

(2022) 08 CAL CK 0063
In the Calcutta High Court
Case No : F.A.T. No. 1074 Of 2007

Lakshmi Rani Dhar & Ors.

APPELLANT

Vs

Falakata Industries Ltd.

RESPONDENT

Date of Decision : 17-08-2022

Acts Referred:

Limitation Act, 1963 — Article 54, 84
Code Of Civil Procedure, 1908 — Section 151, Order 23 Rule 3, Order 6 Rule 5(4)
Code Of Criminal Procedure, 1973 — Section 144
Evidence Act, 1872 — Section 3, 34, 101, 114(g)
Specific Relief Act, 1963 — Section 15(b)
Limitation Act, 1963 — Section 54

Citation : (2022) 08 CAL CK 0063

Hon'ble Judges : Soumen Sen, J; Siddhartha Roy Chowdhury, J

Bench : Division Bench

Advocate : Probal Kumar Mukherjee, Ayan Banerjee, Debdut Mukherjee, Uttam Kumar Bhattacharyya, Surojit Nath Mitra, Sagar Bandyopadhyay, Soma Kar Ghosh, Niladri Banerjee, Ashutosh Singh

Final Decision : Allowed

Judgement

Soumen Sen, J

The appeal is arising out of a judgment and decree dated 19th October, 2006 passed by the learned Civil Judge (Sr. Div.), Jalpaiguri in a suit for specific performance filed by Falakata Industries Pvt. Ltd., (in short, "Falakata").

Briefly stated, the plaintiff filed a suit for specific performance of a contract on the basis of Terms of a compromise forming a schedule to a compromise petition alleged to have been entered into in a previously instituted suit filed by Lakshmi Narayan Dhar, since deceased, against Falakata being O.C. Suit no.90 of 1997.

Falakata alleged that Lakshmi Narayan Dhar, (in short "Lakshmi Narayan") filed a suit being O.C Suit No.90 of 1997 in the month of May, 1997 before the learned Civil Judge (Jr. Div.), Jalpaiguri against Ajit Kumar Agarwal & Ors. inter alia,

praying for a decree for recovery of Khas possession against the defendants by demolishing their illegal structures from the suit land with other consequential reliefs. The plaintiff was the defendant no.3 in the said suit.

In the suit Falakata has alleged that on 28th May, 1997, on the basis of the terms of compromise as mentioned above, Falakata had paid to Lakshmi Narayan a sum of Rs.3,60,000/-towards consideration.

The plaintiff alleged that the joint compromise petition containing the said agreement was duly executed by and between the parties. The plaintiff alleged that the defendant no.1 after receiving the said consideration assured to execute a registered power of attorney in favour of the advocate on record of the plaintiff, as due to his prolonged illness, he was unable to move out of station. However, the said transaction could not be completed within the agreed time and the time to complete the said transaction was mutually extended from time to time and finally on or about 25th August, 2004 Lakshmi Narayan informed the plaintiff that he was unable to execute the deed of conveyance in respect of the suit property unless the plaintiff paid a further sum of Rs.3 lacs. The plaintiff having performed his part of the obligation, and still being ready and willing to perform the essential terms of the said agreement and having regard to the fact that the defendant had denied execution of the sale agreement despite having received the consideration amount, the suit for specific performance was filed.

Lakshmi Narayan died during the pendency of the suit.

The present appellants are the widow and younger son of Lakshmi Narayan.

Lakshmi Narayan the original defendant, however, filed his written statement in which he specifically denied the filing of any suit or any alleged compromise petition or an agreement for sale of the suit property forming part of the compromise petition. It is alleged that the compromise petition containing the terms of settlement is a fabricated document. Lakshmi Narayan further alleged that the compromise petition could not have been signed at Dinhata by him as he never used to reside at Dinhata nor had he engaged Mr. Tapan Sarkar on his behalf to file the suit or prepare any compromise petition or any terms of settlement in the non-existent suit. It is alleged that Mr. Ajit Kumar Agarwal (hereinafter referred to as "Ajit") and the plaintiff tried to dispossess the defendant from the suit property for which an application under Section 144 of the Code of Criminal Procedure was filed before the executive Magistrate, Jalpaiguri on 7th July, 2000 being case no 279 of 2000. In the written statement the defendant had alleged that the suit and compromise petition containing terms of settlement are all forged and fabricated documents. In any event it was alleged that the suit is barred by limitation.

The learned Trial Judge on the basis of pleadings and documents framed 14 issues. The learned Trial Judge accepted the contention of the plaintiff that an agreement had been entered into by and between the parties in a suit instituted by the original defendant and accordingly decreed the suit in favour of the

plaintiff.

Mr. Probal Kumar Mukherjee, learned Senior Counsel appearing on behalf of the appellants has submitted that the judgment suffers from various infirmities.

It is submitted that the plaintiff has failed to prove that there is any privity of contract between the plaintiff and the original defendant. The suit is also ex facie barred by limitation. The existence of the alleged agreement for sale is not proved. Even if it is assumed that there is an agreement between the plaintiff and the original defendant the plaintiff has failed to prove that any consideration amount was paid to the original defendant in terms of such alleged agreement.

Mr. Mukherjee has relied upon paragraphs 4, 8 and 9 of the plaint and submits that the plaintiff alleged that after payment of the consideration amount of Rs.3.60 lacs in terms of the agreement dated 28th May, 1997 the original defendant was requested to execute the deed of conveyance and thereafter at the request of Lakshmi Narayan time to complete the transaction in terms of the said agreement was mutually extended as the original defendant due to his alleged prolonged illness was unable to move out of station to execute a registered power of attorney in favour of his advocate on record in terms of the said agreement and on the basis of such presumed request made by the original defendant on 25th April, 2000 further extension was granted to the defendant up to 31st December, 2000.

Mr. Mukherjee submits that suit was filed on 16th September, 2004 beyond the period of 3years from 31st December, 2000 and is barred under Article 54 of the Limitation Act, 1963. It is submitted that even if it is assumed that such extension was granted till 31st December, 2000, there is no evidence on record to show that the time was extended beyond 31st December, 2000.

In this regard, Mr. Mukherjee has relied upon the decision of the Hon'ble Supreme Court in Ahmadsahab Abdul Mulla (2) (Dead) v. Bibijan & Ors., reported in 2009 (5) SCC 462 paragraphs 11 and 12 which reads:

"11. The inevitable conclusion is that the expression 'date fixed for the performance' is a crystallized notion. This 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 date is fixed it means that there is 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'. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression 'date' used in Article 54 of the Schedule to the Act definitely is suggestive of a specified date in the

calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits.”

(emphasis supplied)

Moreover, even if it is assumed that the parties had entered into an agreement on 28th May, 1997, evidence on record would show that the original defendant never accepted the plaintiff as the owner of the said property and had denied any right of the plaintiff over and in respect of the said property.

Mr. Mukherjee submits that the alleged compromise petition was signed by one Mr. Rungta of Terai Tea Co. Ltd. being the defendant no. 3 in OC suit no.90 of 1997 on 28th May, 1997. The said compromise petition was not signed by Falakata. A suit for specific performance can be filed by a person or a party, who has a privity of contract with the defendant. In the absence of any evidence to show that Mr. Rungta was authorized to sign the compromise petition said to contain an agreement for sale on behalf of Falakata and that the consideration amount had been paid to Lakshmi by Falakata the court could not have decreed the suit in favour of Falakata.

