

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

BEFORE:

**The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Uday Kumar**

**FA 344 of 2014
with
I.A No. CAN 7 of 2023
Sona Majumdar
Vs.
Kishorilal Agarwal & Anr.**

For the Appellants	: Mr. Jayanta Kumar Mitra, Sr. Adv Mr. Debnath Ghosh, Adv. Mr. Ritzu Ghosal, Adv. Mr. Arnab Chakraborty, Adv. Mr. Sukalyan Chakraborty, Adv. Mr. Santanu Chatterjee, Adv. Mr. Biswaroop Mukherjee, Adv.
For the Respondent No.1	: Mr. Malay Ghosh, Sr. Adv Mr. Sakya Sen, Adv. Mr. Rajib Mullick, Adv. Ms. Sormi Dutta, Adv. Mr. Rakesh Sarkar, Adv.
For the Respondent No.2	: Mr. Rupak Ghosh, Adv. Mr. Shounak Mitra, Adv. Mr. Zulfiqar Ali Al Quaderi, Adv.
Hearing concluded on	: 28 th February, 2023
Judgment dated	: 31 st March, 2023

Soumen Sen, J: The appeal is arising out of a judgment and decree dated 30th July, 2014 passed by the Civil Judge (Sr. Div.), Siliguri in a suit for Specific performance of contract.

The appellant claims to be the purchaser of the property in question.

The grievance of the appellant is that the impugned decree was passed disregarding her claim of a prior agreement for sale culminated in a registered deed of conveyance along with delivery of possession of the suit property in her favour. In any event she is a bona fide purchaser for value without notice.

The respondent no.1 is the decree holder.

The respondent no.2 is the vendor.

Briefly stated, the plaintiff Kishorilal Agarwal (hereinafter referred to as 'Kishorilal') alleged to have entered into an oral agreement for sale with Homco Engineering Works Private Limited (hereinafter referred to as 'Homco') on 21st December, 2002 for purchasing the suit property at a sum of Rs.1.25 crores.

In the said transaction one Shri Kamal Kumar Baid and Pulak Chowdhury acted as brokers. Before the agreement the property was jointly inspected and verified by Kishorilal and Partha Dey one of the directors of Homco. Kishorilal alleged to have paid a sum of Rs.10 lacs to Homco towards earnest money. It was mutually agreed that a draft copy of the agreement would be sent to Homco in order to enable it to verify and finalise it and thereafter to forward the said agreement to the plaintiff to facilitate and prepare the final deed of conveyance for execution. The plaintiff in pursuance of such alleged oral agreement forwarded a draft copy of the agreement along with a sum of Rs.2 lacs followed by a further sum of Rs.3 lacs. On receipt of the said sum of Rs.3 lacs Homco forwarded

the draft copy of the agreement which was finalized and settled at the chamber of Mr. S. Ganguly, Advocate at Kolkata in presence of Mr. Partha Dey of Homco, Kishorilal and the two brokers mentioned above. One Shri Ram Prasad Thakur was also present at the time of finalisation of the draft in the Chamber of Mr. S. Ganguly. Thereafter, Kishorilal sent the final copy of the said agreement and requested Homco to indicate the mode, manner and time of payment of the balance consideration amount. Homco accepted the aforesaid sums paid since 21st December, 2002 without any objection. It was alleged that in terms of the agreement the plaintiff was supposed to hand over the actual physical possession of the property in question upon payment of part consideration amount as mutually agreed between the parties, however, Homco was not responding to various requests and demands for execution of the final deed of conveyance. Kishorilal made enquiries and came to learn that Homco had taken advance from market and one M/s. Maonil Estate Private Limited (in short, Maonil) had filed a suit against Homco and others being Title Suit no. 49 of 2002 before the learned Civil Judge (Sr. Div.) Siliguri concerning the property in question. Plaintiff could further ascertain that Homco was habituated in taking advance from the market against properties. On a representation made by Partha allegedly in the morning of 21st February, 2003 that Maonil had agreed to settle the suit upon payment of Rs.10 lacs out of which Homco could arrange Rs.8 lacs and in order to bail out Homco, Kisorilal arranged for the balance amount of Rs.2 lacs and paid such amount in cash on 21st February, 2003 to Partha in presence of Ram

Prasad. Subsequently Kishorilal paid a sum of Rs.2.44 lacs by cheque in the name of Homco, however, the cheque was dishonoured on 7th February, 2003 for insufficient fund. On the basis of the assurance that Homco would sell the property in favour of the plaintiff, Kishorilal immediately paid a sum of Rs.2.44 lacs in cash on 10th February, 2003 in presence of Pulak and Ram Prasad and a further sum of Rs.6000/- to Shri P.D. Dalmia Advocate on the advice of Partha for preparation of the application for settlement to be filed in the suit filed by Maonil. The agreement for sale was prepared and handed over to Partha on 9th March, 2003 along with a further sum of Rs.5 lacs. The said amount was received by Partha from Sudip, the son of the plaintiff in presence of Shri Thakur a representative of the plaintiff. The plaintiff claims that in the aforesaid manner a sum of Rs.10 lacs was paid to Homco between 21st February, 2002 and 9th March, 2003 partly by cheque and partly by cash. On 4th April, 2003 the plaintiff came to know that Homco sold and transferred the property in favour of Smt. Sona Muzumdar (hereinafter referred to as 'Sona') the appellant herein at a consideration of Rs.76 lacs by a deed of conveyance being no. 349 dated 24th February, 2003. The said document was presented in the office of Additional District Sub-Registrar, Siliguri on 24th February, 2003. During enquiry Kishorilal came to know that Partha had signed on the deed of conveyance on behalf of the Homco. In view of such subsequent transfer Sona was made party in the suit. The plaintiff alleged that the cause of action of the suit arose on 21st December, 2002 when the agreement was executed and on dates when part considerations were paid,

that is, 24th January, 2003 and 21st February, 2003 respectively. In view of refusal by Homco to execute the sale deed in favour of Kishorilal, the plaintiff filed a suit for specific performance of contract being T.S. No.17 of 2003. In the suit the plaintiff, *inter alia*, had prayed for a decree for permanent injunction restraining Homco from transferring and/or completing the said deed. The plaintiff also prayed for other consequential reliefs.

Homco and Sona entered appearance and filed their respective written statement.

Homco in its written statement has denied existence of any agreement for sale between the plaintiff and defendant no.1 in relation to the property in question. Homco denied receipt of any amount towards sale consideration and alleged that the amounts alleged to have been paid and mentioned in the written statement were wholly unconnected with the sale transactions.

Sona in her written statement has stated that she is a bona fide purchaser of the suit property and denied existence of any agreement between Kishorilal and Homco. It is stated that on the basis of the agreement entire consideration amount was paid and Homco had put her in possession of the suit property.

In the additional written statement, she has stated that from the "Receipt and Memo of Consideration" of the sale deed it would appear that on 29th April, 2002, the defendant no.1 had agreed to sell the suit property

to the defendant no. 2 at a Rs.76 lacs only and received a sum of Rs.15 lacs by a demand draft no. 076440 dated 29th April, 2002 as earnest money. Thereafter, the balance consideration amount was received between 30th May, 2002 and 19th February, 2003 by demand drafts as clearly mentioned in the Memo of Consideration.

Consequent upon payment of the entire consideration amount the suit property was physically delivered on 3rd June, 2002 to Sona. It was further stated that prior to payment of the earnest money Sona had made enquiries about marketability of the property in question and being satisfied she agreed to purchase the suit property and paid the earnest money of Rs.15 lacs on 29th April, 2002. It was further stated that she had knowledge about the pending title suit being no. 49 of 2002 of Maonil instituted on 26th July, 2002 and her representative took part in the meeting held for settlement of the disputes between Maonil and the defendant No.1 and the settled amount of Rs.10 lacs was paid to the said Maonil directly by Soma on 21st February, 2003 vide demand draft no. 001465 dated 19.02.2003 drawn on Standard Chartered Bank. The compromise petition was filed in court on 23rd February, 2003 by Maonil and Homco in the said title suit no. 49 of 2002 and the suit was finally disposed of on 29th May, 2003.

On payment of the entire consideration amount to the defendant no.1 on 21st February, 2003 the defendant no. 1 executed and presented the sale deed for registration at Siliguri on commission before the Additional District Sub-Registrar, Siliguri and the registration was

completed on 29th June, 2005 after depositing deficit stamp duty. The Registration was duly recorded in Book no. I, Volume No. 31 at page 359 to 380 being no. 1061 for the year 2005.

Sona had denied existence of any agreement between Kishorilal and Homco at any point of time concerning the property in question.

On the basis of the pleadings the court framed four issues.

Kishorilal exhibited sixteen documents that were marked as Exhibits 1 to 16.

The defendants have produced five documents that were marked as Exhibits A to E.

