

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 53 of 2018

with

I.A. NO. CAN 6 of 2022

Sailendra Chandra Dasgupta & Anr.

Vs.

M/s. Spritex Machines & Ors.

For the Appellant : Mr. Sourav Kr. Thakurata, Adv.,
Mr. Hare Krishna Halder, Adv.
Mr. Bikash Kumar Roy, Adv.
Mr. Tanuka Basu, Adv.

For the Respondents : Mr. Swagata Datta, Adv.

Hearing Concluded On : 30th June, 2022

Judgment On : 20th July, 2022

Soumen Sen, J:- I have the benefit of reading the judgment of my brother the Hon'ble Justice Siddhartha Roy Chowdhury. While I concur with the views expressed by His Lordship, I briefly indicate my reasons for affirming the judgment and decree of the trial court.

To avoid prolixity I have not referred to the facts in detail as the facts have been summarized by Justice Roy Chowdhury in his Lordship's separate judgment.

The appeal is arising out of the judgment and decree passed by the learned Civil Judge, (Sr. Div.) at Alipore on 30th January, 2013. On 11th

February, 2013 since corrected on 30th January 2013 in a suit for specific performance and injunction.

The learned trial Judge decreed the suit for specific performance and directed the execution of the deed of sale in respect of the flat in question in favour of the plaintiffs within one month from the date of the decree, failing which the plaintiffs were given liberty to get the same executed through the Court and to recover the cost of execution and registration from the defendants.

The defendants being aggrieved by the said decree preferred the instant appeal. The learned Counsel for the appellant assailed the said judgment and decree on two fold grounds:-

Firstly, the suit is barred under Section 69(2) of the Partnership Act, 1932 and secondly, the plaintiff has failed to prove the oral agreement for sale.

The learned Counsel for the appellant has fairly conceded that the suit is barred under Section 69(2) of the Partnership Act, 1932 was not pleaded in their written statement or raised before the trial court. However, it is argued that since it goes to the very root of the matter the appellant may be permitted to raise the said issue in the first appeal.

Shorn of details, I briefly state only those facts that are relevant for my conclusions on the aforesaid two issues. The plaintiffs filed a suit for specific performance of an oral agreement. The plaintiffs rely upon a

written document and few receipts to show evidence of payment of the agreed consideration. The defendants contested the suit by filing written statement denying all material allegations made against them in the plaint. It is the case of the defendants that the suit as framed is bad for non-joinder of necessary parties. Madhab Prosad Banerjee intimated the defendants that he would continue as the partner of the firm wherefrom he resigned earlier. Madhab Prosad Banerjee also told the defendants not to register flat in the name of the plaintiff no.3. On the contrary it should be registered in the name of plaintiff no.1. According to the defendants the agreed consideration for the sale of the said flat was settled at Rs. 13 lacs out of which a sum of Rs.9.50 lacs have been paid by the plaintiff firm. The plaintiffs dubiously obtained possession of the flat through Madhab Prosad Banerjee taking advantage of the good relationship of Madhab and the defendants. However, with the intervention of Madhab, one of the partners of plaintiff no.1 it was agreed that the partnership firm would occupy the said flat temporarily upon payment of occupational charges at the rate of Rs.4000/- per month along with KMC taxes and several charges till they get a suitable place. The possession of the plaintiff no.1 in respect of this suit flat is illegal, and not pursuant to part performance of contract as claimed by the plaintiffs. It is contended further that a sum of Rs. 3.5 lacs are lying due together with arrears of rent and other charges. The defendants further contended that neither they had nor do they have any obligation to execute any deed in favour of plaintiff no.3

under any circumstances. The defendants prayed for dismissal of the suit.

Learned Court below after considering the pleadings of the parties framed six issues. On the issue relating to the maintainability of the suit the learned Advocate for the respondents have relied upon Exhibit 15 which is the certificate of registration of the firm.

The learned Counsel for the respondent however, argued that while the appellants do not dispute the said partnership firm was registered, however, consequent upon the retirement of Madhav Prosad Banerjee the firm was reconstituted and after such reconstitution the firm was not registered. It appears from record that there is a dispute with regard to the resignation of Madhab Prosad Banerjee. Madhab Prosad Banerjee was called as witness by the defendants to prove that Madhab Prosad Banerjee was handed over the key of the flat in question in good faith and having regard to friendly relationship with Madhab Prosad Banerjee and the respondents the key was handed over in order to enable the plaintiffs to occupy the said flat in question as a monthly tenant. Madhab Prosad Banerjee disputed that he had never resigned from the partnership firm. The original partnership deed dated 19th August 1994 signed by Madhav Prosad Banerjee, Archana Banerjee, Sakti Banerjee and Swadesh Ranjan Ghosh were tendered during chief and was marked as exhibit 3 without any objection. The registration of the said firm is not in dispute. It appears that during the pendency of the suit the Madhav Prosad Banerjee and Swadesh Ranjan Ghosh as petitioners filed an application O. 1 R. 10(2) of

C.P.C. r/w 151 Of C.P.C. praying for allowing them to be added as Plaintiffs No. 4 and 5 in the suit. The basis of the application appears to be that Madhab Prasad Banerjee and Swadesh Banerjee were the partners of the plaintiff no.1 but during continuation of the said partnership disputes and differences arose amongst the partners with regard to the day to day business affairs of the said firm and settlement of accounts. It was alleged that the plaintiff nos. 2 and 3 deliberately and/or intentionally tried to convert the assets of the partnership firms and funds into their personal account illegally. It was also alleged that the plaintiff nos. 2 and 3 in order to make unlawful gain and for acquiring the said flat paid a huge amount of money from the bank account of the partnership firm. It was for such reasons Madhab Prosad Banerjee and Swadesh Banerjee filed an application for addition of parties in the suit as plaintiff nos. 4 and 5.