Mr. Mukherjee has taken us through the deposition of the witnesses of the plaintiff and submits that none of the witnesses were able to prove the execution of the compromise petition said to contain an alleged agreement for sale or payment of consideration amount. In absence of any evidence to establish due execution of the agreement or payment of consideration amount under the said alleged agreement the learned Trial Court could not have passed the decree in favour of the plaintiff.

Mr. Mukherjee submits that the existence of the so-called agreement alleged to have been executed by and between Lakshmi and Terai Tea Co. Ltd. in the previously instituted suit is the most vital document. Curiously the said document was not annexed to the plaint. Mr. Mukherjee relied upon the judgment of the Hon'ble Supreme Court in *Church of Christ Charitable Trust & Educational Charitable Society v. Ponnamman Educational Trust*, reported in 2012 (8) SCC 706 to submit that the said document having not been produced along with plaint, the suit is liable to be dismissed for non-disclosure of cause of action. Moreover, it has not been alleged by Falakata that they are the assignee of Terai and in absence of any such pleading or document to show that Falakata is the assignee of Terai in relation to the property forming the subject matter of the suit, the suit is not maintainable at the instance of Falakata in view of Section 15(b) of the Specific Relief Act, 1963.

Mr. Mukherjee submits that apart from the fact that the execution of the said document is shrouded with mystery, Falakata has failed to prove that the said consideration money was paid by Falakata to the defendant. Mr. Mukherjee by referring to the deposition of PW 1 and PW 6 submits that the plaintiff tried to prove payment of consideration money on the basis of a certificate alleged to have been issued by its auditor. However, the witness of the plaintiff, PW4 had

admitted during his evidence that cash transactions were not maintained regularly at the relevant point of time. Although he stated in his evidence that a cash book is maintained by Falakata which would show that payment was made to the original defendant, but he admits that there is no document to show the receipt of the said amount paid by the plaintiff. It is submitted that burden is on the plaintiff to prove that the payment was made and received by the original defendant. The entry in the records of Falakata would not be conclusive of payment when existence of the said agreement and receipt of the said amount are in dispute and were categorically denied by the original defendant.

Mr. Mukherjee submits that there are certain unusual features in this case. The plaint was presented on 21st May, 1997 and the alleged compromise agreement and agreement for sale was entered into on 28th May, 1997. The alleged compromise petition was alleged to have been signed by Lakshmi Narayan on 28th May, 1997 at Dinhata. Mr. Rungta and others put their signatures on 30th May, 1997. Rungta alleged to have signed as Chief Executive Officer (CEO) and an authorized signatory of Falakata Industry, the defendant no.3 company. The advocates for the parties alleged to have signed on May, 30, 1997.

It is submitted that P.W.2, Court employee, comparing clerk, Copying Department posted under District Judge, Jalpaiguri, deposed that the date of application for the certified copy of the plaint was made on 22nd May, 1997 with urgent fees. It was delivered on 22nd May, 1997 itself. The suit was filed for recovery of Khas possession of suit property. The suit was dismissed for non-prosecution on 30th June, 1997. Mr. Mukherjee submits that PW 6 could not say whether on the date of alleged execution of agreement forming part of the compromise petition Mr. Lakshmi Narayan Dhar was at Dinhata or not. There is no evidence to show that he is a resident of Dinhata. The said witness also could not say whether Rungta went alone to Dinhata or not and whether Lakshmi signed the document on May, 28, 1997. Mr. Mukherjee submits that the evidence of Mr. Narayan, PW6 would show that he was aware of the proceeding under Section 144 of the Cr.P.C. initiated against Mr. Ajit, proprietor of Falakata Flour Mill. Mr. Mukherjee, submits that the said evidence is crucial as Falakata by that time had adequate notice that the original defendant did not accept Falakata to be the owner of the property and the plaintiffs did not file any document before the Judicial Magistrate to show that there was any agreement for sale or by reason of such agreement, possession was delivered to Falakata. The initiation of a proceeding under Section 144 in any event would show that the relationship between the parties was bitter. The evidence of Narayan would also show that within 2 to 3 days after filing of suit a draft settlement in the form of compromise petition was prepared by Tapan Sarkar junior to Mr. Bappaditya Hoare, Advocate and Mr. Narayan collected the same from the law clerk of Mr. Hoare. The said draft agreement is crucial and vital but was not produced at the trial. The said draft was alleged to have been handed over to Mr. Gautam Das, Advocate representing Falakata, for his opinion and after the said draft was alleged to have been settled by Gautam Das in a joint meeting held at the chamber of Bappaditya Hoare and

Tapan Sarkar. On the request of Mr. Rungta, Mr. Tapan Sarkar put his signature. Mr. Hoare is also alleged to have put his signature.

Mr. Mukherjee submits that the Learned Trial Court in utter disregard to the evidence and unusual features of the matter decreed the suit solely on the ground that the version of the Falakata is more acceptable than Lakshmi Narayans' in relation to the execution of the agreement.

Per contra, Mr. Surajit Nath Mitra, learned Senior Counsel appearing on behalf of the plaintiff/decreed holder submits that the basis and/or foundation of the defence of the appellants is non-existence of agreement for sale. The said claim is false and untrue as the record would show that the plaintiff had engaged Mr. Tapan Sarkar, Advocate to represent him in various proceedings. Our attention is drawn to the petition filed under Section 144 of the Cr.P.C to demonstrate that Tapan Sarkar was appointed as the advocate to represent the original defendant on 7th July, 2000. Mr. Mitra has relied upon pages 11 and 15 of Exbt.4 in support of his submission. It is submitted that the evidence on record would show that Falakata belongs to the Terai Group of Companies and Terai has not denied the payment of any money to Falakata enabling Falakata to discharge its obligation under the said agreement. Although Mr. Rungta the signatory of the said petition was an employee of Terai and he had died in the year 2002 before the suit was filed, the evidence of PW1 and PW6 would show that Rungta was inextricably connected with Falakata as he frequently used to visit the office of the plaintiff in order to guide and look after the legal affairs of the plaintiff.

Mr. Mitra submits that the evidence of PW6 would prove the existence of the said agreement as the said witness has clearly stated in great detail the background, mode and manner of the agreement forming part of the compromise petition. It is submitted that the evidence of DW2, the son of the original defendant would also prove that Tapan Sarkar was frequently consulted by his father even in 2003. It is submitted that the record of O.C. Suit No. 90 of 1997 was maintained till 31st January, 2002 (Exbt.7) and the certified copy of the register of the title suit would show that the suit was filed by Mr. Tapan Sarkar on behalf of the defendant (Exbt.8). The evidence of DW2, the son of the original defendant would show that Tapan Sarkar used to be engaged and consulted by the original defendant. At least the application under Section 144 of the Cr.P.C in the year 2000 establishes that the original defendant used to engage Tapan Sarkar for legal matters. In the year 2003 he was consulted in relation to some family matters as deposed by DW2. Once it is established that the defendant is not truthful with regard to the involvement of Tapan Sarkar, the court may disbelieve the defence with regard to the non-execution of the agreement and the payment of consideration amount.

