

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty

And

The Hon'ble Justice Sugato Majumdar

FA No. 180 of 2010

Prabir Das & Anr.

Vs.

Kinu Ram Mondal

For the Appellants : Mr. Rahul Karmakar
Mr. Nitai Chandra Saha
Mr. Debabrata Roy

For the Respondent : Mr. Debjyoti Basu
Mr. Anuran Samanta

Heard on : 24th March, 2022

Judgment on : 11th April, 2022

Sugato Majumdar, J.:

1. The present appeal is directed against the Judgment and Decree dated 15th March, 2010 passed in Title Suit No. 125 of 2005 by the Learned Civil Judge, Senior Division, 7th Court, Alipore, whereby the suit for specific performance of the Appellants was dismissed.

2. Briefly, the plaint case is that the Respondent, being the absolute owner of schedule – B land, entered into an agreement for sale on 13.06.1995 with the Appellants in respect of that property for a consideration of Rs. 6,500 per cottah. In terms of the agreement, the Appellant was to develop the land by filling earth and making roads therein. On execution of the agreement, the Appellants paid a sum of Rs. 62,501/- to the Respondent. It is the case of the Appellant that about rupees five lakhs were invested by the Appellants for development of the land and they paid further sum of consideration money to the extent of Rs. 2, 24, 400/-, from time to time, to the Respondent, apart from the initial payment of Rs. 62,501/-. The Respondent sold out, from time to time, in terms of the agreement, 2 bighas 1 cottah 15 chitaks of land, to different persons nominated by the Appellants wherein the later stood as a confirming party. It is the Appellants' case that so far as remaining 2 bighas 15 cottahs 7 chitaks of land are concerned, the Respondent deliberately neglected to sell the same land to the Appellants or nominated persons. The matter was intimated to Zinjira Bazar Police Investigation Centre on 01.12.2001 in the form of a general diary having GD Entry No. 23 dated 01.12.2001. Thereafter, at the intervention of the well - wishers, the Appellants tried to settle the matter. From 28.02.2003 onwards, the Respondent was unwilling to abide by the terms and conditions of the agreement and finally the Respondent cancelled the agreement

for sale dated 13.06.1995 through a letter dated 27.03.2003 written by the advocate of the Respondent. In the wake of such revocation, criminal proceeding was initiated by the Appellants and the original suit in respect of the unsold part of schedule "B" property which is described in schedule "A" of the plaint was filed praying for specific performance of the contract, along with prayers of permanent injunction restraining the Respondent from selling, transferring or encumbering the suit property, a prayer of mandatory injunction directing the Respondent to execute and register a deed of conveyance; along with damages and other remedies.

3. The suit was contested by the Respondent. In the written statement, execution of the agreement for sale supported by consideration at a rate of Rs. 6,500 per cottah was admitted. It was denied that possession was handed over to the Appellants. It was also specifically averred that time was essence of contract. It was contended that the Appellants developed a better portion of the lands covered under agreement for sale which were sold to different purchasers and that the Appellants showed reluctance and made delay in developing the rest of the land described in schedule "A" of the plaint. Since the Appellants failed to develop the remaining part of the land within stipulated period of time, agreement for sale

was revoked with effect from 01.01.1999 in terms of letter dated 27.03.2003 written by the Learned Lawyer of the Respondent.

4. The learned Trial Court framed as many as six issues: –

- i) Is the suit maintainable in the present form and in law?
- ii) Have the plaintiffs any cause of action to file the instant suit?
- iii) Is the suit barred by the law of limitation?
- iv) Is the agreement for sale dated 13.06.1995 subsisting?
- v) Are the plaintiffs entitled to the decree prayed for?
- vi) To what other relief or reliefs, if any, are the plaintiffs entitled.

5. The Trial Court, while deciding the Issue No. 1 & 2, taken up together, came to the conclusion that the document being agreement for sale dated 13.06.1995 (Ext. 9) is inadmissible in evidence as the same is not properly stamped and although admitted in evidence without objection, there is no bar in raising such objection at later stage, even at the appellate stage. It is observation and finding of the Trial Court that no cause of action can arise, on the basis of an inadmissible document, and the suit itself, based on an inadmissible document, is not maintainable.

