IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

R.F.A. No. 08 of 2018

Mrs. Pankhuri Mishra, aged about 41 years,
Wife of Shri Rajeev Mishra,
C/o Rajeev Electronics,
Resident of Paljor Statdium Road,
P.O. & P.S. Gangtok-737 101,
East Sikkim.

… Appellant

Versus

1. Smt. Rinzing Lachungpa,
Daughter of Shri T. Lachungpa,
Resident of Yamaha Building, M.G. Marg,
P.O. & P.S. Gangtok-737 101,
East Sikkim.

2. Shri Thukchuk Lachungpa,
Son of Late Tencho Lachungpa,
Resident of New Yama Tower, M.G. Marg,
Gangtok-737 101,
East Sikkim.

… Respondents

3. Taktuk Bhutia,
S/o Late K.C. Lama Bhutia,
R/o M.G. Marg,
Gangtok-737 101,
East Sikkim.

4. Bimal Kumar Jain,
S/o Late Punam Chand Jain,
R/o NH-10, Sisa Golai,
Gangtok-737101,
East Sikkim.

… Intervener Respondents

For the appellant : Mr. B. Sharma, Senior Advocate with Mr. M.N. Dhungel, Advocate.

For the respondent No. 1 : Mr. Sudesh Joshi, Advocate.

For the respondent Nos. 2 and 4 : Mr. S.S. Hamal, Advocate.

WITH
RFA No.09 of 2018

Ms. Rinzing Lachungpa,
D/o Mr. Thukchuk Lachungpa,
R/o Yama Building,

M.G. Marg,
Gangtok, East Sikkim.

… Appellant

Versus

1. Mrs. Pankhuri Mishra,
Wife of Shri Rajeev Mishra,
C/o Rajeev Electronics,
Gangtok, East Sikkim.

2. Mr. Thukchuk Lachungpa,
R/o M.G. Marg,
Gangtok, East Sikkim.

3. Mr. Taktuk Bhutia,
Son of Late K.C. Lama Bhutia,
R/o M.G. Marg,
Gangtok, East Sikkim.

4. Mr. Bimal Kumar Jain,
Son of Late Punam Chand Jain,
R/o Sisa Golai,
Gangtok, East Sikkim.

For the appellant : Mr. Sudesh Joshi, Advocate.

For the respondent No. 1 : Mr. B. Sharma, Senior Advocate with Mr. M.N. Dhungel, Advocate.

For the respondent Nos. 2 and 4 : Mr. S.S. Hamal, Advocate.

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

Date of hearing : 17.10.2020

Date of judgment : 09.11.2020

JUDGMENT

(*Arup Kumar Goswami, CJ*)

Appellant in RFA No.08/2018 had filed a suit against the appellant in RFA No.09/2018 for specific performance of contract in the Court of District Judge, East Sikkim at Gangtok.

2. The case was transferred to the Court of District Judge, Special Division-I, East Sikkim at Gangtok where the same was registered as Title

Suit No.14/2015. Subsequently, the father of appellant in RFA No.09/2018, on an application being filed by him, was arrayed as Defendant no.2 in the suit.

3. Later on, one Mr.Taktuk Bhutia and one Mr.Bimal Kumar Jain also filed applications to implead them as parties. Mr. Taktuk Bhutia claimed that he was in possession of the suit property. The plea taken by Mr. Bimal Kumar Jain was that he had purchased a portion of the suit property by a registered sale deed dated 27.03.2008. The learned Trial Court impleaded the aforesaid two individuals as Intervener nos.1 and 2, respectively.

4. By Judgement and Order dated 28.09.2018, the learned Trial Court, while declining to grant a decree of specific performance of contract in respect of a lease deed dated 30.08.2018, ordered defendant no.1 (appellant in RFA No.09/2018) to refund an amount of Rs.27 lakhs to the plaintiff along with interest @6% per annum with effect from 18.12.2012 till the date of filing of the suit i.e.01.09.2015, pendente lite interest @6% per annum and further interest @6% on the principle sum adjudged till fully recovery.