It is submitted that the plaintiff has purposely selected 2003 as his date of knowledge of the earlier suit being OC Suit no.90 of 1997 after destruction of the original record but he could not explain the occasion for him to consult Mr. Sarkar regarding the subject matter of the previously instituted suit. Mr. Mitra has

referred to the deposition of the Court employee Mr. Prasenjit Kumar Saha, the Bench Clerk Mr. Dipak Karmakar and Typist-cum-Copist attached to the Copying Department, District Judge, Jalpaiguri, Shri Siddharta Sankar Sen in order to demonstrate that the suit, was in fact, filed by the original defendant against Ajit and others. It is submitted that the documents regularly maintained by the Court carry a much higher evidentiary and probative value than any other document. It is submitted that all the aforesaid witnesses in their evidence have stated that there is an existence of the suit in the suit register of the Title suits being O.C Suit no.90 of 1997 and the certified copies of the documents being Exbt.3 and Exbt.3/1 are the copies that are available on the record of the Court. The existence of the said documents coupled with the fact that Tapan Sarkar used to frequently represent the original defendant and no evidence being adduced to show that any complaint was made against Tapan Sarkar or such complaint being filed was pursued by the original defendant or by the substituted defendants, it should be presumed that the agreement was entered into between the plaintiff and the defendant no.3 in the previously instituted suit. Mr. Mitra submits that the principal witness on behalf of the original defendant to deny filing of the suit, the compromise petition containing the terms of settlement and failure of consideration was Tapan Sarkar. The original defendant on the basis of the evidence available on record could not have denied that Mr. Tapan Sarkar was his advocate in various proceedings. Tapan would have been the principal witness for the original defendant to prove that the suit was not filed by Lakshmi Narayan or that any compromise petition existed. Tapan was the best person to deny the agreement. The original defendant having failed to call Mr. Tapan Sarkar, as his witness, the principal person involved in the transaction, who was in a position to give a first-hand account of the matters in controversy and throw light on them and who could have refuted all the allegations of the plaintiff concerning the previous suit, it is legitimate to draw adverse inference against the defendants having failed to produce such a principal witness. Mr. Mitra submits that Section 114(g) of the Indian Evidence Act has empowered the Court to draw an adverse inference in the event the Court comes to a finding that a party has withheld important documents in his possession which can throw light on the facts and issue even if the burden of proof does not lie on the party. Mr. Mitra made the aforesaid submission based on the observation made in paragraph 17 of *Bajranglal Poddar v Sitaram Kedia* reported at AIR 1949 Cal 457, paragraph 5 of *Gopal, Krishnaji Ketkar v Mahomed Haji Latif & Others* reported at AIR 1968 SC 1413 and *Nand Kishore v State of Madhya Pradesh* reported in (2011) 12 SCC 120.

Mr Mitra submits that the payment of consideration to Lakshmi Narayan has been adequately proved by the certificate issued by the chartered accountant of Falakata (Exbt. 6) and an extract showing the list of details of advances and security deposits of Falakata Industries Limited dated 31st March 1998 (Exbt. 6/1) forming part of the certificate issued by Messrs. P.K. Shah and Co., chartered accountants. Mr. Mitra has also relied upon the evidence of Mr.

Rajendra Kanodia, PW 4 who according to Mr. Mitra has proved the said transaction by producing the annual reports of Falakata Industries Ltd. (Exhibit 5) and the auditors' certificate along with annexures that were marked as Exhibit 6 series. Mr. Mitra submits that accounts maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable as per Justice Kapadia in Commissioner of Income Tax, Delhi v Woodward Governor India Private Limited reported at (2009) 13 SCC 1, referred to and relied upon in paragraph 28 and Gian Chand and Brothers v Ratan Lal reported at 2013 (2) SCC 606.

On the question of limitation, Mr. Mitra has submitted that when no date is fixed for the performance of the contract, the suit is to be governed by the second alternative clause of Article 54 of the Limitation Act when the plaintiff gets 'notice' of the refusal of performance. In this regard, Mr. Mitra has relied upon a decision of the Jammu and Kashmir High Court in Kharku & Ors. v. Rasil Singh & Ors. reported in AIR 1954 J&K 33 (paragraph 4 and 5) and the Hon'ble Supreme Court in Rathnavathi v. Kavita Ganasham Das report at 2015 (5) SCC 223 (paragraphs 39 to 45).

In a suit for specific performance the burden of proof is on the plaintiff to prove the agreement based on which the prayer for specific performance is made. When the agreement is reduced to writing, the task of the plaintiff becomes easy as the suit would be based on a written agreement. However, when the existence of the written agreement is in dispute the plaintiff has first to prove that there was an agreement between the parties and in spite of the plaintiff having performed and being ready and willing to perform its obligation, the defendant has refused, failed or neglected to discharge or perform its obligation. The burden of proof is on the plaintiff first to prove the existence of the agreement. The doubt surrounding the existence and execution of the agreement and suspicious circumstances surrounding its execution will not be removed if the plaintiff is unable to offer evidence of circumstances leading to a probable conclusion of the existence of an agreement.

If the first hurdle is crossed the second would be the question of limitation. The defendant, in the instant case, has raised a plea of limitation which according to us has not been satisfactorily addressed by the learned Trial Judge.

If the aforesaid two issues are decided in favour of the plaintiff on the preponderance of probabilities, as a civil suit is required to be decided on such basis, the plaintiff may consider the prayer for specific performance to be decided in its favour. We used the word 'may' as the relief is discretionary and all factors including the belated filing of the suit on the verge of limitation and rise in the price of the property would be the other relevant considerations in exercising discretion in favour of the plaintiff. [See: U.N. Krishnamurthy (since deceased) through LRS v. A.M. Krishnamurthy reported in 2022 SCC OnLine SC 840.]

The oral and documentary evidence give us an impression that Tapan Sarkar may not have been engaged at all by Lakshmi Narayan for filing the suit as the relationship between Lakshmi and Ajit at the relevant time was acrimonious. However, whether Lakshmi had agreed to sign any compromise petition said to contain a terms of settlement as pleaded in the suit is not at all free from doubts.

An interesting feature is the address of Lakshmi Narayan in the cause title of the so-called suit. In the cause title of the previous suit the place of residence of Lakshmi Narayan was mentioned as "Dhupguri, District Jalpaiguri and at present residing at Balarampur Road, P.O and P.S Dinhata, District Cooch Behar (West Bengal)". Interestingly all other documents previous to the institution of the alleged suit and subsequent thereto there is no mention of any Dinhata address of Lakshmi Narayan.

The plaintiff could not prove that at the relevant point of time the defendant was residing at Dinhata. Mr. Narayan Prasad Sharma, (hereinafter referred to as "Sharma") PW 6 in his affidavit in chief has stated that during a joint meeting held between the learned advocates of both parties in the presence of Mr. Rungta, Mr. Tapan Sarkar advocate on record of Lakshmi represented that Lakshmi Narayan due to acute illness was confined to bed and Mr. Rungta was requested to make a programme to go to Dinhata for the purpose of execution of the compromise petition and according to the said programme Mr. Rungta and Mr. Tapan Sarkar went to Dinhata. Lakshmi Narayan had executed the compromise petition in the presence of Mr. Rungta and Mr. Sarkar. This occurred within 2 to 3 days of filing of the suit at the time of settlement of the draft petition for compromise as claimed by Sharma in his chief. There is no evidence that Lakshmi was unwell at the relevant point of time besides his apparent stay at Dinhata at the relevant point of time. Mr. Sharma did not accompany Mr. Rungta or Mr. Sarkar to Dinhata for the purpose of execution of the agreement. His evidence to the extent of illness of Lakshmi Narayan and Lakshmi Narayan staying at Dinhata at the relevant time is hearsay evidence. He has no direct knowledge of the illness of Lakshmi Narayan or his residential status at Dinhata at the relevant point of time.

