

(2019) 05 CAL CK 0042
In the Calcutta High Court
Case No : Civil Second Appeal No. 57 Of 2009
Dayabati Das & Ors Vs Meera Das & Ors?

Date of Decision : 16-05-2019

Acts Referred:

Limitation Act, 1963 — Section 3
Benami Transactions (Prohibition) Act, 1988 — Section 2(8), 2(9), 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24
Transfer Of Property Act, 1882 — Section 179(1), 53A
Registration Act, 1908 — Section 49
Specific Relief Act, 1963 — Section 16, 20
Limitation Act, 1963 — Article 58, 59

Citation : (2019) 05 CAL CK 0042

Hon'ble Judges : Sahidullah Munshi, J

Bench : Single Bench

Advocate : Saptangsu Basu, Sibasish Ghosh, Tanmay Mukherje, Koushik Roy, Debasish Roy, Sourav Sen

Final Decision : Allowed

Judgement

Sahidullah Munshi, J

This second appeal is at the instance of the defendant nos. 1, 2 and 3/appellants against the judgment and decree dated September 11, 2018 passed by the learned Additional District Judge, 2nd Court at Hooghly in Title Appeal No. 113 of 2006 affirming the judgment dated March 30, 2006 and decree dated April 7, 2006 passed by the learned Civil Judge (Junior Division) Additional Court at Hooghly in Title Suit No. 150 of 2003. Respondent nos. 1 and 2 were the plaintiffs before the trial Court whereas the respondent nos. 3 to 7 were defendants in the suit. Defendant nos. 3 to 7 adopted the submission of the appellants and supported the stand taken by them. Only plaintiffs/respondents contested the appeal.

According to the plaint case, the predecessor of both the plaintiffs and the defendants, namely, Prasanna Kumar Das, during his lifetime engaged his son Monimohan Das for purchase of some properties in the name of Prasanna Kumar

Das with his money and to get the sale deed registered in his name. But Moni Mohan Das, with some ulterior motive, got the document in his name posing that the same was purchased by him with his own fund. After knowing this fact, Prasanna made a writing describing it to be a settlement (Swaralipi) on 26.01.1976 in respect of his own properties. The document was made in his own handwriting disclosing the mode of settlement of the properties including the suit property. In the said Swaralipi in item no.2, the suit property was mentioned, that is, a land measuring 73 Sahashrangso which was purchased in the name of Moni Mohan, lying and situated on the Southern side of the residential house at Chinsurah. According to the said terms of Swaralipi, the suit property was to be re-transferred in the name of Prasanna and as a condition precedent, the money which was lent by Moni Mohan Das for the said purchase from his fund, would be given back to him. It is the plaint case that the other terms in the settlement had been performed by Moni Mohan by transferring the property at Bagulakhali in the name of his five brothers and a Deed of Exchange was made with Prasanna in respect of a property adjacent to the suit property on 26.05.1980. During his lifetime, whereas the term no.2 was not performed by Moni Mohan, although, he was obliged to execute a Deed of Transfer of the suit property in the name of Prasanna. It is stated that the said transfer would not be materialised during his lifetime as Moni Mohan fell ill. After demise of Moni Mohan, the plaintiffs requested the defendants, that is, the legal heirs of Moni Mohan, to execute and register a Deed in their name in respect of the suit property but the defendants, on one pretext or the other avoided the plaintiff and, ultimately, refused to execute the same.

According to the plaintiff, cause of action arose on diverse dates but first such cause of action arose on 25th December, 1990 and thereafter again on 08.10.1991 when defendants made an attempt to get sanctioned plan in their name from Hooghly-Chinsurah Municipality and lastly on 16.09.1994, when the defendants refused to settle the dispute amicably. Trial Court, on consideration of the evidence on pleadings and the evidence adduced by the plaintiff, decreed the suit in part holding that Moni Mohan, since deceased, was under obligation to convey the suit property in the name of his other brothers who are the legal heirs of Prasanna in accordance with the terms and conditions of the said Swaralipi. In support of such finding the trial Court held that the parties admitted the Swaralipi and in fact, acted on the basis thereof by executing the Deed of Exchange. Therefore, according to the trial Court, the Swaralipi was binding upon both the parties. The first Appellate Court affirmed the decree.

