

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**S.A 312 of 1999
Sri Sourav Chowdhury
Vs.**

**Sri Nalini Gopal Banerjee @ N. G Banerjee, Since Deceased, rep. by
Smt. Namita Banerjee & Ors.**

With

**S.A 313 of 1999
With
CAN 3 of 2023
Manju Banerjee & Ors.
N.G. Banerjee**

For the appellants in
Both matters

: Mr. Sagar Bandyopadhyay
Mr. Debdatta Saha
Mr. Subhamay Dewanji

For the respondents in
both matters

: Mr. Indrajeet Dasgupta
Ms. Puspita Bhowmick

Heard on

: 22.06.2023

Judgment on

: 03.10.2023

Ajoy Kumar Mukherjee, J.

1. The instant second appeal has arisen out of common judgment and decree dated 26th, September 1997 passed by the First Appellate Court reversing the common judgment and decree dated 20th December, 1996 passed by the Trial Court. One Nalini Gopal Banerjee is the plaintiff in Title

Suit No. 17 of 1992 and defendant no. 1 in Title Suit No. 89 of 1994. Said Nalini Gopal filed Title Suit No. 17 of 1992 for specific performance of contract against defendants, (Smt. Manju Banerjee is defendant no.1 and Chetla Housing Co-operative society is defendant no. 2. Defendant no. 3 is the Secretary of the society) contending that defendant no.1 Smt. Manju Banerjee along with others formed a Housing Cooperative Society for the purpose of construction of multi-storeyed building comprising of several flats for residential purpose and after completion of the said building, one flat namely flat no. B-6/3, which is the suit property, was allotted to said defendant no.1. Further contention is that defendant no.1 at the material point of time did not have enough money to pay instalments as against the price of the flat and for that defendant no.1 offered to sell the flat to the plaintiff at a consideration of Rs. 60,000/- on condition that the plaintiff would pay the balance loan amount and thereafter on full payment, the defendant no.1 would arrange for transfer of flat through defendant no.2/ society in favour of aforesaid plaintiff.

2. Further contention of the plaintiff in the said suit is that said arrangement was duly approved by the defendant no.2/society and a Sum of Rs. 4,500/- was paid by plaintiff to defendant no.1 by cheque dated 21.06.1976 and subsequently a further sum of Rs. 11,000/- was paid by the plaintiff to the defendant no.1 and the husband of the defendant no.1 acknowledged the said amount by mentioning it as a loan. It has been stated that after completion of construction of the multi-storeyed building, the plaintiff was put to possession of the said flat by the defendant No.1 on 07.07.1976 and since then the plaintiff has been living in the suit flat by

paying user charges. Plaintiff states that he had paid a sum of Rs. 41,945.20/- to the society as against the consideration money of the said flat as agreed upon in the name of defendant no.1. Defendant no. 2/society by it's letter dated 25.05.1988 informed the plaintiff that the managing committee of the defendant no.2/ society had decided to offer the suit flat to the said plaintiff and asked for consent of the plaintiff and the plaintiff by his letter dated 03.06.1988 accepted the said offer. It is further alleged in the plaint that there had been several correspondences between the parties for completion of the transaction of payment of balance consideration money and despite the plaintiff being ready and willing to complete the transaction, on payment of the balances consideration money, the defendant no.1 had refused to execute the deed in his favour. Plaintiff further stated that on 23.10.1991, plaintiff received an intimation from the defendant no.1 that she had arranged to disburse the suit flat to defendant no.4 and on the basis of such information plaintiff filed aforesaid Title suit no. 17 of 1992 for specific performance of contract.

