

(2026) 08 CAL CK 2981
In the Calcutta High Court
Case No : F.A. 87 OF 2011

Dibyendu Bera & Anr.

APPELLANT

Vs

Mahadeb Pan & Ors.

RESPONDENT

Date of Decision : 04-08-2026

Acts Referred:

Specific Relief Act, 1963 — Section 15 (a), 15 (b), 20
TP Act — Section 53A
Indian Contract Act, 1972 — Section 70

Citation : (2026) 08 CAL CK 2981

Hon'ble Judges : Ravi Krishan Kapur, J;Chaitali Chatterjee Das, J

Bench : Division Bench

Advocate : Mr. Rabindranath Mahato, Adv., Mr. Aritra Shankar Roy, Adv., Mr. Tapas Kumar Sinha, Adv.

Final Decision : Dismissed

Judgement

CHAITALI CHATTERJEE DAS, J.:-

1. This appeal has been filed against judgement and decree dated October 5, 2010 passed by the Learned Civil Judge, Senior Division at Ghatal, District Medinipur (West) in Title Suit no. 39 of 2003.

Brief fact of the case

2. The factual matrix of the case discloses that a title suit being T.S no. 39 of 2003 was filed by the plaintiffs/appellants for specific performance of a contract for sale against the defendant/respondent on the basis of an oral agreement dated 12.08.1409 B.S. The plaintiffs as well as the defendants having their property adjacent to each other that the plaintiffs being the owner of "ka" schedule property where in possession .In the month of Kartick 1409 B.S the defendants No 1& 2 declared to sale the "ka" schedule property and since said "Ka" schedule property was adjacent property to the paternal property of the plaintiffs who wanted to purchase the suit property and accordingly sent their

father Madhab Chandra Bera to defendant no 1 and 2 , the father and two brothers of the defendant no. 1 on 2nd kartick 1409 B.S.

3. It is the further case of the plaintiff that defendants agreed to sale out the "ka" schedule property to the plaintiff and on the same day in presence of other gentleman the consideration price of "ka" schedule property at Rs. 10,91,000/-. On the said date an oral agreement was entered into between the father of the plaintiff and Jashabant Pan the father of defendant no. 1 and defendant no. 3 and 4, the brothers of defendant no. 1 in presence of some other gentleman and that oral agreement was confirmed. It was decided thereby that the defendant no. 1 and 2 would transfer 'ka" schedule property in favour of the plaintiffs by executing two separate register deed and the valuation was fixed as Rs. 10,91,000/-. In order to avoid income tax hazard it was further decided that in each deed such valuation of half of "ka" schedule property would be Rs.3 Lakhs and the plaintiffs would pay Rs.7,41,000/- out of Rs. 10,91,000/-before the registration of the deed to the defendant no. 3 and 4 on behalf of defendant/respondent no. 1 and 2 upon issuing receipts and further balance amount Rs. 3,50,000/- would be given to respondent/defendant no. 1 and 2 at the time of registration of such sale deed. The defendant no. 1, 3 and 4 and their father Jashabant Pan are members of joint family and Jashabant Pan is the Karta of such joint family and accordingly the aforesaid agreement was made.

4. In terms of said oral agreement Madhab Chandra Bera on behalf of the plaintiffs paid an amount of Rs. 1,91,000/- and on 4thkartick 1409 B.S. corresponding to October 22, 2002 as advance to the brother of the respondent/defendant no. 1 ,Sukdeb Pan who is the respondent /defendant and received such money by issuing receipts. However, erroneously his name has been written as on 05.07.1409 B.S, instead of 04.07.1409 B.S. Additionally, in terms of the said agreement on 01.02.1409 B.S. again paid Rs.2, 00,000/- to the brother of the respondent/defendant no. 1 being the respondent/defendant no. 4 and he received such amount and issued receipts. The 3rdpayment was made on 20.08.1409 B.S. of an amount of Rs.1, 02,600 along with gold ornaments of Rs.47, 400 totally Rs.1, 50,000 and the defendant no. 4 issued receipt on behalf of respondent/defendant no. 1.The last payment made by Madhab Chandra Bera on 24.08.1409 B.S. of Rs. 2.00, 000/- when the brother of the defendant/respondent no. 1 Rabindra nath Pan being defendant no. 4 in similar manner received the amount and issued receipts. In this way Madhab Chandra Bera on behalf of the plaintiff paid to the defendant no. 1 and 2 through defendant no. 4 of Rs. 7,41,000/- therefore in terms of the oral agreement made between the parties the amount of Rs.7,41,000/-out of total consideration money of Rs. 10,91,000/- before registration of the deed was made and an advance. Thereafter Jashabant Pan father of the defendant no. 1 handed over to Madhab Chandra Bera the original deed and tax payment receipts in respect of "ka" schedule property and agreed that they would execute an register two deed in respect of "ka" schedule property in favour of the appellant on 26thAgrayan, 1409 B.S. On being asked the plaintiffs purchased stamp paper on 10.12.2002 of