5. In both the appeals, while the father of appellant in RFA No.09/2018 is arrayed as Respondent no.2, Mr.Taktuk Bhutia and Mr.Bimal Kumar Jain are arrayed as respondent no.3 and 4, respectively.

6. Aggrieved by the aforesaid judgment, plaintiff has filed the appeal contending that the learned Trial Court ought to have granted a decree of specific performance of contract as prayed for and the learned Trial Court committed error of law even in decreeing the suit for Rs.27 lakhs in as much as materials on record demonstrate that a sum of Rs.71 lakhs had been paid to the defendant no.1/appellant in RFA No.09/2018.

7. Defendant no.1 had also filed an appeal being RFA No.09/2018 being aggrieved by the direction to pay an amount of Rs.27 lakhs to the plaintiff.

8. The suit was filed stating that a lease deed was entered into by the plaintiff and defendant no.1 on 30.08.2012 to lease out a flat on the ground floor of the building mentioned in Schedule A to the plaint measuring about 40 ft.x21 ft. for a period of 99 years with a renewable clause of 99 years on a consideration amount of Rs.1 crore, out of which, the plaintiff had paid Rs.44 lakhs as advance payment. Subsequently, the plaintiff also paid a sum of Rs.5 lakhs on 01.11.2012 and Rs.12 lakhs on 14.11.2012, thereby, making a total payment of Rs.61 lakhs.

9. The defendant no.1 had submitted the lease deed before the Sub-Registrar, East District for registration. The brother, mother and father of the defendant no.1 had issued No Objection Certificate(NOC) in favour of the defendant no.1 for leasing out the suit property in favour of the plaintiff. However, in spite of several requests the defendant no.1 did not turn up for necessary registration formalities though the plaintiff was ready and willing to pay the balance amount of Rs.39 lakhs at the time of execution of the lease deed.

10. A lawyer’s notice dated 06.09.2012 was issued in this connection but even after that as the defendant no.1 did not perform registration of the lease deed in favour of the plaintiff, the suit came to be filed for specific performance of contract. An alternative prayer was made for a decree directing the defendant no.1 to return the advance amount of Rs.61 lakhs to the plaintiff along with 12% interest if the decree for specific performance of contract cannot be granted.

11. The plaint was subsequently amended to the effect that the plaintiff had also paid an amount of Rs.10 lakhs vide debit voucher no.235

dated 13.12.2012 and thus, a total amount of Rs.71 lakhs was paid leaving an amount of Rs.29 lakhs to be paid.

12. The defendant no.1 had filed written statement to the original plaint as well as to the amended plaint. In the written statement filed to the original plaint, apart from taking the usual pleas such as there is no cause of action for the suit, suit is not maintainable, etc., it is stated that plaintiff and her husband were family friends of defendant no.1 and they shared a very cordial and warm relationship. The plaintiff had expressed her desire to purchase the suit property. However, as the plaintiff is a non-sikkimese lady, defendant no.1 had proposed that a lease deed can be entered into. Accordingly, plaintiff proposed to pay Rs.1 crore as the full and final consideration amount and she promised to pay an advance of Rs.44 lakhs and the balance amount on registration of the lease deed. The plaintiff brought printed lease deed, typed application addressed to the Sub-Registrar dated 30.08.2012 and three number of typed NOCs. She affixed her signature on the said documents and by obtaining the signatures of her brother, father and mother on the NOCs had handed over all the documents to the plaintiff. The plaintiff, however, told that the advance of Rs.44 lakhs could not be arranged and that the same would be paid soon. Since the relationship was cordial, she did not suspect foul play on the part of the plaintiff.

