



GAHC010138872018

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RFA/81/2018

JALALUDDIN ALI

S/O LATE RAHIZUDDIN ALI, EARLIER R/O FRIENDS PATH, HOUSE NO. 16,
NOW R/O KHANKAHH ROAD, HOUSE NO. 82 C/O ANISHA FABICATION,
GHORAMARA KHANKAH ROAD, OPPOSITE PRAGJYOTISH HOUSING
SOCIETY COMPLEX, GUWAHATI 781038, DIST. KAMRUP (M), ASSAM.

VERSUS

MRS MANJU BEGUM AND 3 ORS

W/O INSAN ALI, R/O PACHANIAPARA (BONGARA), P.S. AZARA, PIN 781015
IN THE DIST. OF KAMRUP, ASSAM.

2:MD. MUSTAQ AHMED

S/O LATE INSAN ALI

ALL ARE R/O PACHANIAPARA (BONGARA)

P.S. AZARA

PIN 781015 IN THE DIST. OF KAMRUP

ASSAM.

3:MD. MUKIB AHMED

R/O PACHANIAPARA (BONGARA)

P.S. AZARA

PIN 781015 IN THE DIST. OF KAMRUP

ASSAM.

4:MD. IRPHAN AHMED

S/O LATE INSAN ALI

R/O PACHANIAPARA (BONGARA)

P.S. AZARA

PIN 781015 IN THE DIST. OF KAMRUP

ASSAM

Advocate for the Appellant

: Mr. Z. Mukit, Advocate.

Advocate for the Respondents

: Mr. R. Ali, Advocate.

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 31.05.2022

Date of Judgment : 10.06.2022

JUDGMENT AND ORDER (CAV)

Heard Mr. Z. Mukit, the learned counsel for the appellant and Mr. R. Ali, the learned counsel appearing on behalf of the respondents.

2. This is an appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, 1908 (for short, the CPC) against the judgment and decree dated 23.04.2018 passed by the Court of the Civil Judge, Kamrup at Amingaon in Title Suit No. 84/2015.

3. For the purpose of deciding the instant appeal, the brief facts of the case may be taken into account. For the sake of convenience, the parties herein are referred to in the same status as they were in the suit.

4. The predecessor-in-interest of the plaintiffs one Insan Ali (since deceased) had entered into an agreement for sale of land with the defendant on 24.04.2010. The subject matter of the said agreement for sale was a plot of land measuring 1 Bigha covered by Dag No. 906 of KP Patta No. 55 situated at Village-Koch Para (Mirza) under Mouza-Chayani in the district of Kamrup, Assam. The said plot of land has been specifically described in the Schedule of the plaint. As per the terms of the said agreement, the total consideration of the land was Rs.18 lakh and the predecessor-in-interest of the plaintiffs had agreed to pay a sum of Rs.4 lakh as advance and the balance amount of Rs.14 lakh would be paid subsequently. In terms of the Clause 2 of the said agreement, the necessary sale permission would be obtained by the defendant from the authority concerned and in terms with Clause 4 if the defendant

failed/neglected to execute the registration of the sale deed after obtaining the permission, the predecessor-in-interest of the plaintiffs would be at liberty to take legal action. It was also one of the terms of the said agreement as stipulated in Clause 5 that the defendant shall bound to take responsibility regarding the schedule land if there is any fault/defect in record or in possession. Pursuant to the said agreement for sale being executed and Rs.4 lakh paid as advance, the defendant was further paid on 26.06.2010, 01.09.2010 and 26.01.2011 further advances to the tune of Rs.4 lakh, Rs.4 lakh and Rs.3 lakh respectively thereby the defendant in total was paid a total consideration of Rs.15 lakh as advance against the agreed total sale consideration of Rs.18 lakh. It was alleged in the plaint that after receipt of Rs.15 lakh as advance, the defendant had handed over the possession of the schedule land in favour of the predecessor-in-interest of the plaintiffs by doing the proper demarcation of the land and predecessor-in-interest of the plaintiffs, during his lifetime, possessed the said plot of land by constructing boundary walls and an Assam Type house over the schedule land with the permission from the defendant. It was further alleged in the plaint that the predecessor-in-interest of the plaintiffs was always ready and willing to purchase the suit land and for which he had executed all the necessary papers for obtaining the sale permission and handed over the same to the defendant. The predecessor-in-interest of the plaintiffs also agreed to pay the necessary money to purchase the stamps and registration of the sale deed after obtaining the sale permission by the defendant from the concerned authority in respect of the schedule land by receiving the agreed balance amount.