The evidence of affidavit filed by Kishorilal is almost the replica of the plaint. Kishorilal during his cross examination has stated that there is no commercial transaction between the plaintiff and the defendant no.1 and he reiterated that there was an agreement in writing between the parties and a copy of the said agreement was sent to Homco for execution. Brokers were also produced as witness on behalf of Kishorilal to prove negotiation that had culminated in the alleged agreement. Partha in his evidence has denied existence of any agreement between Homco and Kishorilal and had stated that whatever money Homco had received was unconnected with the sale. Partha however, admitted the transaction between Homco and Sona and payment of Rs. 10 lacs directly to Maonil towards settlement of its dues.

The evidence on affidavit on behalf of Sona was filed by her husband Bhabesh.

Mr. Jayanta Kumar Mitra the learned Sr. Advocate appearing on behalf of the appellant has submitted that the learned Trial court has failed to appreciate that Kisorilal has failed to prove the agreement of which specific performance was ultimately granted. Mr. Mitra referred to various paragraphs of the plaint to demonstrate that the draft agreement which has been relied upon in the plaint could not have been prepared on 21st December, 2021.

The learned Senior Counsel has specifically referred to paragraph 1 to 4 of the plaint and submits that in paragraph 1 of the plaint the plaintiff alleged that “after inspection, verification and after considering the latest market valuation of the said property, as mentioned in the schedule hereinbelow, Kishorilal ascertained the valuation of the property at a sum of Rs.1,25,00,000/- and agreed to pay to Homco, the said sum on the basis of terms mutually agreed between the parties on 21st December, 2002.”

The plaintiff in furtherance of such mutually agreed terms prepared a draft agreement to be sent to the defendant no.1 for finalization and return.

The plaintiff claimed to have send draft copy of the agreement with Rs.2 lacs, and then sent further sum of Rs.3 lacs. According to the plaint, this draft copy of the agreement was finally settled in the chamber of Mr. S. Ganguly, Advocate, Kolkata.

In the examination in chief by way of affidavit evidence the plaintiff has reiterated his averments in the plaint and in support thereof tendered the alleged draft agreement marked as Exbt.1 and a copy of forwarding letter dated 21st February, 2002 marked as Exbt.2.

Mr. Mitra has submitted that from the tenor of the said letter, it would appear that the copy of the agreement sent along with the said letter was merely a draft agreement for sale, which defendant no. 1 was requested "to accept and settle the agreement for sale". In other words, the said alleged draft agreement required the approval of the defendant no. 1 to be finally settled at his end.

Significantly, the said letter dated 21st December, 2002 contained a promise and an assurance of the plaintiff that out of the total consideration of Rs.1.25 crores, Rs.50 lacs would be paid in the name of Howrah Motors and Another Rs.10 lacs would be paid in the name of the defendant no.1 and upon Xerox copies of the drafts of the above sums being made over to Partha Dey to defendant no. 1, he would hand over possession of the property in Siliguri.

However, the said letter is silent about the balance amount. This letter was followed by letter dated 24th January, 2003 wherefrom it would appear that a cheque dated 27th January, 2003 for a sum of Rs.3 lacs drawn on Corporation bank was sent to Homco towards part payment with a request to handover the agreement of 25th January, 2003 with an assurance that Kishorilal would pay the balance amount as per payment

schedule of the agreement. Mr. Mitra submits that the agreement annexed to the plaint refers to various payments that were made subsequent to 25th January, 2003 and accordingly the said agreement could not have been the agreement forwarded to Homco for finalization.

Mr. Mitra submits that even it is assumed that there is an agreement for sale between the plaintiff and the defendant no.1 the consideration amount of Rs.1.25 crores as recorded in the alleged agreement was predicated upon the fact that the plaintiff would buy the property free from encumbrances, charges, claims and liabilities. The failure to get the property free from the said security would disentitle the plaintiff from claiming specific performance.

Mr. Mitra submits that the pleading and the evidence of Kisorilal and other witnesses supporting Kishorilal would show there are three agreements. It is argued that if it is assumed that on 21st December, 2002 an oral agreement was entered into between the plaintiff and defendant no.1 followed by a draft agreement then the agreement relied upon by the plaintiff in the suit for specific performance could not be the final draft agreement. However, if it is contended that the said agreement is the final agreement then the draft agreement has not been produced during the trial.

Mr. Mitra has drawn our attention to the undated agreement alleged to have been forwarded by Kishorilal on 21st December, 2002 being Exbt.1 and the letter dated 24th January, 2003 being Exbt.2 to show that the said

agreement could not have been forwarded by the letter dated 21st December, 2002.

Mr. Mitra submits that in paragraph 3 and 4 of the plaint the plaintiff has alleged that in terms of the “aforesaid agreement” the plaintiff has sent final copy of the agreement and asked the defendant no. 1 to inform the plaintiff as to when and how the rest amount of consideration was to be remitted. The plaintiff alleged that the defendant no.1 did not respond to the draft copy of the agreement for sale even though the plaintiff was “keenly interested and willing to proceed” with the sale.

Mr. Mitra submits that even assuming this averment to be correct, the most relevant question arises as to where is this so-called final copy of the agreement, which has neither been disclosed in this proceedings, nor tendered in evidence. If there existed any such final copy of the agreement, it should have contained details of payment schedule and the obligation of the plaintiff to make payment in terms thereof. Significantly, nothing was brought on record, and the so called “final copy of the agreement” remained undisclosed to the Court.

It is submitted that by his own averment in the plaint and the evidence led by the plaintiff, Kishorilal has himself admitted that no final agreement for sale between the plaintiff and the defendant no. 1 came into existence at all. If the plaintiff's case as stated in paragraph 4 were taken to be correct, then the question arises of which agreement was the plaintiff asking for specific performance. According to the plaintiff the draft

agreement, being Exbt. 1 is not the agreement of which specific performance is being sought for, and the oral agreement pleaded in paragraph 4 cannot be the agreement since by the plaintiff's own showing the defendant no. 1 neither approved of it nor had shown any interest to approve and send the final draft copy. Partha on behalf of Homco has denied the existence of the said agreement. Even if it is assumed that Kishorilal had an agreement with Homco but his conduct would not show that he was ready and willing to perform his obligation under the agreement. It is submitted that Kishorilal had failed to explain as to whether Exbt.1 is a draft agreement of the final agreement. However, on the basis of the pleading it can be safely assumed that Exbt.1 is the agreement to which reference was made in the plaint and is clearly discernible from the letter dated 21st December, 2002 and 24th January, 2003 respectively.

The plaintiff did not lead any evidence to show its readiness and willingness to perform his obligation and on the contrary the plaintiff has alleged that the defendant no.1 did not show any interest in approving and sending the draft copy of the agreement to the plaintiff and/or to its advocate nor the defendant no.1 has advised the mode of further agreement.

Mr. Mitra has referred to Clause 9 of the agreement which recorded that a total sum of Rs.9.50 lacs have been paid to Homco between 21st December, 2002 and 21st February, 2003 and Clause 10 of the said agreement refers to a further sum of Rs.10 lacs to be paid to Howrah

Motors Company Ltd. by a cheque no.027307 dated 8th March, 2003 under the advice of Homco and from the total consideration amount Rs.50,000/- has been paid to the vendor on 8th March, 2003. Mr. Mitra submits that if the recitals truly reflected the transactions, then the draft agreement could not have been sent before 8th March, 2003 as the said amount was allegedly paid in cash on that date i.e. 8th March, 2003.

It is submitted that the said agreement in any event, is incomplete as it states in paragraphs 12 and 13 that a further sum of Rs.5 lakhs would be paid by KishorilLal to Howrah Motors or to its nominee M/s. golden Trust Financial Services Pvt. Ltd. as may be advised by the vendor and upon payment of a total sum of Rs.81 lakhs Homco would handover vacant possession of the property to Kishorilal. The agreement does not mention payment of the balance consideration amount or the period within which the said amount is to be paid.

Mr. Mitra refers to the evidence of Kishorilal and submits that according to KishorilLal original copy of the draft agreement of sale was forwarded by the letter dated 21st December, 2002. In cross-examination, Kishorilal has stated that the draft agreement was handed over to the defendant no.1 after payment of 2 lacs on 21st December, 2002 and the agreement filed along with the plaint is not that agreement.

The plaint does not refer to any other agreement other than Exbt.1 and according to the evidence of the plaintiff that Exbt.1 is the agreement forwarded under the cover of the letter dated 21st December, 2002.