13. But since the plaintiff did not make any payment even after lapse of a considerable period of time from the date of execution of the lease deed, defendant no.1 decided to withdraw the agreement and accordingly, she had asked the plaintiff to withdraw all the documents from the office of Sub-Registrar. The plaintiff had informed the defendant no.1 that she had withdrawn the documents. While categorically stating that she had not received any money from the plaintiff, the defendant no.1 also denied

receipt of any legal notice from the plaintiff. It is pleaded that the lease deed dated 30.08.2012 is basically a sale deed and as such the suit was barred by law in view of Revenue Order No.1 of 1917, the plaintiff being a non-Sikkimese lady. It is also pleaded that the lease deed is violative of Government Notifications which provide that period of lease deed cannot exceed 35 years.

14. The written statement of the defendant no.1 to the amended plaint is almost a verbatim reproduction of the written statement to the original plaint. Additionally, the defendant no.1 denied payment of Rs.12 lakhs by the plaintiff vide debit voucher no.235 dated 13.12.2012 to defendant no.2 and receipt of a sum of Rs.71 lakhs.

15. The defendant no.2 in the written statement to the original plaint had stated that a lease deed of 99 years with a renewal clause of another term of 99 years is nothing but a sale deed in the garb of a lease deed and as such the same is violative of Revenue Order No.1 of 1917. It is averred that husband of the plaintiff, who is a businessman, had a cordial and good business relation with him for many years and in connection with such business, many documents were exchanged between them bearing their signatures. He had denied receipt of Rs.5 lakhs and Rs. 12 lakhs as alleged by the plaintiff. In the written statement filed against the amended plaint, he had stated that the plaintiff had obtained his signatures on some blank papers and misusing the same he had been made a witness to the lease deed. He denied receipt of Rs.12 lakhs from the plaintiff vide debit voucher no.235 dated 13.12.2012 as well as total payment of Rs.71 lakhs made by the plaintiff.

16. Intervener No.1 did not file any written statement but Intervener no.2 had filed a written statement. In his written statement Intervener No.2 had stated that he had purchased a portion of the ground floor of the

property which is mentioned in Money Receipt dated 14.11.2012 from one Smt. Kamal Kumari Subba much before the lease deed between plaintiff and defendant no.1 was executed and he had been running a sweet-meat shop in the name and style of Unique. It is also stated that a suit being Title Suit No.01/2013 filed by him against Smt. Kamal Kumari Subba and her husband is pending in the Court of learned Civil Judge, East Sikkim.

17. The learned trial Court had framed the following issues:

"1. Whether the suit is maintainable? (onus on the Plaintiff).

2. Whether the suit is barred by the law of limitation? (onus on the Defendants).

3. Whether the suit is barred by Revenue Order No.1 of 1917? (onus on the Defendant)

4. Whether the law of land permits lease deed for more than 35 years with automatic renewal clause? (onus on the Defendants)

5. Whether the Plaintiff had paid a sum of Rs.71,00,000/- as advance to Defendant no.1 and 2? (onus on the Plaintiff)

6. Whether the defendant no.2 at all received any amount on behalf of Defendant no.1 in the form of advance from Plaintiff in consideration of the lease agreement dated 30.08.2012? (onus on the Plaintiff)

7. Whether the lease agreement dated 30.8.2012 is valid in the eyes of law? (onus on the Plaintiff)

8. Whether the Plaintiff is entitled to a decree of specific performance of contract for effecting lease deed dated 30.08.2012 registered and delivery of possession of the suit land? (onus on the Plaintiff).

9. Whether the Plaintiff is entitled to a decree for return of the advance money paid with 12% interest from the Defendants no.1 and 2? (onus on the Plaintiff)

10. Whether in view of registered agreement dated 27.03.2008 executed by Smt. Kamal Kumari Subba, wife of Shri Ashok Kumar Subba, the plaintiff and defendant no.1 could have executed Money Receipt dated 14.11.2012? (onus on the Plaintiff) and

11. Reliefs, if any?"

18. During trial, plaintiff had examined herself and 2 other witnesses. While defendant no.1 had examined herself, defendant no.2 examined himself and another witness.