3. On the other hand the present appellant Sourav Chowdhury filed suit for eviction being T.S No. 89 of 1994 against said Nalini Gopal Banerjee (plaintiff of title suit no. 17 of 1992) contending that he purchased the aforesaid suit flat from aforesaid Manju Banerjee and on being allotted membership of the said cooperative society he went to take possession of the suit flat and he was told by his vendor that aforesaid Nalini Gopal Banerjee who is in possession of suit flat is her relative and care taker of the said flat and is residing at suit flat as licensee under Smt. Manju Banerjee who is defendant no.1 of T.S 17 of 1992. In the aforesaid circumstances, said

Sourav Chowdhury as plaintiff filed aforesaid Title Suit no. 89 of 1994 for eviction of said Nalini Gopal Banerjee from the suit flat. The defendant no.2 namely Chetla Co-operative Housing Society Ltd. and the defendant no.4 contested the said suit being T.S 17 of 1992 by filing the written statement and also participated in the trial. The defendant no. 1 filed separate Written Statement but ultimately she did not appear and the suit proceeded exparte against her. In the said later suit i.e. Title Suit no. 89 of 1994, plaintiff Sourav Chowdhury specifically pleaded that there is no agreement for transfer of the said flat in favour of plaintiff of the earlier suit at any point of time and no earnest money whatsoever was paid by the plaintiff to the defendant in respect of the said suit flat.

4. Both the said suits were heard analogously by the Trial court and were disposed of by a common judgment and decree dated 20.12.1996 wherein the later suit being Title Suit No. 89 of 1994 filed by Sourav Chowdhury was decreed by directing Nalini Gopal Banerjee to vacate the suit Premises within three months from the said order. Trial Court was further pleased to dismiss the earlier suit for specific performance of contract filed by Nalini Gopal Banerjee being Title Suit no. 17 of 1992.

5. The Trial Court came to a specific finding that there is no agreement in between the plaintiff and defendant no.1 or with the defendant no.2 for sell of the said flat. It was further observed, even if it is assumed that there was any oral agreement between the parties, even in that case the plaintiff failed to prove that any consideration money was paid by him and therefore, such oral agreement is void because of non-payment of consideration money in view of section 25 of the Indian Contract Act.

6. Being aggrieved by the said judgment and order dated 20.12.1996 passed by the Trial Court, said Nalini Gopal Banerjee preferred two separate Appeals being Title Appeal No. 98 of 1997 arising out of Title Suit No. 89 of 1994 and Title Appeal No. 99 of 1997 arising out of Title Suit No. 17 of 1992 and both the Appeals were disposed of by a common judgment and order dated 26.09.1997 by the learned judge, Special Court, Alipore. The first Appellate Court was pleased to set aside the judgment and order dated 20.12.1996 passed by Trial court and decreed the suit filed by Nalini Gopal Banerjee and was further pleased to dismiss the suit filed by Sourav Chowdhury/appellant herein.

7. Being aggrieved by the judgment and decree passed by the first Appellate Court the present second appeal has been preferred by appellant Sourav Chowdhury contending that the First Appellate Court without considering the evidence on record, came to a finding that there was an oral agreement of sale in between Nalini Gopal Banerjee and Manju Banerjee and Chetla Co-operative Society. The court below further recorded that said plaintiff had paid a sum of Rs. 30,000/- to the society and the balance amount was not paid by him. The first appellate court i.e. the court below on the basis of Presumption recorded that since Sourav Chowdhury's father had examined all the papers, therefore, he had knowledge that there was subsistence of a contract of sale between the Cooperative Society and Manju Banerjee in one side and Nalini Gopal Banerjee on the other side and thus the purchase of suit property by Sourav Chowdhury was not a valid purchase and he further erred in observing, since Nalini Gopal Banerjee was in possession by Smt. Manju Banerjee, he cannot be ousted from the said

flat by decree of eviction without referring any provision of law. First Appellate Court further observed that said Nalini Gopal Banerjee was not a member of co-operative society and there is absence of sanction in his favour either by the Registrar of the co-operative societies or by the society itself but such technicalities cannot be a bar for passing of a decree for specific performance of sale, which finding is perverse one.