Rs. 24,000/- and prepared two separate deeds mentioning the consideration prices of each deed as of Rs. 3 lakh total Rs. 6 lakh and according to such settlement the deeds were written by the deed writer on 25th Aghrayan, 1409 B.S. corresponding to 12.12.2002. Thereafter, on Aghrayan 1409 B.S. when the plaintiffs and their father Madhab Chandra Bera as well as the deed writer Sri Shibram Gope and other witnesses came to the residents of the respondent no 1 and request to execute the deed of sale in terms of the agreement they demanded more amount and refused to accept the balance of Rs. 3, 59,000/- as well as refused to execute and register the deed as agreed.

5. Having no other alternative the plaintiffs through their advocate Tapan kumar Sinha issued separate notice on 23.05.2003 to the respondent no. 1 and 2 in order to execute and register the deed upon receipt of balance amount of Rs. 3, 50,000/- but despite receiving the notice they refused to execute and register the sale deed and hence the plaintiffs had to file the suit against them praying for decree of specific performance of contract.

Submissions

6. It is the contention of the Learned Advocate representing the appellants that the Learned Trial Judge though held that the execution of oral agreement was proved in respect of the suit property and found the suit to be maintainable dismissed the suit on the ground that the valuation of the suit property was described in the deeds as of Rs6 Lakhs when the proposed consideration prices agreed was of Rs. 10,91,000/- hence the agreement is void as by such agreement the parties intended to defraud the Income Tax Department. It is further contended that the finding of the Learned Trial Court regarding the acceptance of the oral agreement was not challenged by the respondent by filing a cross appeal and is binding between the parties which cannot be assailed at this stage. In this reliance is placed upon the decision in ***Ranchhoddas Chhaganlal vs Devaji Sudpu Dorik and Ors***¹. para 9.

7. It is further argued that the finding of the Learned Judge to the effect of non-description of the schedule property in the deed of sale in two different sale deeds and that in whose name the plots are lying or the rate of land have not been proved, is perverse because of non-consideration of exhibit 6 and 6/1 where in the schedule as well as in the schedule of the deed the price of specific land to be transferred was properly described.

8. The further argument made before the Court is that the Learned Trial Court without considering exhibit 3/2, one of the money receipts where it was mentioned that the money transaction is for land, held that plaintiffs have failed to prove the transaction between the parties was for the purpose of purchasing the suit land. It is specifically argued that the consideration price which was mentioned in exhibit 6 and 6/1 can be cured by describing the present market price as the appellant is ready and willing to pay the present market price and the oral agreement cannot be held as invalid on the ground of non-mentioning of

actual transaction amount with the intention to defraud the Income Tax Department for Rs.4, 91,000/- which can be cured by mentioning the actual money transaction. The appellant throughout shown their readiness and willingness to purchase the suit properties and made payments which have been proved and also the deeds were prepared for such proposed transfers were also exhibited.

9. The Learned Advocate relied upon the decision reported in **Panchanan Dhara and Others vs Monmatha Nath Maity (Dead) through legal representatives and another**² para 35 to substantiate his contention that oral agreement is permissible in law. Further reliance is placed upon the decision in **V.R Sudhakara Rao and Ors vs T.V Kameswari**³ para 4,8 that oral agreement for sale can be entered into by representative or agent on behalf of the vendor or purchaser . The defendant /respondent no. 3 and 4 who never appeared in the suit nor filed any written statement and did not adduce evidence to the effect that they did not receive the money on behalf of respondent no.1 and 2 or the amount was received for any other purposes and never authorised the respondent no 3 and 4 to act on their behalf and hence their objection cannot be accepted at this stage particularly when it is established that the defendant no. 4 was a witness in the deed being exhibit 4/3. In this regard put reliance on the decision in **Lateefa Begum Vs B.G Kirloskar (Dead) by Lrs**⁴. In addition reliance is placed upon the decision in **V.R Sudhakara Rao and Ors vs T.V Kameswari (supra)** para 13 to substantiate that considering the evidence relating to part performance by the appellant by paying Rs.7, 41,000/- to the defendants and handing over the original title deeds by the respondent to the plaintiffs and by preparing the proposed sale deeds the Learned Court ought to have decreed the suit.