While affirming the judgment and decree passed by the trial Court, the Appellate Court came to the conclusion that since the Swaralipi was acted upon and execution thereof was identified by Prabir Kumar Das the same is to be enforced in law. Learned first Appellate Court also held that the predecessors of the defendants that Moni Mohan Das wrote two letters being exhibits 2 & 2(A) which makes it clear that Moni Mohan Das admitted the execution of the Swaralipi. The Appellate Court held that even long after the execution of the Swaralipi Moni

Mohan admitted that this was made by his father Prasanna Kumar Das. According to first Appellate Court Moni Mohan Das agreed to execute deeds of transfer of the suit property mentioned in the name of Prasanna and that he had already executed a deed on 26.05.1980 in respect of a property mentioned in the said Swaralipi. The learned Appellate Court below has held that from the Swaralipi it is clear that the properties were purchased by Prasanna in the name of Moni Mohan from his own fund. However, a little part of the fund was contributed by Moni Mohan. The appeal was admitted by this Court on 28th January, 2009 on the following substantial question of law.

1. Whether the learned Judges in the Courts below substantially erred in law in construing the document of title, that is, the deeds of purchase, being Exhibits A and B and in placing reliance upon the alleged deed of family settlement, being Exhibit-1, which was, prima facie, inadmissible in law?

2. Whether the learned Judges in the Courts below substantially erred in law in decreeing the suit without considering that the suit is not maintainable as framed being barred by limitation?

3. Whether the suit is barred by the Benami Transaction Act, 1988?

I wish to first discuss the second substantial question of law which relates to the maintainability of the suit. According to the plaintiff/appellant, the first cause of action arose on 25th December, 1990 and the suit had been filed on 7th April 1994 as mentioned in paragraph 8 of the plaint and the last cause of action arose on 16.09.1994. Trial Court framed issues. Issue no.2 relates to maintainability of the suit and issue no.3 relates to the bar of limitation. Mr. Saptangsu Basu, learned Senior Advocate appearing for the plaintiff submitted that if Article 58 of the Limitation Act is taken into consideration it will be clear that cause of action means the cause of action first arose before the suit is filed and the period of limitation is three years from the period when right to sue accrued. He has drawn attention of this Court to Article 59 of the Limitation Act which shows the period of limitation to be three years from the period when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first became known to him. Therefore, according to Mr. Basu purport of Article 58 and Article 59 of the Limitation Act if to be considered, the period of limitation is three years from the date when cause of action accrues.

Articles 58 and 59 of the Limitation Act are set out below:

Description of suit

Period of limitation

Time from which period begins to run

58. To obtain any other declaration

Three years

When the right to sue first accrues.

59. To cancel or set aside an instrument or decree or for the rescission of a contract

Three years

When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

In support of his submission Mr. Basu relies on the following decisions:

? Abdul Rahim & Ors. -Vs. - Sk. Abdul Zabar & Ors. reported in AIR 2010 SC 211;

? State of Gujarat -Vs. - Kothari And Associates reported in 2016(2) CHN (SC) 303;

? Bhringuram Mondal & Ors. -Vs. - Birendra Nath Das & Ors. reported in 2014(3) ICC 511.

Citing these decisions Mr. Basu points out that every Court has got responsibility to verify whether a proceeding is barred by law of limitation. If such bar is apparent then the Court should not have gone into the other issues and it is duty bound to elaborately discuss as to why the suit should be considered barred under the relevant article of the Limitation Act and if the Court holds that the suit is not barred then he has to give appropriate reasons. In the instant case, neither the trial Court, nor the first Appellate Court below has gone into such aspect of the matter and it is evident from the judgment of the trial Court that it has simply bypassed the issue on the pretext that issue nos. 2 and 3 were not pressed by the learned Advocates of either sides. Question, therefore, is, even if the parties do not press the question of maintainability whether the Court has got any independent duty in coming to a conclusion whether suit is barred by law or not.