8. It has further been further argued by Mr. Bandypodhyay on behalf of the Appellant that the dispute as sought to be raised by Nalini Gopal Banerjee in his suit for specific Performance squarely comes within the purview of section 95(1) (b) of the West Bengal Co-operative Societies Act 1983 and thus the jurisdiction of civil court to entertain the suit of Nalini Gopal Banerjee was barred by section 134 (2) (d) of the said act of 1983 read with section 9 of the Code of Civil Procedure. In such view of the matter the aforesaid Title Suit No. 17 of 1992 filed by Nalini Gopal Banerjee was not maintainable before the civil court and trial court ought not to have entertained said suit and the order impugned passed by First Appellate Court is a nullity and liable to be set aside. In this context appellant relied upon following judgments:-

(i) ***Habron Co-operative Housing Society Limited Vs Meenakshiben Anantkumar Macwan and Another*** reported in **AIR 2002 Gujrat 163.**

(ii) ***Deccan Merchants co-operative Bank Ltd Vs Dalichand Jugraj Jain and others*** reported in **AIR 1969 SC 1320.**

(iii) **Hanuman Meena Vs Chandra Singh** reported in **AIR 2007 Raj 76.**

(iv) **Shyamal Yadev and Ors. Vs. Kusum Dhawan** reported in **(1979) 4 SCC 143.**

9. Mr. Dasgupta on behalf of Respondents contended that there was an oral agreement with Manju Banerjee and the Society for the sale of the suit flat and the plaintiff had paid the consideration price to the cooperative society as Manju was unable to pay off the loan to the society against consideration price. The Co-operative Society had taken a resolution to transfer the flat in favour of the plaintiff. The plaintiff had been given proposals for purchasing the flat and he accepted the same and accordingly possession was handed over to the plaintiff. The respondents specifically contended that in the evidence of defendant no. 2, he has stated that as a secretary he sent a letter to the plaintiff asking him whether he was willing to purchase the said flat and the plaintiff gave reply to that effect that he was willing to purchase the same. In cross examination said defendant no.2 stated that there was a resolution adopted by the Managing committee for offering of the said disputed flat to the plaintiff and he cannot remember whether such resolution was cancelled by any subsequent resolution. Furthermore the father of appellant Sourav Chowdhury stated in his cross examination that before purchase of the suit flat he negotiated with the cooperative society on behalf of his son. Before the trial court the letter dated 25.05.1988 written by the secretary of defendant no.2/cooperative society to Nalini Gopal Banerjee stating that the defendant no.1 Manju Banerjee expressed her willingness to dispose of her

flat. Exhibit 2 is the letter written by Nalini Gopal Banerjee addressed to defendant no.2/ Society stating his willingness to purchase the said flat and exhibit 4 is the counter foil of the cheque book. In fact learned Trial Court proceeded on the presumption that the defendant no.1 was the owner of the suit flat, and he can only enter into an agreement with the plaintiff and the society was nothing but a consenting party and trial court further erred in holding that exhibit 1 and 2 do not prove that plaintiff entered into an agreement with the defendant no.1 or with defendant no. 2. Learned first Appellate Court has come to a conclusion based on evidence on record that there was an oral agreement and consideration was paid for the same. Even if assuming not admitting that the issue of possession was decided incorrectly, it does not affect the merit of the case and the Respondent herein is entitled to specific performance of such contract.