Deciding on the Issue No. 3, it was observed that time was not essence of the contract, in this case. But, as concluded by the Trial Court, the suit was filed well beyond three years from the date of notice of refusal to perform. Since date of notice of refusal to perform was 01.12.2001, and the suit was filed on 18.03.2005, the suit is barred by the law of limitation. The Trial Court, since held that the suit was not maintainable, did not decide upon the Issues No. 4, 5 & 6 on merit. In nutshell, the Trial Court dismissed the suit as the same was not filed within time limit and since the same was based on irregular and insufficiently stamped document.

6. Mr. Karmakar appearing for the Appellants submitted that finding of the Trial Court that the suit is barred by law of limitation is erroneous. The Trial Court failed to take into consideration that the Appellants lodged a general diary in Zinjirabazar Police Investigation Centre on 01.12.2001 alleging delay in performance of the agreement for sale dated 13.06.1995. The letter itself is marked as Ext. A, produced by the Respondent. The Appellant, never stated in Para.7 of the plaint that the Respondent committed breach of the agreement by that time, so as to give rise of the cause of action from then on. In Para. 8, of the plaint it was stated that attempts were made to settle the dispute through intervention of the friends. Referring to cross-examination of the D.W. 1, it was pointed out that in D.W. 1's cross examination there was an

admission in cross-examination that there was no question of cancellation of the agreement for sale before 27.03.2003. It is stated in Para. 7 of the affidavit-in-chief of the Respondent that the agreement for sale dated 13.06.1995 was terminated by letter dated 27.03.2003 with effect from 01.01.1999. In view of such admitted fact, the finding of the Trial Court that cause of action arose on 01.12.2001 is erroneous and result of improper appreciation of material evidences. Mr. Karmakar further submitted that according to Article 54 of the Limitation Act, 1963, period of limitation for specific performance of contract is three years from the date fixed for the performance of it or, if no such date is fixed, when the plaintiff has noticed that performance is refused. According to him, the agreement for sale dated 13.06.1995 did not specify any date for performance, though a time frame of two years was fixed for payment of consideration money. In absence of any fixed date for performance of the agreement, date of notice of refusal to perform should be relevant. It is evident and admitted that cause of action arose on and from 27.03.2003, as Mr. Karmakar continued, and the suit, therefore, is not barred by the law of limitation. He relied upon the ratio of **Ahmadsahab Abdul Mulla Vs Bibijan & Ors. [(2009) 5 SCC 462]** and **Madina Begum & Anr. Vs Shiv Murti Prasad Pandey & Ors. [(2016) 15 SCC 322]** in support of his contention.

7. The next point argued by the Mr. Karmakar is that the Trial Court erroneously held that the agreement for sale is inadmissible for insufficiency of stamp duty. According to him, the Trial Court failed to take into consideration and failed to apply the principles of law enshrined in Section 36 of the Indian Stamp Act 1899 and Order 13 Rule 3 of the Code of Civil Procedure 1908. Relying on the ratio of **Shyamal Kumar Roy Vs Sushil Kumar Agarwal [(2006) 11 SCC 331]**, he submitted that the agreement for sale dated 13.06.1995 was admitted as evidence without any objection of the Respondent. Therefore, the Respondent lost his right to object its admissibility. Mr. Karmakar also relied upon the findings and observation of Co-Ordinate Bench of this Court in **Monjur Alam Mallick vs Rajib Saha [2019(2) ICC 657 (Cal)]**. Mr. Karmakar also referred to the ratio of **Govind Prasad Chaturvedi vs Hari Dutt Shastri & Anr. [(1977) 2 SCC 539]** to buttress his argument that time is not essence of the contract when the same relates to sale of immovable property.
8. Mr. Basu, appearing on behalf of the Respondent, at the very outset, stated that he supports the impugned judgment and decree, which, according to him, does not suffer from any infirmity or error. He argued in respect of the point of limitation that the P.W.1 in examination-in-chief clearly admitted that in the year 2001 it came to his knowledge that the Respondent committed breach of the

