit-2, a money receipt for Rs.40,000/- shows that the said amount was paid by way of a loan to the original proposed vendor Sukumar Dutta and as such could not be treated to be a part of the consideration as per the plaint case. In the absence of any memorandum of consideration or the mode of payment thereof being a part of the agreement itself, the plaint case of payments being made ought to be disbelieved.

- 33.** The agreement is a transaction independent of the loan given, if any, to the tune of Rs.40,000/- and there is nothing in the agreement to connect the two. Thus, it is argued, the said amount cannot be treated to be a part of the advance consideration for the proposed sale.
- 34.** Learned counsel for the respondent further argues that the statements of P.W.2, purportedly a Civil Engineer and P.W.1, the plaintiff himself, as regards subsequent payment of Rs.50,000/- by the plaintiff to Late Sukumar Dutta is not supported by any independent receipt or note/memorandum in the agreement.
- 35.** It is submitted that there was collusion between the original defendant no.2, the son of the Late Sukumar Dutta, and the plaintiff. Thus, the admission of the said defendant of the plaint case cannot bind the present respondents.
- 36.** The reason for the controversy between the defendants was the marriage contracted by the present respondent outside the religion of her parents to a Muslim gentleman and as such, it is submitted that such controversy boiled down to the other defendants taking a stand contrary to her.
- 37.** It is reiterated that in the teeth of the eviction decree which already stands in favour of the defendant no.3/respondent, the appellant, even if he succeeds in the present appeal, would have a toothless decree of specific performance.
- 38.** During hearing, the court indicated to the parties that it might rely on the judgment of *Fatehji and Company and another v. L.M. Nagpal and others*, reported at (2015) 8 SCC 319, and both parties, upon being

put to such notice, responded to the ratio laid down therein. In the said judgment, it was *inter alia* observed that the fact that the plaintiffs were put in possession of the property agreed to be sold on the date of the agreement itself would not make any difference with regard to the limitation for filing the suit for specific performance and that the courts below therein had rightly held that Article 54 of the Limitation Act does not make any difference between a case where possession of the property had been delivered in part performance of the agreement or otherwise. Also, if any permission was to be obtained prior to the performance/completion of the contract, the mere fact that the defendants had not obtained the said permission would not lead to the inference that no cause of action for filing the suit for specific performance would arise. Learned counsel for the appellant submits that the said ratio is not applicable to the present case in the absence of there being any date fixed for performance of the contract.

- 39.** Upon consideration of the arguments of the parties and the materials on record, the Court comes to its conclusions under the following broad heads:

**Limitation**

- 40.** Crucial to the adjudication on limitation in the present case is the language in which the agreement dated October 16, 1995 is couched, more particularly, the habendum clause thereof. Clauses 1 and 2 of the agreement are germane in such context and are re-produced hereinbelow:

- “1. The Vendor shall sell and the Purchasers shall purchase the cover space measuring more or less 140 Sq.ft. built-up area of on the ground floor of the building be made over to the purchase after completion of the construction within Six months from the date of Agreement for their use and occupation inhabitable condition at Premises No. 11A, Puran Chand Nahar Avenue, Calcutta – 700 014 under P.S. Taltola, fully described in the schedule hereinbelow and free from all encumbrances and liabilities at a Rs. 750.00 <sup>per Sq.ft.</sup> (Rupees Seven hundred fifty per sq.ft.) only out of which a sum of Rs. 50,000.00 (Rupees Fifty thousand only is paid this day the 16<sup>th</sup> day of October, 1995 on signing this agreement as Earnest Money in part-payment of the said agreed consideration, and the rest at the time of making over possession of the said cover space in question to the Purchasers. The vendor shall remain obliged to execute and register a proper Deed of Conveyance unto and in favour of the Purchaser, at the cost and expenses of the Purchaser.
2. The Purchasers shall send draft conveyance to the vendor after making over possession of the cover space of the said building and the Registration shall be completed within one month from the date of making over possession of the said cover space by the Purchaser.”