Mr. Mitra submits that the draft copy of the agreement alleged to have been finalized in the chamber of Mr. S. Ganguly was not produced. Mr. Mitra submits that if Exbt. 1 is the draft agreement for sale sent along with the letter dated 21st December, 2002 then the plaintiff has come with a false case as the said so called agreement could not have been settled in the chamber of Mr. S. Ganguly, Advocate as the said alleged agreement record payments subsequent to 21st December, 2003. It is thus clear that the plaintiff has come to court claiming equitable relief of specific performance with unclean hands and a false case. Mr. Mitra submits that it is trite law that he who claims equity must come with clean hands. Mr. Mitra submits that a plaintiff seeking equitable relief of Specific performance with unclean hands has no legitimate right to seek the equitable remedy as held in ***Lourdu Mari David and Ors. v. Louis Chinnaya Arogiaswamy & Ors.***, reported in **1996 (5) SCC 589**(paragraphs 1 to 3)and ***Lalit Kumar Jain & Ors. v. Jaipur Traders Corporation Pvt. Ltd.***, reported in **2002 (5) SCC 383** (paragraph 14)

Mr. Mitra has submitted that the recital of the alleged draft agreement being Exbt.1 in the internal page 4 at page 294 of the Paper Book has referred to an alleged agreement for sale of the property at Rs.1.25 crores “free from all encumbrances, charges, claims and liabilities and with vacant possession”. Clause 1(b) of the said agreement at page 296 of the Paper Book records an encumbrance on the said property by way of mortgage for a sum of Rs.9,15,019.99 towards principal and interest that was due and payable by Homco to one Prafulla Nalini Seva Sangha.

Under Clause 1(n) the vendor was obliged to produce a certified copy of the return showing satisfaction of mortgage duly filed with the Registrar of Companies and also to produce receipt of payment of the dues of the said creditor for verification. Mr. Mitra submits that there is no evidence on record that the plaintiff did make any payment of the aforesaid sums to redeem the mortgage in order to make the property free from encumbrances. Mr. Mitra has submitted that one of the obligations of the vendor would be to provide funds to meet the various liabilities of Homco and the recitals in the agreement has clearly stated that Homco was in need of funds to meet its various liabilities and in order to discharge such liabilities had decided to sell and transfer the said property after obtaining vacant possession from Howrah Motor Company Private Limited and it was upon such negotiation the parties mutually arrived at Rs.1.25 crores as the consideration amount. Mr. Mitra submits that the plaintiff was unable to prove that he has paid any amount to discharge the mortgage or enable the defendant no.1 to pay off its debt to Maonil. Mr. Mitra submits that the sale is conditional upon the property being made free from all encumbrance and all liabilities discharged.

Mr. Mitra has submitted that specific performance cannot be granted in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform of essential terms of contract which has to be performed by him. The very fact that the plaintiff has failed to provide necessary fund to pay off the loan amount to make the property free from encumbrances is a clear evidence of Kishorlal's lack of

readiness and willingness to perform his part of the contract. It is submitted that if Kishorilal had inspected the properties as claimed then he must be aware of the existing encumbrances and liabilities and the existence of the suit filed by Maonil.

It is submitted that one of the essential features of an agreement of sale is the consideration amount. There are serious discrepancies with regard to the agreed amount as the agreement that was alleged to have been forwarded to Partha mentions agreed consideration of Rs.81 lacs whereas in the plaint it is mentioned that Rs.1.25 crores. Mr. Mitra has referred to the draft alleged agreement for sale and has submitted that from Clauses 11 to 14 it can be easily seen that the respondent no. 1 was not ready and willing to perform its obligation.

Mr. Mitra submits that there is sufficient evidence on record to hold that the respondent no.1 had failed to perform its obligation and in ***Telikicherla Sesibhushn (Dead) by Legal representatives v. Kalli Raja Rao (Dead) by Legal Representatives & Ors.***, reported in **2014(15) SCC 743** paragraphs 7 and 8 has recognized the principle that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. Mr. Mitra submits that since the pleadings manifest that the conduct of the plaintiff is not unblemished hence no decree could have been passed in favour of the plaintiff.

Mr. Mitra submits that the pleadings and the evidence if read together would clearly show that there is no concluded contract between the parties and it lacks mutuality.

It is submitted that the plaintiff has also failed to aver and prove that he was ready and willing to perform his obligation. In fact, save and except payment of a sum of Rs. 10 lakhs allegedly made between 21st December, 2002 and February 21, 2003 the plaintiff has not been able to demonstrate any other payment in terms of the alleged agreement save and except payment of a meager sum of Rs.50,000/- as claimed on 8th March, 2003. The plaintiff is required to demonstrate continuous readiness and willingness. In fact the plaintiff was impecunious as it would appear from the evidence that the cheque drawn by the plaintiff on 4th February, 2003 was returned by the bank with the remark "insufficient fund". All the payments would not show that it was paid to the respondent no.1 as it appears from the evidence that some payments were allegedly made to Howrah Motors at the instruction of Partha on behalf of the defendant no.1 which however Partha has denied.

Mr. Mitra submits that in any event and in any view of the matter the relief for specific performance in terms of Section 20 of the un-amended Specific Relief Act, 1963 is discretionary and the court is not bound to grant such relief merely because it is lawful to do so.

It is submitted that on consideration of the entirety of the pleadings, the plaintiff could not prove with certainty as to whether the so-called

contract of sale between the plaintiff and defendant no.1 was a concluded contract. The alleged oral agreement is uncertain and cannot be made certain, for which it cannot be specifically enforced in a court of law.

Mr. Mitra in this regard has relied upon Fry on Specific Performance 6th Edn.: Para 380 at Page 179.

The plaintiff having failed to prove the alleged contract between him and the defendant no.1, it is immaterial to examine the legality and validity of the sale of the suit property by the defendant no.1 to the defendant no.2 by the registered deed of sale dated 21st February, 2003.

The plaintiff in the instant case has failed to prove the agreement of which he is seeking specific performance. An oral agreement for sale, without anything more, is invisible in nature. The evidence of the Plaintiff in the instant case is sketchy and contradictory. The witnesses who have sought to support the Plaintiff's story have not been able to identify the so-called agreement. The plaintiff admittedly has not been in possession of the suit property at any point of time. The Division Bench of this Hon'ble Court in ***Sukumar Samanta & Ors. Vs. Sibdas Roy & Ors.***, reported at **2008(4) CHN 704** [paragraphs 17 and 18] has taken note of similar facts to negate the claim of the Plaintiff for specific performance of an agreement for sale.

Mr. Mitra submits that the subject property was a clean property at the time the appellant/defendant no.2 had entered into the agreement for purchase with the defendant no.1. The appellant is a bona fide purchaser

for value and such fact would be corroborated by the cross examination of the defendant no. 2 where the witness has averred that he was not aware of any purported agreement between the plaintiff and defendant no. 1 regarding sale of the suit property at a consideration of Rs.1,25,00,000/- prior to 29th April, 2002. There is no further cross examination based on this question which implies that the plaintiff had admitted and accepted the same.

Mr. Mitra submits that findings of the trial court on the issue with regard to validity of the so-called agreement between the plaintiff and the defendant no.1 and thereby negating the registered agreement between the appellant and the defendant no.1 is on a complete mis-appreciation of evidence and contrary to law.

Mr. Mitra submits that the averments made in the plaint would show that no case has been made out in the plaint or in the evidence of the plaintiff with regard to declaration that the deed of conveyance dated 21st February, 2003 was null and void. The learned trial Judge has failed to appreciate that the evidence led by the plaintiff was not in consonance with the pleadings and could not have relied upon or looked into such evidence at all in deciding the matter. The learned trial Judge did not frame any issue relating to a declaration that the deed of conveyance dated 21st February, 2003 is null and void. The learned trial Judge completely overlooked that the statement of accounts as well as the bank reconciliation statement of the appellant dated 29th April, 2003 which clearly shows the debit of Rs.15,00,000/- on 29th April, 2002 from the

account of the appellant in favour of the defendant no.1 It also clearly shows that the said payment was made in furtherance of a deed of sale.

Mr. Mitra submits that the learned trial Judge has failed to take into consideration that the appellant is not a signatory to a purported draft agreement allegedly executed between Homco and Kishorilal. The said agreement has not been signed by Homco, the main vendor in the agreement and is an unexecuted agreement. The reference to Golden Trust in the said unexecuted agreement could not have been construed by the learned Single Judge against the appellant. The appellant had knowledge of the purported agreement being a partner of Golden Trust. The plaintiff has deliberately not prayed for cancellation of the said deed dated 21st February, 2003 and neither any issue in relation to cancellation of the sale deed executed between the defendant no.1 and the defendant no.2 (the appellant) had been framed by the learned Single Judge. The suit is clearly barred under Section 22 of the Specific Relief Act.

The plaint does nowhere speak of the invalidity of the sale on the ground that such alienation in favour of the appellant was void because of the principles of the lis pendence under Section 52 of the Transfer of Property Act.

On such consideration it is submitted that the decision of the trial court declaring that the sale deed executed between Homco and Sona is null and void is without jurisdiction. Mr. Mitra in this regard has relied upon the decision of the Hon'ble Supreme Court in **Shivaji Balaram**

Haibatti v. Avinash Maruthi Pawar: 2018 (11) SCC 652, paragraph 26 and ***Jharkhand State Electricity Board v. Anirudh Sahu: 2018(18) SCC 330*** paragraph 6.