In the decision of Abdul Rahim (supra) the Hon'ble Apex Court, while discussing the scope of Article 59 of the Limitation Act, held that the suit ought to have been filed within a period of three years from the date of knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place. The Hon'ble Apex Court held that suit having been filed within a period of three years it had been rightly held to be barred by the limitation. It goes without saying that the starting point of limitation is the date of knowledge of the alleged fraud. Since the plaint itself discloses the first cause of action on a particular date, there is no doubt that the suit ought to have been filed within a period of three years from the date which is disclosed to have been in their knowledge, since the suit is one for declaration of the right, title and interest in respect of the suit property. It is pertinent to point out the prayers made in the plaint. The plaint shows that the plaintiffs prayed for declaration that the suit property mentioned in the schedule is the joint property of the plaintiffs and the defendant being the heirs of deceased Prasanna Kumar Das a further declaration

was sought for to the effect that the defendant nos. 1 to 3 are under obligation to execute document transferring the shares of the defendants in the suit property giving effect to the writing dated 26.01.1976 (Swaralipi) left by deceased Prasanna Kumar Das. If the first prayer is considered, it is nothing but a declaration sought for by the plaintiff. So far the first prayer regarding declaration limitation is three years since when the right to sue first accrues. So far the second prayer is concerned, it is a case of specific performance of a document, that is, the Swaralipi dated 26.01.1976. The decision arrived at by the Courts below is more on the second prayer. The Courts below proceeded in a manner as if the said Swaralipi was sought to be specifically performed by the plaintiff and it is submitted before the Court below by the plaintiff/respondent that the suit cannot be held to be barred inasmuch as it was filed within a period of three years from the date of refusal to specifically perform the obligation under the said document/Swaralipi (Exhibit 1).

Decision in the case of State of Gujarat (supra), the Hon'ble Apex Court supports the case of the appellant. From the said decision it is found that question of limitation was not pleaded as a ground before the trial Court or the High Court, it was placed for the first time in course of oral argument before the High Court. The High Court noting the contention raised by the respondent that the point of limitation was a mixed question of law and fact and could, therefore, not be adjudicated before the Supreme Court. It was held that even if it could be adjudicated the suit would not be barred under the principle of prescription as it was based on series of successive breaches committed by the appellant/State and in such circumstances the date of the last breach was relevant. The High Court was of the opinion that limitation need not mandatorily be computed on the basis of each cause of action. It held that the date of return of the security deposit as the last date of payment when the work done, and concluded that the suit had been filed within three years from the date. The suit was, therefore, found within the prescribed period of limitation. Ultimately, the Hon'ble apex Court held that the respondent failed to file the suit for damages within the period prescribed in the Limitation Act. The suit was, therefore, dismissed. The impugned order was also set aside and the appeal before the Supreme Court was allowed. The argument that was advanced by Mr. Mukherjee, learned Counsel appearing on behalf of the respondents that since the appellant did not pray for issue nos. 2 and 3 (maintainability and bar of limitation), they are not entitled to raise the question in the second appeal inasmuch as the question of limitations is a mixed question of law and fact. In the context of the said decision of the Hon'ble Apex Court the argument advanced by Mr. Mukherjee appearing for the respondents cannot be supported. In this context, however, we may take note of Section 3 of the Limitation Act which mentions about the bar of limitation in case of suits, appeals and applications. Section 3 of the Limitation Act says that subject to the provision contained in Sections 4 to 24 of the said Act (both inclusive), every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although, limitation has been set up as a

defence. Section explicitly mentions that it is incumbent upon the Court to satisfy itself that the suit is not barred by limitation regardless of whether such a plea has been raised by the parties. The question of limitation is a mandate to the forum and irrespective of the fact whether it was pleaded or not, the Court must consider and apply it in its true perspective. Of course, while applying such provision of limitation the disclosed causes of action are to be taken into consideration. The Hon'ble Apex Court in State of Gujarat (supra) has held - "a duty was cast on the Court to consider this aspect of law, even on its own initiative, and since it failed to do so, the appellate/State was competent to raise this legal question in appeal or indeed even in any successive appeal."