The learned Trial Court allowed the said application for addition of the said parties on the ground that if the capital of the partnership firm is utilised for purchasing the suit flat in the name of the defendant no.3 without settling the account to the satisfaction of Madhab Prosad Banerjee and Swadesh Banerjee, their rights are likely to be affected. The trial Court accordingly allowed the application for addition of parties on 28th March, 2006 and added them as plaintiff nos. 4 and 5 respectively.

The plaintiffs challenged the said order in a civil revision being C.O. No. 2380/2006 and the revisional application was allowed and the order

dated 28th April, 2006 was set aside by an order dated 4th April, 2007 inter alia with the following observation:

“After taking into consideration all relevant fact and circumstances, I find it difficult to appreciate the stand taken on behalf of the opposite parties. So far as the suit for specific performance and injunction is concerned, the defendant nos. 1 and 2 being opposite party nos. 1 and 2 herein cannot have any business with regard to any complication in the matter of functioning of the partnership firm. It is claimed that they accepted the entire amount of consideration money. It is admitted that the present petitioners are in possession of the flat in question. What is required to be done is the execution and registration of a deed of Conveyance in favour of the petitioner no.1 firm. In such backdrop, the opposite party nos. 3 and 4 by no stretch of imagination can have anything to do with the pending suit. If they have any grievance relating to the settlement of dues, they will certainly be at liberty to raise such grievance and take appropriate action in accordance with law. But that by itself cannot be a ground for allowing them to be added as parties in the present suit.”

The deed of partnership clearly stipulates that the partnership will not dissolve on the death or demise of any of the partner. It will continue to carry on with the surviving partners. The Partnership Act does not require that when a change occurs in the constitution of a registered firm a separate registered instrument is required to be executed. It is clear from a plain reading of Section 63 of the Partnership Act, 1932 which reads:

“63. (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or

dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1)”

Moreover, retirement of one of the partners may not result in dissolution of the partnership and hence a fresh registration of the subsequent deed. In **Guru Nanak Industries v. Amar Singh** reported at **2020 SCC Online 469** the distinction between retirement of a partner and dissolution of a partnership firm has been stated in the following terms:

“13. There is a clear distinction between ‘retirement of a partner’ and ‘dissolution of a partnership firm’. On retirement of the partner, the reconstituted firm continues and the retiring partner is to be paid his dues in terms of Section 37 of the Partnership Act. In case of dissolution, accounts have to be settled and distributed as per the mode prescribed in Section 48 of the Partnership Act. When the partners agree to dissolve a partnership, it is a case of dissolution and not retirement [See – Pamuru Vishnu Vinodh Reddy v. Chillakuru Chandrasekhara Reddy and Others, (2003) 3 SCC 445]. In the present case, there being only two partners, the partnership firm could not have continued to carry on business as the firm. A partnership firm must have at least two partners. When there are only two partners and one has agreed to retire, then the retirement amounts to dissolution of the firm [See – Erach F.D. Mehta v. Minoo F.D. Mehta, (1970) 2 SCC 724].”

In fact, the defendants and Madhab Prosad Banerjee had in the said proceeding contended that the registration of the deed should be in the name of the partnership firm which means that Madhab Prosad Banerjee has recognised the existence of the plaintiff no.1. Madhab Prosad Banerjee still claimed to be a partner of the partnership firm. This dispute is yet to be resolved. The plaintiffs contended that the firm was reconstituted after the retirement of Madhab Prosad Banerjee. The issue that may come up for determination is on reconstitution if there is a need for fresh registration. In this regard, it is necessary to refer to ***Sharad Vasant Kotak & Ors. v. Ramnikal Mohanlal Chawda*** reported in **(1998) 2 SCC 171**, in which the Hon'ble Supreme Court encountered a similar factual scenario dealing with a registered partnership firm comprising seven partners, however, upon death of one of the partners his widow was admitted as partner of the firm and another deed of partnership was executed but the said deed was not registered. When a suit was filed for dissolution of the partnership objection was raised on the ground that it was necessary to get the partnership deed freshly registered on induction of the widow of the deceased partner. Rejecting the objection, the Hon'ble Apex Court observed as follows:

“30. Learned counsel for the appellants placed strong reliance on the Objects and Reasons for the amendments introduced in the Maharashtra Act. According to the learned counsel, if his contention is not accepted, the object with which Section 69(2A) was introduced will be lost. We do not think so. In this context, we wish to point out that Section 69(3)(a) of the Central Act enables the partners of both registered and unregistered firms to file a suit for dissolution and/or accounts. That being the position by

introducing Sub-section (2A) in Section 69, the Maharashtra Legislature has placed certain restrictions to the extent that even the suit for dissolution of a firm or for accounts, the suit can be filed only if the firm is registered and the 'person' suing as a partner is shown in the Register of Firms as a partner in the firm. In other words, a person, who is not shown in the Register of Firms by induction after registration even though the firm is registered, cannot file a suit for dissolution or accounts. This does not in any way mean that the registration given to the firm earlier will cease. In this case, the firm was registered and there was only a reconstitution of the firm and the first respondent, the plaintiff in this case, is a person whose name is shown in the Register of Firms along with the names of the appellants and, therefore, there is compliance of Section 69(2A). The contention to the contrary by the learned counsel for the appellants cannot be accepted.