Mr. Mitra submits that the court could not have travelled beyond the pleadings and the evidence adduced and granted relief to the decree holder by declaring that the sale deed executed between the defendant no.1 and defendant no.2 is null and void. Mr. Mitra submits that no decree can be passed in favour of the plaintiff. It is the fundamental rule in civil suit that relief can only be granted with respect to the prayers in the pleadings. No amount of evidence on a plea that is not based on the pleadings can be looked into by way of evidence.

The Deed of Sale of the suit property in favour of Defendant no.2 was registered, and the registration was completed on June 29, 2005. It is submitted that in terms of Section 54 of the Transfer of Property Act, 1882, sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. Under Section 47 of the Registration Act, once registration is effected, the title under the sale deed relates back to the date of its execution. Hence, though the registration in the instant case was completed on June 29, 2005, the Transferee's title under the said deed related back to the date of its execution i.e. February, 21, 2003 as clearly held in ***Hamda Ammal Vs. Avadiappa Pathar & Ors.***, reported in **1991(1) SCC 715 @ 721** paragraphs 9 and 12) and ***Principal Secretary, Government of Karnataka & Ors., Vs. Ragini Narayan & Ors.***, reported in **2016(10) SCC 424 @ 429-430** paragraphs 13 to 15).

Mr. Mitra submits that the plaintiff having failed to prove the alleged agreement for sale is not entitled to a decree for specific performance and accordingly the decree is liable to be set aside.

Per contra Mr. Maloy Ghosh the learned Advocate representing the decree holder has submitted that the plaintiff has filed the suit for specific performance on the basis of an oral agreement duly recorded in the letter dated 21st December, 2002 which mentions the following agreed terms:

- i) Consideration for sale was Rs.1.25 crores.
- ii) Out of the total consideration of Rs.1.25 crores a draft amounting to Rs. 10 lacs would be issued in the name of Homco Engineering Works (Pvt.) Ltd. (Defendant No.1) and another draft of Rs.50 lacs would be issued in the name of Howrah Motors Company.
- iii) After receiving Rs.60 lacs the defendant no.1 would hand over possession of the suit property.
- iv) The balance consideration amount would be paid in cash or cheque at the time of registration of the sale deed.
- v) The proof of oral agreement was duly recorded in the letter dated 21st December, 2002 was duly briefed by the plaintiff to the appellant defendant.1.

Mr. Ghosh submits that Kishorilal in his evidence has clearly stated the circumstances in which the oral agreement came into existence. Mr. Ghosh has referred to paragraph 2, 4, 7, 8 and 9 of the affidavit of evidence of Kishorilal in this regard.

Kishorilal during his cross-examination has duly controverted that no oral agreement was entered into and in proof of such oral agreement had produced two witnesses namely Mr. Baid and Pulak who were present at the time of negotiation and in whose presence the parties had agreed on the terms mentioned above.

Mr. Ghosh submits that the essential terms of the agreement mentioned in the letter dated 21st December, 2002 is proved by the plaintiff and the two other witnesses namely Baid and Pulak. The said two witnesses in their chief has deposed regarding the existence of an oral agreement between the plaintiff and the defendant no.1 for sale of the property in question and also the circumstances in which the oral agreement has been entered into between the parties. The evidence of PW2 and PW3 would corroborate with the evidence of PW1 with regard to the existence of the oral agreement. They have also during their cross-examination indicated in detail their role in the negotiation and their participation in the dealings leading to the contract for sale of the suit property between the plaintiff and the defendant no.1.

Mr. Ghosh submits that the oral agreement as pleaded by the plaintiff was acted upon by the parties which would be evident from the payment schedule indicated below:

DATE	MODE	AMOUNT
21.12.2002	Cheque No. 32539 on Corporation bank, Kolkata in favour of Defendant	1,00,000

	no.1	
21.12.2002	Cheque No.32592 on Corporation Bank, Kolkata in favour of Howrah Motor Co. Ltd.	1,00,000
2.2.2003	Cash	6000
8.2.2003	Cash	2,44,000
24.1.2003	Cheque no.52596 on Corporation Bank	3,00,000
21.2.2003	Cash	2,00,000
9.3.2003	Cash	50,000

The said payments have not been disputed by the Homco. It would thus, appear from the aforesaid schedule that as on 9th March, 2003 an aggregate sum of Rs.10,00,000 was paid by the plaintiff to the defendant no.1 on several dates as mentioned above.

The first draft of the agreement proposed to be entered into was made over under cover of letter dated 21st December, 2002. The draft agreement was marked as Exhibit 1 through PW1. The handing over of the draft agreement to the defendant no.1 in the chamber of the Advocate in presence of PW2 and PW3 was also confirmed in the cross examination by PW1. Even PW2 and PW3 in their affidavit in chief duly confirmed the fact of draft agreement being handed over. The same was also stated in cross examination by PW2 and PW3.

The readiness and willingness on the part of the plaintiff is manifest from the payment schedule. At regular intervals the plaintiff tendered

payment to the defendant no.1 in the mode agreed. The defendant no.1 has never complained regarding any delay or breach on the part of the plaintiff to make payment as promised. The readiness and willingness of the plaintiff would further be confirmed from the fact that immediately upon passing of the decree the plaintiff deposited the balance consideration amount.

Mr. Ghosh submits that the materials on record would reveal that the defendant no.1 committed breach of the oral agreement by purporting to execute a deed of sale with the appellant on 21st February, 2003. It is important to note that at the relevant time when the purported deed in favour of the defendant no.2 was alleged to have been executed it had no legal existence and/or validity in the eye of law as it was not registered under the provisions of the Registration Act.

Mr. Ghosh submits that in view of Section 54 of the Transfer of Property Act, 1882 sale of immovable property and value about Rs.100/- can only be by a registered instrument and it becomes complete and effective only when it stands registered and hence the fiction of relation back of registered document to the date of its execution created by Section 47 of the Registration Act, 1948 would not be applicable to a deed of sale of immovable property before its actual registration.

Mr. Ghosh submits that since the said agreement for sale is *void ab initio* there is no requirement to file a suit for cancellation of the said agreement.

Mr. Ghosh submits that in the written statement the appellant has professed to be the bona fide purchaser of the property and has got physical possession of the same. The appellant alleged to have paid a sum of Rs.15,00,000/- on 29th April, 2002 and the last payment on 19th February, 2003 and thereafter on the same date a sale deed was executed between the appellant and the defendant no.1 and was presented for registration on commission in Siliguri before the Additional Sub-Registrar Siliguri. The registration was completed on 29th June, 2005 after depositing the deficit stamp duty.

Mr. Ghosh submits that search report in respect of the property was not produced by the advocate conducting search on the pretext that those reports were misplaced.

Mr. Ghosh submits that the appellant has failed to prove that the appellant is a bona fide purchaser within the meaning of Section 19 of the Specific Relief Act, 1963. The said Section contemplates that the appellant should be a transferee for value but has paid the consideration in good faith and did not have notice of the prior agreement. The appellant in her written statement did not make out any case of oral agreement or a written agreement for sale preceding the deed of sale executed on 21st February, 2003.

The appellant alleged to have made payments between 29th April, 2002 and 21st February, 2003. The appellant however has failed to prove such payment. The appellant relied upon the memo of consideration

of the deed executed in her favour to corroborate her case of part payment which she claimed to have paid but during trial she could not produce the books of account or any cogent evidence to show that actual payment was made towards the consideration amount.

The appellant partnership firm was in possession of the suit property carrying on business as a sub tenant.

The said partnership firm of the appellant, Golden Trust, was a party to the Title suit No.49 of 2002 filed by the Maulin Estate against Defendant No.1 for specific performance of the agreement entered into by defendant no.1 with the said Maulin Estate and they were aware of an order of injunction subsisting in respect of the said property passed in the said title suit in favour of Maulin.

The appellant with the knowledge of such injunction subsisting since 26.7.2002 has allegedly made part payments on several dates. Mr. Ghosh has submitted that several significant incidents had happened on 21st February, 2003. On that day an alleged Memorandum of Understanding (MOU) was entered into by and between Homco and Maulin Estate for settlement of T.S. 49 of 2002 and cancellation of the agreement. An amount of Rs.10,00,000/- alleged to have been paid by the appellant by a demand draft to the defendant no.1. The alleged deed of sale between the appellant and the defendant no.1 was executed and presented for registration.

At the time when payments were made by the appellant and the deed was executed and presented for registration Title Suit No.49 of 2002 was pending before the Court of Learned Civil Judge, Senior Division, Siliguri to which the defendant the partnership firm of the appellant was a party. The said Title Suit No.49 of 2002 was finally disposed of on compromise on 27th May, 2003 after the deed was executed and presented for registration by the appellant.

The suit property claimed to have been purchased by the appellant as “bona fide purchaser” was the subject matter of not only an agreement for sale entered into by and between the defendant no.1 and Maulin Estate but a suit for enforcement of such agreement was pending before a Civil Court being T.S. No.49 of 2002 in which an order of injunction was subsisting. All such facts were within the knowledge of the appellant/defendant no.2 as would appear from the compromise petition itself.