Mr. Basu has relied on a decision in the case of Bhringuram Mondal & Ors. (supra) to argue that a suit is to be filed within three years from the date when the right to sue accrue first. The Single Bench held that suit is to be filed within three years from the date when the right to sue accrue first.

In my view, therefore, the suit was not maintainable on the day when it was presented before the Court, in view of the disclosed cause of action in the plaint and the Appellate Court below grossly neglected to consider the point of maintainability and the bar of limitation. It simply subscribed the view of the trial Court. First Appellate Court being the last Court of fact ought to have taken into consideration this factual aspect which disentitles a person from prosecuting another without having any cause for the suit. The suit unnecessarily continued for a longer period of time.

The next substantial question of law which I now deal is really the first substantial question of law. The respondents proceeded before both the Courts below as if the document/Swaralipi (Exhibit 1) was an agreement for sale and/or settlement deed which was to be specifically performed by Moni Mohan and in his absence his legal heirs, the defendants. How far, this claim can be held to be justified. Mr. Basu learned counsel appearing for the appellant submitted that this plea cannot be considered at all, inasmuch as, the document/Swaralipi is not admissible in evidence. The learned Courts below held since the document was admitted by both the parties and since part performance thereof in respect of several properties not being the suit property has already been executed by the defendants, they are under obligation to execute a deed of sale in favour of the other heirs of Prasanna in respect of the suit property. In the Swaralipi Prasanna has described that he is the owner of all the three properties in item nos. 2 and 3 of schedule of document (Exbt.1). The description of the disputed property which according to Prasanna was to be purchased in his name but it was purchased in the name of Prasanna partly by his own contribution and partly by Moni Mohan. Moni Mohan was entrusted to purchase the property in the name of Prasanna. Money was paid in the name of Prasanna but consideration money was paid by Moni Mohan which, in fact, Prasanna agreed to return to Moni Mohan. But even then Moni Mohan did not execute the deed of re-conveyance. Mr. Basu raised a question that this is a pure case of Benami transaction and barred under Section

4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter to be referred to as the 'said Act'). Section 4 of the said Act is set out below:

"4. Prohibition of the right to recover property held benami.-

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,-

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

From Section 4 it appears that no suit or claim or action can be enforced in respect of any property held Benami. Sum and substance of Section 4, therefore, makes it clear that no defence based on any right in respect of any property held Benami against the person in whose name the property is held or against any other person could be allowed in any suit.

Although, no substantial question was framed on this but this is a pure question of law and can be agitated even in the second appeal which is partly covered under issue no.6 which says - "are the plaintiffs entitled to get the decree as prayed for?"

In the present case, it is the specific averment in the plaint that Prasanna entrusted his son Moni Mohan to purchase the suit land in his name and paid money. Moni Mohan also paid some of the consideration money and instead of purchasing the property in the name of Prasanna his father, he got the transaction registered in his name paying the remaining part of the consideration money. Question is, if someone admits that Moni Mohan paid some money and the property was purchased in his name whether this could be said to be a 'Benami' or not? In this context the definition of 'Benami property' and 'Benami transaction' would be relevant.

'Benami property' has been defined under Section 2(8) of The Prohibition of Benami Property Transactions Act, 1988. Section 2(8) and 2(9) of the said Act is set out below :

"2. ...

(8) "benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property;

(9) "benami transaction" means,-

(A) a transaction or an arrangement-

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by-

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor,

partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 (22 of 1996) and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.-For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred

to in section 53A of the Transfer of Property Act, 1882 (4 of 1882), if, under any law for the time being in force,-

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered."