- 41.** Despite the construction of the first sentence being a bit complicated, there is not much difficulty in construing the intention of the parties therefrom. The Clauses quoted above provide that the vendor shall sell and the purchaser shall purchase the covered space described therein which would be “made over to the purchaser after completion of the construction within six months from the date of Agreement for

their use and occupation in habitable condition” ... and free from all encumbrances and liabilities. Thus, it is a continuous sentence and we cannot disjoint or cull out the phrase “within six months from the date of agreement” and cut-paste and connect the same with the first part of the sentence which says “the vendor shall sell and the purchaser shall purchase”.

- 42.** Doing so would be an affront against the clear language of the said sentence, since the provision in the clauses regarding the intended sale and purchase was followed by the building being made over to the purchaser after completion of the construction for their use and occupation in habitable condition. The time stipulated of six months, conveyed by the expression “within six months from the date of the agreement” comes right in between the phrases “after completion of the construction” and “for their use and occupation in habitable condition”. Thus, there cannot be any manner of doubt, on a plain reading of the said sentence, that there is no confusion regarding the six months’ period qualifying the completion of the construction for the purchaser’s use and occupation in habitable condition and did not circumscribe the sale itself.
- 43.** Such notion is further corroborated by the last part of Clause 1, which contemplates the earnest money of Rs.50,000/- to be paid simultaneously with the agreement and the balance to be paid at the time of making over possession of the covered space-in-question to the purchaser. In the very next sentence, it is stated that the vendor shall remain obliged to execute and register a proper Deed of Conveyance

unto and in favour of the purchaser at the cost and expenses of the purchaser.

- 44.** The next numbered paragraph, that is Paragraph No.2 of the agreement, is also crucial in the context. It provides that the purchaser shall send a draft conveyance to the vendor *after making over possession of the covered space of the said building* and only thereafter the registration shall be completed within one month from such date of making over possession.
- 45.** Thus, it is amply clear from a conjoint reading of Clauses 1 and 2 of the agreement that the draft conveyance would be sent by the purchaser only after the vendor completing the construction within six months and making over possession to the purchaser in habitable condition, upon which registration would be completed within one month. This bolsters the view that the draft conveyance deed and registration of the said deed, upon which the sale would be completed, would happen only after completion of the construction and depended solely on such completion of the construction and handing over possession, that too, in habitable condition, to the purchaser. Seen from such perspective as well, the six months' stipulation qualified the completion of construction and handing over of possession in habitable condition and not the execution of the deed.
- 46.** Thus, even without taking resort to any external aid of construction, the very language of the agreement itself leaves no manner of doubt, even on a plain reading thereof, that time was not the essence of contract insofar as the date of the agreement was concerned and the

six months' stipulation qualified not the execution of the deed of conveyance but the completion of the construction and handing over of possession to the purchaser by the vendor in habitable condition.

- 47.** It is admitted by the defendant nos.3/present respondent in her evidence-in-chief as D.W.2 that possession of the suit garage was taken by the plaintiff on May 28, 1999, although allegedly forcibly, whereas the suit was filed on June 25, 1999, that is, about a month thereafter.
- 48.** It is the plaintiff's case that the possession was handed over by the proposed vendor to the plaintiff in the end of June, 1997, which also brings the suit within the three years' limitation as prescribed in Article 54 of the Schedule-I of the Limitation Act.
- 49.** The first limb of the third column of Article 54 in the Schedule provides the commencement of limitation to run from the date fixed for performance whereas, the second limb provides that if no such date is fixed, the limitation begins when the plaintiff has notice that performance is refused.
- 50.** The first limb is not applicable here, since the six months' period mentioned in Clause 1 of the agreement does not apply to the execution of the proposed sale deed but the completion of the construction by the vendor. If we take into consideration the ratio laid down in *Ahmadshah Abdul Mulla (supra)*, the date of commencement of limitation would crystallize on the date of refusal, which could commence only after the handing over of possession. Even if we go by the case of either of the parties, the date of handing over of possession

was within the limitation period of three years from the institution of the suit and, as such, the suit was not time-barred. Hence, the finding of the learned Trial Judge in the impugned judgment as to the suit being barred by limitation is erroneous on the face of a plain reading of the agreement as well as of the evidence on record.