5. During the lifetime of the predecessor-in-interest of the plaintiffs, on several occasions, he went to the residence of the defendant personally and requested him to take steps for obtaining the sale permission and to execute the sale deed immediately in his favour by receiving the balance amount of Rs.3 lakh but the defendant remained silent. Under such circumstances, the predecessor-in-interest of the plaintiffs, through his advocate on 07.06.2011, had issued a legal notice and thereby requested the

defendant to take immediate steps for obtaining necessary sale permission within 15 days from the date of receipt of the notice. It was further alleged that the defendant after receiving the legal notice had contacted the predecessor-in-interest of the plaintiffs and informed him that he had already applied for obtaining the permission but due to some problem in the DC Court, the same was delayed and requested the predecessor-in-interest of the plaintiffs to wait for some time and the defendant confirmed that he would immediately execute the sale deed as soon as sale permission was obtained. On good faith, the predecessor-in-interest of the plaintiffs waited for some time, but unfortunately on 21.12.2012, he expired leaving behind the plaintiffs being his wife and children. It has been further alleged that after the death of the predecessor-in-interest of the plaintiffs, the plaintiffs being the legal heirs on several occasions, i.e., on 15.03.2013, 01.06.2013, 10.10.2013, 05.04.2014 and 01.11.2014 went to the residence of the defendant and expressed their readiness and willingness to perform their part of agreement and on request of the defendant also executed necessary affidavits and also put their signatures in the sale permission application for obtaining the sale permission in their name and handed over the same to the defendant.

6. It is the case of the plaintiffs that on 15.03.2015, the plaintiff No. 2, on behalf of the other plaintiffs, went to the defendant's residence to know the progress of the sale process but the defendant refused to obtain any sale permission and to execute the sale deed as earlier promised. Under such circumstances, a legal notice was issued on 20.03.2015 to the defendant demanding him to immediately within a period of 15 days from the date of receipt of the notice to take steps to obtain the sale permission and to execute the sale deed in their favour.

7. It was further alleged that after receipt of the notice dated 20.03.2015, the defendant on 10.04.2015, came to the residence of the plaintiffs and requested them to allow him at least 3 to 4 months' time in order to obtain the sale permission and to execute the sale deed. The plaintiffs, accordingly, on good faith, decided to wait for

the said period but as the plaintiffs did not hear anything regarding obtaining of sale permission from the defendant, on 16.08.2015, the plaintiff No. 2 again went to the residence of the defendant to ask about the progress in obtaining the sale permission as four months had already elapsed but the defendant intentionally avoided the plaintiff No. 2. On the basis thereof, the plaintiffs apprehended that unless legal action is taken against the defendant, they would lose their right to purchase the suit land for all time to come for which the suit was instituted seeking specific performance for agreement of sale dated 24.04.2010; directing the defendant to execute the sale deed in respect to the schedule plot of land by receiving the balance agreed amount of Rs.3 lakh; for execution of the sale deed by the court as per the provision of order XXI Rule 34 of the CPC, if the defendant failed to execute the same; for permanent injunction, costs of the suit and in the alternative also prayed for realization of Rs.15 lakh along with the interest at the rate of 20% per annum from the date of payment till realization along with an amount of Rs.10 lakh towards expenditures made by the plaintiffs for construction of boundary walls and Assam Type house over the suit land and another Rs.40 lakh being damage compensation for mental agony and physical sufferings caused to the plaintiffs from the conduct of the defendant. The said suit was registered and numbered as Title Suit No. 84/2015.

8. The defendant appeared and filed his written statement. In the written statement, amongst the various preliminary objections, a preliminary objection was taken that the suit was barred by the Law of Limitation. It was further mentioned in the written statement that there is no question of performance of any obligation on the part of the defendant after a long gap of almost 5 years. Furthermore, the doubt over the sincerity and bonafide of the plaintiffs stood established by the fact that the plaintiffs have taken 5 years to either cause to serve the notice or to file the suit before the court. In paragraph No. 11 of the written statement it was mentioned that although it was the duty of the defendant to take necessary sale permission but the predecessor-in-interest of the plaintiffs had handed over and execute necessary

papers for obtaining the sale permission to the defendant. It was mentioned that the predecessor-in-interest of the plaintiffs caused to serve a legal notice dated 07.06.2011 through his counsel, Miss. Namita Kumari upon the defendant. Consequent upon which the defendant through his counsel also served a reply dated 04.08.2011 highlighting the facts and the lapses/laches committed by the predecessor-in-interest of the plaintiffs who even after having the knowledge that while obtaining necessary sale permission certain documents are required by the Office of the Deputy Commissioner, such as Voters List/PRC/photos etc. did not turn up to furnish and fulfill those requirements and meanwhile more than 4 years has already been passed and the value of the land has gradually increased and the said predecessor-in-interest of the plaintiffs ultimately refused to purchase the land by treating the agreement as cancelled and did not act upon his rights within the period of limitation. It was further averred that the present plaintiffs, on the ill advice of some vested interest, have chosen to file the suit. It was further denied in paragraph No. 14 of the said written statement that the defendant had handed over the possession of the schedule land after proper demarcation to the predecessor-in-interest of the plaintiffs and predecessor-in-interest of the plaintiffs had constructed the boundary walls as well as an Assam Type house. In paragraph No. 12 of the written statement, the defendant simply denied the statements made in paragraph Nos. 6, 7 & 8 of the plaint, barring the date of 07.06.2011 on which date the notice was sent by one Namita Kumari, Advocate and the same was duly replied. It was further stated that as no notice dated 20.03.2015 was received by the defendant so as to contact the plaintiffs on 10.04.2015 or on any date thereafter, the same was required to be proved by the plaintiffs.