10. The suit for specific performance or oral contract merely because of denial made by the defendant/respondent regarding of entering into oral agreement and payment of part of consideration prices cannot be denied when the appellant plaintiff all through expressed their readiness and willingness to purchase the suit property and even now ready to purchase at the present market price. In this regard relied upon the decision reported in **U.N. Krishnamurthy (since deceased) through Legal Representatives vs A.M. Krishnamurthy**⁵, para 8, 2,11,21,34.

11. Per contra the respondent nos. 1 and 2 submitted the respondents no. 1 and 2 are admittedly the owner and in possession of 5 decimal and 1 decimal of suit land respectively. The entire averment that the appellant sent their father Madhab Chandra Bera to represent respondent no 1 and the father and two brother of respondent no.1 on 2nd Kartick ,1409 B.S. and in presence of other gentleman the consideration price was settled at Rs. 10,91,000/-specifically denied by the present defendant. The defendant never asked the appellant or their father to purchase the stamp paper or prepared the sale deed and in written statement specifically denied such contention .It was further averred that

their father was alive and was residing separately at Cuttack in Odissa for last 12 years and carrying on his business over there. They never authorised the defendant and Jashabant Pan for sale of "ka" schedule property or any other property. The respondent no. 1 and 2 never received any advanced money for "ka" schedule property in the appellant or their father or from any other persons. The defendant lodged a complaint before Ghatal Police Station since the original document of "ka" schedule property was lost.

12. It is the further contention that there was no privity of contract between the appellants who are the owner of suit property and respondents 1 and 2. No pleading was made that Madhab Chandra Bera, the father of the present appellant was constituted attorney or authorised agent of the appellant. The appellants failed to prove by evidence that father of the appellant was authorised to enter into or the oral agreement on the contrary on the date of oral agreement the appellants were present with their father which would be evident from deposition of P.W. 1 and P.W. 2. The plaintiffs appellants also failed to prove that father of the defendant no 1 and defendant no. 3 and 4 are the constituted attorney or authorised agent of defendant no. 1 and 2 as they specifically denied in their deposition to ever authorised the respondent no. 3,4 and Jashabant Pan to sale the "ka" schedule property or to receive money for that purpose in this regard. In this regard relied upon a decision reported in, **Aries Advertising Bureau vs C.Y. Deyaraj (dead) by LRs6.**

13. The second point raised is that the oral agreement was not specific and plaintiffs failed to prove the oral agreement. It is submitted that in the alleged oral agreement the consideration money of land of respondent no. 1 and 2 was not separately determined. There was no oral agreement for land of respondent no. 2, no instalment amount and date of payment of instalments amount for payment of Rs. 7,41,000/- out of alleged consideration money of Rs.10,91,000/- was fixed in the oral agreement and the alleged payment was shown to have been made according to convenient dates in order to manufacture the money receipt as the respondent no 3 and 4 and father of the appellants both have jewellery business and had business relations. That apart the money receipts failed to show that any advance consideration money was paid to the respondent no. 3 and 4 in the suit land and or that such alleged advance consideration money was paid for the "ka" schedule land. In this regard relied upon the judgement reported in **(Ganesh Seth vs. Dr. C.S.G.K Setty and Ors.7, (K. Nanjappa) dead by legal representatives vs. R. A. Hameed @ Ameersab (dead) by legal representatives and anr.8 and Mayawanti vs Kaushalya Devi9.** It is further argued that where there is a case of oral agreement greater amount certainty is required in terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is to be the basis of an action at law of damages.