Furthermore, there is no evidence on record to show that Falakata had authorised Mr. Rungta to sign the alleged compromise petition on behalf of Falakata. The board resolution of Falakata was not produced. The power of attorney in favour of Rungta was also not produced. This is relevant as Mr. Rungta had died in the year 2002 prior to the filing of the suit by Falakata.

The execution of the Terms of Compromise is also not proved and shrouded with suspicious circumstances as Narayan (PW 6) had fairly stated in his deposition that he was not present at the time of execution of the draft agreement. Mr. Goutam Das would have been the principal witness for the plaintiff to prove the existence of the suit, compromise petition and Terms of Compromise. Mr. Das is the principal person in the matter to prove the agreement as he was in a position to give information and explain the matters in controversy and throw light on

them. He was the person involved at the time of preparation and finalisation of the draft agreement. According to Sharma, PW 6, he settled the draft agreement which forms part of the compromise petition. An agreement is not proved merely by marking it as an exhibit. The plaint in the previously instituted suit and the compromise petition were marked as 3 and 3/1 respectively, with objection. Mr. Das would have been the right person for the plaintiff to prove the existence and contents of the terms of settlement and to affirm the transaction mentioned therein and it is only thereafter the onus would have shifted to the original defendant to prove otherwise. The contents of the compromise petition or the terms of compromise were never proved.

Dinhata episode suggests two issues viz., (i) Laxmi Narayan used to stay there (ii) Tapan Sarkar accompanied Mr. Rungta to Dinhata for making payment and getting the petition signed.

Unless it is proved that Lakshmi had his abode at Dinhata, motor ride of Tapan Sarkar together with Mr. Rungta, to that house of Lakshmi Narayan for whatever purpose, assumes no relevance.

Since plaintiff has failed to prove the first point, the second narrative that Tapan Sarkar, Advocate of Lakshmi Narayan together with Mr. Rungta went to Dinhata and the petition was signed by Lakshmi Narayan upon receipt of Rs. 3,60,000/- appears to be concocted and absurd. Therefore, no adverse presumption can be drawn against the defendants/appellants for non-examination of Sri Tapan Sarkar under Section 114 (g) of the Evidence Act, as suggested by Mr. Mitra, learned Senior Counsel.

Even, if we accept that a suit has been filed by the original defendant against Falakata and others, the agreement alleged to have been entered into between the original defendant and Falakata on the basis of which a compromise petition was drafted and intended to be filed in the pending suit of O.C. Suit No.90 of 1997 is required to be proved by the plaintiff. The evidence of Narayan would show that there was a discussion at the chamber of one Mr. Hoare, Advocate senior of Tapan Sarkar where a draft agreement alleged to have been prepared. One Mr. Goutam Das an advocate was also involved on behalf of Falakata at the time of preparation of the draft agreement. Mr. Das was alleged to have settled the draft agreement. The draft agreement was never produced nor was Goutam Das called as a witness by the plaintiff to prove the existence of the suit and the compromise petition.

It is interesting to note that the learned trial Judge failed to take into consideration that Goutam Das, advocate who was engaged by the plaintiff and according to the deposition of PW.6 Goutam had settled the draft agreement, was never called as a witness by the plaintiff. Goutam is the only person who could have a direct knowledge of the alleged discussion culminating in the draft agreement and thereafter a final agreement which is claimed to have been signed by three advocates and Rungta on behalf of Falakata on 30th May, 1997

and Lakshmi at Dinhata on 28th May, 1997.

Lakshmi in his written statement has stated that the suit property is surrounded by properties belonging to Falakata and one Terai Tea Co. Ltd. Ajit and Rajendra Kanodia are the directors in both the plaintiff's company and Terai Tea Co. Ltd. Ajit along with Rajendra tried to take possession of the property of Lakshmi. On 20th August, 1986. Lakshmi entered into an agreement for sale of suit property with one Mahendra at a consideration of Rs.9 lacs. However, Mahendra did not complete the transaction, for which Lakshmi cancelled the said agreement dated 20th August, 1987. In May 1987 Rajendra filed a suit against Mahendra and Anr. in which on the basis of the application filed by Rajendra on 20th May, 1987 a receiver was appointed in respect of the suit property. Lakshmi alleged a collusion between Mahendra and the directors of Falakata and Terai Tea Co. Ltd. And also that on 13th December, 1988 Lakshmi found said Rajendra and Mahendra were colluding and conspiring with Ajit and had procured huge quantity of building material for the purpose of raising construction thereby preventing Lakshmi from enjoying his own property. In the written statement Lakshmi had disclosed copies of plaint and had referred to an application filed by him in the said suit for appropriate reliefs. The aforesaid facts would show that the relationship between Lakshmi and Ajit and/or Falakata and/or Terai Tea Co. Ltd. was not cordial. The recital in the alleged terms of settlement forming terms of the compromise petition adequately ventilates Lakshmi's stand in relation to the conduct of Ajit and Falakata. It was in the said background that it is highly unlikely that Lakshmi would enter into a compromise with Ajit within 2-3 days of filing of the suit. The suit was dismissed on the ground for non-prosecution which is extremely surprising as for the purpose of finality of the proceeding, a decree on the terms of settlement would have been logical and probable.

The oral and documentary evidence on record would show that at the time of institution of the present suit by Falakata, the original suit record of the previously instituted suit was destroyed on 31st January 2002. According to the information available, the previous suit was alleged to have been instituted on 22nd May 1997 by Lakshmi Narayan through his advocate Mr. Tapan Sarkar. Curiously, without service of any summons, on the self-same date i.e., 22nd May 1997, one or some of the plaintiffs obtained a certified copy of the plaint upon making an application with urgent fees. The copy of the application for the certified copy has not been exhibited. We could not find from the evidence which of the plaintiff/s has/have applied for the certified copy of the plaint with urgent fees. What could be the urgency was not explained. None of the witnesses of the present respondent/plaintiff could explain the knowledge of the plaintiff with regard to the filing of the previous suit. They have also not deposed that the plaintiffs had entered appearance in the suit. The procedure under Order 5 Rule 9 for service of summons or other procedure prescribed under the said provision was not followed.

In fact, the judgements relied upon by Mr. Mitra for drawing an adverse inference

supports the case of the appellant/defendants more than that of the plaintiff/respondents having regard to the matter in controversy and discharging the burden of proof.

There is a categorical denial by Lakshmi Narayan about his stay at Dinhata at any point of time and particularly on the date when he was alleged to have signed the said petition i.e., 28th May 1997. There is no evidence on record to show that Lakshmi was a resident of Dinhata at any point of time. The ailment of Lakshmi shown as a ground for Rungta to travel at least 4 to 5 hours by vehicle to Dinhata for getting the agreement signed by Lakshmi within 6 days from the date of filing of the suit is quite unusual. Sharma had not seen Lakshmi executing the alleged compromise petition at Dinhata. He did not accompany Rungta. That Lakshmi signed the agreement at Dinhata is also not proved. Sharma had no personal knowledge about the residential address of Lakshmi Narayan. During Cross-examination he volunteered to say: "Tapan Sarkar did not say (to) me that Lakshmi Narayan Dhar was at Dinhata". Sharma admittedly did not accompany Rungta.