- 51.** As to the judgment referred to by the court in the matter of *Fatehji and Company (supra)*, the ratio laid down therein is not applicable in the present case. The Supreme Court held in the said judgment that irrespective of when the possession was handed over to the purchaser and/or whether any preliminary formalities required by the agreement were performed by the vendor, the limitation would commence from the period as stipulated in the contract. In the said case, the period was stipulated in the contract itself by mentioning a specific date, that is, December 2, 1973, by which date the contract was to be performed. Such position was accepted by the plaintiffs therein, since admittedly there were extensions of the said period of six months, the last of which fell outside the limitation period.
- 52.** Contrary thereto, in the present case, as held above, the agreement did not stipulate any time-limit for execution of the deed of conveyance from the date of the agreement. In fact, there was no time-limit stipulated at all and the six months' period mentioned in the contract qualified the date of completion of construction and handing over of the same in habitable condition to the purchaser. Thus, the said ratio does not make any difference insofar as the present case is concerned.

**What was the amount paid as consideration?**

- 53.** Exhibit 1 is a money receipt of Rs.10,000/- paid by the proposed purchaser to the proposed vendor Late Sukumar Dutta, where it has been categorically mentioned that the payment was on account of advance of the suit property. Thus, there cannot be any doubt that the said sum was paid *in lieu* of part consideration. Doubt, if any, might have arisen in respect of Exhibit 2, which is a receipt for Rs.40,000/- paid as loan for six months by the proposed purchaser to the vendor.
- 54.** In the evidence of the plaintiffs, it has come out that the said amount so obtained was used for completing the construction and for building the house containing the suit space and thus, was used for the purpose of the suit property.
- 55.** P.W.1 and P.W.2 corroborate in their evidence that the vendor agreed to adjust the said sum with the consideration paid. The conduct of defendant nos. 1 and 2 in executing a sale deed subsequently in favour of the plaintiff in pursuance of the agreement for sale regarding their 2/3<sup>rd</sup> share, where they admit that the total consideration already paid was Rs. 1,00,000/- including the amount of Rs. 40,000/- initially paid as loan, further corroborates the adjustment of the said amount of loan as a part of the consideration.
- 56.** The argument of the respondent, that in the absence of a separate memorandum of consideration in the agreement it cannot be said that any advance was paid, is not tenable in the eye of law. The memo of

consideration and the break-up of payments is generally given in the final deed of conveyance executed in terms of an agreement and absence of such a memo in the agreement, which would also have to envisage future payments, cannot be fatal to the validity of an agreement for sale under any law.

- 57.** It has to be noted further that the trial court itself, upon appreciating the evidence adduced, came to the conclusion that the money receipts bearing Exhibits 1 and 2 and the agreement were genuine and the existence of the same was believed.
- 58.** The deed of conveyance subsequently executed by defendant nos.1 and 2, two of the heirs of Late Sukumar, the original vendor, in respect of their 2/3<sup>rd</sup> share, on April 26, 2004 clearly narrates that the entire amount of Rs.50,000/- was paid as advance initially on October 12, 1995 and the further balance of Rs.50,000/- was paid on October 16, 1995, along with the said agreement. They, accordingly, took their 2/3<sup>rd</sup> share of the remaining balance of Rs.5,000/- as consideration, as evidenced from the sale deed dated April 26, 2004, executed by defendant nos.1 and 2 during pendency of the suit.
- 59.** It has to be borne in mind that all the defendants, including the defendant no.3/respondent, claim through the original vendor Late Sukumar Dutta and the evidentiary value of the admission of two of them cannot be brushed aside insofar as binding effect on the third is concerned, since the estate of the heirs of Late Sukumar, vis-à-vis their liabilities regarding the agreement, is joint and non-severable in that sense.