14. Further the plaintiffs are not entitled to obtain specific performance of the oral agreement which was allegedly entered into between Madhab Chandra Bera,

father of the plaintiffs, father of the respondent no. 1 and respondent no. 3 and 4 as the appellants who are neither representatives in interest nor the principle and according to the provision of Section 15 (a) 15 (b) of the specific Relief Act, 1963 the title suit filed by the plaintiff/appellant is not maintainable.

Analysis

15. On perusal of the materials on record coupled with the submission advanced the moot question which falls for consideration as to how far the claim of the appellants praying for a decree for specific performance of contract is established in respect of the scheduled suit premises.

16. The Trial Court eventually considering the materials and the evidences adduced was satisfied about the oral agreement which took place between the father of the Appellant Madhab Bera and the father of the Respondents Jasbant Pan in presence of other persons. The Trial Court however was not convinced that such oral agreement was for the suit property or any advance amount was received towards the consideration amount. It is a settled law that existence of a concluded contract is essential pre condition to maintain suit for specific performance. It is equally settled law that such suit is well maintainable on the basis of oral agreement but the necessity of proof of fully concluded contract is sine qua non. In the decision relied upon by the Learned Advocate representing the appellant in ***Ranchhoddas Chhaganlal (supra)*** there was an oral agreement to sell the agricultural land for Rs 17,000/-and a suit was filed for specific performance of contract and the case of the plaintiffs was that the defendants was never ready and willing perform their part.

17. In the case of ***V.R. Sudhakara Rao and Ors. Vs. T.V. Kamaleswari (supra)*** an oral agreement of sale was made and it was observed that the defence under Section 53A of the TP Act is not available to a party who alleges to be in possession of the property. In the said case the father of the plaintiff approached the first defendant for purchase of site and the first defendant agreed to sell at a total consideration of Rs. 42,575 and the allegation was raised that the oral agreement was entered into between them are false and denied. It was held by the Hon'ble Supreme Court that-

"The High Court rightly concluded that there is no clear proof relating to the other terms and conditions. The relief of specific performance is discretionary relief and except the oral evidence, there is no clear evidence to prove several of the essential terms which have been taken note of by the High Court. The High Court, on analysing the evidence came to such observation that except exhibit B-1 and the oral evidence of D.W. 1 and D.W. 2, there is no clear proof regarding the other terms and conditions of the contract which can be turned as essential conditions like delivery of possession and also the obtaining of permission from the Urban Land Ceiling Authorities and therefore, it cannot be said that all the essential terms and conditions of a well concluded contract had been established in the case in hand."

18. In the case of ***Lateefa Begam vs. B.G. Kirloskar (Dead) by LRS (supra)*** the appeal arose out of a suit seeking specific performance of agreement of sale

based on an oral agreement by the defendant no. 1 who is successor in title of the original owner and is the appellant before the Court. The negotiations for sale took place through defendant no. 2 who was alleged to agent and nephew of defendant no. 1 and the receipt was issued by defendant no. 2 for and on behalf of defendant no. 1. Before filing the suit for specific performance, the plaintiff served a legal notice to both the defendant and defendant no. 2 alone gave a reply repudiating the contract. It was held by the Learned Single Judge the Trial Court as well as the Learned Single Judge of the High Court that an oral agreement did take place between the defendant no. 2 on behalf of defendant no. 1 and the plaintiff and aforementioned part consideration for sale was paid and the decree for specific performance for executing the sale of land was granted. The Hon'ble Supreme Court held that no specific issue was raised on the question of the existence of any alleged agency between defendant no. 1 and defendant no. 2. No specific issue was raised on the existence and validity of the agreement for appointment of defendant no. 2 as an agent of defendant no. 1. The defendant no. 1 kept herself away from the witness box and sent no reply to the legal notice to deny that she had not authorised her own nephew to act as an agent and negotiate for sale. A similar transaction took place earlier where defendant no. 2 acted as an agent on behalf of defendant no. 1 and considering the concurrent finding of the fact recorded by all courts that there was an oral agreement of sale evidenced by payment of part price by cash and cheque evidence by a formal issuance of receipt and concurrent finding recorded that defendant no. 2 was acting as an agent of defendant no. 1 decline to re-appreciate the evidence and take a contrary view and accordingly dismissed the appeal.