The compromise petition contains terms of compromise. The paragraphs 2 and 3 of the compromise petition are interesting, which reads:

"2. The common friends and well wishers of both parties have intervened into the matter to settle the dispute and on their intervention and after discussion to their respective lawyers the parties to this suit have agreed between themselves to have the suit settle on the terms and conditions mutually agreed upon by and between the parties as set out in the schedule hereunder.

3. The terms and conditions mutually agreed by and between the parties hereto are in no way void or voidable under the Indian Contract Act, 1872 and those are lawful agreement and liable to be accepted by this learned Count on satisfaction and in the circumstances there is no necessity of the case being proceeded with further."

The "common friends" or "well-wishers" of either of the parties at whose instance the parties presumably agreed to settle their dispute on the terms mentioned in the compromise were not examined. The plaintiff could not produce any witness who was a "common friend" or "well-wisher" of both parties. The recitals have been carefully worded with a view to perfect the title of Falakata in respect of the suit property. This would be clear from the following recitals of the terms of compromise.

"The plaintiff admits the exclusive possession of the defendant no.3 in respect of the suit property and also the plaintiff admits that he was actually dispossessed by the defendant no.3 in the year 1986 and the possession of the defendant no.3 at all materials times and still the hostile possession expressly in denial of the title of the plaintiff and the possession of the defendant no.3 is an actual and exclusive possession under a claim of right, adequate continuity, in publicity and in extent so as to adverse to the plaintiff and the possession of the defendant

no.3 in denial of the suppose title of the plaintiff and also is peaceable, open and continuous and in the circumstances, the defendant no.3 and its officers and successors have acquired the absolute right, title, interest and lawful possession by prescription of law vis-a-vis by virtue of adverse possession.” (emphasis supplied)

The joint compromise petition was placed as an evidence of payment of consideration. No one has proved the contents of the aforesaid statement or any of the statements in the compromise petition. Even if one stretched his imagination to believe that Lakshmi Narayan had filed the suit, which we are convinced had never happened, the existence of such agreement has not been proved at all.

The distinction between the admissibility of a document as evidence of a transaction and the admissibility of a document in proof of a statement contained therein, though refined, but of a fundamental character is yet frequently overlooked as observed by our Division Bench in *Lakshan Chandra Mondal v. Takim Dhali & Ors.* reported in 28 CWN 1033.

Curiously, Falakata offered 3.60 lacs as the consideration money for purchasing the land in question from the original defendant. The plaintiff was unable to produce any acknowledgment or receipt of payment of any such amount by Lakshmi, the original defendant. Although it is stated in the agreement that a sum of Rs.3.60 lacs has been paid by defendant no.3 Falakata to the original defendant simultaneously with the execution of the said agreement and Lakshmi alleged to have admitted and acknowledged the said payment, no evidence of any payment of consideration save and except a certificate from a chartered accountant has been disclosed in the evidence to prove such payment. Mr. Sharma (PW 6) in his evidence has stated that he has heard that a sum of Rs.3.60 lacs was paid to Lakshmi in cash at Dinhata by Mr. Rungta in presence of Mr. Tapan Sarkar. The payment of cash transaction was attempted to be proved by PW4, Rajendra Kanodia. He was one of the directors of Terai Tea Co. Ltd. He stated that Falakata is one of the group companies of Terai and he produced an extract of the cash book of Falakata Industries Ltd., and details of advance and security deposits of Falakata Industry Ltd. as on 31st March, 1998 supported by a certificate from one P.K. Shah and Company, chartered accountant certifying that the said list has been verified from the books of accounts of the company for the year 1997-98. The chartered accountant was never produced as a witness by the plaintiff. On what basis such certificate was issued referring to payment of 3.60 lacs to Lakshmi Narayan by Falakata has remained unclear. According to Mr. Kanodia, the plaintiff company maintained electronic cash book prior to 1997 and M/s. P.K. Shah & Co. was the auditor of the plaintiffs company for the year 1997-98.

During his cross-examination he has stated that on 28th May, 1997 he was a director of Falakata and he could produce the cash book of Falakata for the year 1997-98. This cash book was never produced. He admitted that cash book of

Falakata does not contain any signature of Lakshmi. He also admitted that he does not have "any scrap of paper" acknowledging the receipt of any money by Lakshmi from Terai or Falakata.

We wonder how a chartered accountant could certify that Falakata had paid a sum of Rs.3.60 lacs to Lakshmi in terms of the sale agreement without having a scrap of paper or document available on record to prove it. The primary books of accounts of Terai and Falakata were not produced. The date of such transfer according to the chartered accountant was 28th May, 1997. The said certificate mentions the following:

"This is to certify that the total amount of Advances and Security Deposits as reflected in the audited Balance Sheet of Falakata Industries Limited as on 31st March, 1998 is Rs.23,28,071.39. which includes as advanced of Rs.3,60,000/- given to Laxmi Narayan Dhar on A/c of land.

The said amount of Rs.360000/- was received in cash from Terai Tea Co. Limited and given to Laxmi Narayan Dhar in cash on 28.05.1997, which has been verified from the cash book of the company for the year 1997-98.

The information given above is true and correct."(emphasis supplied)

Mr. Mitra has submitted that the payment of consideration is adequately proved by the certificate issued by the chartered accountant on examination of the accounts. He has relied upon the decision of the Hon'ble Supreme Court in this regard namely Commissioner of Income Tax (supra) and Gian Chand (supra).

Section 34 of the Indian Evidence Act 1872 refers to entries in the books of accounts. The said Section reads:

"Sec.34 Entries in books of account, including those maintained in an electronic form, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

The said Section is based upon the principle that entries made regularly in the course of business can be presumed to be accurate. In all such entries the writer has full knowledge, there is no motive to falsehood, and there is the strongest improbability of untruth. The said Section suggests the circumstances when entries in the books of accounts are relevant. The entries in the books of the accounts regularly kept in the course of business are relevant in a court of law but these entries are not by themselves sufficient to charge any person with liability. (See State of Andhra Pradesh v Cheemalapati Ganeswara Rao reported in AIR 1963 SC 1850) The book of accounts should be full proof and above suspicion. The court is required to examine the whole state of accounts at the material time to come to a definite conclusion that there is no improbability of untruth in the transaction. It is interesting to note that according to the certificate, on 28th May 1997 Terai transferred 3.60 lacs in favour of Falakata and the said amount was given in cash to Lakshmi on 28th May 1997 itself

presumably at Dinhata which was claimed to have been verified from the cash book of Falakata in the year 1997-98, though no such book of accounts was ever produced at the trial. Terai has not produced any books of accounts to show transfer of fund to Falakata and neither has Falakata produced its primary books of accounts. Falakata has also not produced the chartered accountant alleged to have certified the payment to Lakshmi Narayan. The transaction is not proved by the evidence of Rajendra Prasad who has no direct knowledge of the said transaction and who had not seen the said transaction at all. His evidence is completely hearsay in relation to the said transaction or with regard to the entries made in the books of Falakata. He has clearly acknowledged that there was no acknowledgement in writing by Lakshmi Narayan of the amount received by him under the compromise petition. It is unbelievable that Mr. Rungta who claimed to have travelled for 4 to 5 hours by vehicle to Dinhata to get the signature of Lakshmi Narayan at Dinhata did not feel it necessary to have any document signed by Lakshmi Narayan at Dinhata acknowledging receipt of the said payment under the terms of the compromise. What vouchers and/or documents were examined by the chartered accountant before issuing the certificate is unknown and unclear. Under such circumstances, we are unable to accept the submission of Mr. Mitra that the said certificate would show that consideration has passed to Lakshmi Narayan on 28th May 1997. The circumstances are such that it makes the certificate tailor-made with no evidentiary or probative value.