9. Before proceeding further and taking into account the contentions of the parties, it may be relevant herein to mention that the paragraph Nos. 6, 7 & 8 of the plaint specifically stated about the issuance of the legal notice dated 07.06.2011 and further that the defendant after receipt of the said legal notice had contacted the

predecessor-in-interest of the plaintiffs and stated that he had already applied for obtaining the permission but due to some problems in the Office of the Deputy Commissioner, the same was delayed and requested the predecessor-in-interest of the plaintiffs to wait for some time with a request to immediately execute the sale deed as soon as sale permission was obtained. Further to that, in paragraph No. 7 of the plaint, it was specifically averred that after the death of the predecessor-in-interest of the plaintiffs, the plaintiffs on 15.03.2013, 01.06.2013, 10.10.2013, 05.04.2014 and 01.11.2014 went to the residence of the defendant and expressed their readiness and willingness to perform their part of agreement and on the request of the defendant also executed necessary affidavits and also put their signatures in the sale permission application for obtaining the sale permission in their name and handed over the same to the defendant. Further to that, it has also been averred in paragraph No. 7 of the plaint that on 15.03.2015, the plaintiff No. 2, on behalf of the other plaintiffs, went to the defendant's residence to know the progress about the sale process and the defendant refused to obtain any sale permission and to execute the sale deed as earlier promised for which the legal notice was issued on 20.03.2015. In paragraph No. 8 it was specifically mentioned that after receipt of the legal notice dated 20.03.2015, the defendant on 10.04.2015, came to the residence of the plaintiffs and requested the plaintiffs to allow him at least 3 to 4 months' time so as to obtain the sale permission and to execute the sale deed. It has been further averred that the plaintiffs waited for 4 months and then on 16.08.2015, the plaintiff No. 2 again went to the residence of the defendant to ask about the progress in obtaining the sale permission but the defendant intentionally avoided the plaintiff No. 2. However, if this Court looks into the paragraph No. 12 of the written statement, these facts have not been specifically denied. A vague denial has been given that the statement made in paragraph Nos. 6, 7 & 8 of the plaint are denied.

10. On the basis of the said pleadings, the trial court framed as many as five issues which are quoted herein below:-

(i) Whether there cause of action for the suit?

(ii) Whether the suit is barred by Law of Limitation?

(iii) Whether the defendant entered into an agreement for sale of the suit land with Insan Ali on 24.04.2010 for a total price of Rs.18 lakh (Rupees eighteen lakh) and received Rs.15 lakh (Rupees fifteen lakh) in total as earned money from Insan Ali?

(iv) Whether the plaintiffs are ready and willing to perform their part of the contract?

(v) To what reliefs are the parties entitled to?

11. The plaintiffs adduced the evidence of two witnesses and exhibited one document which is the agreement for land sale dated 24.04.2010. The defendant was the sole witness and he exhibited three documents which were the reply dated 04.08.2011 and two postal receipts dated 04.08.2011. Both the plaintiffs' witnesses as well as the defendant's witness were cross-examined.

12. By the judgment and decree dated 23.04.2018, the suit was decreed in favour of the plaintiffs thereby declaring that the plaintiffs are entitled for specific performance of agreement for sale dated 24.04.2010 and the defendant was directed to execute the sale deed in respect to the schedule plot of land by receiving the balance amount of Rs.3 lakh and on failure on the part of the defendant to execute the said registered sale deed, the court shall as per the provision of Order XXI Rule 34 of the CPC would execute the said registered sale deed. Further to that, permanent injunction was granted in favour of the plaintiffs thereby restraining the defendant from alienating or transferring the schedule land in favour of any other person or persons and not to change the nature and character of the said land.

13. Feeling aggrieved and dissatisfied, the appellant has preferred the instant appeal taking various grounds of objection.