19. In the decision of **U.N. Krishna Murthy (Supra)** as relied upon by the Learned Advocate of the respondent it was observed that readiness and willingness to perform an obligation to pay money must be averred and proved. The Hon'ble Supreme Court took note of the decision of **H.P. Pyarejan vs. Dasappa¹⁰** wherein the judgement of the High Court was reversed and it was held that High Court did not provide reasoning for its conclusion that the plaintiff was ready and willing to perform his part of contract as relied upon by the Learned Advocate of the respondent.

20. In the decision of **K. Nanjappa (dead) by legal representative (Supra)** as relied by the Learned Advocate of the respondent the Hon'ble Supreme Court held that oral agreement for sale of immovable property is permissible but

"heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case". It was further held that "Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to grant decree of specific performance; however the court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of operation to

have an unfair advantage not only to the plaintiff but also to the defendant". In paragraph 25 of the said decision it was that :-

It is equally well-settled that relief of specific performance is discretionary but not arbitrary, hence, discretion must be exercised in accordance that sound and reasonably judicial principles. The cases providing for a guide to courts to exercise discretion one way or the other are only illustrative and they are not intended to be exhaustive, in England, the relief of specific performance pertains to the domain of equity, but in India the exercise of discretion is governed by the statutory provisions."

21. In **Mayawanti vs Kaushalya Devi (supra)** where in the matter of Specific Relief Act, 1963 and its applicability it was held that there must be a valid and binding contract between the parties in respect of which parties should be *consensus ad idem*. Burden of proof is on plaintiff seeking specific performance of contract.

22. In **Ganesh Shet (supra)** again it was reiterated by the Hon'ble Supreme Court that discretionary power of court in granting relief of specific performance and the variations between pleading and in regard the terms of the contract the decision in differences between suit for specific performance and the other suits, the Court should not exercise its discretion in such situation to grant a decree for specific performance.

23. Lastly in the decision of Hon'ble Supreme Court reported in **Aries Advertising Bureau vs. C.T. Devraj (dead) by LRS respondent (supra)**, the Court observed that "*The High Court, on appeal, found that there was no privity of contract. Though the appellant relied on Section 70 of Indian Contract Act, 1972 admitted to fasten the liability on the respondent , it was found that the respondent did not derive any benefit under the contract between him and Balakrishnan*". It was further held that "*agreement Exhibit A-3 is bilateral between the respondent and Balakrishnan and the appellant was not a party to that agreement so there was no privity of contract between the appellant and Devraj*".

24. In the instant case that respondent no. 1 and 2 being the respondent herein are the joint owners of the suit property. In the entire pleading nowhere it was stated that the father of respondent no. 1 Jaswant Pan was authorised to act as an agent on their behalf to approach the father of the appellant regarding the sale of suit property. It is nowhere found from the pleadings that Madhab Chandra Bera the father of the present appellant were also authorised by the present appellant to pay the money or to enter into the oral agreement in respect of the suit property of which Jaswant Pan was not the owner. It is found from the record as well as the exhibits that the certain amounts were paid on various occasions which were received by respondent no. 3, son of Jaswant Pan, respondent no. 4 another son of Janwant Pan and but it was categorically denied in course of cross-examination on behalf of the respondent that at no point of time the owner of the property authorised those persons to receive money on

their behalf in respect of sale of the disputed property. Defendant Respondent no. 1 adduced evidence as D.W. 1 and the respondent/defendant no. 2 filed written statement along with him, who admitted that the property belongs to them and he was deposing on behalf of the respondent no. 2 and himself. He clearly denied that he or defendant no. 2 ever declared to sale out "ka" schedule property. It further transpires from such evidence that D.W. 1 had 5 decimal of land and the defendant no. 2 had one decimal of land in plot no. 470 and there was no talk of sale between them and plaintiff no. 1 and 2 or their father on the alleged day of Kartick 1409 B.S. or any other dates. He denied to have accepted any money as advance for selling out such "ka" schedule property either from the plaintiff or from their father. He is a resident of Cuttack, State of Orissa for about 15 to 17 years having a jewellery business there in and they never handed over to the authority to sold out such "ka" scheduled property over defendant/respondent no. 3 and 4 or their father Jaswant Pan. He admitted that they are six brothers and they have relation with Biman Ghosh as neighbour. He denied that on 22.10.2002 Madhab Bera on behalf of plaintiff paid Rs. 1, 91,000/- to Sukdeb Pan as per oral agreement and Sukdeb Pan issued receipt to that effect or Madhab Bera paid further Rs. 2 lakhs on 12.08.1409 B.S. and Rabin Pan issued the receipt as per oral agreement. He also denied that on 24.08.1409 B.S. or on 20.08.1409 B.S. Rabin Pan received an amount of Rs. 2 lakh or Rs. 1 lakh 50 thousand from Madhav Bera as well as gold jewelleryes as per oral agreement and issued the money receipt accordingly.