33. Our conclusion is that on the induction of the second respondent, the existing firm was only reconstituted on the facts of this case and, therefore, there is no necessity to get a fresh registration. If by virtue of non-compliance of certain mandatory provisions in not informing the firm, certain penalties provided in the Act alone are attracted and that will not lead to the conclusion that the registration of the firm ceased. This conclusion is based on a conjoint reading of Sections 58-63 and the forms prescribed thereunder. Further, this conclusion does not in any way militate the object of the Maharashtra Amendment introduced by Act 29 of 84.

34. In the result, we hold that the suit in question is not hit by section 69(2A) of the Act and, therefore, the Division Bench is right in allowing the Appeal. Consequently, the Appeal is dismissed. However, there will be no order as to costs." (emphasis supplied)

There are distinct set of rules for certificate of Registration given to a firm and any alteration to be entered in the Register of Firm. This will suggest in no uncertain terms that the changes in the constitution of the firm will not affect the registration once made. The Act does not

contemplate that for every alteration in the constitution of a registered firm a fresh registration would be required.

The learned Counsel for the appellant submits that the contention of the plaintiffs that the firm was reconstituted after resignation of Madhab Prosad Banerjee and the names of the partners of the reconstituted partnership firm have been duly sent to the registered firm and was recorded has not been proved. However, the said submission would not take the appellants any further even if it is assumed for the moment that there has been such default, as the record shows that as on the date of filing of the suit the plaintiff nos. 2 and 3 were the partners of the firm. If it is assumed that reconstitution has not taken place the register of the firm would show the names of other two person namely Madhab Prosad Banerjee and Swadesh Banerjee.

However, it would not affect the proceeding initiated by the partnership firm. Reconstitution unlike dissolution does not put an end to the partnership but keeps it alive may be in another form.

The effect of non-compliance of Section 63 of the Partnership Act vis-à-vis Section 69 of the said Act was deliberated upon by the Hon'ble Andhra Pradesh High Court in ***Maddi Sudarsanam v. Boorugu Viswanadham Bros.***, reported in **1954 SCC Online AP 34: AIR 1955 AP 12** since approved in **Sharad Vasant Kotak** (*supra*), *inter alia* at paragraph 16 which reads:

“16. The second condition laid down in section 69(2) is also satisfied. The persons now suing i.e., the present partners, are shown in the register of firms as partners of the firm, though the same register shows other partners, one of whom died and the other retired. It may be that the fact of retirement of one of the partners and the death of another should have been notified to the Registrar under section 63(1) as the said events effected a change in the constitution of the firm. But the default made by the firm in not so notifying is not of any relevance in considering the question of the maintainability of the suit under section 69(2). There is the essential distinction between the constitution of a firm and its dissolution. Non-compliance with the provisions of section 63(1) may have other consequences but, under section 69(2) only two conditions should be complied with by a firm to enforce a right arising from a contract and those two conditions are complied with in the present case.”

On similar lines, the Hon’ble Bombay High Court in ***Pratapchand Ramchand & Co. v. Jahangir***, reported in **1940 SCC Online Bom 8: AIR 1940 Bom 257** encountered a similar conundrum where Plaintiff’s firm was a registered partnership under the Partnership Act on 13.11.1933, however, the firm in respect of certain transactions filed suit against the defendant on 26.10.1939 and on 24.1.1940 notified the registrar of firms regarding change in the constitution of the firm by reason of death of one of the partners on 11.05.1937. The question arose whether the suit was bad by reason of S. 69(2) of the Act on account of the failure to tender notice of change in the constitution of the firm until after the suit was filed. To quote the excellent and astute Hon’ble Justice Blackwell in full who upon considering the germane provisions of the legislation deliberated as follows:

“Chapter VII of the Indian Partnership Act deals with the registration of firms. The Act does not make the registration of firms compulsory but voluntary. Section 58 provides the method by which a firm may be registered and prescribes what must be contained in the statement

delivered to the Registrar. Among other things that statement must contain the names in full and permanent addresses of the partners, and the statement must be signed by all the partners, or by their agents specially authorised in that behalf. Sections 60 to 63 provide for the recording of various alterations, such as in the firm name, the principal place of business, the opening of branches, changes in the names and addresses of partners, and changes in and dissolution of a firm. In each of those sections the word used is 'may' and not 'shall'. They are permissive and not compulsory. The point to be observed in connection with those sections, in my opinion, is that the Act contemplates notwithstanding a change in respect of the matters which have to be set out in the original statement accompanying registration that the firm should be deemed to be continued to be registered although by reason of the alteration the original statement as filed had become inaccurate. Dealing in particular with s. 63(1), that sub-section among other things provides that when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof, and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under s. 59. Pausing there, that section evidently contemplates in the case of a dissolution of a firm by death that notwithstanding the death the firm should still be treated for the purpose of the Act as still registered. Mr. Davar has argued that by reason of the death and the dissolution of the firm the firm ceased to be registered, and in his argument he went so far as to say that the firm ought to have been registered again. No doubt it would have been logical having regard to s. 42 if the Act had so provided. But in fact it has not. The Act does contemplate notwithstanding dissolution by death that so far as registration is concerned the firm is to be deemed still to be registered, and it empowers any person who was a partner immediately before the dissolution to give notice of the change and requires the Registrar to record that notice in the entry relating to the registration of the firm and to file it along with the original statement which had been filed.