10. Respondents further contended that the appellant is practically seeking a retrial of the suits. There cannot be a roving enquiry into the facts and evidence of the suit in a Second Appeal. Referring the case of ***Bengal Secretariat Co-operative Land Mortgage Bank and Housing Society Ltd. Vs. Alope Kumar & Another*** reported in ***2022 SCC online SC 1404***, Mr. Dasgupta on behalf of respondents contended that once a person becomes a member of cooperative society, he loses his individuality with the society and he has no independent right except those given to him by the statute and by laws. The member has to speak through the society or rather the society alone can act and speaks for him qua the rights and duties of the society as a body. Accordingly, observation of the Trial Court that the society was nothing but a consenting party, is not sustainable in the eye of law. In

the present case admittedly there was a resolution adopted by the society and as such the society was duty bound to ensure that such resolution was given effect to. In this context he also relied upon section 72 and 82 of the West Bengal cooperative Societies Act 1983. Mr. Dasgupta further contended that the restriction on transfer is a restriction on the member and not on a purchaser. The member is obliged in obtaining the permission as per the bylaws. As such in the present context it was the obligation on the part of the defendant no.1/Manju Banerjee to obtain necessary permission for the sale/transfer in favour of plaintiff in the present suit. There is nothing to indicate that the appellant Sourav Chowdhury had obtained necessary permission. In this context he on behalf of respondents further contended that oral contract cannot be said to be without any consideration as out of total consideration of Rs. 60,000/-, half of the amount has already been paid and as such section 25 of the contract Act would not attract in the present context. The term “consideration” does not indicate that there has to be any advance payment of money or earnest money. A promise to pay would also be a consideration. In this present context, evidently the defendant no.1 Manju Banerjee failed to pay the money due to the society, which the plaintiff undertook to pay and had in fact paid in part, howsoever, small that amount may be. The appellant herein cannot urge that one of the suits was maintainable before the civil court and the other was not. When the present Appellant did not object to a joint trial before the Trial court then they are estopped from challenging the jurisdiction and if at the common judgment is to be set aside, it is to be set aside as a whole and consequently decrees passed in both the suits have to be set aside. In this

context he also relied upon **Anjan Choudhury vs. Anandaneer Co-operative Registered Housing Society** reported in AIR 1990 Cal 380.

Accordingly the respondents have prayed for dismissal of the present appeal.

11. Both the parties submitted that in view of order dated 03.04.1998 the appeal will be heard on 31 grounds taken in the Memo of Appeal. Now on synchronizing the above grounds, in this appeal following grounds need to be answered:-

- (i) Whether the learned First Appellate Court erred in law in holding, in one hand that there was only an oral agreement for sale of the suit flat while on the other hand holding that the possession of the flat was given by defendant no.1/ Appellant No.1 to the plaintiff/respondent in 1976 as part performance of the agreement, without considering that under section 33A of the Transfer of Property Act, part performance by way of delivery of possession is possible only in respect of written agreement.*
- (ii) Whether the First appellate Court misconstrued the fact that, the possession of the flat was taken by Mr. N.G. Banerjee under the authority of Manju Banerjee on her behalf and not on the basis of any alleged oral contract for sale and therefore whether the Learned First Appellate Court erred in law in co-relating such transfer of possession as being part performance of the alleged oral agreement for sale.*
- (iii) Whether the court below failed to consider that letter dated 25.5.1988 i.e. Exhibit No.1 cannot be construed to be a valid offer for sale of the said flat, as it does not contain the terms of offer with understandable clarity and the flat having been allotted to Manju Banerjee, the Defendant/ the Society has no right to offer for sale of Manju Banerjee's flat to any party.*
- (iv) Whether according to West Bengal co-operative Societies Act, 1983, once a flat is allotted in favour of a member, the member is vested with ownership in respect of the flat in question and as such, the society cannot have any right and/or authority to sell or even to offer for sale of such flat.*
- (v) Whether in case of an oral agreement of 1976 (as made out in the plaint) the court below should have held the suit to be barred by limitation as the suit was filed in 1992.*
- (vi) Whether there being a definite manner of and method by which the transfer of a flat in a co-operative Housing Society could be effected, under the West Bengal co-operative societies Act, 1983, any agreement in violation thereof is void and not enforceable at all.*
- (vii) Whether the Learned Court of Appeal below erred in law in not holding that the relief as prayed for the specific performance of an alleged oral agreement for sale cannot be afforded to the plaintiff/respondent in exercise*

of the discretionary power of the court, as contemplated under section 20 of the Specific Relief Act, 1963. Evidences on record warrants no such exercise of discretionary power of the Learned Court of Appeal below:

(viii) *Whether the First Appellate Court erred in law in holding that the concerned society has given an offer to N.G. Banerjee and further in holding the consideration money was fixed at Rs.60,000/- out of which N.G. Banerjee has paid Rs.30,000/- to the concerned co-operative society without any materials and or evidence on record.*

(ix) *Whether Court below erred in not considering that the correspondences made by and between the Co-operative society with the plaintiff/respondent and the contents thereof does not and cannot be construed to conclude a contract for sale of flat by the allottee-member (Manju Banerjee-defendant/appellant no.1) of her flat.*

Additional substantial question of law heard under section 100 (5) of the

Code of Civil Procedure:-

(x) *Whether in view of the fact that the dispute raised by N.G.Banerjee squarely comes within the purview of section 95 (1) (b) of the West Bengal Co-Operative Societies Act 1983, jurisdiction of civil court to entertain the suit of N.G.Banerjee was barred by section 134 (2) (d) of the said act of 1983 read with section 9 of the Code of Civil Procedure 1908.*

DECISIONS WITH REASON

12. After synchronising the grounds stated in the memo of appeal, let me discuss the substantial questions of law, involved in both the appeals. It is not in dispute that the plaintiff of Title Suit No. 17 of 1992, Mr. N.G. Banerjee has filed the suit seeking relief under section 53A of the Transfer of Property Act. The essentials of section 53A are as follows

- (i)** The contract to transfer immovable property
- (ii)** The transfer should be for consideration
- (iii)** The contract must be in writing
- (iv)** It should be signed on behalf of the transferor
- (v)** The terms of contract should be ascertained with the reasonable certainty from the writing

(vi) The transferee has taken possession of the whole or part of the property or if already in possession continues in possession.

(vii) Such taking of or continuance in possession should be in part performance of the contract

(viii) The transferee has done some act in furtherance of the contract

(ix) He should have performed or is willing to perform his part of the contract.

13. In such view of the matter let me discuss the aforesaid essentials in the context of the present appeal. It is not in dispute that in the present case there is no written contract in between the parties and plaintiff of T.S 17 of 1992 has also admitted the same in his evidence. Accordingly whatever claim has been made by plaintiff is on the basis of oral agreement for sale of the said flat and that the possession of the flat was given by defendant no. 1 /appellant no. 1 to the plaintiff respondent in 1976 claiming as a part performance of the agreement. From exhibit 1 it is submitted that possession of the flat was taken by aforesaid plaintiff Mr. N.G. Banerjee under the authority of the Manju Banerjee on her behalf and not on the basis of any alleged oral contract for sale. It is needless to say that in every contract for sale there must be a valid offer. The letter dated 25.05.1988 which is marked as exhibit 1 can hardly be construed to be a valid offer for sale for the said flat because it does not contain the terms of offer with understandable clarity. Furthermore the suit flat admittedly allotted to defendant no. 1/ Manu Banerjee and as such the Society cannot

have exclusive right whatsoever to offer for sale of flat allotted to Manju Banerjee to any Third party in the absence of any tripartite agreement and flat being transferable in the hands of allottee member, the society can only give approval. Section 82 of the West Bengal Co-operative Societies Act 1983(herein after called as Act of 1993) specifies in subsection (a) as follows:-

82(a): a member of a co-operative society, the object of which is the reclamation and colonization of land or the acquisition of land and the leasing thereof to its members, shall not be entitled to transfer his possession of, or interest in, any land held by him under the co-operative society except to the co-operative society or with its previous approval in accordance with its by-laws, to a member thereof.