The defendant no.1 committed breach of the oral agreement by purporting to execute a Deed of Sale with the appellant/defendant no.2 on 21st February, 2003.

The instant suit was filed by Kishorilal at a point of time when the purported deed in favour of the defendant no.2 had no legal existence in the eye of law not being registered under the provisions of the Registration Act. Mr. Ghosh submits that the completion of registration of the Deed of Sale on June 29, 2005 after institution of the instant suit is thus covered by the principle of lis pendence envisaged under Section 52 of the Transfer

of Properties Act, 1882 in view of the decision in ***Har Narain (Dead) by Lrs. v. Mam Chand (Dead) by Lrs. & Ors.***, reported in **2010(13) SCC 128** wherein at paragraph 23 it has been held that:

“as sale stood completed during the pendency of the suit, the doctrine of lis pendence is applicable in the facts and circumstances of the case and the doctrine of relating back under Section 47 of the Registration Act would not have any application”.

The purported Deed of Sale [Exht.I] cannot be looked into as the registration of Deed of Sale was completed on 29th June, 2005 during subsistence of interim order of injunction dated 11th May, 2005 passed by the Hon’ble High Court at Calcutta in CAN 4039 of 2005 in FMAT No.1308 of 2005 [arising out of the order dated February 10, 2005 (LCR)] wherein the Hon’ble Court *inter alia* held that-

“After hearing the Ld. Adv. For the parties and after going through the materials we pass an order of status quo as regard the nature & character of the property and restraining the respondents from transferring the property.”

Mr. Ghosh submits that any Deed executed in the teeth of the injunction order is void, is well accepted and in this regard Mr. Ghosh has relied upon the decision in ***Jehal Tanti & Ors. v. Nageshwar Singh (Dead) through Lrs.***, reported in **2013(14) SCC 689** [paragraphs 5, 6, 10, 11, 13 and 14].

It is submitted that the provision of Section 47 of the Registration Act, 1908 does not mean in the facts and circumstances of the present case that the illegal registration would relate back to the date of execution of the

sale deed *i.e.* February 21, 2003. Accordingly, in the facts of the present case, Sona Majumder, the appellant/defendant no.2 is not and should not be held to be a purchaser or a bona fide purchaser for value in good faith without notice of the suit property. As a result thereof, Sona Majumder, the appellant/defendant no.2 cannot take benefit of Section 19(b) of the Specific Relief Act, 1963.

Mr. Ghosh has also relied upon the decision in ***Avinash Kumar Chauhan v. Vijay Krishna Mishra*** reported in **2009(2) SCC 532** [(paragraphs 14, 17, 24, 25 and 26)] in support of his contention that the words ‘for any purpose’ in Section 35 of the Stamp Act, 1899 should be given their natural meaning and effect and would include any collateral purpose and that the insufficiently stamped Sale Deed (as on the date of institution of the present suit) cannot be used to corroborate the oral evidence of Partha (DW1) and Bhabesh (DW2).

Mr. Ghosh submits that there are also other suspicious circumstances surrounding the deed of sale. They are:

- i. The Declaration in the recital at page 3 of the deed claiming the property to be free from all encumbrances is false and false to the knowledge of the appellant.
- ii. Documents purporting to be the sale deed relied upon by the appellant does not bear the signature and the photograph of the appellant/purchaser or the vendor as required by Section 32(A) of the Registration Act.
- iii. The property is still shown in the balance sheet of the defendant no.1 company.”

Mr. Ghosh submits that it is significant to note that the appellant/defendant no.2 did not come forward as a witness proving her case. The husband of the appellant gave evidence claiming that negotiations were done by him. The Dw2 deposed that during 1996-1997 payments have been made through Cheque and Demand Draft and he could not remember whether any bank document was filed showing such payments. He stated that no statements of accounts were filed before the Court showing that the transaction was made from the account of his wife. DW2 could not remember whether any documents were filed regarding agreement for sale for the said property of Rs.76 lacs. DW2 said that he does not know whether any inquiry was made before purchase of the suit property. He also stated that neither he nor his wife made any inquiry before Registrar of Companies whether the suit property is charged or not.

DW2 specifically deposed that he was not present during registration of the sale deed. He was unable to say whether his wife was present during registration of sale deed.

It is submitted that mere payment of Rs.15,00,000/- on 29th April, 2022 purporting to evidence a prior agreement does not create a better right in favour of the appellant in view of there being a subsisting order of injunction in respect of the suit property as on that date to the knowledge of the appellant whose partnership firm was a party to T.S. 49 of 2002. In fact, this deed shows that the deal entered into by the defendant appellant was not in good faith.

Bhabesh Majumder, the husband of Sona Majumder, was a mere power of attorney holder of Sona Majumder and not competent to adduce evidence on behalf of Sona Majumder. In this context, Mr. Ghosh has relied upon the decision in ***Janki Vashdeo Bhojwani & Ors., v. Indusind Bank Ltd. & Ors.***, reported in **2005(2) SCC 217** [paragraphs 10, 11, 12, 13, 14, 17, 18, 19, 20, 21 and 22].

Mr. Ghosh has submitted that adverse inference is required to be drawn against Homco as Partha could not prove that the money received by Partha on behalf of Homco was unrelated to the sale of the property. It is submitted that irrespective of such adverse inference it is well established that the defendant no. 2 could not make a claim of a bona fide purchaser for value in good faith and without notice. Mr. Ghosh has prayed for dismissal of the appeal.

In the light of the submissions made on behalf of the parties the pleadings and the evidence on record the merits of the appeal are to be decided.

The first and foremost question that arises for determination is whether the plaintiff Kishorilal was able to prove existence of an oral agreement of which specific performance was granted.

In a suit for specific performance the plaintiff has to aver and prove that there is a concluded agreement between the parties and the plaintiff was ready and willing to perform his part of the contract and he has

performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him.

The evidence with regard to the existence of the oral agreement for sale of the property is unclear, unsubstantiated and uncertain. The agreement pleaded in the plaint and the agreement alleged to have been forwarded under cover of the letter dated 21st December, 2002 being Exbt.1 is not the agreement of which specific performance has been prayed for by the plaintiff. The law as it stands is not an obstacle in allowing specific performance of an oral agreement for sale of an immovable property. Mr. Ghosh was unable to clear which of the several agreements were sent to Partha for confirmation and acceptance as the draft agreement for sale annexed to the plaint records certain transactions in the recitals which could not have been forwarded on 21st December, 2002. The agreement or the terms of the agreement duly settled in the chamber of Mr. Ganguly has not been disclosed or surfaced.

Mr. Moloy Ghosh has strenuously argued that the oral agreement is recorded in the letter dated 21st December, 2002. For the sake of convenience the said letter is reproduced below:

M/s. Homco Engineering Works (P) Ltd. 21st Dec.2002

1/1 Shashekhar Bose Road,

Kolkata 700 021

*Sub: Earnest Money Deposit against sale of your property at
Burdwan Road, Siliguri Rs.2,00,000/-*

Dear Sir,

This has reference to the meeting held on 19th December, 2002 at Calcutta Swimming Club with your Director Mr. Partha Dey, in presence of Sri Pulak Chaudhury wherein it has been agreed that you will sell the above property free from all encumbrances for a sum of Rs.1.25 crores on the agreed following terms and conditions and accordingly two cheques of Rs.1 lac each are enclosed herewith along with draft agreement for sale for your kind approval.

That out of the total consideration Rs.1.25 crores, one draft in the name of M/s. Howrah Motor Co. Ltd. Of Rs.50 lacs and another of Rs.10 lacs in the name of M/s. Homco Engineering Works (P) Ltd will be made and Xerox copy of the same will be handed over to Sri Partha Dey so that he will go to Siliguri and hand over the possession after obtaining two drafts of Rs.60 lacs.

I will also arrange cash or draft to the tune of Rs.10 lacs to settle the other liabilities if so required. Balance amount are payable at the time of registration of Sale Deed.

You are requested to accept the draft and settle the “Agreement for sale”. (emphasis supplied)

Encls: As above

Yours faithfully.

Sd/- Kishorilal Agarwal

The letter dated 21st December, 2002 does not refer to an oral agreement. It records a meeting of 19th December, 2002 at Calcutta Swimming Club with Partha of Homco in presence of P. Chowdhury in which it was agreed that the property would be sold free for all encumbrances for a sum of Rs.1.25 crores on the agreed terms of conditions and two cheques of Rs.1 lac each were enclosed along with draft agreement for sale for approval. It also records that one draft in the name of Howrah Motor Company Private Limited of Rs.50 lacs and another of Rs.10 lacs in the name of M/s. Homco Engineering Works Private Limited would be made and Xerox copy of the same would be handed over to Partha so as to enable Partha to go to Siliguri and hand over the possession after obtaining two drafts of Rs.60 lacs. This draft agreement has not seen the

light of the day. Moreover, Partha was requested to accept the draft and settle the agreement for sale. This has not happened.