Benami transaction means a transaction or an arrangement where a property is transferred to or is held by a person and the consideration for such property has been provided or paid by some other person. In a case where admittedly, a portion of the consideration money has been paid by Prasanna and some consideration part has been paid by Moni Mohan and in such a case whether the benami plea can be available to the appellant or not. Admittedly, the transaction took place on 7th October, 1964 and 3rd December, 1975. No attempt was made till 1994 by the heirs of Prasanna to establish that the money actually paid by Prasanna by giving evidence and because this could not have been proved, the plaintiffs sought for a declaration over the property as if the property belonged to Prasanna and he had the authority to execute a document to settle the property along with others in favour of his legal heirs. In my view, if the property is purchased in the name of Moni Mohan, admittedly, with the money of Prasanna, it is hit by the provisions of Benami Transactions Act and no defence was available to the plaintiff to claim that the property was purchased in the name of Moni Mohan with the money of Prasanna. On this ground also the suit ought to have been dismissed.

Mr. Basu submitted that the so-called document being the Swaralipi (Ext.1) is an unregistered document and cannot be relied on. Mr. Basu also relies on the decisions in the case of -

? Bhim Singh (dead) by L. Rs and Anr. -Vs. - Kan Singh reported in AIR 1980 SC 727;

? Pratima Paul & Ors. -Vs. - Rupa Paul & Ors. reported in (2010) 1 CHN 15;

In Bhim Singh & Ors. (supra) the Hon'ble Apex Court held that principle governing the determination on the question whether a transfer is benami transaction or not depends upon four circumstances -

1) The burden of showing that transfer is a benami transaction lies on the person who asserts that it is such a transaction;

2) If it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary;

3) The true character of the transaction to govern by the intention of the person who has contributed the purchase money;

4) The question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct.

In Pratima Paul & Ors. (supra) the Division Bench of this Court held in the same view of the views taken by the Hon'ble Apex Court in Bhim Singh & Ors. (supra).

Therefore, in my view, the ratio decided in the aforesaid decisions of Bhim Singh & Ors. (supra) and Pratima Paul & Ors. (supra) and the attending circumstances based on material evidence, it can be safely held that the ingredients of the Benami Transactions Act is applicable in the present case.

The next question which has been raised by Mr. Basu that the Swaralipi is being un-registered, un-stamped document is not admissible in evidence. Regarding registration, non-registration of a document vis-à-vis its admissibility in evidence Mr. Basu relied on a decision in the case of -

? Shyam Narayan Prasad -Vs. - Krishna Prasad and Ors. reported in (2018) 7 SCC 646; and

? K.B. Saha and Sons Private Limited -Vs. - Development Consultant Limited reported in (2008) 8 SCC 564.

In K.B. Saha (supra) the Hon'ble Apex Court held that an un-registered document is not admissible in evidence under Section 49 of the Registration Act. There is no dispute with regard to the proposition but question arises whether the said document can be admitted into evidence, if the execution thereof is admitted by the parties. It is submitted that even for collateral purpose the document cannot be relied on. The learned Counsel appearing for the respondent, however, submitted that when the document has already been exhibited without objection it is not for the appellant to raise this point again before the Second Appellate Court. According to him once a document has been marked as an exhibit, its admissibility cannot be challenged at a subsequent stage of the proceeding.

Mr. Mukherjee, learned Counsel appearing for the respondents has relied on a decision in the case of SMS Tea Estates Private Limited -Vs. - Chandmari Tea Company Private Limited reported in (2011) 14 SCC 66 relying on paragraph 10 and 11 of the said decision the learned Advocate for the respondent submitted that there is an exception to Section 49 of the Registration Act, 1908 which says that an un-registered document affecting immovable property and required by the Act that is Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.

Section 49 of the Registration Act, 1908 is set out below:

"49. Effect of non-registration of documents required to be registered.- No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.] State Amendment Uttar Pradesh: In section 49,-

(i) in the first paragraph, after the words "or by any provision of the Transfer of Property Act, 1882" insert the words "or of any other law for the time being in force",

(ii) substitute clause (b) as under: "(b) confer any power or create any right or relationship, or",

(iii) in clause (c), after the words "such power", insert the words "or creating such right or relationship",

(iv) in the proviso, omit the words "as evidence of a contract in a suit for specific performance under Chapter II of the Specific

Relief Act, 1877, or". [Vide Uttar Pradesh Act 57 of 1976, sec. 34 (w.e.f. 1-1-1977)]."