Notably, the matter moved with an extraordinary fast pace. The suit was filed on 22nd May, 1997. The facts and circumstances surrounding the filing of the suit, drawing up of a compromise petition said to contain terms of settlement and the dismissal of the suit for non-prosecution in the presence of Mr. Rungta are shrouded in mystery. The thickening cloud hovering over the plaintiff surrounding the so called previously instituted suit and compromise petition was not satisfactorily removed by Falakata in its suit. There are certain unusual and extraordinary features which we have indicated above which seem to have escaped the attention of the learned Trial judge resulting in erroneous application of law with regard to burden and onus of proof. Within 2-3 days time from the date of filing of the suit a compromise petition was prepared and Lakshmi Narayan alleged to have signed it on 28th May, 1997 at Dinhata and rest of the persons on 30th May, 1997. The suit was however, dismissed on 30th June, 1997 for non prosecution. The plaintiff did not offer any explanation for not bringing it to the attention of the learned trial Court about the said petition of compromise. Sharma, PW6 in his deposition has said that at the time of dismissal Mr. Rungta was present. The plaintiff claimed that Lakshmi Narayan and Falakata have filed the compromise petition in the said suit in accordance with Order 23 Rule 3 of the Code of Civil Procedure. It is completely unbelievable that Falakata having claimed to have paid Rs.3.6 lacs would remain passive and would not seek an adjournment or invite the court to dispose of the suit on the basis of the compromise petition.

The learned Single Judge decided the issue number 6, 9, 10, 11, 13 and 14 together. The said issues are:

6. Whether the original defendant entered into an agreement with the plaintiff on 28.05.1997 in the form of application for compromise made under Order 23 Rule 3 read with Section 151 of the C.P.C. in O.C. suit no. 90/97 in the court of Civil Judge (Jr. Div.) Jalpaiguri?

9. Whether the alleged compromise in a suit which has been dismissed for default is binding on any of the alleged parties to the suit?

10. Whether the defendant's predecessor in interest had ever instituted the alleged O.C. suit no. 90/97 in the court of Civil Judge (Jr. Div.) at Jalpaiguri or had taken any step therein?

11. Whether the plaintiff was/is in adverse possession of the suit property at any point of time?

13. Whether the plaintiff paid the alleged sum of Rs.3,60,000/- or any other sum to the defendant's predecessor in interest?

14. Whether there was/is any contract of agreement between the plaintiff and the defendant's predecessor in interest?

The learned Judge proceeds on the basis of Order 23 Rule 3 of the C.P.C. without realising that the said petition was never moved before the trial Court and there was no occasion for the trial Court to consider the said petition in terms of the aforesaid provision. Moreover, the very existence of the joint compromise petition which said to contain the terms of compromise is in dispute. The mere admission of the signature of Lakshmi Narayan, by DW 2 during his cross examination in connection with a completely different proceeding under Section 144 of Cr.P.C. does not necessarily lead to the conclusion that the compromise petition was signed by Lakshmi. The learned Judge seems to have been swayed by the submission that Lakshmi raised the issue of the existence of O.C suit no. 90 of 1997 only after the destruction of the case record. Lakshmi appointed Shri Sindhu Roy for ascertaining the status of the suit alleged to have been instituted by him being O.C. suit no. 90 of 1997 after Lakshmi during his conversion with Tapan Sarkar in relation to some other matters was informed by Mr. Sarkar. Admittedly Lakshmi did not engage Tapan Sarkar for the aforesaid purpose. If Lakshmi had trusted Mr. Sarkar, he could have engaged Tapan to defend him in the latest suit. The presumption could be that he lost faith in Tapan Sarkar and that could be the reason for which Tapan was not called upon to give evidence on behalf of Lakshmi. The learned Trial Judge merely summarised the evidence of the respective parties in deciding the aforesaid issues and then arrived at the following conclusion:

During the argument the parties to this suit did not press for the point of adverse possession. We have Considered the submission of both sides, perused the relevant documents as above said and considered the authority as above

mentioned. I find that the argument advanced by the learned advocate for the plaintiff is more convincing and acceptable. Hence these issues are decided in favour of the plaintiff.

The said issues were decided in favour of the plaintiff as the learned Judge found the argument advanced by the learned Advocate for the plaintiffs more convincing and acceptable. It seems as if the learned trial Judge approached the issue by trying to eliminate the impossible and whatever remained, however, improbable was accepted as truth. No judge would like to decide a case on burden of proof if he can legitimately avoid having to do so. However, owing to the unsatisfactory state of evidence or otherwise the court may decide the issue on the burden of proof as that could be the only just course for him to take. The reasoning of the learned Trial Judge can only apply when all factors are known, so that all possible explanations except a single extremely improbable one, can properly be eliminated. The legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of instance before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden (See *Rhesa Shipping CO SA v Edmunds* reported in [1985] 2 All ER 712 followed in *Kanti Devi Bhutoria and Others v Srila Dutta and others* reported in MANU/WB/0884/2015).

The Court can only enforce specific performance contract if it is based on a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court would not pass an order for specific performance. The specific performance of the contract stipulates the terms for execution and the Courts direct the party in default to do the very thing which he contracted to do and the acceptance must be observed corresponding to the terms of the offer.

A Civil suit is decided on the preponderance of probabilities. The standard of proof in civil trial has been lucidly explained recently by the Hon'ble Supreme Court in *M. Siddiq (D) thr. L.Rs. v. Mahant Suresh Das &Ors.*, reported in 2020(1) SCC 1 paragraphs 720-725 which reads:

"720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. "Phipson on Evidence" formulates the standard succinctly: If therefore, the evidence is such that the court can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.¹¹⁴ In *Miller v. Minister of Pensions* (1947) 2 ALL ER 372, Lord Denning, J. (as the Master of Rolls then was)

defined the doctrine of the balance or preponderance of probabilities in the following terms:

(1)... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice.

721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarized by Denning, LJ in *Bater v. Bater* [1951] P. 35, where he formulated the principle thus:

So also in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on that subject matter.