The said letter significantly refers to the existence of a draft agreement and a request was made to Homco to accept and settle the alleged agreement for sale. If it is assumed that the second paragraph of the aforesaid letter contains the proposed terms and conditions then Exbt. 1 supposed to have been sent with the letter would have mentioned such terms in the said draft agreement. However, significantly, the draft agreement being Exbt.1 is different from what is stated in the second paragraph of the said letter. Kishorilal could not produce any draft agreement claimed to have been forwarded with the letter and he admitted that Exbt.1 is not “the draft agreement”. Then the question would arise which agreement the plaintiff is seeking to enforce. This letter was followed by a letter dated 24th January, 2003.

The said letter was written with reference to the letter dated 21st December, 2002.

The said letter is reproduced below:

*“ M/s. Homco Engineering Works (P) Ltd.
1/ 1, Shashekhar Bose Road,
Kolkata – 700 021*

24th January, 2003

*Ref: My letter dated 21st December, 2002
Sub: Part Payment against above
Attention: Mr. Partha Dey*

Dear Sirs,

Further to my above letter and your request for further payment I am enclosing herewith a Cheque No.325396 dated 27.1.2003 for Rs.3.00 lakhs (Rupees Three Lakhs) only of Corporation Bank, Dharamtolla Street Branch in your favour being the part payment against the total consideration amount as mentioned in the above letter for the whole property at Burdwan Road, Siliguri. He agreed in presence of Mr. Raghunath Dey you are required to handover the agreement by 25th evening and oblige and we will keep paying you the balance amount as per payment schedule of the agreement. (emphasis supplied)

Please acknowledge receipt of the above.

Thanking you,

*Yours faithfully,
Sd/- Kishorilal Awarwal"*

Encl: As above

The aforesaid letter refers to a payment of Rs.3 lacs as part consideration and a request for return of the agreement by 25th of January, 2003. It mentions the name of Mr. Raghunath Dey in whose presence such handing over of the agreement was decided.

Kishorilal in his chief has stated that on 21st December, 2002 he sent the draft copy of the agreement along with a sum of Rs.10 lacs as per the concluded agreement to which the defendant no.1 that is Homco did not respond. It is stated that Exbt. 1 is the copy of the draft agreement for sale that was forwarded to Homco by a forwarding letter dated 21st December, 2002. Thereafter Kishorilal has referred to carbon copy of forwarding letter-cum- money receipt of Rs.3 lacs dated 27th January, 2003, original cheque of Rs.244,000/- dated 5th February, 2003, bank voucher of Indian Overseas Bank and a money receipt dated 9th March, 2003 in his attempt to show that the oral agreement for sale was acted upon and accepted by Homco. However, in the cross-examination he has

stated that he handed over a draft agreement to the defendant Homco after paying him Rs.2 lacs on 21st December, 2002 and the agreement which he had filed that is Exbt.1 is not that agreement. Apart from Exbt.1 there is no other agreement produced by Kishorilal. The question that would obviously arise then from which document or correspondence the essential terms of and alleged oral agreement can be inferred. Kishorilal referred to the letter of 21st December, 2002 in which according to Kishorilal the parties have agreed to certain terms and conditions which would be reflected from the draft agreement for sale and that was forwarded to Partha for acceptance and returned.

Mr. Mitra has rightly remarked while placing the said letters that it is like a Jigsaw Puzzle and reminds us of the famous oft quoted lines from Alice in Wonderland by Lewis Carol that it becomes “curiouser and curiouser”.

Mr Ghosh is unable to demonstrate any evidence or any communication from Partha accepting any of the terms mentioned in the letter dated 21st December, 2002 or acknowledging the draft agreement. The subsequent letter of 24th January, 2003 also in any way assist the appellant as the appellant has failed to prove any agreement that Partha of Homco had agreed to sale the said property in presence of Mr. Raghunath Dey and also agreed to hand over the agreement by 25th January, 2003. The payment schedule in the letter of 24th January, 2003 is different from the payment schedule mentioned in the letter dated 21st December, 2002. However, in the meantime certain developments have taken place. The suit

filed by Maonil Estate Private Limited against Homco and others being Title Suit no. 49 of 2002 for Specific Performance of contract and other reliefs were in the process of settlement and Homco was receiving moneys in tranches from the appellant not only to free the said property from encumbrances but other encumbrances as well it would be clear from the Exbt. 14 namely, the joint verified petition on 21st February, 2003 by Maonil Estate and Homco regarding compromise. The learned Civil Judge Senior Division Siliguri disposed of the suit on the basis of the terms and conditions mentioned in paragraph 4 of the said petition. For the time being we may refer to Clause 4(a) and 4(b) of the compromise petition which reads:

“4. The following are the terms and conditions of Sulehanama (compromise) which will be (sic) form a part of the judgment and decree of this learned Court binding all the parties to act accordingly-

a) The defendant no.1 has paid to the plaintiff the sum of Rs.10,00,000/- (ten lacs) vide no. 001465 in lump-sum towards compensation and incidental charges, whatever name may be called by bank draft/payment drawn in favour of 'Maonil Estates Private Ltd. payable by any bank in Kolkata or Siliguri, in full and final settlement of the plaintiff.

b) On payment of said sum of Rs.10,00,000/- by bank draft/ payment and on encashment of said payment, the agreement of sale dated 25.09.2001 shall come to an end the same shall be for all purposes be

treated as determined or cancelled having no force of law.” (emphasis supplied)

This money was admittedly paid by appellant to Homco which would be evident from the “receipt of memo of consideration” in the deed of sale dated 21st February, 2003 between of Homco and Sona in relation to the said property.

The receipts and memo of consideration in the said deed is mentioned hereinbelow:

Receipt and Memo of Consideration

Received from the within names purchaser the within mentioned sum of Rs.76,00,000/- (seventy six lakhs) only towards the full final payment of the consideration for sale of the said premises of the SCHEDULE herein before in the following manner.

Sl. No.	Banker's cheque no.	Date	Bank	Amount
1	D.D. No. 076440 payable to Homco Engineering works pvt. Ltd.	29.04.2002	Standard Chartered	15,00,000/-
2	Demand Draft no. 618898-618996	30.05.2002	Andhra Bank	32,59,223/-
	Cheque no.192643-44	03.06.2002	Centurian Bank	40,000/-
	Cheque no.000075-77	03.06.2002	UTI	25,000/-
3	D.D. No.001466 payable to Homco Engineering Works Pvt. Ltd.	19.02.2003	Standard Chartered	15,00,000/-
4	D.D. No.001465	19.02.2003	Standard	10,00,000/-

	payable to Maonil Estates(P) Ltd.		Chartered	
5	Cash			2,75,777/-
	Total			76,00,000/-

It would appear from the receipt and memo of consideration that between 29th April, 2002 and 3rd June, 2002 appellant has paid a sum of Rs.48,24,232/- out of the agreed consideration of Rs.76 lacs much prior to Kishorilal's alleged oral agreement with Partha. Moreover the cheque referred to in paragraph 4(b) of the Compromise petition is the cheque issued by Sona in favour of Maonil enabling Homco to pay off the agreed compensation. The evidence of Bhabesh would show that on 3rd June, 2002 physical possession of the said property was delivered by the defendant no.1 to Sona during the pendency of the suit filed by Maonil Estate against Homco and others. In the suit filed by Maonil an order was passed on 26th July, 2002 in terms of which Maonil contended that Homco is likely to transfer the suit property in breach of the existing agreement either to Golden Trust Financial Services the partnership firm or to any third party and the learned trial Court on 26th July, 2002 restrained the respondent including Homco from transferring, alienating any portion of the suit property either in favour of Homco or to a third party till disposal of the injunction petition. The evidence of Bhabesh regarding prior agreement and possession is established. If we rely on Exbt.1 it also records the name of Golden to be in possession. Mr. Ghosh claimed that Sona is one of the partners of the said partnership firm. It is immaterial in what capacity Sona had purchased the said property but the transaction between Sona

and Homco is spread from 29th April, 2002 to 19th February, 2003. In fact, the sale deed with Sona would show that the appellant had paid a sum of Rs.10 lacs directly to Maonil Estates towards settlement of the dispute. The compromise petition filed by Maonil and Homco record payment of the said sum. The memo of consideration would show that the appellant has been paying different sums at different times to Homco in order to enable Homco to discharge its various liabilities and in furtherance of an agreement to sale the property in her favour. As opposed to a definite pattern of transaction that had culminated in an agreement for sale Kishorilal had failed to prove and establish that Kishorilal had entered into any agreement for sale with Homco and on the basis of such “mutual agreed terms” Kishorilal had performed his obligations and was ready and willing to perform the rest of the obligations. We find from evidence that even a payment of Rs.2.44 lacs by cheque no. 325400 dated 04.03.2003 was returned dishonoured on 7th February, 2003 with the remark “insufficient fund” which really raises a serious doubt about financial capability and capacity and willingness of Kishorilal to pay a sum of Rs.1.25 crores in terms of the alleged oral agreement. Significantly, the said fact would appear from the alleged draft agreement for sale being Exbt.1 which according to Kishorilal was sent along with letter dated 21st December, 2002. The said agreement refers to payment made in 2003 by cheque or cash and makes it “curiouser and curiouser” The said agreement obviously was brought into existence by Kishorilal for the purpose of the suit.