The next section requiring notice is s. 69(2). That is in these terms:—

“No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”

Applying that sub-section to the present case the firm was registered and in my opinion continued to be registered at the date of the institution of this suit on October 26, 1939. There is no time limit fixed in any of the ss. 60 to 63 as to when notice of alterations or changes should be given. Mr. Davar argued that the word ‘when’ with which each of those sections begins involves an obligation upon the person proposing to give notice of the change to give it immediately upon the change occurring. The sections do not say so. The position therefore is this: *The firm was registered at the time of the institution of the suit.* The firm then consisted of Chhogamal Dhanaji and Chunilal Idanji, two of the original partners whose names were shown on the register at the date of registration and were shown on the register at the date of the institution of the suit. The fact that the firm was registered at the date of the institution of the suit and that the names of the persons suing (the firm being a compendious name for the persons suing) were shown in the register at the date of the institution of the suit appears to me to be a compliance with s. 69(2) of the Act. It would seem that the Legislature introduced the words with which that sub-section concludes, viz., “and the persons suing are or have been shown in the Register of Firms as partners in the firm” advisedly. If additional partners had come into the firm as partners since the date of registration and their names had not been entered on the register in accordance with notice of a change in the constitution of the firm given to the Registrar, it may well be that the firm as then constituted could not sue, because although it was a registered firm some of the persons then suing would not be shown in the Register of Firms as partners in the firm at the date of the suit. That is not this case. *The partners who are suing were shown in the register originally and are still shown, and the firm according to my construction of the Act remained registered notwithstanding the death of one of the original partners.*” (emphasis supplied)

In fact, the decision in **Pratapchand Ramchand** (supra) was relied upon by this Hon'ble Court in **Tapendra Chandra Gooptu v. Jogendra Chandra Gooptu**, reported in **1941 SCC OnLine Cal 296:AIR 1942 Cal 76** where the Court faced with a scenario germinating from the facts that in 1935, the defendant therein gave a warrant of attorney to the firm of H.N. Datta & Co. to represent him in a dispute. Upon such representation, the attorneys had to file the suit in question against the defendant for realization of their costs, charges, and expenses. However, the defendant resisted the suit on the ground that there is a change in the constitution of the law firm with the retirement of one of the partners and consequently without any fresh registration the firm is an unregistered firm. This Hon'ble Court placing reliance upon the decision **Pratapchand Ramchand** (supra) held that notwithstanding the retirement of Mitra, the firm remained a registered firm and could institute the proceedings under question.

In view of the aforesaid, the first objection raised by the appellant that the suit is barred u/s 69(2) of the Partnership Act, 1932 is not accepted and overruled. In fact, the appellants were not much serious on the aforesaid issue.

However, the next issue is of seminal and of pivotal importance.

The question is with regard to enforcement of an oral agreement for sale in relation to an immovable property. It is interesting to note that Exb. A which contains the description of the property and the price have

been marked as an Exhibit without objection. Both the parties have relied on the said exhibit and accepted that there was an oral agreement for sale of the property. While the plaintiff would contend that it was agreed to be sold at Rs. 10 lacs the defendants contended that the consideration amount was fixed at Rs. 13 lacs. The cross examination of D.W.1 has clearly established these facts the relevant portion whereof is set out below:

“Cross examination of DW 1

..... My son resides at Calcutta. I reside at Bhubaneswar with my family in a rented accommodation. The subject matter of contract from suit flat was shown in my income tax statement file. There the price on which it was agree to sell the suit property was show in income tax statement. I cannot say whether the same was shown in the income tax file of my son. On the consideration price how much shown in my income tax file and how much shown at the income tax file of my son cannot be remembered by me but if I have been asked I can produce the document to that effect. At SBI Mysore, Rashbehari Branch the said consideration money was deposited. I maintain that account of that bank and I can produce document showing the transaction of said consideration money. I cannot say how much money was transacted through the account of my son and it can be taken by my son. As per our stand the plaintiff should pay 13 lacs rupees to use. I have the document which I already given to my learned Advocate to show on that very date of contract the plaintiff agreed to pay Rs.13 lacs to us. Exbt. A is the said document where are entered into contract for the firm to sell the property at the said amount of consideration money.