14. I have heard the learned counsels appearing on behalf of the parties. Mr. Z. Mukit, the learned counsel for the appellant submits that although various grounds of objection have been taken in the appeal but the grounds of objection on which he would like to submit is that the trial court did not decide the issue of limitation as well as the issue of readiness and willingness of the plaintiffs in the proper perspective. Mr. Mukit, the learned counsel submits that in terms with Article 54 of the Limitation Act, 1963, the period of limitation is 3 years from the date fixed for performance or if no such date is fixed when the plaintiffs have notice that the performance is refused. The learned counsel submits that on 04.08.2011, a reply (Ext.A) was sent to the notice dated 07.06.2011 wherein it was categorically mentioned that the defendant had on several occasions called the predecessor-in-interest of the plaintiffs to take his money back and the predecessor-in-interest of the plaintiffs, instead of taking the money back, has caused to serve the notice through the counsel upon the defendant for some unwarranted gain. Mr. Mukit further submits that a perusal of Ext.A would show that it was further mentioned that the predecessor-in-interest of the plaintiffs should come forward and receive back the advance amount instead of tendering threat of taking legal action. Relying on Ext.A, Mr. Mukit, the learned counsel, therefore, submitted that perusal of the said reply dated 04.08.2011 would show that the defendant had refused the performance of the agreement dated 24.04.2010 and further referring to Ext.B and Ext.C, which are postal receipts, he submits that applying Section 27 of the General Clauses Act, 1897 the said reply, i.e., Ext.A would be deemed to have been served within 7 days and as such with effect from 11.08.2011, the predecessor-in-interest of the plaintiffs had due knowledge about the refusal of the defendant that the performance of the agreement for sale dated 24.04.2010 was refused. The period of limitation being 3 years, no suit could have been filed for specific performance of the agreement dated 24.04.2010 after 10.08.2014. The learned counsel further submitted that even if the reply dated 04.08.2011 is not taken into consideration but from a perusal of the pleadings as well

as the evidence would show that the plaintiffs have duly admitted the sending of notice dated 07.06.2011. Vide the notice dated 07.06.2011, the PW1 has categorically stated in her evidence on affidavit that 15 days' time was granted for the purpose of taking out the sale permission and the said 15 days was elapsed on 22.06.2011 and as such the last date for filing of the suit, even on a perusal of the documents and evidence produced by the plaintiffs, would be on 21.06.2014. The learned counsel submits that the instant suit was filed on 09.09.2015, and as such, the suit was barred by limitation.

15. Mr. Mukit, the learned counsel appearing on behalf of the appellant submitted that readiness and willingness of the plaintiffs is one of the most relevant and vital consideration to be taken into account for the purpose of deciding a suit for specific performance. Drawing the attention of this Court to the evidence and the stand being taken by the defendant in his pleadings as well as also in the evidence that the predecessor-in-interest of the plaintiffs failed to submit the necessary papers for which the permission could not be applied and as such when the predecessor-in-interest of the plaintiffs did not have the readiness and willingness to perform his part of contract, the trial court could not have decreed the suit in favour of the plaintiffs without considering the said vital aspect of the matter.

16. Mr. Mukit, the learned counsel for the appellant further submits that the plaintiffs have intentionally not adduced the notices dated 07.06.2011 and 20.03.2015 as the same would clearly go to show that the suit was barred by limitation. Relying illustrations (g) of Section 114 of the Indian Evidence Act, 1873 the learned counsel submits that the presumption should be drawn against the plaintiffs.

17. On the other hand, Mr. R. Ali, the learned counsel appearing on behalf of the respondents submits that the question that the suit is barred by limitation does not arise at all inasmuch as the pleadings as well as the evidence would clearly go to show that till 2015, the defendant had not shown his refusal to perform the part of the

contract. Referring to Paragraph Nos. 6, 7 & 8 of the plaint and paragraph No. 12 of the written statement, Mr. R. Ali, the learned counsel submits that in terms with the pleadings, it has been categorically mentioned that after the issuance of the notice dated 07.06.2011, the defendant had approached the predecessor-in-interest of the plaintiffs and requested not to resort to take any legal action and he would be taking appropriate steps for obtaining the sale permission. The said aspect of the matter has not been specifically denied. Further to that, after the death of the predecessor-in-interest of the plaintiffs on 21.12.2012, the plaintiffs on 15.03.2012, 01.06.2013, 10.10.2013, 05.04.2014, 01.11.2014, 15.03.2015 and 10.04.2015 had met the defendant and the defendant has all along never shown his refusal to perform his part of the contract. It was only on 16.08.2015 the plaintiffs realized that the defendant was avoiding the plaintiffs for which apprehending that the defendant was not interested to perform his part of the contract, the suit was filed. This aspect of the matter has not been specifically denied by the defendant in his written statement. It is under such circumstances that the learned counsel for the respondents submitted that the suit was filed on 09.09.2015 and as such it cannot be said that the suit was barred by limitation. The learned counsel for the respondents further submitted that a perusal of the evidence on affidavits of the plaintiffs' witnesses would also show that evidence was led in conformity with paragraph Nos. 6, 7 & 8 of the plaint and there no cross-examination was made or anything could be taken out from the evidence of the plaintiff witness which would show that the said statements are false. The learned counsel further submitted that not even a suggestion was also given to that effect.

18. As regards the question of readiness and willingness, Mr. R. Ali, the learned counsel for the respondents submitted that the predecessor-in-interest of the plaintiffs was all along ready and willing to perform his part of the contract of payment of Rs.3 lakh. Thereupon, after the death of the predecessor-in-interest of the plaintiffs, the plaintiffs have been pursuing with the defendant for the purpose of obtaining sale permission and in that regard has also submitted the necessary papers to the

defendant for obtaining the said sale permission and this aspect of the matter would clearly show that the plaintiffs were all along ready and willing to perform the part of their contract.