Mr. Jayanta Kumar Mitra, learned Senior Counsel has emphasised that there are inconsistency in the pleadings with regard to the agreement of which the plaintiff has claimed specific performance.

Mr. Ghosh possibly realizing that it would be difficult for Kishorilal if not impossible to prove a concluded agreement between the parties on the basis of the aforesaid two letters have made attempts to pin-prick the loopholes in the agreement for sale between the appellant and the respondent no.2. Mr. Ghosh has fairly submitted that apart from the said letters and few receipts to show that moneys have been paid there is no other evidence to prove the oral agreement for sale. However, he has strenuously argued that the conduct of the parties following the communications dated 21st December, 2002 is required to be taken into consideration. It is submitted that Kishorilal has proved that between 21st December, 2002 and 9th March, 2003 he has paid a sum of Rs.10 lacs in aggregate. The said payments have not been disputed by Homco.

Significantly, there is no communication from the respondent no.1 in response to the letter dated 21st December, 2002 accepting the terms. Partha has denied to have received any draft agreement although he had acknowledged receipt of few amounts and according to Partha it was not in any way connected with any sale transaction. Kishorilal is a prudent businessman. It was expected that when Kishorilal was entering into a transaction of this magnitude he would have kept record of the transactions and would insist for an acknowledgement of the agreed terms in writing or at least a communication to that effect. It was alleged that

one Mr. Ganguli was the solicitor engaged to finalize the agreement. Mr. Ganguli however was not produced as witness. There is no exchange of any letter or correspondence between the parties wherefrom the court can gather that the parties have agreed on the essential terms of contract. We would have expected the essential terms to be reduced in writing with the acknowledgement of both the parties and thereafter to demonstrate that the plaintiff had performed his obligation and willing to perform the essential terms of the contract or establish a course of conduct strongly suggesting and justifying existence of an agreement.

Mr. Ghosh has clearly submitted that the plaintiff is not relying on Exbt.1 but an oral agreement pleaded by the plaintiff and acted upon by Homco which would appear from the payment schedule between 21st December, 2002 and 9th March, 2003. The question would arise when such oral agreement was entered into, between whom, before whom and in what manner. If it is assumed that on 21st December, 2002 an oral agreement was entered into followed by a draft agreement then the agreement relied upon by the plaintiff in the suit for specific performance could not be final draft agreement. There is also anomaly with regard to the consideration amount. While the letter dated 21st December, 2002 mentions total consideration as Rs.1.25 crores but the draft agreement being Exbt. 1 is incomplete on such essential element.

Our attention was drawn to Clause 9 of the draft agreement which recorded that a total sum of Rs.9.50 lakhs has been paid to the purchaser between 21st December, 2002 and 21st February, 2003. Clause 10 of the

said agreement refers to a further sum of Rs.10 lakhs to Howrah Motors by a cheque dated 8th March, 2003 under the advice of Homco. If the recitals were correct then the draft agreement could not have been sent before 8th March, 2003 as the said amount was alleged to have been paid in cash on that date i.e. 8th March, 2003.

It is also incomplete as it states in paragraph 12 and 13 of the said agreement that a further sum of Rs.5 lakhs would be paid by Kishorilal to Howrah Motors or to his nominee as per the advise of the vendor and upon payment of a total sum of Rs.81 lakhs Homco would handover vacant possession of the property to Kishorilal. The agreement does not say anything about the payment of the balance consideration amount or the period within which the said amount is to be paid. Apart from the aforesaid the said draft agreement could not have been forwarded under cover of the letter dated 21st December, 2002 being Exbt. 1.

It was in view of such insurmountable difficulties a story of an alleged oral agreement was spun in a desperate attempt to nullify the otherwise valid agreement for sale between the appellant and the defendant no.1. We accept the submission of Mr. Mitra that the plaintiff was unable to prove with certainty and with conviction as to what the so-called contract of sale was and looked like. A contract which is uncertain cannot be made certain in a suit for specific performance of contract. The court cannot be asked to enforce specific terms which are uncertain. An oral agreement for sale is invisible in nature and the evidence of the plaintiff in the instant case is sketchy and contradictory.

Fry in his celebrated work “A treatise on the Specific Performance of Contract” (6th Edition) paragraph 380 has elaborately discussed the consequence of uncertainty of the contract. It states:

“..... Whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed. It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject matter of the contract, and the circumstances under which and with regard to which it was entered into.....” (emphasis supplied)

The plaintiff does not say that the terms of the contract have been originally uncertain, but the contract has been acted upon in such a manner that at the end of the transaction it gives a shape of a concluded contract. Moreover under the draft agreement of sale Kishorilal was supposed to discharge various obligations and provide fund to Homco in order to enable Homco to free the property from encumbrances and thereafter to buy the property free from encumbrances. Kishorilal was unable to prove that he discharged such obligations. It is elementary that Specific Performance cannot be granted and allowed to be enforced at the instance of a party who has failed to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than the terms the performance of which he has been prevented or waived by the defendant.

Any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling

him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief. [See. **Telikicherla Sesibhushan (Dead) by Legal Representatives v. Kalli Raja Rao (Dead) by Legal Representatives and Ors.**, reported in **2014(15) SCC 743** [paragraphs 7 to 11] and **Lalit Kumar Jain & Anr. v. Jaipur Traders Corporation Pvt. Ltd.** reported in **2002(5) SCC 383** Kishorilal's evidence does not establish his readiness to perform his obligations even if we accept existence of an oral agreement.

There cannot be any two opinions that an oral agreement can be specifically enforced. Neither the Specific Relief Act nor any law requires that for enforcement of the agreement for sale the said agreement must be in writing and accordingly an oral agreement for sale is also specifically enforceable. (See. **K. Nanjappa v. R.A. Hameed & Ors.**, reported in **2016(1) SCC 762**).

The identity of the parties and that they have consented to the terms of the agreement arrived at between them is essential. It is not essential that the contract must in writing. If the agreement propounded is oral the evidence produced must be reliable, acceptable and cogent. The evidence in support of the oral agreement must be consistent and provide a clear indication that the intention of the parties was to enter into such an agreement. Kishorilal significantly did not lay much emphasis on the draft agreement being Exbt. 1 and he refers to an oral agreement which he could

not prove. He could not give any cogent and satisfactory evidence with regard to the time and place of such oral agreement and the circumstances under which such agreement was entered into. Kishorilal for obvious reason did not lay any claim on the draft agreement, Exbt.1 as recitals in the said draft agreement would nullify any claim that the said draft agreement was forwarded under the letter dated 21st December, 2002. We wonder why in the first place the draft agreement was produced when it was never intended to be relied upon in the suit for specific performance. The letter dated 21st December, 2002 at the highest is an offer and in absence of acceptance of the terms mentioned in said letter by the defendant no.1 there is no concluded contract between the parties.

In **K. Nazappa** (supra) the Hon'ble Supreme Court while recognizing that a decree for specific performance can be granted on the basis of an oral contract has observed:

"21. There is no dispute that even a decree for specific performance can be granted on the basis of oral contract. Lord Du Parcq in a case (AIR 1946 Privy Council) observed, while deciding a suit for specific performance, that an oral contract is valid, binding and enforceable. A decree for specific performance could be passed on the basis of oral agreement. This view of a Privy Council was followed by this Court in the case of Koillipara Sriramulu v. T. Aswatha Narayana : AIR 1968 SC 1028, and held that an oral agreement with a reference to a future formal contract will not prevent a binding bargain between the parties.

22. However, in a case where the Plaintiff come forward to seek a decree for specific performance of contract of sale of immoveable property on the basis of an oral agreement or a written contract, heavy burden lies on the Plaintiff to prove that there was consensus ad idem between the parties for the

concluded agreement for sale of immoveable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the Plaintiffs that vital and fundamental terms for sale of immoveable property were concluded between the parties.” (emphasis supplied)

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 plaintiff comes forward to seek a decree for specific performance of contract of 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 & Ors. v. Sugra Begum & Ors.**, reported in **1990 (4) SCC 147**)

In the present case the plaintiff has failed to prove that there was a concluded oral agreement between the parties on 21st December, 2002 or subsequently. It is clear from the evidence that nothing was settled on that

date. It is elementary that in case of an oral agreement for sale there is a necessity to prove of a fully concluded contract and essential terms thereof.

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

The Court can only enforce specific performance contract if it is based on a valid and enforceable contract. Where a valid and enforceable contract

has not been made, the Court would not pass an order for specific performance. The specific performance of the contract stipulates the terms for execution and the Courts direct the party in default to do the very thing which he contracted to do and the acceptance must be observed corresponding to the terms of the offer.