14. In view of the aforesaid specific provisions it is clear that transferring authority is certainly the member to whom the flat has been allotted but of course subject to previous approval of the co-operative society. Once a flat is allotted in favour of a member the members is vested with right in respect of flat in question and as such the society alone cannot have any right to made any offer for sale of such flat and as such the letter dated 25.05.1998 marked as exhibit-1 cannot be construed in law to be a valid offer by the society in respect of suit flat to plaintiff N.G. Banerjee, specially when the oral agreement has not been proved and there is no evidence that any amount of alleged consideration price was paid to said Manju Banerjee. In fact the letter dated 22.06.1976 written by Manju Banerjee and marked as exhibit A and letter dated 25.05.1988 marked as exhibit 1 written by the Society to N.G. Banerjee and the letter dated 03.06.1988 (exhibit-2) written by N.G. Banerjee to the society and exhibit B which is letter dated 10.08.1988 written by the society to N.G. Banerjee do not constitute the

intention of the alleged oral agreement for sale of suit flat, since Manju Banerjee/allotee of the flat in any of these letters made alleged offer for sale.

15. Section 142 of the West Bengal Co-operative Rules 1987 clearly laid down act of transfer and letting out by member of a Co-Operative Housing Society. Such rule provides that in all cases of transfer and letting out of land house or apartment, prior permission of the Registrar shall be obtained in addition to written consent of the society. Sub-section (3) and subsection (2) of section 142 makes detailed provision in this regard. In the present case there is nothing to show that for such offer and/or for such contract, prior consent of the Registrar of the Co-Operative Societies and/or the society, which are condition precedent for sustaining the alleged oral agreement as agreement for transfer of a flat in a co-operative society, was at all obtained. In fact the receipt dated 12.03.1978 marked as exhibit 3 relates to transaction of loan for the year of 1978, which indicates the fact that the loan transaction took place long after taking over of the possession of the flat and much before the alleged offer by the society and therefore exhibit 3 cannot be construed to be the payment on account of part payment against alleged oral agreement. Even if for the sake of argument if it is presumed that there was any oral agreement entered in 1976, then why before the filing of the suit, the parties were silent, which indicates that there was no concluded contract between the parties and there was no intention of the parties to conclude any agreement. The co-operative Societies Act does not suggest that on behalf of the co-operative society or on the basis of approval given by co-operative society, which is a registered

body co-operative can make oral agreement. When there is nothing to show that the allottee member Manju Banerjee agreed with any third party and when plaintiff N.G Banerjee is admittedly not a member of the society and when there was no tripartite agreement by and between the parties, the society alone in violation of the Co-Operative Societies Rules cannot make any valid offer to transfer to Mr. N.G. Banerjee. When there is definite manner and method by which the transfer of a flat in a Co-Operative Housing Society could be effected under the Act of 1983, any agreement in violation thereof is void and not enforceable at all in as much as from the averments in the plaint and also from the oral testimony it remains undisputed that there was no tripartite agreement at any point of time. On the contrary the evidence shows which includes exhibit A, which is letter dated 22.06.1976 that Manju Banerjee who was the allottee member of the Co-Operative Society and in whose favour the suit flat was allotted, authorized the plaintiff/respondent to take delivery of possession of the flat on her behalf from the co-operative society and therefore Mr. N.G. Banerjee took delivery of possession of the said flat not on the basis of any independent individual right but as an agent of defendant no. 1/Manju Banerjee and as such there was no part performance of the alleged oral agreement for sale of the suit flat. It is not understandable how the court below came to a finding that oral agreement between Manju Banerjee and N.G. Banerjee is subsisting in the absence of any kind of oral or documentary evidence and I am constrained to say that such finding of the court below is based on no evidence, necessary to prove the subsistence of oral agreement for sale of a flat. The court below ought to have considered