25. As D.W. 2 Biman Ghosh adduced evidence who is a joint owner of the suit property. He also denied that they ever agreed to sale "ka" schedule property or had any talk with the plaintiffs of their father relating to sale out the suit property. They never authorised defendant/respondent no. 3 and 4 or Jaswant Pan to sale out property on their behalf or to receive any money towards sale of suit property. It is further stated by both the witness that in the year 2002 the market price of such property was more than Rs. 30 lakhs and therefore it cannot be said that the value of property could have been agreed at Rs. 10,91,000/-.

26. Therefore curiously enough neither Jaswant Pan nor the witnesses who issued the receipts were examined. Similarly, on behalf of the plaintiff the plaintiff /appellant no. 2 his father Madhab Bera , one Brigendra Nath Karak, one Sibram lal and Narohaur Mal was examined as plaintiff witnesses. The appellant respondent no. 2 did not adduce any evidence. On close scrutiny of the evidence of Madhab Chandra Bera it appears that the land, where his residence is there was purchased by him from the brother of appellant respondent no. 1 Sukdeb Pan and the brother of respondent/defendant no. 2 Bibhas Ghosh and Balaram Jana . He specifically deposed that the respondent/defendant no. 4 Rabindranth Pan told his eldest son Suvendu Bera that Mahadeb Pan and Biamn Ghosh are intended to transfer the suit property by way of sale. On being asked by his son he went to the house of respondent/defendant no. 1 on 2ndKartick 1409 B.S. and Biman Ghosh told him that they intended to sale the suit property and on

that day he came to the house in the afternoon with his two sons and two other persons. On the same day in the afternoon the father of defendant no. 1 and 3 and 4 shown them the deed related to the suit property and also the Dakhilas which were gone through by the said witness along with his sons and S.Lal and came to conclusion that suit property of Madhab Pan has his five decimal while Biman Ghosh has only one decimal. It was agreed that defendant no. 3 and 4 will receive the advance money on behalf of plaintiff no. 1 and 2 through him and they will issue the receipt of the effect.

27. It appears from the evidence that the amount of Rs. 7, 41,000/- was paid in cash and excepting the receipt shown no other document was filed to establish that such hefty amount was paid by the father. So far the jewelleries are concerned in the receipts are bereft of any description of the jewelleries received and or how the valuation of such jewelleries were calculated. It is admitted both Madhab Pan as well as the defendants have goldsmith business. Sibram Lal is a deed writer by profession and he accompanied the father of the appellant to the house of madhab Pan on 2ndKartik 1409 and he found Suvendu Bera , Dibendu Bera, Madhab Bera,Mrigen Karok and Narottamm Mal,Mahadebn Pan, Biman Ghosh, Sukdeb Pan , Biman Ghosh, Jaswant Pan and some other persons when that sale of plot was discussed. The evidence manifest that Madhab Pan showed them six deeds and two Khajna Dakhila which were read over and he purchased the stamp through treasury for preparation of the deeds which also drafted and handed over to him and the appellants herein which also was typed by him through competitor. He produced two computerised unregistered sale deed in the name of Dibendu Bera and Suvendu Bera with the signature of one Swapan Mondal, from whose laser printer the deeds were printed. None of their evidence disclosed the denomination of such huge amount of money of Rs. 1 Lakh 50 thousand or Rs. 2 Lakhs or Rs. 1 Lakh 91 thousand which were alleged to have been paid neither it appears in the receipts issued in favour of them.