- 60.** Strictly speaking, such admission by the defendant nos.1 and 2 in their individual capacities is not binding on the defendant no.3/respondent. However, since such admission was in the capacity of joint heirs of Sukumar, which is at par with the capacity of the defendant no.3/respondent, such admission undoubtedly has a strong evidentiary value insofar as the veracity of the plaintiff's case is concerned.
- 61.** Insofar as the payment of Rs.50,000/- simultaneously with the agreement is concerned, the same is evidenced and recorded in the agreement itself and does not require any further receipt or memorandum of consideration in the agreement. In fact, the memorandum of consideration and the breakup thereof as given in the sale deed executed by the defendant nos.1 and 2 during pendency of the suit in pursuance of the disputed agreement clearly enumerate the payments of the initial Rs.10,000/- along with Rs.40,000/- dated October 12, 1995 and the amount of Rs.50,000/- paid along with the agreement on October 16, 1995 as admitted.
- 62.** The recording of the payment of Rs.50,000/- simultaneously with the agreement has not been rebutted by any cogent evidence by the defendant nos.3/respondent whereas the same has been corroborated in oral evidence by the plaintiff's witnesses. In view of the learned Trial Judge, in the impugned judgment, having categorically believed the existence of the agreement dated October 16, 1995 while deciding the issues in the suit, along with the receipts dated October 12, 1995, the said payments cannot be avoided by the respondent.

- 63.** In fact, the very fact that there is no pleading or proof on the part of the defendants to the effect that the purported loan of Rs.40,000/- was ever repaid to the original vendor Late Sukumar, shows that by the conduct of the parties, the plaint stand is strengthened to the effect that such payment was adjusted with the advance consideration paid for the intended purchase.
- 64.** Thus, on a preponderance of probability, it is evident that the corpus of advance payments, combining Rs.10,000/- (described as advance) and Rs.40,000/- (initially described as loan) dated October 12, 1995, in the absence of any evidence of repayment of such loan, goes on to form cumulatively a part of the advance payment of consideration to the tune of Rs.50,000/-. Supplemented by the payment of further Rs.50,000/- as balance consideration on October 16, 1995, as recorded in the agreement of even date, which has not been disbelieved by the learned Trial Judge and such finding has not been challenged either at the time of hearing of the appeal or by filing a cross-objection by the respondents.
- 65.** Hence, this Court is of the clear opinion, on the basis of the evidence on record, that out of the total consideration of Rs.1,05,000/-, Rs.1,00,000/- (10,000 + 40,000 + 50,000) had already been paid by the plaintiff/purchaser to the proposed vendor Late Sukumar as advance. Thus, the balance amount of Rs.5,000/- is only to be paid, out of which 2/3<sup>rd</sup> had already been paid by the purchaser/plaintiff to the vendors at the time of execution of the sale deed dated April 26, 2004 by the defendant nos.1 and 2 in respect of their respective

shares of the suit property and only 1/3<sup>rd</sup> of the balance amount of Rs. 5,000/- remains to be paid to the defendant no.3/respondent.

**Alleged interpolation in agreement**

- 66.** The respondent has sought to make out a case of interpolation in the agreement dated October 16, 1995 on the strength of the handwritten insertions in the same. However, the said case was not made out by the joint written statement initially filed by the defendant no.3 along with defendant no.1. For the first time, the allegation of interpolation was sought to be made out in the evidence-in-chief of the defendant no. 3, who adduced evidence as D.W.2. Thus, such oral evidence of D.W.2 is beyond the pleadings of the defendant no.3 in her written statement and, thus, cannot be looked into.
- 67.** Even then, for abundant caution, this Court went carefully through the original agreement dated October 16, 1995, marked as Exhibit 3 in the suit. It is clearly seen that each of the handwritten insertions is either accompanied by the short signature of the parties against such insertions individually, or by continuous signature of the parties on the margin covering the portions of the handwritten insertions, which is a commonly prevalent practice in execution of documents. Such accompanying signatures clearly denote the authenticity of such insertions.
- 68.** Also, such insertions, contrary to the arguments of the respondents, do not change any material facts of the agreement.

- 69.** In fact, the written statement of defendant nos.1 and 3 (from which defendant no.1 subsequently resiled by filing an amended written statement disowning her statements in the first written statement), contains contradictory allegations, one of which is that signatures of Late Sukumar Dutta were taken on blank papers. If such be the case, it defies logic as to why the person perpetrating such fraud would unnecessarily include interpolations instead of having a clear typewritten copy of the entire document on the blank papers.
- 70.** Thus, the allegation of interpolation cannot be accepted. In fact, as recorded above, the authenticity and existence of the agreement was never disbelieved by the learned Trial Judge.