..... It is not a fact that Exbt. A is not an agreement. I had no business relation with the plaintiff during execution of Ext. A but I know the plaintiff long time.” (emphasis supplied)

In the affidavit in chief the D.W.1 has stated that the agreed consideration price for sale of the flat was settled for Rs. 13 lacs and out of the same only a sum of Rs. 9.5 lacs has been paid by the said firm to him leaving a sum of Rs. 3.5 lacs outstanding. The plaintiff in his chief has stated that the price was initially settled at Rs. 9.50 lacs excluding Municipal tax to be paid by the plaintiff. The plaintiff paid the aforesaid sum on 19th June, 2000 and a further sum of Rs. 50 thousand towards municipal taxes on 17th June 2000 from its current account no. 100554 maintained with the Allhabad Bank Hazra Road Branch. In addition to the aforesaid the plaintiff paid Rs.3 lacs in three instalments of Rs 1 lac each on 21st July, 1999, 15th October, 1999 and 18th March 2000 respectively. The plaintiff produced photocopies of 3 kancha receipts. The photostat copies of the kancha receipts were marked as Exhibit 16, with objection. The defendants contended that Rs. 13 lacs was the agreed consideration. If we take into consideration the payment of Rs. 3 lacs by cash it shows that a sum of Rs. 13 lacs has been paid in full whatever may be the consideration for the payment of Rs. 3 lacs. Over and above the said sum a further sum of Rs.50 thousand was paid towards arrears municipal tax. This payment of Rs. 3 lacs however, is not free from doubt. The nature of the objection is not stated. The trial court accepted that the said payments have been made in absence of the nature of the objection being clearly spelt out. I take it that the said receipts have not been proved in accordance with law. The defendants, however, could not prove that the plaintiffs were put to possession under a tenancy agreement or the

relationships between the parties are that of landlord and tenant and not in part performance of the oral agreement. The defendants did not make any counter claim either for recovery of arrears of occupation charges or eviction of the plaintiff no.1. On the contrary the defendants admit the agreement. DW1 during his cross-examination admitted existence of Exhibit A. The defendants having failed to establish the possession of the plaintiffs other than by way of part performance of the contract would be entitled to the balance consideration amount if found due and payable. The evidence of payment shows readiness and willingness on the part of the plaintiffs to perform its duty and obligation.

The learned Counsel for the appellant has relied upon a decision of the Hon'ble Supreme Court in ***K. Nanjappa vs. R.A. Hameed and Ors.*** reported at **2016 (1) SCC 762** to argue 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 sale of the immovable property.

There cannot be any doubt that in a suit for specific performance it is incumbent upon the plaintiff to prove that he was ready and willing to perform the contract as it actually was and not as it is alleged to be by him. [See. ***Rustomali & Ors. v. Sheikh Ahider Rahaman Mia*** reported in **45 C.W.N. 837**].

There is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where

the plaintiffs come forward to seek a decree for specific performance of contract for sale of immovable property on the basis of an oral agreement alone, heavy burden lies on, the plaintiffs to prove that there was consensus ad-idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement. [See. ***Brij Mohan and Ors. v. Sugra Begum & Ors.***, reported at **1990 (4) SCC 147**].

The terms of the oral agreement could be discerned also from the conduct of the parties and from their pleadings and evidence.

In the instant case as observed earlier, the parties are not disputing the existence of the agreement. The dispute is with regard to the quantum of the consideration amount. The defendant claims that Rs. 13 lacs is the consideration amount. The evidence clearly shows that Rs.10 lacs have been paid by the respondent no.1 and duly accepted by the appellants.

The plaintiffs having being able to establish substantial compliance and performance of the agreement and is ready and willing to perform any

or other obligations I am inclined to affirm the judgment of the learned Trial Court with the modifications indicated by Justice Roy Chowdhury in His Lordship's Judgment.

(Soumen Sen, J.)

Siddhartha Roy Chowdhury, J:-This appeal preferred by the defendant, assails the judgment and decree passed by learned Civil Judge, Senior Division at Alipore on 30th June, 2013 and on 11th February, 2013 respectively.

To appreciate the appeal in its proper perspective we consider it expedient to indicate the facts in brief.

Plaintiff no. 1 is a partnership firm in which the plaintiff nos. 2 and 3 are the partners and the defendants/appellants are the owners of flat no. 1 situated on the eastern side of the first floor of premises no. 31 Lansdown Place, Kolkata-700029 along with proportionate share of land. On 15th March, 1999 the plaintiff no. 1, the partnership firm entered into an oral agreement for sale of the flat in suit at a consideration of Rs. 10,00,000/- and sum of Rs. 1,00,000/- was received by the defendants/appellants as earnest money.

It is contended by the plaintiffs that the consideration money was fixed at Rs. 9,50,000/- and Rs. 50,000/- was paid towards municipal tax. It is adverted further that the plaintiff no. 1 paid the entire consideration

money from time to time and last of such payment was made on 19th June, 2000. Upon receipt of the entire consideration money the defendants delivered peaceful vacant possession of the said flat to the plaintiffs. In the mean time, two partners of the plaintiff firm namely Madhab Prosad Banerjee and Swadesh Ranjan Ghosh resigned from said partnership business with effect from 15th March, 2003 and plaintiff nos. 2 and 3 reconstituted the partnership firm. Request was made by the plaintiff nos. 2 and 3 to the defendants to execute the deed of conveyance in favour of the plaintiff no. 3 Archana Banerjee who was willing to pay Rs. 4,75,000/- towards capital gain tax as pointed out by the defendants but the defendants did not show any interest in performing their part of contract despite receipt of the entire consideration money. The plaintiffs forwarded a draft of the deed of conveyance for approval of the defendants but the defendant refused to take any steps towards the execution of the deed. Hence the suit.