28. Swapan Mondal was not examined though he was alive. No challan produced to show the stamp paper was purchased .This witness further deposed that the value of property was settled by calculation but no paper or deeds were consulted at the time of determination of the value of the property. No measurement was taken regarding the suit property before fixing its value. Besides settlement of valuation there were talks about registration of the deeds but no date was fixed when the money is to be paid in advance though what amount would be paid was decided and accordingly Rs. 7, 41,000 was paid as advance. He admitted that there is no mention of the advance money in the printed deeds though he admitted that actual consideration money and the property which is the subject matter of transfer to be mentioned in the deed. P.W. 3 Mrigendra Nath Karok stated that he was present when the agreement took place in between the parties regarding the sale of the property but in his cross-examination he stated that on the date of agreement that is on 2ndday Kartick, 1409 B.S. no talk took place regarding execution of the deed and on that day no money was transacted. This witness found to a tenant of shop room

under Madhab Bera.

29. The Learned Trial Court meticulously discussed the evidence and arrived at a finding that an oral agreement took place between the parties. Such observation has not been challenged by the present respondent and no cross appeal has been filed against the same. Therefore the point raised questioning about the oral agreement at this stage is not permissible in the eye of law. The Learned Court further observed that the plaintiffs failed to establish that such oral agreement was for the sale of the suit property and also that in order to defraud the Income tax authorities such agreement was entered into to prepare two different deeds showing less valuation of the property. In the alleged Deed dated 12.12.2002 which was said to be prepared and marked with exhibit 6 primarily disclose the name of purchaser as Dibyendu Bera and vendors are Mahadev Pan and Biman Ghosh. No name of witnesses are mentioned, no consideration Memo is found showing that out of total consideration any amount has been paid. In schedule ka and kha two schedule described but no recital part to show who is the owner of which part. Ka schedule is bereft of any detail of its surroundings. Definitely the deed is prepared in a cryptic manner without complying with the formalities as required in accordance with law.

30. In **(Ranchhoddas Chhaganlal vs Devaji Sudpu Dorik and Ors (supra))** since the oral agreement was between the owner and the purchaser and on failure of paying the remaining amount the suit was filed when in this case admittedly the fathers of the property being the appellants and the father of the respondents entered into such alleged agreement were not owners. More so the receipts failed to prove that the amount was received as an advance for sale of suit property. The judgment relied upon by the appellant in **V.R Sudhakara Rao and Ors vs T.V Kameswari (Supra)** is distinguishable in the present case as the oral agreement in that case at the time of receiving the amount the name of the vendee's agent and son-in-law and further mentioned the sale consideration along with its rate and despite that the High Court decided that there is no clear proof relating to the other terms and condition and the said observation was upheld by the Hon'ble Supreme Court.

31. The remedy for specific performance is an equitable remedy and the Court while granting relief for specific performance exercises discretionary but such discretion must be exercised in accordance with the sound and reasonable judicial pronouncement. It is no longer in dispute that the suit for specific performance of contract of sale of immovable property is maintainable even on the basis of oral agreement but the burden of prove the same lies upon the plaintiff and it is the plaintiff to ascertain that no uncertainty arises in the mind of the court. Therefore even if the finding of the Learned Court is accepted that there was an oral agreement, the plaintiff failed to prove that the subsequent payment was made towards consideration or at all any amount was paid by the plaintiff in absence of the person who received the amount on behalf of the appellant. Any deeds were executed as alleged when no signature of the parties

or the witness are there in the deed as exhibited. Merely because the Deed were prepared do not fulfil the required level of evidence to establish that despite receiving the amount, the respondents no 1 & 2 did not go for registration. Therefore even though the observation made by the Learned trial court that the decree cannot be passed since in order to defraud the Income Tax authority two agreements were executed with much less price than agreed is not accepted by this Court, no merit can be found in the appeal in view of the above discussion and hence the appeal is liable to be dismissed.

Conclusion

32. Accordingly this F.A 87 of 2011 stands dismissed. The judgement and decree passed by the Learned Trial Court is hereby affirmed.

33. No order as to the costs.

34. Decree be drawn up in accordance with law.

35. The T.C.R be sent down to the concerned court forthwith.

36. Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

I agree

FOOTNOTES

1. (1977) 3 SCC 584
2. (2006) 5 SCC 340
3. (2007) 6 SCC 650
4. (2005) 11 SCC 515
5. (2023) 11 SCC 775
6. AIR 1995 SC 2251
7. (1998) 5 SCC 381
8. (2016) 1 SCC 762
9. (1990) 3 SCC 1
10. (2006) 2 SCC 496