**Whether the agreement dated October 16, 1995 was genuine**

- 71.** The case made out by the defendant no.3, initially jointly with defendant no.1, in her written statement is mutually contradictory insofar as the agreement is concerned. Three clearly contradictory stands have been taken – first, that the document is fabricated and forged, secondly that the vendor's signatures were actually taken, but on blank document and thereafter converted to the agreement, and third, that the vendor did not know English, taking advantage of which the agreement was executed in English.
- 72.** If the second and third versions are to be considered, the existence of the agreement and the authenticity of the signatures of the vendor therein are also admitted by the defendant no.3/respondent, since in case of blank papers being obtained or lack of knowledge in English,

fact remains that the execution of the agreement by the vendor is admitted. Such case runs contradictory with and is mutually exclusive with the case of the entire document being forged and fabricated and a general denial in the written statement of defendant no.3 of the very existence of the document as such. Hence, the defence in that regard is itself suspect.

- 73.** Moreover, no particulars of fraud have been pleaded in terms of Order VI Rule 4 of the Code of Civil Procedure in the written statement of the respondent, nor has any proof been furnished of such fraud being perpetrated. Rather, it comes out in the oral evidence that there was another agreement executed between one Ashoke Roy and Suresh Marketing with Late Sukumar Dutta during his lifetime in English. Thus, the lack of knowledge of Sukumar Dutta is immaterial, since he admittedly executed several agreements in the said language.
- 74.** The defendant no.3/respondent, in her cross-examination as D.W.2, also admits her lack of knowledge regarding the payment of Rs.50,000/- as part consideration. Hence, she could not have been in a position to disprove such payment, having admittedly no knowledge of the incident.
- 75.** The respondent has submitted that there is no date on the stamp paper which is marked as Exhibit 5, apart from the year 1997, and that the said draft deed makes out a different case than the agreement, being in the name of the wife of the plaintiff as purchaser at a consideration of Rs.75,000/-, both of which are contrary to the agreement.

- 76.** However, nothing hinges on the same, since such preparation of a draft deed is a superfluity and even if ignored, there are sufficient other documents and corroborative evidence to prove the plaintiff case. The defendant nos.1 and 2 have admitted the plaintiff case in totality and executed a deed of conveyance in favour of the plaintiff during pendency of the suit regarding their 2/3<sup>rd</sup> share in the property.
- 77.** Moreover, the relief of specific performance has not been sought on the basis of the said draft deed but it was only sought to be adduced as a collateral piece of evidence. Even if it does not have any evidentiary value to prove the plaintiff case, by itself it does not disprove the plaintiff case either. Even if a draft conveyance was prepared in the name of the plaintiff's wife at a different consideration, the same was never given effect to and would have no bearing on the issues involved in the present suit and, thus, does not give a go-bye to the right of the plaintiff to obtain a specific performance of the agreement dated October 16, 1995. Hence, it is reiterated that nothing hinges on the same.
- 78.** Importantly, the learned Trial Judge, in the impugned judgment and decree, has believed categorically the existence of the receipts and the agreement dated October 16, 1995, respectively marked as Exhibits 1, 2 and 3.
- 79.** Thus, the defence of the respondent that the said agreement was not an authentic document is not proved, more so in the absence of any cross-objection or argument challenging the said finding of the learned Trial Judge.