The defendants contested the suit by filling written statement denying all material allegations made against them in the plaint. It is the case of the defendants that the suit as framed is bad for non-joinder of necessary parties. Madhab Prosad Banerjee intimated the defendants that he would continue as the partner of the firm wherefrom he resigned earlier. Madhab Prosad Banerjee also told the defendants not to register flat in the name of the plaintiff no. 3. On the contrary it should be registered in the name of plaintiff no. 1. According to the defendants the agreed consideration for the sale of the said flat was settled at Rs.

13,00,000/- out of which a sum of Rs. 9,50,000/- have been paid by the plaintiff Firm. The plaintiff no. 2 took possession of the flat after obtaining the key of the lock of the entrance door from his brother Madhab Prosad Banerjee, who took the key from the defendants for undertaking some minor finishing works in the flat. Madhab Prosad Banerjee was the custodian of the suit flat key of which he was holding in trust of defendants. Neither he had power to hand over the key of the said flat to the plaintiff no. 2 nor was he authorized to hand over the key to plaintiff no. 2. The defendants having found the illegal act of the plaintiff, raised objections and ultimately with the intervention of Madhab Prosad Banerjee, one of the partners of the plaintiff firm, it was agreed that M/S Spritex Machines would be allowed to use the flat as a tenant since the firm was badly in need of office space and it was further agreed that for such occupation, the plaintiff firm would pay a sum of Rs. 4,000/- per month along with KMC taxes and service charges but they failed to discharge such obligation towards payment of rent or taxes and maintenance charges. The possession of the plaintiff no. 1 in respect of this suit flat is illegal, and not pursuant to part performance of contract as claimed by the plaintiffs. It is contended further that a sum of Rs. 3,50,000/- are lying due together with arrear of rent and other charges. The defendants further contended that neither they had nor do they have any obligation to execute any deed in favour of plaintiff no. 3 under any circumstances. The defendants prayed for dismissal of the suit.

Learned Court below after considering the pleadings of the parties framed the following issues for adjudication:

- 1) Is the suit maintainable in its present form and in law?
- 2) Have the plaintiffs any cause of action to file this suit?
- 3) Is the suit barred by principles at estoppels, waiver and acquiescence?
- 4) Is the suit bad for non-joinder of necessary parties?
- 5) Are the plaintiffs entitled to get decree as prayed for?
- 6) To what other relief, in any, are the plaintiffs entitled?

Learned Trial Court having considered the evidence on record both oral and documentary was pleased to answer the issues in favour of the plaintiffs and was further pleased to direct the defendants to execute and register the deed of sale of flat in suit in favour of the plaintiff no. 1 within one month from the date of judgment failing which liberty was given to the plaintiffs to get the sale deed executed through the Court.

Being aggrieved by and dissatisfied with the judgment and decree the defendants have preferred this appeal.

Learned Advocate appearing for the appellants assailed the impugned judgment primarily that on the ground that plaintiff no. 1, the partnership firm is not registered with Registrar of Firms, West Bengal.

Drawing our attention the provision of Section 69 (2) of the Partnership Act, 1932, learned Advocate for the appellant emphatically argued that suit as framed is not maintainable.

While according to learned Advocate, the suit as framed is well maintainable and learned Trial Court was absolutely correct in answering the issue as to the maintainability of the suit in favour of the plaintiffs/respondents.

It is further argued by the learned Advocate for the plaintiffs/respondents that the defendants/appellants did not raise this issue before the learned Trial Court and for the first time this issue is brought to the fore before this Court which may not be entertained.

Upon perusal of materials on record, we find that PW 1 Sakti Prasad Banerjee in his evidence in-chief on affidavit submitted under Order XVIII, Rule 4 of Civil Procedure Code claimed that plaintiff no. 1 is registered partnership firm and he also filed the original partnership deed and reconstituted the partnership deed dated 3rd June, 2002 and both the documents are admitted into evidence as Exhibit 2 and Exhibit 3. From the oral testimony of PW 1 we find that firm was reconstituted pursuant to resignation of Madhab Prosad Banerjee and Swadesh Ranjan Ghosh who were the partners since 19th August, 1994.

We therefore need to address this issue on law as to whether the suit as framed is maintainable in the light of sub-Section 2 of Section 69 of the Partnership Act and if such plea can be taken for the first time before the Appellate Court.

Section 69 of the Partnership Act says :

(1) "No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."

Hon'ble Supreme Court in **Haldiram Bhujawala & Ors. vs. Anand Kumar Deepak Kumar & Ors.** reported in **AIR 2000 SC 1287** held :

"22. In *Raptokos Brett and Co.*, AIR1998SC3085, it was clarified that the contractual rights which are sought to be enforced by the plaintiff firm and which are barred under Section 69(2) are rights arising out of the contract" and that it must be a contract entered into by the firm with the third party defendants. Majmudar, J. stated (at p. 191) as follows:

A mere look at the aforesaid provision shows that the suit filed by an unregistered firm against a third party for enforcement of any right arising from a contract with such a third party would be barred....

23. From the above passage it is firstly clear that contract must be a contract by the plaintiff firm not with anybody else but with the third party defendant.

24. The further and additional but equally important aspect which has to be made clear is that - the contract by the unregistered firm referred to in Section 69(2) must not only be one entered into by the firm with the third party-defendant but must also be one entered into by the plaintiff firm in the course of the business dealings of the plaintiffs firm with such third party-defendant.