19. As regard the question of not exhibiting the notices dated 07.06.2011 and 20.03.2015, the learned counsel submits that the said documents were duly sent to the defendant and the defendant, if he was interested, should have exhibited the said documents and having failed to do so cannot raise the issue as regards a presumption should be drawn against the plaintiffs.

20. Upon hearing the learned counsel for the parties and also perusing various grounds of objection it appears that the following points for determination arise before this Court:-

(i) Whether the suit was barred by limitation?

(ii) Whether the plaintiffs were ready and willing to perform their part of the contract?

21. For the purpose of deciding, the first point for determination which is as to whether the suit was barred by limitation it would be relevant to take note of Article 54 of the Schedule to the Limitation Act, 1963 which specifically deals with a suit for specific performance. Article 54 of the Schedule to the Limitation Act, 1963 reads as follows:-

	Description of suit	Period of limitation	Time from which period begins to run
54.	For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

22. From a perusal of the said Article, it would show that the prescribed period of

limitation for filing a suit for specific performance of contract is 3 years and the period of 3 years has to be calculated based on two contingencies, i.e., the date fixed for performance of contract or if no such date is fixed, the date when the plaintiff has notice about refusal of the performance by the defendant. The expression "date fixed for performance" is a crystallized notion. When a date is fixed, it means there is a definite date fixed for doing a particular act. Therefore, there is no question of finding out the intention from other circumstances. The expression "date" is definitely suggestive of a specified date in the calendar. The second part puts stress on "when the plaintiff has notice that performance is refused". Here also there is a definite point of time, when the plaintiff noticed the refusal. In that sense, both the parts refer to definite dates. So, there is no question of finding out an intention of other circumstances. Whether the date was fixed or not the plaintiff had noticed that the performance is refused and the date thereof, is to be established with reference to materials of evidence to be brought on record.

23. The Supreme Court in the case of ***Madina Begum and Another Vs. Shiv Murti Prasad Pandey and Ors.***, reported in ***(2016) 15 SCC 322*** observed that a mere reading of Article 54 of the Limitation Act would show that when the date is fixed for the performance of an agreement, then non-compliance with the agreement on the date would give a cause of action to file a suit for specific performance within 3 years from the date so fixed. But when no date is fixed, the limitation of 3 years would begin when the plaintiffs have noticed that the defendant has refused the performance of the agreement.

24. In the backdrop of the above, it would be pertinent to take note of the facts of the instant case. A perusal of the agreement for sale (Ext.1) dated 24.04.2010 would show that there is no date fixed for performance of the agreement. Clause 2 of the said agreement stipulates that the sale permission has to be obtained by the defendant from the authority concerned and Clause 4 stipulates that if the defendant failed/neglected to execute the registration of the sale deed after obtaining

permission, the predecessor-in-interest of the plaintiffs would be at liberty to take legal action. Therefore, this is a case which falls in the second part of Article 54 of the Schedule to the Limitation Act, 1963 which would mean when the plaintiffs had noticed that the performance is refused.

25. This Court had at paragraph No. 9 of the instant judgment dealt with paragraph Nos. 6, 7 & 8 of the plaint and paragraph No. 12 of the written statement. There was no specific denial to the statements made except what has been already indicated in paragraph No. 9 of the instant judgment.

26. At this stage, this Court deems it appropriate to take into consideration the provision of Order VIII Rules 3, 4 & 5 of the CPC, 1908 which stipulates the necessity that the denial has to be specific and the effect of not making a specific denial.

27. The Supreme Court in the case of **Badat and Co., Bombay Vs. East India Trading Co.**, reported in **AIR 1964 SC 538** observed that Rule 3, Rule 4 and Rule 5 of Order VIII of the Code form an integrated Code dealing with the manner in which the allegation of the fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It was observed that the written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary.

28. In the case of **Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar**, reported in **(1993) 4 SCC 6** had also taken a similar view as would be seen from paragraph Nos. 13, 14, 15 and 19 of the judgment which are quoted herein below:-

13. Order 8 Rule 5(1) reads as follows:

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the

defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be provided otherwise than by such admission."

14. *What is stated in the above is, what amounts to admitting a fact on a pleading while Rule 3 of Order 8 requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth.*

15. *Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant. What this rule says is, that any allegation of fact must either be denied specifically or by a necessary implication or there should be at least a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted.*

19. *Non-traverse would constitute an implied admission. In the facts of this case the findings of the trial court and that of the first appellate court could be upheld on this admission. Thus, we find the High Court was wrong in interfering with this finding. Accordingly, the appeal will stand allowed. No costs.*

29. Further to that, in another judgment of the Supreme Court in the case of **Muddasani Venkata Narsaiah (D) Th. Lrs. Vs. Muddasani Sarojana**, reported in **(2016) 12 SCC 288** had also observed the effect of not making a specific denial.