In my view it is clear from the language of Section 49 that if a document is compulsorily registrable and if not registered, will not affect the immovable property comprised therein in any manner. A document in this case is directly affecting the property in question. Therefore, being un-registered document it ought not to have been admitted into evidence.

However, since it has already been admitted Court can always weigh the evidentiary value of the said document. I hold that since the document has already been admitted into evidence the Court did not commit any error in relying on the same. Mr. Basu, however, points out before this Court that before the trial Court when the document was marked as an exhibit the defendants raised objection and this went up to Revisional Court which finally passed an order holding that the defendants will be at liberty to take objection at the final hearing.

In this case Mr. Mukherjee for the plaintiff/respondent has repeatedly argued before this Court that the Swaralipi can be considered to be a Contract and the plaintiff sought for specific performance of that Swaralipi under which the parties were bound. Since the execution of Swaralipi was accepted by the parties there can be no bar for the plaintiff to pray for specific performance of the Swaralipi considering that to be an agreement. There are several reasons for not accepting the said Swaralipi as an agreement. Firstly, it is clear that when the said Swaralipi was executed in the year 1976, the person who had executed the document declared himself as the owner of the suit property and considering him to be the owner of the suit property he made a condition that his son must return the property in his name and must execute a deed of re-conveyance transferring the property to him upon acceptance of the balance of the consideration money. It is the plaintiff's case that, although, in every specific performance it has to be filed within the period of limitation, he submitted that the limitation will run from the date of refusal. I do not find from the record that any claim was made by the plaintiff for specific performance of the said document which the defendants have refused to perform. Question arises if there is no specific demand for performance on the basis of the document in question, question of refusal does not arise. It is the self created cause of action by the plaintiff that the defendants refused to execute the document despite letters were sent to them and no reply was given. Therefore, by this way the argument of shifting of cause of action to a deferred date cannot be accepted. This cannot be said to be a suit for specific performance of contract. Secondly, the document which has been argued to be specifically performed is not a contract between the parties rather the deed of settlement unilaterally made by the defendant's predecessor. Before the property is declared to have been purchased in benami by Moni Mohan his father had no right to claim title over the same, holding that he became the owner of the property. It is clear that when the deed of settlement (Swaralipi) was executed the author was not the owner of the property and he had no right to put the condition for re-conveyance by Moni Mohan for his father. Therefore, this will be clear absurdity to accept the argument made by Mr. Mukherjee. Even the argument that this was a suit for specific performance of contract, in my opinion no relief is available to the plaintiff. Although, the discretion to be exercised under Section 20 of Specific Relief Act is a discretionary jurisdiction, such discretion shall not be exercised when the contract itself becomes frustrated by passage of time. The argument advanced by the plaintiff also cannot be appreciated in view of Section 16 of the Specific Relief Act, 1963, when, admittedly, the plaintiffs were under obligation to make some payment in favour of the defendants for them to perform the Act by executing a deed of conveyance in favour of the plaintiff, the plaintiff must show his readiness and willingness to perform the contract according to its true construction which is hopelessly absent in the present case. The relief of specific performance cannot at all be granted as argued by Mr. Mukherjee, for the reason that specific performance of contract cannot be enforced in favour of a person who would not have been entitled to recover compensation for its breach. No

such provision since has been made under the said Swaralipi the claim made by the plaintiff is also barred under Section 16 of the Specific Relief Act. The document is not enforceable in law and, therefore, the argument made on behalf of the plaintiff/respondent fails. Judgment and decree passed by the first Appellate court affirming the judgment and decree passed in suit is set aside.

The appeal is allowed.

However, there will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned advocates for the respective parties upon compliance of all usual formalities.