19. Mr. B. Sharma, learned Senior Counsel for the appellant submitted that the learned Trial Court committed manifest error of law in declining to grant specific performance of contract holding that the lease deed was a sham document. Payment of Rs.44 lakhs by the plaintiff was acknowledged by the defendant no.1 in clause 1 of the lease deed (Exhibit-1). However, the learned Trial Court, on a totally wrong understanding of clause 2 of the lease deed, came to an erroneous conclusion that it was difficult to accept that Rs.44 lakhs was paid by the plaintiff. He submits that a total amount of Rs.71 lakhs was paid by the plaintiff but the learned Trial Court had accepted on the basis of Exhibits-2, 3 and 4 that the plaintiff had paid only a sum of Rs.27 lakhs. He has contended that a document has to be read as a whole and a sentence here and there cannot be picked up and looked into in isolation. Further contention advanced by Mr. Sharma is that in any view of the matter documentary evidence must prevail over oral evidence of defendant no.1 regarding non-payment of Rs.44 lakhs. Mr. Sharma submits that it is only because of the fact that Rs.44 lakhs was paid at the time of

execution of the lease deed, in Exhibit-3, payment of the amount of Rs.12 lakhs was shown as part-payment. He has submitted that in Exhibit-3, apart from the description of the property being wrongly mentioned, it is wrongly noted that payment was made for purchase of the property. He submits that in the written statement filed to the original plaint an admission was made by the defendant no.2 but while filing the written statement to the amended plaint, such admission was omitted and in that context, he has drawn the attention of the Court to paragraphs 13 and 14 of both the written statements. He forcefully argues that it is a fit case where this Court ought to decree the suit of the plaintiff for specific performance of contract. By way of alternative submission, Mr. Sharma submits that if for some reason this Court is not inclined to grant specific performance of contract, direction may be issued for refund of Rs.71 lakhs. He has placed reliance on *Heeralal* v.*Kalyan Mal*, reported in *(1998) 1 SCC 278* , *General Court-Martial & ors.* v*. Col. Aniltej Singh Dhaliwal*, reported in *(1998) 1 SCC 756*, *Delhi Development Authority* v. *Durga Chand Kaushish*, reported in *(1973) 2 SCC 825*, *Laxman Haraklal & ors.*v.*U.Z.Mahajan & ors,* reported in *AIR 2011 Bom 159*, *M/S Jain Udyog Limited* v. *M/S Mahindra and Mahindra Limited*, reported in *2011 SCC Online Jhar 62* and *P. Madhusudhan Rao* v. *Ravi Manan*, reported in *MANU/AP/0139/2015*.

20. Mr. S. Joshi, learned Counsel for the defendant no.1/appellant in RFA No.09/2018 submits that plaintiff is a housewife and no where she had stated about her ability to pay such a substantial amount of Rs.1 crore. He has submitted that the learned Trial Court rightly disbelieved alleged payment of Rs.44 lakhs made by the plaintiff to the defendant no.1 as clause no.2 of the lease deed also recited that the plaintiff had paid a sum of Rs.1 crore and it was in the aforesaid context the learned Trial Court had concluded that the lease deed was a sham document. He submits that although no amount was paid, defendant no.1 had executed the lease deed