30. In the backdrop of the above, if this Court, therefore, looks into the statements made in paragraph No. 12 of the written statement, it would be seen that the denial so made is an evasive denial. There is no specific denial as regards that the defendant after receipt of the notice dated 07.06.2011 met the predecessor-in-interest of the plaintiffs and requested him to wait for some time. There is no denial to the effect that after the death of the predecessor-in-interest of the plaintiffs, the plaintiffs on various dates had visited the defendant and the defendant had categorically assured the

plaintiffs that he would perform his part of the contract. There is no denial to the allegation that the defendant asked the plaintiff to wait for 4 months. There is also no denial to the allegation that on 16.08.2015, the defendant avoided the plaintiff No. 2 on the basis of which the plaintiffs had the apprehension that the defendant is not interested to perform his part of the contract.

31. Now coming to the question of evidence, it would be seen that the contents of paragraph Nos. 6, 7 & 8 of the plaint is also mentioned in the evidence on affidavit of the plaintiff witness No. 1 at paragraph Nos. 4, 5, 6 & 7. In the cross-examination of the plaintiff witness, it would be seen that there is no effective cross-examination as regards the statements made in the evidence on affidavit, more particularly to the paragraph Nos. 4 to 7. The cross-examination is a matter of substance and not a procedure that one is required to prove one's own version in the cross-examination of the opponent. The effect of not cross-examining is that the statement of the witnesses has not been disputed. The Court would presume that the witness's account has been accepted. It is trite that matters sworn to by one party in the pleadings and not challenged either in the pleadings or cross-examination by the other party must be accepted as fully established. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one.

32. A Division Bench of the Nagpur High Court in ***Kuwarlal Amritlal Vs. Rekhlal Koduram and Others***, reported in ***AIR 1950 NAG 83*** had laid down that when attestation is not specifically challenged and the witness is not cross-examined regarding details of attestation it is sufficient for him to say that the document was attested. It was further held that if the other side wants to challenge the statement, it is their duty, quite apart from raising it in the pleadings to cross-examine the witness along those lines.

33. In the word of Lord Herschell in the case of ***Browne vs. Dunn, (1883) 6 R 67 (A)*** it is stated that:-

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.

I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with the witnesses."

34. The Supreme Court in the case of **Muddasani Venkata Narsaiah** (supra) had also taken into consideration the effect of not putting questions to the witness during the cross-examination and held that the system of administration of justice allows cross-examination of the opposite party's witnesses for the purpose of testing their evidence and it must be assumed that when the witnesses were not tested in that way, the evidence is ordinarily required to be accepted. Paragraph Nos. 15, 16 and 17 of the said judgment is quoted herein below:-

15. *Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and PW 2 have not been cross-examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non-cross-examination is that the statement of witness has not been*



disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat. This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd.

16. In *Maroti Bansi Teli v. Radhabai*, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established. The High Court of Calcutta in *A.E.G. Carapiet v. A.Y. Derderian* has laid down that the party is obliged to put his case in cross-examination of witnesses of opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one. A Division Bench of the Nagpur High Court in *Kuwarlal Amritlal v. Rekhlal Koduram* has laid down that when attestation is not specifically challenged and witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of the Patna High Court in *Karnidan Sarda v. Sailaja Kanta Mitra* has laid down that it cannot be too strongly emphasised that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to

be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first appellate court as to the factum of execution of the sale deed in favour of the plaintiff.

17. *It is also settled law that passing of consideration under a sale deed cannot be questioned by third party. Defendant 3 has not been able to establish her case that she is an adopted daughter of the deceased Yashoda and thus, she being the third party, could not have questioned the execution of the sale deed by Buchamma on the ground of passing of consideration as rightly laid down by the High Court of Madhya Pradesh in Ramjilal Tiwari v. Vijai Kumar. The High Court of Patna has also held that passing of consideration can be questioned by a party or his representative in Akli v. Daho. Similar is the view of the High Court of Nagpur in Maroti Bansi Teli. Thus, the High Court has erred in law on this ground also in dismissing the suit.*

35. In the backdrop of the aforesaid law, if this Court takes into consideration the cross-examination of the plaintiffs' witnesses it would be seen that no questions were put upon the witnesses insofar as the statement made in paragraph Nos. 4, 5, 6 & 7 of the evidence on affidavit except that there was no transaction of money between the plaintiffs and the defendant for the period from 26.01.2011 to 09.09.2015, and that apart, except Ext.1 there is no other document filed and exhibited which would show and prove the cause of action had taken place on the various dates. The plaintiffs' witnesses were not tested on the evidence adduced pursuant to the notice dated 07.06.2011 whereby the defendant requested the predecessor-in-interest of the plaintiffs not to proceed with any litigation and that the defendant assured that he would apply for the sale permission and thereafter execute the sale deed. The

statement made in the evidence on affidavit to the effect that after the death of the predecessor-in-interest of the plaintiffs, the plaintiffs have on various occasions met the defendant who all along had informed the plaintiffs that he was also ready and willing to execute the registered sale deed after taking the sale permission. The statement that the plaintiffs had submitted documents with the defendant for the purpose of sale permission has also not been tested by way of cross-examination. This aspect of the matter would clearly go to show that the evidence put forth by way of the evidence on affidavit by the plaintiffs' witnesses were not tested for which the said evidence is required to be accepted.