agreement and that such breach was informed to the Zinjirabazar Police Investigation Centre on 01.12.2001 in terms of Ext. A. This is admission on the part of the Appellants that they were aware of and had notice of the Respondent's alleged refusal to perform the agreement which cannot be assailed by the Appellants. Referring to Article 54 of the Limitation Act and relying upon the ratio of Madina Begum's case (supra), Mr. Basu elaborated that period of limitation in case of specific performance of a contract begin to run either from the date fixed for performance or where no date is fixed, from the date when the Plaintiff has notice of refusal of performance. In the instant case, as Mr. Basu explained, date is fixed two years after the date of execution of the agreement for sale. Period of limitation starts from that date. Even otherwise, if it is assumed that no date is fixed, refusal came to the notice of the Appellants/Plaintiffs on 01.12.2001, as admitted by P.W.1 in his deposition. Since admitted fact need not be proved, it is well established that the notice of refusal to perform came to the notice of the Appellants on 01/12/2001. Therefore, as argued, the suit should have been filed within a period of three years since then. Since the suit is filed in the year 2005, it is hopelessly barred by limitation.

9. Mr. Basu further submitted that the Trial Court correctly came to the conclusion that the insufficiently stamped agreement for sale is

inherently inadmissible as evidence and no rule can cure it. Since the agreement for sale is inadmissible as evidence, the conclusions reached by the Trial Court, is correct.

10. We have heard rival submissions.

11. Since the disputes between the parties herein revolve round the agreement for sale dated 13.06.1995 (Ext.1) and since the Trial Court came to a conclusion that the suit, based on inadmissible document, is not maintainable, the issue of its admissibility of the said agreement for sale should be addressed by us at the outset. Section 33 (1) of the Indian Stamp Act casts a duty on every person having authority to receive evidence or in charge of public office, except an officer of police, to impound an insufficiently stamped instrument. There is amendment of Section 33 of the Indian Stamp Act, 1899 in the State of West Bengal. In terms of the amendment it is incumbent upon the Collector to impound insufficiently stamped instrument produced before him. When such an insufficiently stamped document is brought to the notice of the Collector or it otherwise comes to his notice, he may call for the instrument for the purpose of satisfying himself as to adequacy of stamp placed on it and to proceed to deal with the instrument in terms of Section 38 of the Act. Proviso to the amended section states, however, that no action under the sub-section shall be taken after a period of four years from the date of execution of the

instrument. Section 36 of the Indian Stamp Act, 1899 provides for a “stand alone” clause. The section reads as follows:-

“36. Admission of instrument where not to be questioned – *where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.*”

Effect of Section 36 of the Indian Stamp Act, 1899, along with Section 33 as amended in the State of West Bengal, was discussed at length by Supreme Court of India in **Shyamal Kumar Roy vs. Sushil Kumar Agarwal [(2006) 11 SCC 331]**. Deciding on the issue whether an insufficiently stamped development agreement, which was admitted in evidence without objection, was admissible or not, it was observed that Section 36, provides for a “stand alone” clause. It categorically prohibits a court of law from reopening a matter in regard to the sufficiency or otherwise of the stamp duty paid on an instrument in the event the same has been admitted in evidence. Only one exception has been made in this behalf viz. the provisions contained in Section 61 providing for reference and revision. In a case where Section 33 of the Indian Stamp Act, 1899, as amended by the West Bengal Act would be applicable, the proviso appended to sub-section (5) carves out an exception that