on implicit trust because of the good relationship that she shared with the plaintiff, which trust, however, was belied by the plaintiff. It is submitted that the falsity of the case of the plaintiff would be apparent from the legal notice dated 12.10.2015 (Exhibit-12) wherein it is categorically stated that Rs.61 lakh was paid on 14.11.2012 which is in total contradiction to what is recorded in the lease deed. It is difficult to believe that the plaintiff could not remember payment of Rs.10 lakhs if really such payment was made necessitating amendment of the plaint and that shows the hollowness of the claim of the plaintiff, he contends. He has submitted that though in cross-examination PW-1 had stated that she had paid Rs.30 lakhs out of Rs.44 lakhs in cash and Rs.14 lakhs by cheque, the plaintiff did not lead any evidence with regard to such payment through cheque and the same also demonstrates that the plaintiff had instituted a false case. He contends that Exhibit-2 dated 01.11.2012 and Exhibit-4 dated 13.12.2012 do not show payment made by the plaintiff to the defendant no.1. Drawing the attention of the Court to Money Receipt dated 14.11.2012(Exhibit-3) for an amount of Rs.12 lakhs, he submits that the aforesaid amount was also paid to the defendant no.2 and not to the defendant no.1. Even payment of this amount was not established in view of the evidence of Mr. A.K. Upadhyay, a senior advocate who deposed on behalf of the defendant no.2, he contends. He has submitted that the learned Trial Court, in absence of any material on record, erroneously came to the conclusion that there was an implied agency in between the defendant no.1 and defendant no.2. He submits that the defendant no.1 cannot be saddled with any liability for payment of any amount when there was no agency, express or implied, with defendant no.2. He has placed reliance in the cases of *Rajgopal(dead) by LRs* v. *Kishan Gopal & another* ,reported in *(2003)10 SCC 653* and *Fine Knitting Co. Ltd.* v. *Union of India*, reported in *(1986)4 SCC* 276.

21. Drawing attention of the Court to Exhibits-2 and 4, Mr.S.S Hamal submits that assuming that the amount was paid to the defendant no.2, it is not the plaintiff who had made the payment and therefore, the said payment, in any view of the matter, cannot be a part-payment towards the consideration amount. With regard to Exhibit-3 he submits that the Money Receipt does not pertain to the suit premises and that apart, payment is also not proved and therefore, no liability can arise out of Exhibit-3.

22. I have considered the submissions of the learned Counsel for the parties and have perused the materials on record.

23. The learned Counsel for the parties submit that issue nos.1, 2 and 10 are not pressed. Learned Trial Court had observed that in view of decision in issue nos.7, 8 and 9, issue no.3 as well as issue no.4 had become academic. However, at the same time, an observation was made that, as on 30.08.2012, a lease up to a period of 99 years was permissible.

24. Relevant portions of paragraphs 13 and 14 of the written statement, which Mr. Sharma claims to be an admission, are identical. For better appreciation, the same is reproduced herein below:

"".....For the past more than five years the defendant no.2 had not ascertain from plaintiff in connection with what business transaction he had given such signed document of his including those mentioned in the plaint and the same is therefore yet to be ascertain by him without which he is not in position to admit the plea of the plaintiff as alleged or at all in Para under reference."

The reply extracted above was in respect of paragraphs 3 and 4 of the plaint wherein the plaintiff had stated that defendant no.2 had signed as a witness to the lease deed dated 30.08.2012.

In the amended written statement the aforesaid extracted portion was omitted and corresponding portion at paragraphs 13 and 14 reads as follows:

"......At the relevant time he has several business transactions with the defendant no.2 and in connection with some business transaction the plaintiff had obtained the signature in some blank papers from defendant no.2. The defendant no.2 has only in this case now learnt that his signatures has been misused by the plaintiff and he is made as witness to a lease agreement which is for 99 years with compulsory renewal of another term of 99 years not permissible in law."

25. In *Heeralal* (supra), it was held that an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed.A perusal of the extracts above will go to show that so far signing of the document by defendant no.2 is concerned the same is not disputed and therefore, it does not amount to omission of any admission. The defendant no.1, in his examination-in-chief, had admitted that he was a witness to the lease deed, Exhibit-1 and therefore, the contention raised by Mr. Sharma regarding omission of alleged admission in the amended written statement,in any view of the matter, loses relevance.