The story of an alleged oral concluded agreement was so inherently improbable and inherently inconsistent that it is not possible for a court to grant such equitable relief on such unreliable evidence.

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

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

(1) ... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable" the

case is proved beyond reasonable doubt, but nothing short of that will suffice.

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

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

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

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

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

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

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

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

The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is

to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue [Per Dixon, J. in Wright v. Wright, (1948) 77 CLR 191, 210] "; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear [Blyth v. Blyth, (1966) 1 AER 524, 536] ". But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

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

The plaintiff wants the existence of an oral agreement to be believed without clarifying the date on which such agreement was concluded and make us to believe that the draft agreement mentioned in the letter dated 21st December, 2002 is not the agreement mutually agreed. The plaintiff is completely silent about any other draft agreement which has reduced the fundamental and essential terms of the agreement intended to be executed. It is really becoming "curiouser and curiouser" and is getting increasingly confounding. The assertion of an oral agreement is to be proved by the plaintiff. For the court to give judgment in favour of the plaintiff as to his

legal right to claim execution of the deed of conveyance the existence of an oral agreement between the parties must be proved by Kishorilal as the burden of proof that there is an oral agreement and terms of such concluded legal agreement have been acted upon is on the plaintiff. The burden of proof on the pleadings never shifts and it remains constant. The initial burden of proving a prima facie case in his favour is cast on the plaintiff, when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce evidence rebutting the case made out by the plaintiff. As the case continues to develop the onus may shift back to the plaintiff. It may not be easy in all cases to decide at what particular stage in the course of evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the court feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden. [See: ***K. Lakshmana v T. Venkateswarlu*** reported at **AIR 1949 PC 278**].

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

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

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

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

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

decide on the value of conflicting evidence. So soon as a conflict of evidence arises it ceases to be a question of onus of proof.”

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

The plaintiff lost at the threshold of this test.

In a suit for specific performance of a contract the falsity of the defence story does not necessarily establish the truth of the plaintiff's story which must stand or fall on its own merits, independently of any inherent weakness in the defence case, per Justice **Renupada Mukherjee** in **Nalini Nath Mitra & Anr. v. Bepin Behari Das** reported in **AIR 1956 Cal 525**.

Plaintiff can only succeed on the strength of his own case.

Kishorilal claimed that on April 4, 2003 he became aware of the sale in favour of Sona on February 24, 2003 and accordingly Sona was impleaded as defendant no. 2. Kishorilal did not pray for cancellation of the sale deed which in the fact and circumstances was necessary in view of considerations having passed in favour of Homco from Sona much before Kishorilal had entered into the so called oral agreement. In the plaint Kishorilal did not pray for cancellation of the deed and no issue was framed in that regard. Sona in the facts and circumstances cannot be said to be a transferee pendente lite. However the relief granted by the learned trial judge in effect results in cancellation of an agreement. It is trite law that relief not founded on pleadings cannot be granted. Any finding recorded on

an issue dehors the pleadings is without jurisdiction as held in **Shivaji Balaram** (supra) in paragraph 26. Moreover, decision on a premise that was not pleaded would be contrary to pleading and is patently illegal.

In **Union of India** (supra) it was held that:

“..... A decision of a case cannot be based on grounds outside the pleadings of the parties. No evidence is permissible to be taken on record in the absence of the pleadings in that respect. The Court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it. (emphasis supplied)

It is settled law that in a suit for specific performance a subsequent transferee is not required to be made a party and there may not be any need to seek for cancellation of the sale deed in favour of the subsequent purchaser as any such transfer would be hit by a doctrine of lis pendence. However, the effect of Section 52 is that the right of the successful party in the litigation in regard to that property would not be affected by the alienation, but it does not mean that as against the transferor the transaction is invalid. In **Thomson Press (India) Ltd. v. Nanak Builders and Investors Private Limited** reported in **2013(5) SCC 397**, it was held the provision of Section 52 of the Transfer of Property Act, 1882, did not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation. There can be no doubt with respect to the position that the prohibition by application of the

principles of the said doctrine would take its effect with the institution of the suit. [See. **Shivshankara & Anr. v. H.P. Vedavyasa Char in Civil Appeal No.10215 of 2011** decided on 29th March, 2023].

The property was free to be dealt with on or after 21st February, 2003 and by that time Sona had paid the entire agreed consideration amount of Rs.76 lacs as evident from the deed of sale executed on 21st February, 2003. The right of Sona to the property till such time was subsequent to Maulin.

In a fairly recent decision in **P. Ramasubbamma v. V. Vijayalakshmi & Ors.: 2022(7) SCC 384** this principle has been reiterated. It was held that in a suit for specific performance it is not necessary for the buyer under a prior agreement to sell (the agreement holder) to seek cancellation of sale deed executed in favour of a subsequent purchaser. Rather, it is sufficient to implead the subsequent purchaser in the suit and seek relief of specific performance against the original owner and also seek direction to the subsequent purchaser to join in the execution of the sale deed in order to completely convey title to the agreement holder. [See. Paragraphs 5.3 and 16]

In the said decision the Apex Court in paragraph 16 has quoted with approval the observation in **Durga Prasad and Ors. v. Deep Chand & Ors.**, reported in **AIR 1954 SC 75** with regard to the nature of the decree to be passed in the following words:

“16. In light of the aforesaid factual aspects and the findings recorded by the learned trial court, the decision of this court in Durga Prasad (supra) is required to be referred to. In paragraph 42, it is observed and held as under:

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin AIR 1931 Cal 67 and appears to be the English practice. See Fry on Specific Performance 6th Eds. P. 90 para 207. We direct accordingly.

The aforesaid decision has been subsequently referred to and followed by this court in the subsequent decision in Rathnavathi.”

The said decision has also clearly stated that the passing of consideration under a sale deed cannot be questioned by a third party.

In the instant case, even if it is assumed and accepted that there is a legally valid and enforceable oral agreement between Kishorilal and Homco the evidence on record strongly suggest a prior agreement for sale in favour of Sona and vis a vis the transaction between Sona and Homco, Kishorilal was a third party. Moreover, the execution of the sale deed by Homco in favour of Sona has not been disputed. In the aforesaid background there was a requirement for Kishorilal to impeach the sale deed and to pray for cancellation of the said agreement if he perceived any foul play or fraudulent dealings between Sona and Homco. This case has not been made out in the pleadings. In **Siddik Mohamed Shah v. Mt. Saran** reported in **AIR 1930 PC 57**, Viscount Dunedin expressed the view that no

amount of evidence could be looked into upon a plea which was never put forward.

Mr. Ghosh has laid much emphasis on the subsisting order of injunction and the effect of registration on the sale transaction between Sona and Homco. If the said argument is taken seriously then Kishorilal's oral agreement would fall foul of the same as on the date of such alleged agreement, assumed to have been entered into on 21st December, 2002 an order of injunction was subsisting in relation to the suit property in favour of Maulin in its pending suit for specific performance. This embargo was cleared when Maulin was fully paid off on 21st February, 2003 by Sona. This passing of consideration by Sona in favour of Homco is clearly borne out from the deed of sale and passing of this consideration cannot be questioned by Kishorilal. Moreover there is no pleading to the effect that the consideration did not pass in favour of Homco under the said deed of sale and it is a sham transaction.

Almost at the conclusion of the hearing of the appeal Mr. Raghunath Dey on behalf of Homco filed an application to bring on record certain documents to nullify the transactions between Homco and Sona and Homco and Kishorilal. Homco has not preferred any appeal. The said application is thoroughly misconceived. In fact, Partha on behalf of Homco filed written statement on behalf of Homco and was contesting the proceedings on behalf of Homco in the suit filed by Maulin and Kishorilal concerning the self-same property. Raghunath Dey could not explain as to why the documents that are now sought to be relied upon to nullify both

the transactions could not have been produced in the suit and in the appeal earlier. In fact Homco was not represented in the appeal for a long time in spite of service of notice and after several attempts being made and on being compelled to appear and tried to make out a completely different case not pleaded in the written statement. Significantly, Raghunath Dey did not support Kishorilal about him being a part of any discussion for sale of the said property. However, the same is not considered relevant as we have dealt with the matter in detail on merits. It is simply a ploy to set at naught the concluded transactions with an ulterior motive and after having received the consideration amount. The differences between Partha and Raghunath attempted to be raised cannot be considered now.

Under such circumstances the judgment and decree dated 30th July, 2014 is set aside.

The appeal is allowed.

The learned Registrar General is directed to return the amount of Rs.1,15,00,000/- (one crore fifteen lacs) deposited by Kishorilal on 28th April, 2015 along with accrued interest by a demand draft to be drawn in his name upon proper identification within two weeks from the date of communication of this order by either of the parties.

The said application, I.A. No. CAN 7 of 2023, stands dismissed.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)