no action would be taken after a period of four years from the date of execution of the instrument. Relying upon the ratio of **Javer Chand vs. Pukkraj Surana [(1962) 2 SCR 333]**, it was further observed and held that if a party to the *lis* intends that an instrument produced by the other party being insufficiently stamped, should not be admitted in evidence, he must raise an objection thereto at the appropriate stage. He may not do so only at his peril. Objection as regards admissibility of a document, thus, specifically is required to be taken that it was not duly stamped. On such objection only the question is required to be determined judicially. This issue of objection as to the admissibility of a document was considered in details by the Supreme Court of India in **R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple & Anr. [(2003) 8 SCC 752]**. It was observed that Order 13 Rule 4 of the Code of Civil Procedure 1908 provides that every document admitted in evidence in a suit being endorsed, signed or initiated by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend on the document being endorsed as admitted or not admitted in evidence. The objections as to admissibility of documents in evidence which is *itself*

inadmissible in evidence other than one 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, is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the other case, where objection is directed towards the *mode of proof* alleging the same to be irregular or insufficient, the objection should be taken when 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. This is a rule of fair play. A belated objection, not taken in appropriate time, will put a party, producing the document, in surprise. Had any objection been raised at the opportune and appropriate time, the party producing the document, would have cured such defect, whereas, a belated objection, would deprive that party, producing the document, to cure such defect. This principle was reiterated in **Dayamathi Bai v. K.M. Shaffi [(2004) 7 SCC 107]** by the Supreme Court of India. In **Monjur Alam Mallick vs. Rajib Saha [2019 (2) ICC 657 (Cal)]**, a Co-ordinate Bench of this Court, referring to various authorities on the issue, held that if a party fails to raise any objection with regard to admissibility of a document on the ground of any defect like insufficiency of stamp,

the said party is clearly estopped from raising any objection at the hearing of the suit regarding its admissibility. The objection, if any, has to be raised at the time when the document is tendered in evidence and not subsequently for the simple reason that if such objection is considered to be valid then a party would have a chance to remove the defects and/or deficiency in the document in order to make it admissible.

12. Coming to the case in hand, the agreement for sale dated 13.06.1995 (Ext. 1) is an undisputed document. Execution and payment of consideration money acting upon the agreement is not disputed by either of the parties. The suit was filed in the year 2005, almost after ten years of execution of the agreement for sale. The Respondent did not raise any objection at the time of producing and admitting the document as evidence. It is nobody's case that the document, namely, Ext.1 is itself inadmissible. It is rather a case that the agreement for sale dated 13.06.1995 (Ext.1) is inadmissible for insufficiency of stamp. Admission of the document was allowed without any objection. Therefore, objection on admissibility of the document cannot be raised at later stage of the suit. The Trial Court, although referred to **Dayamathi Bai's case** (supra) manifestly failed to understand, appreciate and apply the principles of law while concluding that the agreement for sale dated 13.06.1995 (Ext. 1) is inadmissible in evidence. The finding

is not sustainable and is liable to be set aside. We, therefore, hold that the objection as to admissibility of the agreement for sale (Ext. 1) cannot be raised at subsequent stage of the suit where such objection was not raised at the time of admission of the document and the Trial Court erred in law in allowing the objection of admissibility at later stage which, in view of settled principles of law, is not permissible.

13. Next we address the finding of the Trial Court that the suit is not maintainable as it is based on a document which is not admissible in evidence. It is decided by the Trial Court on Issue No.2 : *“Therefore, cause of action which arose on the basis of the impugned document also cannot arise.”* This is a queer proposition of law. Even if the agreement for sale appears to be inadmissible to the Trial Court, it should have proceeded with and decide the suit on the basis of other evidences. There is no proposition of law that because of inadmissibility of one of the documentary evidences, a suit cannot be decided upon and should be considered as not maintainable or that no cause of action arises at all. Such a finding is erroneous, contrary to legal principles and is not sustainable. We, therefore, set aside this finding of the Trial Court.