26. Now, I shall take up issue nos. 5 and 6 together. There is no dispute that the suit property belongs to the defendant no.1. The positive case of the plaintiff in the plaint is that she had paid Rs.44 lakhs as advance and the same was duly acknowledged in the lease deed.

27. It is also the case of the plaintiff that she had paid Rs.5 lakhs on 01.11.2012 vide Exhibit-2, Rs.12 lakhs on 14.11.2012 vide Exhibit-3 and Rs.10 lakhs on 13.12.2012 vide Exhibit-4.

28. The decision in *Delhi Development Authority* (supra) was pressed into service by Mr. Sharma to contend that a document has to be read as a whole and not piecemeal in the context of clause 1 and clause 2 of the lease deed and that if it is so read it will become crystal clear that recital of payment of Rs.1 crore was an inadvertent error. In *M/S Jain Udyog* (supra), Jharkhand High Court had held that it is not open to lead collateral evidence to contradict the statement made in the agreement (clause 37 of the agreement in that case) in view of Sections 91 and 92 of the Evidence Act. In *Madhusudhan* (supra), Andhra Pradesh High Court had observed that when language in a document is clear and unambiguous, intention of the parties need not be looked into. In *Laxman* (supra), on the facts of the case Bombay High Court found that there was no reason to disbelieve the recital in the agreement.

29. Clauses 1 and 2 of the lease agreement dated 30.08.2012, Exhibit-1, read as follows:

> *"1. That the total premium for the entire period of Lease of 99 (Ninety-nine) years and renewal of one more period of 99 (Ninety-nine) years is fixed at Rs.1,00,00,000/- (One Crore only) the lessee has already paid an amount of Rs.44,00,000/- (Forty-four Lakhs) in the form of advance, which the Lessor do hereby acknowledges. The balance amount of the total premium amounting to Rs.56,00,000/- (fifty-six Lakhs) only shall be paid by the Lessee on completion of the Registration of the Lease Deed.*
>
> *2. That in consideration of the premium amounting to Rs.1,00,00,000/- (One Crore only) paid by the Lessee to the Lessor (the receipt of which is acknowledged) reserved and of the covenants on the part of the Lessee hereinafter contained the Lessor both hereby demise after registration of this presents and*

after full and final payment of the total consideration amount unto the Lessee all the part of said flat with all its advantages and disabilities hidden or obvious containing more particularly described in the Schedule hereunder written the possession of the said flat has been delivered to the Lessee, together with all rights, easement and appurtenances whatsoever to the said flat or belongings or in anyway appertaining to hold the same for a term of NINETY-NINE YEARS (99 YEARS) with a compulsory right of renewal of one more period of NINETY-NINE YEARS (99 YEARS) each."

30. A perusal of clause 1 goes to show that an amount of Rs.44 lakh was already paid as advance and payment of such amount is acknowledged by the lessor,ie.,the defendant no.1 and Rs.56 lakhs more is to be paid by the lessee ,ie.,plaintiff , on completion of registration of the lease deed. When the said amount of Rs.44 lakhs was paid is not reflected. There is lack of clarity in clause 2. However, what is clear is the recital that premium amounting to Rs.1 crore was paid by the lessee to the lessor and the receipt of the same is also duly acknowledged. Even if it is assumed that recital of payment of Rs.1 crore was an error, clause 1 has to be considered in the light of evidence on record.

31. In *General Court-Martial* (supra), the Hon'ble Supreme Court had observed that an admission can be explained by the makers thereof and an admission is not conclusive as to the truth of the matter stated therein and that it is only a piece of evidence, the weight to be attached to which must depend upon the circumstances under which it is made. It may be shown to be erroneous or untrue so long as the person to whom it was made has not acted upon it at the time when it might become conclusive by way of estoppel.