25. It will also be seen that the present defendants who are sued by the plaintiff-firm are third parties to the 1st plaintiff firm. Section 2(d) of the Act defines 'third parties' as persons who are not partners of the firm. The defendants in the present case are also third parties to the contract of

dissolution dated 16-11-74. Their mother, Kamla Devi was no doubt a party to the contract of dissolution. The defendants are only claiming a right said to have accrued to their mother under the said contract dated 16 11-74 and then to the defendants. In fact, the said contract of dissolution is not a contract to which even the present 1st plaintiff firm or its partners or the 2nd plaintiff were parties. Their father Moolchand was a party and his right to the trade mark devolved in plaintiffs. The real crux of the question is that the legislature when it used the words "arising out of a contract" in Section 69(2), it is referring to a contract entered into in course of business transactions by the unregistered plaintiff firm with its customers-defendants and the idea is to protect those in commerce who deal with such a partnership firm in business. Such third parties who deal with the partners ought to be enabled to know what the names of the partners of the firm are before they deal with them in business."

Admittedly the plaintiffs and the defendants entered into an oral agreement for sale the suit flat. Defendant no. 1 as DW 1 stated that during cross examination that he had no business relation with the plaintiff firm, but had acquaintance with the partners who wanted to have to the flat for office space. Therefore, in our view, it was not a contract for commercial purpose, but for acquiring an immovable property to set up office.

Therefore, Section 69 (2) cannot stand in the way in proceedings with a suit for Specific Performance of Contract. We do not find any reason to disagree with the view of the ld. Trial Court. In their written statement defendants have not taken this point, yet as it is a question of law, we have considered this point raised by learned Advocate for the appellant, though unsuccessfully.

Plaintiff no. 1, being a partnership firm has the locus standi to file or maintain a suit for Specific Performance irrespective of it's being registered with Registrar of Firm, West Bengal or not. It is of no consequence.

Since we have found that the suit is not barred by sub-Section 2 of Section 69 of the Partnership Act, 1932, we are now inclined to consider the readiness and willingness to perform their part of contract by the respective parties. Learned Trial Court though not framed specific issue on this yet we found from the impugned judgment that learned Trial Court discussed the facts based on available materials.

In paragraph 21 of affidavit in chief filed by plaintiff no. 2 Sakti Prosad Banerjee, it is adverted that the payment of Rs. 9,50,000/- was completed on 19th June, 2000 in paragraph 22 it is stated that on that very date a sum of Rs. 50,000/- was found to be due as Municipal tax which was paid but no receipt was granted by the defendants. In paragraph 27 of the said affidavit PW 1 stated further that "in addition to sum of Rs. 10,00,000/- we paid sum of Rs. 3,00,000/- in three installments of Rs. 1,00,000/- each on 21st July, 1999, 15th October, 1999 and 18th March 2000 respectively by cash for some addition, alteration, fixtures and findings". In support of such averment PW 1 produced photocopy of three receipts with the narrative that original kancha receipts were taken back by Sailendra Chandra Dasgupta on the pretext that he would give pacca receipts. The photocopy of receipt was admitted into evidence as Exhibit 16 with an endorsement "with

objection". This Exhibit 16 contains three receipts of three different dates prior to 19th June, 2000 which leads us to the obvious presumption that these are the components of Rs. 9,50,000/- paid by 19th June, 2000. It would not be out of place to mention here that the plaintiff used to make payment to the defendants against receipt. He must have in his possession all the receipts but he did not produce the same to substantiate his claim towards payment of Rs.13,00,000/-. When we consider the evidence of PW 1 on the point of payment of consideration of money, preponderance of probability in absence of documents tilts towards the natural corollary that entire consideration money of Rs. 13,00,000/- has not been paid by the plaintiffs/respondents.

This suggests unerringly that the plaintiffs/respondents have not discharged their obligation by making payment of entire consideration money; they are yet to pay a sum of Rs. 3,00,000/- as it was decided by and between the parties and which is corroborated by Exhibit A.

Drawing our attention to the oral testimony of PW 1, Learned Trial Advocate for the respondents/plaintiffs submits that pursuant to payment of consideration money possession of the flat was given to the plaintiffs in part performance of contract. Per contra, learned Advocate for the appellants submits that possession of suit flat was obtained by illegal manner and not pursuant to part performance of contract.

Documents are to be proved by way of primary evidence and in certain cases by secondary evidence as envisages under Section 64 and 65

of the Evidence Act. Learned Trial Court admitted Xerox copy of receipts, Exhibit 16 being tendered by PW 1 without answering the objection raised and without following the provision laid down under Section 63, 64, 65 and 66 of the Evidence Act, 1872, which say :

“63.Secondary evidence.—Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained1;1;"

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it. Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Exhibit 16 does not satisfy the requirement of Section 63 of the Evidence Act.

Even if we accept the testimony of PW 1 that original receipts were taken back by Sailendra Chandra Dasgupta, no notice was served in compliance with Section 66 of the Evidence Act, calling upon Sri Sailendra Chandra Dasgupta to produce the same. Exhibit-16 a photocopy of document was admitted as secondary evidence without required foundation for establishment of right to give such evidence.

In this regard we may rely on the judgment of Hon'ble Supreme Court pronounced in case of **R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and Ors.** reported in **AIR 2003 SC 4548** at paragraph 20 :

“Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently.