722. The definition of the expression 'proved' in Section 3 of the Evidence Act is in the following terms:

3. "Proved".--A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

723. Proof of a fact depends upon the probability of its existence. The finding of the court must be based on:

723.1. The test of a prudent person, who acts under the supposition that a fact exists;

723.2. In the context and circumstances of a particular case.

724. Analysing this, *Y V Chandrachud J* (as the learned Chief Justice then was) in *Dr. N G Dastane v. S Dastane* (1975) 2 SCC 326 held:

The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the

status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue [Per Dixon, J. in Wright v. Wright, (1948) 77 CLR 191, 210] "; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, (1966) 1 AER 524, 536] ". But whether the issue is one of cruelty or of a loan on a promissory note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

725. The Court recognised that within the standard of preponderance of probabilities, the degree of probability is based on the subject matter involved.] (emphasis supplied)

Lakshmi during his lifetime filed an affidavit in chief in which he has categorically denied the existence of the suit and the agreement. Lakshmi Narayan filed the written statement on 20th May, 2005. It was supported by an affidavit affirmed on 18th May, 2005. Prior thereto, he filed an affidavit in opposition to the injunction application on 10th March, 2005 affirmed on 17th March, 2005. The written statement was quite detailed as the affidavit in opposition. In the written statement he had categorically denied the existence of the suit, compromise petition or any instruction given to Tapan to file a suit. Unfortunately, Lakshmi died during the trial and he was substituted by the present appellants. The present appellants have filed their respective affidavits in chief and were cross-examined. It cannot be disputed that to some extent, the evidence of the said two substituted defendants/appellants were hearsay, however, the younger son of Lakshmi, DW2 had categorically stated that he had assisted his father in connection with the present suit and that Tapan was never instructed to file any earlier suit. DW 2 has also corroborated the statement of his father about the acrimonious relationship between Ajit and his father. This evidence has remained unshaken. The statements made in the written statement cannot be totally discarded although it may have a weak evidentiary value. There is nothing in the Evidence Act which would render such evidence inadmissible. The written statement was duly affirmed by the original defendant during his life time. It is certainly a piece of evidence whose evidentiary and probative value is required to be examined by taking into consideration the circumstantial and attending facts concerning the validity, authenticity and credibility of the earlier alleged suit. In our view, the evidence is admissible but the weight to be attached to such evidence should depend upon the facts and circumstances of the case. It ought not to be rejected entirely. The only difficulty would be that the witness was not examined in open court upon oath or that he has filed an affidavit in chief which can be a reiteration of his written statement. Considering the fact that the written statement was accompanied by an affidavit for the present purpose we will consider it as his chief and assess the evidentiary and probative value of the statements made in the said pleading. In fact under the amended provision of

Order 6, Rule 5, Sub Rule 4 the person verifying the pleading is mandatorily required to furnish an affidavit in support of his pleading. By reason of such amendment it has changed the complexion of the written statement and increased its evidentiary value.

We have discussed earlier that the plaintiff has failed to prove due execution of the compromise petition and the terms of compromise. The consideration amount paid to Lakshmi is also not proved. These factors seem to have been overlooked by the learned trial Judge and the evidence adduced on behalf of Lakshmi or even the witnesses on behalf of plaintiff were diluted and interpreted in a manner which could not be accepted for the reasons we have indicated above.

The case could not have been decided by the process of elimination of the impossibility and the remaining improbable could not have been treated to be the truth so as to form the basis of finding in favour of the plaintiff when the probability of existence of the suit, compromise petition and its execution are not removed from doubt. The ingenuity and the mechanism adopted by the plaintiff in perfecting its title by giving an impression of a suit filed by Lakshmi was overlooked and ignored by the learned trial Judge while appreciating the evidence.

We find substance in the argument of Mr. Probal Kumar Mukherjee learned Sr. Counsel appearing on behalf of the appellant that the suit is barred by limitation. This issue in our view has not been correctly decided by the learned Trial Court and we hardly find any discussion on this issue. If it is accepted for the purpose of argument that a compromise petition was entered into on 28th May, 1997, the said agreement in Clause B mentions execution of a deed of conveyance in favour of the plaintiff. Admittedly, no deed of conveyance was executed during the pendency of the suit. On the contrary, the suit was dismissed on 30th June, 1997 for non prosecution in presence of the representative of Falakata. Thereafter, on 7th June, 2000 an application was filed by Lakshmi against Ajit and Ors. under Section 144 of the Cr. P.C alleging threatened dispossession.

The agreement unless registered could not have transferred any interest in favour of Falakata as it involves creation and extinction of rights in the property. By reason of the suit being dismissed for non-prosecution no interest could have accrued in favour of Falakata in respect of the property in question unless a deed of conveyance is registered. Falakata could not explain the reason for not going ahead with the compromise petition and allowing the suit to be dismissed for non-prosecution. The filing of the suit, compromise petition and dismissal of the suit for non-prosecution happened between 22nd May 1997 and 30th June 1997. This gives a clear impression that Falakata was more interested to create a document in their favour to be used as a ruse against the defendant at an appropriate point of time. Although, the proceeding under Section 144 of the Criminal Procedure Code may not have related to the suit property, it undoubtedly shows that in 2000, the relation between Falakata and Lakshmi Narayan was bitter and

acrimonious. In such background, it is very difficult to accept that Lakshmi had agreed to extend the time for execution of the agreement for sale either contemporaneously or till 31st December 2000 as claimed by Falakata. There is no evidence as to whether Lakshmi had executed any power of attorney in favour of Tapan Sarkar. If it were not executed in terms of the compromise petition then it logically follows that Lakshmi was unwilling to execute any power of attorney in favour of Tapan and had denied his obligation under the said compromise petition. This holds good even if Lakshmi had knowledge of the compromise petition and he had signed the said document. This is important for the purpose of deciding the issue of limitation.

Mr. Mitra has relied upon the decision of the Apex Court in *Rathnavati & Anr.* (supra) and decision of the Jammu and Kashmir High Court in *Kharku & Ors.* (supra) to impress upon us that the suit was filed within the period of limitation. The judgement in *Kharku & Ors.* (supra) is based on an interpretation of Article 84 of the earlier Limitation Act which corresponds to Section 54 of the Limitation Act, 1963. It is clear from a reading of the said Article that if a date is fixed for performance of an agreement, then non-compliance of the agreement on that date would give a cause of action to file a suit for specific performance within 3 years from the date so fixed. However, when no such date is fixed the limitation of 3 years to file a suit for specific performance would begin when the plaintiff has "noticed" that the defendant had refused the performance of the agreement. In the present case, if we accept that there is an agreement between the parties on 28th May 1997, the refusal to execute the said conveyance would be 30th June 1997 when the suit was dismissed for non-prosecution without the conveyance being executed by and between the parties. Mr. Sharma PW 6 in his deposition has stated that so far as he could recollect, Mr. Rungta had appeared before the court on 30th June 1997 but neither had Lakshmi appeared nor had his advocate taken any steps in the learned Court and consequently, the suit was dismissed for non-prosecution. This is a clear notice of refusal of performance by Lakshmi Narayan under the second clause of Article 54 of the Limitation Act.

There is no contemporaneous evidence to show that beyond June 1997, the time to execute the conveyance was mutually extended or extended at the request of Lakshmi Narayan. In fact, the evidence is to the contrary as we find from documentary evidence that Lakshmi initiated a proceeding under Section 144 of the Criminal Procedure Code on 7th June 2000. Notice was served upon the accused persons which include Ajit. PW 3 and PW 6 in their deposition have confirmed that a proceeding was initiated against Ajit and Falakata under Section 144 of the Cr.P.C and PW6 specifically in his deposition has admitted to have taken steps in the said proceeding on behalf of Falakata. This acrimonious relationship between Lakshmi and the present plaintiff clearly runs contrary to the fabric of the case made out by the plaintiff for extension of time to complete the transaction and any mutuality between the parties on this score.