**Effect of the plaintiff not filing a separate appeal against the counter claim decree of recovery of possession**

- 80.** The respondent has vehemently argued that the present appeal is not maintainable in view of no challenge having been preferred against the decree passed in the counter claim for recovery of possession. However, the existence of the said decree of recovery of possession passed in the counter claim does not *per se* operate as a bar to the present appeal. Admittedly, the plaintiff is in actual physical possession of the property, although the respondent labels the same as forcible, from May 28, 1999. Evidence has been led by the plaintiff's witnesses in support of the contention that possession was handed over in the year 1997 by the original vendor in favour of the plaintiff. Paragraph nos.9 and 12 of the examination-in-chief of D.W.2 (present respondent) corroborates the possession of the plaintiff at least from May 28, 1999 irrespective of the allegation that the same was forcibly taken.
- 81.** Even if the possession of the plaintiff in respect of the property was "unlawful" due to the decree of *khas* possession or otherwise, and not pursuant to the agreement-in-question, the same could at best hit at any defence under Section 53A of the Transfer of Property Act to the counter claim, if taken by the plaintiff, but could not, by itself, debar a suit for specific performance of contract, which flows not from possessory right but from an independent right on the strength of the agreement dated October 16, 1995 and furnishes a chose-in-action in

favour of the plaintiff arising out of the said agreement, the existence of which has been believed by the learned Trial Judge. Admittedly, the plaintiff is still in actual physical possession of the subject property till date and the counter claim decree of recovery of possession has not yet been executed against the plaintiff.

- 82.** The effect would be that in the event a decree of specific performance is passed, the plaintiff/appellant would become the full and absolute owner of the suit garage space, which would render the eviction decree inexecutable, since the paramount title of the plaintiff, upon execution of a deed of conveyance pursuant to the decree of specific performance, would subsume his lesser rights as a mere occupier.
- 83.** Even if we proceed on the basis of the sale deed executed during pendency of the suit on April 26, 2004 by the defendant nos.1 and 2 (whose names have been subsequently expunged) in respect of their 2/3<sup>rd</sup> share of the suit property in favour of the plaintiff, pursuant to the agreement-in-question, the plaintiff has already become a majority shareholder of the suit property and as such, it is doubtful as to whether the decree of recovery of possession can be executed against the plaintiff, since the undivided ownership of the majority 2/3<sup>rd</sup> share of the plaintiff in the suit property even on the present day would put the plaintiff on a co-equal, if not better, footing with the defendant no.3/respondent vis-à-vis title to the suit property.
- 84.** Taking the worst, even if the eviction decree could be executed today, the execution of a deed of conveyance in execution of the decree of specific performance, which would be the obvious consequence if the

present appeal succeeds, would entitle the plaintiff/appellant to file a suit for recovery of possession against the defendant no.3/respondent immediately thereafter on the strength of paramount and absolute title in the suit property, whereas the defendant no.3/respondent, upon the appeal succeeding, would be denuded of any title in the suit property whatsoever.

- 85.** Thus, it cannot be said that the absence of challenge to the counter claim for recovery of possession by way of a separate appeal would *per se* affect the outcome of the present appeal.

**Whether the matter should be remanded**

- 86.** In view of the above conclusion of this Court that the plaintiff is entitled to a decree of specific performance to the extent of the 1/3<sup>rd</sup> share of the defendant, since all the findings of this Court lead towards the same, a consideration which would acquire relevance is whether the matter should be remanded to the Trial Court for re-adjudication on the other issues, as the suit was dismissed only on the ground of limitation.
- 87.** However, we decide against the same for the following reasons:
- 88.** Order XLI Rule 24 of the Code of Civil Procedure provides that where the evidence on record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred

has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

- 89.** The present case stands on an even better footing, since there is no reason for re-settling of issues as all the germane issues, from Issue Nos. 2 to 4, on the relevant facts of the case, were already framed and finally decided by the learned Trial Judge.
- 90.** In fact, the parties had ample opportunity to lead evidence and addressed in arguments all the germane issues even apart from limitation and the learned Trial Judge categorically came to the finding that the agreement dated October 16, 1995 and the money receipts for Rs.10,000/- and Rs.40,000/- exist.
- 91.** Even after coming to such conclusions, the suit was dismissed only on the ground of limitation.
- 92.** Thus, since this Court upsets the conclusion of the learned Trial Judge on limitation and holds that the suit was filed within time as stipulated in law, there would not arise any further occasion to re-settle the issues or unnecessarily remand the matter back to the Trial Court.
- 93.** In fact, in the above discussions, we have added our own reasons along with those of the learned Trial Judge to hold that the plaintiff is otherwise entitled to a decree for specific performance of the agreement against the defendant no.3/respondent. Hence, there is no scope of remanding the matter unnecessarily, particularly in view of more than a quarter of a century having elapsed between the institution of the suit and this day.