that the plaintiff/ N.G. Banerjee could not even prove that defendant no. 1/ Manju Banerjee made any offer for sale of the suit flat to the plaintiff. Hence offer made by the co-operative society/defendant no. 2 and the acceptance thereof by N.G. Banerjee cannot give birth to a concluding contract between N.G. Banerjee and Manju Banerjee, when admittedly Manju Banerjee is the allottee member of the suit flat. In fact the acceptance letter dated 03.06.1988 upon which the plaintiff has heavily relied upon, is no acceptance in the eye of law, since the same was not absolute and unqualified. In fact on plain reading of the plaint and the evidence it is apparent that the alleged oral agreement, if any, cannot be enforced in any court of law in view of its vagueness and uncertainty in as much as such uncertainty renders a contract void ab initio. There is no material as to when and how the said contract was concluded and as such it is barred under section 53A of the T.P. Act 1882. This is also because in the plaint there is no whisper as to when such agreement was made and there has been no proof or evidence of the date and time when such agreement was made and there was no evidence of any person, in whose presence such agreement was made and no corroborative witness deposed in support of such statement made in the plaint. It is also not understandable in the absence of any evidence as to when and how the consideration money was fixed at Rs. 60,000/-. Learned court below held that out of Rs. 60,000/-, Mr. N.G. Banerjee has paid 30,000 to the concerned co-operative society but such payment is not supported by any material and/or evidence on record in as much as, not even a scrap of evidence has been produced in support of alleged payment of Rs. 30,000/-

to the society except exhibit 3, which is a receipt granted by the society to Manju Banerjee, on account of repayment of loan and the receipt above the acknowledgement by the society for a sum of Rs. 676.60/-. Learned court below did not consider that the alleged oral agreement has been denied and payment of consideration money has also not been proved. Even the alleged payment of Rs. 4,500/- by cheque to the husband of Smt. Manju Banerjee was shown to be a payment on account of loan. In fact the correspondence made by and between co-operative society and the plaintiff N.G. Banerjee and the contents thereof can hardly construed a concluded contract for sale of flat by the allottee member Manju Banerjee and at best such correspondence can be called as an attempt of negotiation, specially when there is nothing to show that Manju Banerjee had any consent in respect of said correspondence. The court below ought not to have been passed the decree in favour of plaintiff N.G. Banerjee, when he has failed to prove plaint case regarding oral contract and payment of consideration money, though burden heavily lies upon him under section 101 of the Evidence Act. On the contrary the plaintiff has clearly admitted in his cross examination that there was no written agreement between the parties and he has not paid any amount to Manju Banerjee who is the owner of the flat. The court though recorded that N.G. Banerjee was not a member of the co-operative society and there was no sanction in his favour either by the registrar of the co-operative Societies or by the society itself but erroneously came to the conclusion that such technicalities cannot be a bar for passing of a decree for specific performance of sale inspite of the fact that rule 142 of the West Bengal co-operative Societies rule 1987 only permits transfer of

flat with the permission of Registrar of co-operative Societies. The court below was not justified in coming to a finding that there was an oral agreement for sale of the flat and in view of the fact that admittedly there was no agreement for sale in writing in favour of plaintiff and as such the plaintiff could not have any protection under law as against *bonafide* purchaser since the protection under section 53A of Act of 1882 can only be available when there is an agreement in writing and the court below was absolutely erred in setting aside the purchase deed of defendant no. 4, Saurav Chowdhury, who is appellant, herein without the protection under section 53A of the Transfer of Property Act, which was not available to the plaintiff. Court below awarded the decree of specific performance of contract after coming to a finding that the plaintiff has paid a sum of Rs. 30,000/- to the defendant no. 1 by the defendant no. 2, whereas no such claim was made by the plaintiff in his plaint and on the contrary he had claimed that he has paid sum of Rs. 49,949.20/-. Accordingly the court below ought not to have passed a decree of specific performance when undisputedly the sale of suit flat was made by registered deed of conveyance prior to the filing of the suit by said N.G. Banerjee and there was no evidence which could have conclusively proved that the appellant Saurav Chowdhury had prior knowledge of alleged oral agreement, if any, between the parties.