The plaint in paragraph 9 has stated that on the basis of the request of Lakshmi

the performance of the agreement was extended till 31st December, 2000. It was further claimed that the said time was however, mutually extended until on 25th August, 2004, Lakshmi refused to execute the deed of conveyance unless he is paid a further sum of Rs.3 lacs. Between December 2001 till the date of alleged denial, the contentions are all based on oral assertion and there is no evidence of the person with whom Lakshmi had conversation in this regard in which he agreed to extend the said time. There is not a single scrap of paper between the date of execution of the alleged agreement on 28th May, 1997 till the date of filing of the suit calling upon Lakshmi to execute the deed of conveyance in favour of the plaintiff on the basis of such alleged terms of settlement. From the aforesaid it can be safely concluded that the plaintiff had due notice of the refusal if not in June 1997 but positively by June 2000 or by the end of the year 2000. It is surprising that the plaintiff has not demanded performance of the said agreement in writing between the date of alleged execution of the agreement for sale till the date of filing of the suit by Falakata i.e. 16th December 2004. In view thereof, we are unable to accept the submission of Mr. Mitra that the suit for specific performance was filed within the period of limitation.

The question that would obviously arise is what prevented Falakata from appearing in the said suit and appraising the learned Court of the compromise petition and the existence of terms of compromise. According to Falakata, Mr. Rungta was present when the suit was dismissed for non-prosecution. The burden of showing the existence of the terms of compromise is on the plaintiff. The plaintiff is a company involved in commercial activities. In a normal situation and as expected in a case of this nature, the plaintiff would not have allowed the suit in which such a compromise petition is claimed to have been filed by the parties, to be dismissed for non-prosecution when the deed of conveyance was not executed although the consideration amount was claimed to have been paid to Lakshmi Narayan. This was expected from Falakata in view of clause B and clause C of the proposed terms of compromise which reads:

"B. The plaintiff in consideration of the sum of Rs.3,60,000/- (Rupees three lac sixty thousand) only paid by the defendant No.3 to the plaintiff simultaneously with the execution of this Solenama (the receipt whereof the plaintiff hereby admits and acknowledges and of and from the same release and discharge the plaintiff) and the plaintiff has beneficial owner do hereby grant, convey, transfer, assign and assure unto and to the use of the defendant no.3 free from all encumbrances together with the structures and building whereupon or on particular whereof the same is erected and built by the defendant no.3 together with all building, trees, conveyances, hedges, ditches, ways waters, water course, lights privileges, easement and appurtenances whatsoever supposed to belonged or be a appurtenant thereto and the plaintiff, his heirs, administrators or assigns further covenant that he or they shall at the request and cost of the plaintiff and his assigns do or execute or cause to be done or executed a proper deed of conveyance and all such lawful acts, deeds and things whatsoever for further and more perfectly conveying and assuring the suit property and every

part thereof in the manner aforesaid according to true intent and meaning of this decree.

C. The plaintiff do herein relinquishes unto the defendant no.3 all his suppose right, title, interest and beneficial claim over the suit property to the extent that the same was henceforth ceased and be extinguished to all intents and purpose and such relinquishment may be deemed to be absolute relinquishment in consideration of the sum of Rs.3,60,000/- (Rupees three lac sixty thousand) now paid by the defendant no.3 to the plaintiff, the receipt of which sum the said plaintiff hereby acknowledges.

A prudent business man having regard to the nature of the dispute and having claimed to have paid the consideration could not have remained a mute spectator when it is evident that his dream to have the property is going to be shattered. This is extremely unusual and something more than what meets the eyes. The contents of the compromise petition would show that Falakata was claiming adverse possession although the period for claiming such right had fallen short of 12 years from the date of claim of hostile and continuous possession. Falakata was trying to legitimize and legalise its wrongful act and had orchestrated the litigation only for the purpose of creating a document to claim ownership. The earlier suit and compromise petition are artifice and designed to create a legal right in favour of Ajit and Falakata. It reminds us of the proverbial words- "What is apparent is not real and what is real is not apparent."

The plaintiff wants the existence of the previous suit, compromise petition and the terms of compromise to be believed. These assertions are to be proved by the plaintiff. For the court to give judgment in favour of the plaintiff as to his legal right to claim execution of the deed of conveyance the existence of all the aforesaid facts must be proved by Falakata as the burden of proof that those facts exist is on the plaintiff. The burden of proof on the pleadings never shifts and it remains constant. The initial burden of proving a prima facie case in his favour is cast on the plaintiff, when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce evidence rebutting the case made out by the plaintiff. As the case continues to develop the onus may shift back to the plaintiff. It may not be easy in all cases to decide at what particular stage in the course of evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the court feels it cannot make up its mind as to which of the versions is true, it will held that the party on whom the burden lies has not discharged the burden. [See: K. Lakshmanan v T. Venkateswarlu reported at AIR 1949 PC 278].

Section 101 of the Evidence Act lays down the rule that "whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists." In other words it is the same as saying that the burden of proof lies on the party who substantially asserts the affirmative of the issue and not on the party who denies it. The burden of proof in any particular case depends on the circumstances in

which the claim arises.

The elementary rule in Section 101 is inflexible. In terms of Section 101, Evidence Act, 1872, ordinarily, the burden of proving the fact rests on the party who substantially asserts the affirmative of the issue and not on the party who denies it. The said rule may not be universal in its application and there may be exception thereto.

Burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour.

The tests that can conveniently be adopted for ascertaining on whom the burden of proof lies are first, to consider which party would succeed if no evidence were given on either side, and secondly to examine what would be the effect of striking out of the record the allegations to be proved; bearing in mind that the burden of proof must be on the party that would fail, if either of these steps were pursued.

Bowen, L.J., in the well-known case of *Abrath v. N. E. Railway Co.*, 11 Q.B.D. 440 at 456, lays down the canons of this subject as follows:-

"Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing he fails; if he makes a *prima facie* case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this; to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that, as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that, if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on forever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises it ceases to be a question of onus of proof."

The burden of establishing a case is initially on the plaintiff but shifts as soon as a party adduces sufficient evidence to raise a presumption in its favour.

The plaintiff lost at the threshold of this test.

To sum up, the plaint and the terms of settlement of the alleged previous suit O.C. 90 of 1997 set up by the plaintiff were subject to proof by the persons setting them up and would affect the result of the suit based on what is proved. Mere production of the certified copy is not conclusive evidence of the filing of

the suit as there is no means to ascertain its authenticity in absence of production of the original pleadings and documents. The original record of the Court was destroyed on 31st January, 2002. The plaintiff did not take any steps to enforce the said compromise prior to the destruction of the said record and failed to establish the reason for not pursuing it until the suit was filed on 16th September, 2004. The probability of a suit being filed by Lakshmi Narayan against Ajit in 1997 and thereafter allowing it to be dismissed for non-prosecution is improbable and unnatural. Lakshmi Narayan faced with such hostility from Mahendra and Ajit who had teamed up against him at the relevant point of time makes the existence of the suit, compromise petition and the subsequent dismissal of the suit for non prosecution highly improbable. The plaintiff has failed to establish the preponderance of probability in his favour of the existence of the suit and the compromise petition.

Under such circumstances we set aside the judgment and decree dated October 19, 2006. The appeal succeeds.

The respondent shall pay Rs.1 lac to the appellants by Pay Order/Demand Draft in the name of the appellant No.1 towards cost and a further sum of Rs.1 lac to the State Legal Services Authority to be earmarked for Juveniles for utilisation by the Juvenile Justice Committee, High Court within three weeks from date.

The department is directed to send down the LCR to the trial Court.

I agree.