14. Once it is concluded by us that objection as to admissibility of the agreement for sale dated 13.06.1995 (Ext. 5) cannot be agitated at later stage of the suit and since the said document had already

been admitted in evidence, there is no bar to rely upon Ext.-1. In such perspective, the issue of limitation can be looked into. Clause 1 of the said agreement stipulated that consideration money shall be paid within two years from the date of execution of the document. Clause 1 further stipulates that the Respondent shall execute sale deeds in favour of the Appellants or in favour of the persons selected by the Appellants at a time or in different times. The Respondent shall take measurement and make plan of the land and shall do such other things as are mentioned in the agreement. Except for payment of consideration money, no time is fixed for performance of the agreement. Much emphasis was laid by Mr. Basu on oral testimony of P.W. 1 contained in question 19 of the affidavit-in-chief where the P.W. 1 stated that due to deliberate refusal by the Respondent to sell the entire land, he informed the entire incident to the Officer-in-Charge of Zinjira Bazar Investigation Centre on 01.12.2001. It is the contention of Mr. Basu that the statement amounts to admission that notice of refusal came to the knowledge of the Appellants on 01.12.2001 from which date time period began to run. Facts admitted need not be proved under Section 58 of the Indian Evidence Act, 1872. Therefore, according to Mr. Basu, the Trial Court rightly held that the suit is time barred.

15. In **Ahmadsahab Abdul Mulla (2) v. Bibijan, [(2009) 5 SCC 462]**, the view expressed by the Supreme Court of India was that:

“11. The inevitable conclusion is that the expression “date fixed for the performance” is a crystallised 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.”

In Madina Begum’s case (supra), no specific calendar date was fixed for performance of the agreement for sale although time frame of six month was fixed for payment of consideration money. Referring to Ahmadsahab’s case (supra) it was observed by the Supreme Court of India that when no date for performance is fixed, the limitation of three years would begin when the plaintiff has notice that the defendant has refused the performance of the agreement.

16. The complaint dated 01.12.2001 itself was adduced as evidence and marked as Ext. 5. It is alleged in the Ext. 5 that the Respondent had been killing time on various pretexts and the project had suffered loss. Nothing is there to indicate that the Respondent refused to perform his part of agreement. No evidentiary value should be attached to the oral account of Ext. 5 which itself should be looked into. Whether there was delay on the part of the Appellants to bring action promptly against the Respondent is not a relevant matter to be considered to decide on the point of limitation. The Respondent rather admitted in cross-examination, as pointed out by Mr. Karmakar, that there was no question of cancellation of the agreement before 27.03.2003. It is also admitted by the Respondent in cross-examination that before 27.03.2003 he had not given any letter to the Appellants. The aforesaid letter dated 27.03.2003 is admitted in evidence and is marked as Ext. B. Para 7 of Ext. B, namely, the letter dated 27.03.2003 contains the following statement: *"I have been advised to revoke the said Baina Patra dated 13.06.1995 with immediate effect though the said Baina Patra has become hopelessly barred by limitation as the time was essence of the Baina Patra."* (underline and italics provided by us) This clearly shows that the agreement for sale dated 13.06.1995 (Ext. 1) was cancelled in terms of the aforesaid letter dated 23.03.2003. The agreement was not cancelled earlier, as admitted by the Respondent and manifest from

Ext. B. Material evidences produced very clearly establish that the agreement was terminated and performance was refused on 27.03.2003 and not before hand. The agreement for sale itself evinces that no date was fixed for performance of the contract. Therefore, it is apt and just to conclude, following the ration of Ahmadsahab's case and Madina Begum's case that limitation started from the date on which refusal to perform was noticed and limitation should run from 27.03.2003. The Trial Court, it appears, attached unnecessary importance to the oral testimony of the P.W. 1 being oblivious of the true purport of the basic principles of primary and secondary evidences as well as the contents of Ext. 5. We, therefore, set aside the finding of the Trial Court that the suit was barred by law of limitation.

17. We, accordingly, set aside the impugned judgement and decree. Since the Trial Court dismissed the suit on the ground that it was not maintainable, without deciding the principal issues, we remand the suit for fresh hearing and disposal on merit. The Trial Court shall endeavor to dispose of the suit within a period of six months from the date of communication of this judgement, without unnecessary delay.

18. The instant First Appeal is accordingly disposed of.

19. No order of cost.

20. Lower court record along with a copy of judgment be returned forthwith.
21. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Sugato Majumdar, J)

(Tapabrata Chakraborty, J)