36. At this stage it may also be relevant herein to take note of Ext.A which is a reply dated 04.08.2011 sent by the defendant to the predecessor-in-interest of the plaintiffs as well as to the lawyer Miss Namita Kumari. But the pertinent question which arises as regards the accepting of the said document is as to whether the said document was at all communicated to the predecessor-in-interest of the plaintiffs or the plaintiffs. There is evidence led in that regard except the postal receipts which have been exhibited as Ext.B and Ext.C. A perusal of Ext.B would show that the name and address appeared therein is Nmita Kumari, Palashbari S.O. PIN-781128 and in Ext.C, Insan Ali, Palashbari S.O. PIN-781128. The defendant has failed to prove by way of evidence that the said communication dated 04.08.2011 (Ext.A) was sent to the correct address. Unless and until the said aspect is proved, the question of importing the provision of Section 27 of the General Clauses Act, 1897 does not arise. It is also relevant at this stage to mention that the defendant who was the sole defendant's witness was also put to cross-examination as to whether any evidence was tendered to show as to whether the Ext.A was served upon the predecessor-in-interest of the plaintiffs as well as his advocate, the defendant replied that he had not submitted any such document. He also stated that he had not called any witness from the Postal Authority to prove that the said Ext.A was delivered upon the predecessor-in-interest of the plaintiffs as well as his advocate.

37. Therefore, on the basis of the pleadings as well as the evidence, it would be clear that it was only on 16.08.2015, the plaintiffs had notice about the refusal of the defendant to perform his part of the contract. Subsequently, this Court, therefore, is in agreement with the learned trial court and holds that the suit was not barred by limitation.

38. The next point for consideration which arises is as regards the readiness and willingness of the plaintiffs to perform their part of the contract. The law as to whether the plaintiff is ready and willing to perform his part of the contract is well settled. For the purpose of adjudging as to whether the plaintiff is ready and willing to perform his contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The Supreme Court in the case of **C. S. Venkatesh vs. A. S. C. Murthy (Dead) By Lrs.,** reported in **(2020) 3 SCC 280** observed that whether the plaintiff was ready and willing to perform his part of the contract can be inferred from the facts and circumstances of a particular case. It was observed that it is not necessary for the plaintiff to produce ready money but it is mandatory on his part to prove that he has the means to generate the consideration amount.

39. In the judgment and decree impugned before this Court, the trial court had taken into consideration the issue as regards the plaintiffs' readiness and willingness to perform their part of the contract in Issue No. 4 and came to a finding on the basis of the evidence that the plaintiffs were ready and willing to perform their part of the contract and it was the defendant who avoided by not applying for the sale permission.

40. From the pleadings of the plaintiffs it would be seen that in paragraph Nos. 5, 6, 7, 8, 9 & 10 the plaintiffs have specifically pleaded their readiness and willingness to perform their part of the contract which is in tune with Section 16 (c) of the Specific Relief Act, 1963 as it stood prior to its amendment by the Specific Relief (Amendment)

Act, 2018.

41. In the written statement filed by the defendant at paragraph No.11 it has been mentioned that it is not true that the predecessor-in-interest of the plaintiffs was always ready and willing to purchase the schedule plot of land and had executed all the necessary papers for obtaining the sale permission and handed over the same to the defendant. It was further mentioned that the predecessor-in-interest of the plaintiffs knew that for obtaining sale permission certain documents were required by the Office of the Deputy Commissioner such as Voters List/PRC/photos etc. which the predecessor-in-interest of the plaintiffs did not furnish and fulfill those requirements and meanwhile more than 4 years period have already passed and the value of the land has gradually increased and the predecessor-in-interest of the plaintiffs ultimately refused to purchase the land by treating the agreement cancelled and did not act upon his right within the period of limitation. In paragraph 12 of the written statement which was the reply to paragraph Nos. 6, 7 & 8 of the plaint, there is no denial that the plaintiffs did not have the readiness and willingness to perform the part of the contract although the same was specifically averred in the said paragraph of the plaint. In paragraph No. 13 of the written statement, it was stated that the claim of the plaintiffs that they were ready and willing to perform the part of the agreement creates doubt over the said assertion of the plaintiffs but there was no denial to the said aspect of the matter.