16. There is other aspect of the matter also Even if one can assume that there was an oral agreement in 1976 as made out in the plaint, then how the suit can be treated as maintainable which was filed in the year of 1992 and when said N.G. Banerjee had admitted in his deposition in chief that

he never made any demand for specific performance for alleged oral agreement for sale and as such the suit which was filed after 16 years of alleged agreement for sale is hopelessly barred by limitation and as such passing decree for specific performance of contract in favour of N.G. Banerjee cannot arise, which the court below failed to consider.

17. Section 20 of the Special Relief Act 1963 provides discretion of the court to grant decree for specific performance of contract. Though such discretion is not arbitrary but it must be exercised with sound judicial principles. When the terms of contract are unspecified and the contract even if exists is admittedly oral agreement for sale such agreement cannot be afforded to plaintiff N.G. Banerjee in exercise of the discretionary power of the court particularly when evidence on record do not justify to such exercise of discretionary power of the first Appellate Court i.e. the court below in view of clear admission made by N.G. Banerjee in his cross examination that there was no agreement between himself and said defendant no. 1 for selling the flat in question and that defendant no. 1 Manju Banerjee never received any money personally from plaintiff in respect of the suit flat and that Manju Banerjee never wrote any letter to him asking to pay money for disputed flat to the society. The court below ought to have held that relief as prayed for by the plaintiff for specific performance of the alleged oral agreement for sale cannot be afforded to the plaintiff respondents in exercise of the discretionary power of the court as contemplated under section 20 of the Specific Relief Act 1963 for granting such relief particularly when evidence on record does not justify such

exercise of discretionary power of the court below and circumstances do not justify exercise of such discretion.

18. Then comes the question as to whether dispute as sought to be raised by N.G. Banerjee in his suit for specific performance and which was filed in 1992 squarely comes within the purview of section 95(1) (b) of the West Bengal Co-operative Societies Act 1983. Chapter XI of the Act of 1983 deals with the settlement of dispute and section 95 clearly provides that in case of dispute concerning the business of the co-operative society capable of being the subject of civil litigation shall be referred to the Registrar, if the parties thereto are among the member or a person claiming the he member of co-operative society. In the present suit plaintiff N.G. Banerjee claimed his right which is subject of civil litigation through Manju Banerjee who is a member of the co-operative Society and as such section 95(1) (b) squarely attracts in the present case. Section 134 of the said Act provides no civil court or Revenue court shall have jurisdiction in regard to anything done or any action taken or any order passed under this Act in regard to any dispute required to be referred to the Registrar under section 95 of the Act. Section 9 of the Civil Procedure Code specifically provides that the courts shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either exclusively or impliedly barred. Since in view of the section 134 (2) (d) read with section 95 of the Act of 1983 clearly bars suits before the civil court, the suit filed by N.G. Banerjee being Title Suit No. 17 of 1992 is also barred under section 9 of the code of Civil Procedure and as such the said suit is not maintainable before the civil court and the decree passed by the court below is a nullity and is liable to be set aside.

19. Since N.G. Banerjee's suit for specific performance of contract is liable to be dismissed and in the absence of his any kind of right to stay in the suit property, he must be held to be a trespasser in respect of the property in question and as such plaintiff Saurav Chowdhury of Title Suit No. 89 of 1994 is entitled to get decree for eviction of N.G. Banerjee from the suit flat.

20. In view of above, S.A 312 of 1999 and S.A 313 of 1999 are allowed. The judgment and decree passed in Title Appeal No. 98 of 1997 and 99 of 1997 are hereby set aside. Title Suit No. 17 of 1992 held to be not maintainable and liable to be dismissed, and as such judgment and decree passed by Trial Court on 20th December 1996 in Title Suit No. 89 of 1994 and Title Suit no 17 of 1992 is hereby affirmed.

21. Department is directed to send the Lower Court record at once.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J)