- 94.** Viewed from a different perspective, Order XIV Rule 2(1) of the Code of Civil Procedure mandates the court, notwithstanding that a case may be disposed of on a preliminary issue, to pronounce judgment on all issues.
- 95.** The only exception is carved out in sub-rule (2) of Rule 2 which envisages two situations - where the issue relates to jurisdiction of the court and/or a bar to the suit created by any law for the time being in force - in which case the settlement of other issues are to be postponed till after that issue is determined and the suit is to be decided in accordance with the decision on that issue alone.
- 96.** However, in the present case, no question has been raised as to lack of jurisdiction of the court. As to the bar of limitation, the same was at best a mixed question of fact and law in the context of the instant case and could not have been decided at the outset prior to the other issues within the contemplation of Order XIV Rule 2(2) of the Code. Thus, rightly, the learned Trial Judge did not decide the issue of limitation first by postponing the other issues but took up the same along with the other issues and came to a decision on all the issues independently, as mandated under Order XIV Rule 2(1) of the Code. Hence, this is not a case that the suit was not decided on the other issues. Since the learned Trial Judge held in the impugned judgment that the suit was barred by limitation, the findings on the other issues were treated to be academic.
- 97.** Thus, as we find that the plaintiff is otherwise entitled to a decree of specific performance against the respondent and set aside the

conclusion of the learned Trial Judge regarding the suit being barred by limitation, we choose to exercise our powers under Order XLI Rule 24 of the Code and decide the appeal ourselves, instead of relegating the same unnecessarily on remand to the Trial Court.

**98.** Accordingly, in view of the above findings and observations, we hold that the plaintiff is entitled to a decree of specific performance of the contract dated October 16, 1995 as against the respondent in respect of the 1/3<sup>rd</sup> share of the defendant no.3/respondent in the suit property. We also come to the conclusion that out of the total consideration of Rs.1,05,000/- for the proposed sale, already an amount of Rs.1,00,000/- (10,000 + 40,000 + 50,000) has been paid respectively on October 12, 1995 and October 16, 1995 and the balance amount of Rs.5,000/- only was left to be paid by the plaintiff. Out of such balance amount of Rs.5,000/-, the defendant nos.1 and 2 have already executed a sale deed in respect of their 2/3<sup>rd</sup> share in the property upon receipt of their 2/3<sup>rd</sup> share of the balance consideration and the plaintiff/appellant is merely to pay the 1/3<sup>rd</sup> share of the balance of Rs.5,000/- to which the defendant no.3/respondent is entitled, which comes to Rs.1,667/-, rounded to the last rupee.

**99.** Accordingly, F.A. No.87 of 2007 is allowed on contest, thereby setting aside the impugned judgment and decree dated August 31, 2006 passed by the learned Judge, Fourth Bench, City Civil Court at Calcutta in Title Suit No.1085 of 1999 and granting a decree of specific performance of the agreement dated October 16, 1995 in favour of the plaintiff/appellant to the extent of the 1/3<sup>rd</sup> share in the

suit property of the defendant no.3/respondent, upon the plaintiff/appellant paying the balance consideration amount of Rs.1,667/- to the defendant no.3/respondent. The appellant shall deposit such amount in the Trial Court within two (02) months from date.

- 100.** Upon such payment being made, the defendant no.3/respondent shall execute a registered deed of conveyance in favour of the plaintiff/appellant in terms of the agreement dated October 16, 1995 within one month thereafter.
- 101.** In the event the defendant no.3/respondent fails to do so, it will be open to the plaintiff/appellant to have this decree executed and to have an appropriate deed of conveyance in respect of the 1/3<sup>rd</sup> share of defendant no.3/respondent being executed through court in accordance with law.
- 102.** There will be no order as to costs.
- 103.** A formal decree be drawn up accordingly.
- 104.** CAN 3 of 2018 (Old No: CAN 1383 of 2018) is also disposed of accordingly.

**(Sabyasachi Bhattacharyya, J.)**

I agree.

**(Uday Kumar, J.)**