42. Be that as it may, on the basis thereof, the Issue No. 4 was framed as to whether the plaintiffs were ready and willing to perform their part of the contract. To prove the fact that the plaintiffs were ready and willing to perform their part of the contract, the plaintiff witness No. 1 had averred in paragraph Nos. 3, 4, 5, 6, & 7 that the predecessor-in-interest of the plaintiffs as well as the plaintiffs were ready and willing to perform their part of the contract. In the cross-examination of the plaintiff witness No. 1, on being asked as to whether she knew that in order to obtain sale permission, documents from the seller is required, the plaintiffs' witness answered in

the affirmative. On being asked as to whether the defendant had ever asked for Voters List/PRC/photograph from her husband to obtain sale permission, she replied that she did not remember that. She had also stated that her husband did not produce any Voters List/PRC/photograph to the defendant for obtaining the sale permission as required. On the basis of the same, the learned counsel for the appellant submitted that as the Voters List/PRC/photograph were not produced by the predecessor-in-interest of the plaintiffs; the sale permission could not be obtained. To appreciate the said contention it would also be relevant to take note of the evidence which have been laid by the defendant wherein he stated that though he had undertaken to take responsibility for obtaining the sale permission but the predecessor-in-interest of the plaintiffs did not come forward and gave required papers such as the Voters List/PRC/photograph.

43. The entire thrust of the case as could be seen from the evidence of the defendant is on the basis of the letter dated 04.08.2011 which however the defendant failed to prove that the said document was duly communicated to the predecessor-in-interest of the plaintiffs. It may be relevant here to note that if the said document, i.e., Ext.A is not taken into consideration; nothing survives in the defence of the defendant that the predecessor-in-interest of the plaintiffs was not ready and willing to perform his part of the contract. It would be seen that the defendant had admitted during his cross-examination that he had not taken any steps for obtaining the sale permission. He further stated that he had not issued any notice to the predecessor-in-interest of the plaintiffs for giving any document. He further admitted that in his written statement there is no mention that he had asked the predecessor-in-interest of the plaintiffs orally also to give him the documents. He further stated that after the elapse of a long period, even if the plaintiff paid the remaining balance amount, he has no intention to obtain the sale permission and execute the sale deed. He further stated in his cross-examination that the required document which is necessary to be executed as a seller for the sale permission has also not been prepared by him. He admitted

that the suit land is covered by a boundary wall and the plaintiffs had constructed an Assam Type house in spite of his protest but he had not reported it to the police. It may not be lost sight of that it was the responsibility of the defendant to obtain the sale permission. He was, therefore, required to prove that he had taken necessary steps in that regard including taking steps to get the documents from the purchaser for obtaining the sale permission. This aspect of the matter is totally lacking in the evidence of the defendant.

44. The above evidence, therefore, would show that the plaintiffs have averred as well as have proved their readiness and willingness to perform their part of the contract. The defendant had failed to produce any evidence to show that he had requested the predecessor-in-interest of the plaintiffs or even after the death of the predecessor-in-interest of the plaintiffs to produce their necessary documents for the purpose of obtaining the sale permission as well as the execution of the sale deed. On the other hand, he had specifically mentioned that he had not taken any steps for obtaining the sale permission and even if the balance consideration was paid then also he shall not execute the sale deed by obtaining the sale permission. Even otherwise, it is also relevant to take note of that Clause 2 of the agreement dated 24.04.2010 which specifically mentioned that it was the responsibility of the defendant to obtain the sale permission but there is no material placed on record to show that the defendant had taken any steps in that regard rather he had admitted that he had not taken any steps towards obtaining the sale permission. Further, it is also relevant to take note of that the total consideration for the suit land was Rs.18 lakh and out of that, Rs.15 lakh had already been paid which has been duly admitted by the defendant and the remaining amount of Rs.3 lakh which the plaintiff has specifically admitted that they are ready and willing to pay the same. Consequently, therefore, this Court is of the opinion that the plaintiffs were ready and willing to perform their part of the contract.

45. In view of the findings arrived at as regards both the points for consideration



and the agreement for sale being a duly admitted document as well as also the receipt of the consideration of Rs.15 lakh out of the total consideration amount of Rs.18 lakh, this Court is in agreement with the judgment and decree passed by the trial court, and accordingly, affirms the same thereby dismissing the instant appeal.

46. Accordingly, the plaintiffs are entitled to for specific performance of agreement dated 24.04.2010 and the plaintiffs are directed to pay the remaining balance amount of Rs.3 lakh within a period of 2 (two) months, i.e. on or before 08.08.2022 before the trial court, i.e., the Court of Civil Judge, Kamrup, Amingaon and the defendant is directed to execute the sale deed in respect to the schedule plot of land by receiving the balance amount of Rs.3 lakh which the plaintiffs would deposit in terms with the instant order.

47. It is further decreed that on the failure of the defendant to execute the said registered sale deed, the Court of the Civil Judge, Kamrup, Amingaon shall in conformity with the provision of Order XXI Rule 34 of the CPC execute the said registered sale deed in favour of the plaintiffs.

48. It is further decreed that the plaintiffs are entitled to permanent injunction as prayed for in the suit thereby restraining the defendant, his men, agents etc. from alienating or transferring the schedule land in favour of any other person or persons and not to change the nature and character of the same.

49. The plaintiffs/respondents herein would also been entitled to the costs.

50. Prepare the decree accordingly.

51. Send back the LCR.

JUDGE

Comparing Assistant