The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision.

In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of

the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.

In the first case, acquiescence would be no bar to raising the objection in superior Court.”

Hon’ble Apex Court (Coram 5 Judges) in case of **Roman Catholic Mission vs. The State of Madras & Anr.** reported in [1966] 3 SCR 283 observed that :

“Where the originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence, the High Court rejected them and it was plainly right in so deciding.”

In another case of **Shalimar Chemical Works Ltd. vs. Surendra Oil and Dal Mills (Refineries) & Anr.** reported in [2010] 8 SCC 423 the Hon’ble Supreme Court held :

“On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have “marked” as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants.”

Therefore we are constrained to hold that Exhibit 16 does not have any probative value, though it has been admitted into evidence by learned Trial Court. As a natural corollary we are of the view that the plaintiffs/respondents have failed to prove the factum of payment of Rs. 3,00,000/-. Since the plaintiffs/respondents have paid substantial amount of money in discharge of their obligation arising out of contract, it can safely be said that they were and still are ready and willing to perform their part of contract in spirit.

Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to grant decree for specific performance and it goes without saying that such discretion should be exercised in accordance with sound and reasonably judicial principle.

In ***Satya Jain v. Anis Ahmed Rushdie*** reported in **(2013) 8 SCC 131** the Hon’ble Supreme Court held :

“39. The long efflux of time (over 40 years) that has occurred and the galloping value of real estate in the meantime are the twin inhibiting factors in this regard. The same, however, have to be balanced with the fact that the plaintiffs are in no way responsible for the delay that has occurred and their keen participation in the proceedings till date show the live interest on the part of the plaintiffs to have the agreement enforced in law.

40. The discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on

sound, reasonable, rational and acceptable principles. The parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act, 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and circumstances of each case. The ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive without any real difficulty. It must however be emphasised that efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Such a view has been consistently adopted by this Court. By way of illustration opinions rendered in *P.S. Ranakrishna Reddy v. M.K. Bhagyalakshmi* [(2007) 10 SCC 231] and more recently in *Narinderjit Singh v. North Star Estate Promoters Ltd.* [(2012) 5 SCC 712 : (2012) 3 SCC (Civ) 379] may be usefully recapitulated.

41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalizing the Plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour.

From another perspective it may also indicate the inadequacies of the law to deal with the long delays that, at times, occur while rendering the final verdict in a given case. The aforesaid two features, at best, may justify award of additional compensation to the vendor by grant of a price higher than what had been stipulated in the agreement which price, in a given case, may even be the market price as on date of the order of the final Court.

42. Having given our anxious consideration to all relevant aspects of the case we are of the view that the ends of justice would require this Court to intervene and set aside the findings and conclusions recorded by the High Court of Delhi in *R.F.A. No. 11/1984* and to decree the suit of the Plaintiffs for specific performance of the agreement dated 22.12.1970. We are of the further view that the sale deed that will now have to be executed by the Defendants in favour of the Plaintiffs will be for the market price of the suit property as on the date of the present order. As no material, whatsoever is

available to enable us to make a correct assessment of the market value of the suit property as on date we request the learned trial judge of the High Court of Delhi to undertake the said exercise with such expedition as may be possible in the prevailing facts and circumstances.”

Admittedly the plaintiffs/respondents have been possessing the suit flat since after making payment of Rs. 10,00,000/-. In terms of agreement they are under obligation to pay remaining Rs. 3,00,000/-. The plaintiff no. 2 as PW 1 made an unsuccessful attempt to prove the payment of said amount. Therefore, the plaintiffs/respondents are under obligation to pay the said amount. Had the said amount of Rs. 3,00,000/- been paid in the year 1999 or 2000, the said amount would have earned more than Rs. 3,00,000/-,. Therefore, while exercising our judicial discretion we consider it our duty to strike a balance.

In the given facts and circumstances of the case, we consider it expedient to maintain the decree for Specific Performance of contract and in the interest of justice upon payment of Rs. 3,00,000/- towards remaining consideration money and in our view ends of justice would be met if the appellants/defendants are awarded further sum of Rs. 3,00,000/- as compensation to be paid by the plaintiffs/respondents for litigating the issue without paying the entire consideration money within one month from this day.

In fine the impugned judgment and decree passed by learned Trial Court stands modified to the effect that the plaintiffs/respondents shall pay a sum of Rs. 6,00,000/- to the defendants/appellants within one

month from this day along with capital gains tax if applicable. The defendants/appellants shall execute the deed of conveyance in favour of the plaintiffs/respondents within two weeks from the date of payment as directed, failing which the plaintiffs/respondents will be at liberty to approach the learned Trial Court to execute the deed of conveyance. If the plaintiffs/respondents fail to make such payment within one month as directed, the suit shall stand dismissed.

Consequently the appeal is allowed in part, but without cost.

(Siddhartha Roy Chowdhury, J.)

Later:

After pronouncement of the judgment, the learned Counsel for the appellants on instruction from the appellant who is personally present in court has agreed to accept a sum of Rs.6,00,000/- (six lacs) provided capital gains tax as applicable is paid by the respondents. In fact, the judgment and decree to that effect has already been passed in favour of the appellants.

(Soumen Sen, J.)

(Siddhartha Roy Chowdhury, J.)