32. In the paper book, 2nd page of legal notice dated 12.10.2015, Exhibit -12, was inadvertently left out but the same is made available by Mr. M.N Dhungel, learned Counsel appearing for the appellant in RFA No.08/2018. In the said legal notice, it is categorically stated that the plaintiff had paid Rs. 61 lakhs on 14.11.2012 towards advance thereby totally nullifying clause 1 of lease deed dated 30.08.2012. If Rs.44 lakhs was paid as stated in the lease agreement, then there was no question of amount of Rs.61 lakh being an advanced amount and further there was also no necessity to make payment of Rs.61 lakhs as in that event total amount paid would have been Rs.1.05 crore, which exceeds the agreed consideration amount of Rs.1 crore.

33. The defendant no.1, as DW-1 had stated in her evidence in affidavit that as the advance money was not paid even after passage of more than a month from the date of execution of the lease deed, she and the plaintiff had decided to drop the transaction altogether and the plaintiff was asked to withdraw the lease deed and other papers from the office of the Sub- Registrar, Gangtok and the plaintiff had informed her that she had withdrawn all the documents from the office of the Sub- Registrar, Gangtok and that the transaction stood cancelled. It was further stated that she had no reason to suspect the plaintiff as they shared a good relationship and she never thought that the plaintiff would play fraud on her on the strength of those documents pertaining to the cancelled deal.

34. The aforesaid evidence of DW-1 was not tested by the plaintiff by way of cross-examination. Thus, the aforesaid evidence of defendant no.1 has remained un-impeached and as a consequence thereof only conclusion that can be drawn is that the transaction was cancelled for non-payment of advance amount and the lease deed was not to be acted upon. The same

also goes to show that no amount in the form of advance was paid on 30.08.2012 i.e., on the date of execution of the lease deed.

35. In view of the above discussion, I am of the considered opinion that learned Trial Court was justified in coming to the conclusion that merely because it is mentioned in Exhibit-1 that amount of Rs.44 lakh was paid by the plaintiff, payment of Rs.44 lakhs on the date of execution of the lease deed is not proved. Documentary evidence to outweigh oral evidence has to be clear and unambiguous. Reliance placed by Mr. Sharma on the decision in *Fine Knitting Co. Ltd* (supra) to contend that in absence of a receipt, payment of Rs.44 lakh has be accepted because it is so mentioned in the lease deed, is wholly misconceived. The aforesaid judgment does not lay down any such proposition. The Hon'ble Supreme Court had only made an observation that it was not clear as to whether the sale has in fact taken place pursuant to the agreement of sale as neither a receipt for the money received nor a receipt for the machinery delivered has been placed before the Court.

36. There is no pleading whatsoever in the plaint that there was an agency in between the defendant no.1 and the defendant no.2. The plaintiff though stated that defendant no.1 had told her that she could make remaining payment to her father, such evidence cannot be looked into when the plea is not taken as held in *Rajgopal* (supra). In cross-examination, the plaintiff had stated that there is nothing on record to prove that defendant no.2 is an agent, authorised signatory or power-of-attorney holder of defendant no.1 in respect of the suit property.

37. PW-2, the husband of the plaintiff admitted that neither he nor his wife is the owner of Rajeev Electronics and that it was his father who is owner/proprietor of Rajeev Electronics. The same was contradicted by PW-3, who was working as a Manager of Rajeev Electronics for about 6-7 years,

stating that Rajeev Electronics is a company. Exhibit-2 is a debit voucher dated 01.11.2012 issued by Rajeev Electronics to defendant no.2 for an amount of Rs.5 lakhs. Exhibit-4 is also a debit voucher dated 13.12.2012 issued by Rajeev Electronics to defendant no.2 for an amount of Rs.10 lakhs. Admittedly, the aforesaid amounts were not paid to defendant no.1. It is not the pleaded version in the plaint that Rajeev Electronics had made part payment on behalf of the plaintiff. There is no indication in the aforesaid debit vouchers the purpose for which the alleged payment were made. By Exhibit-3, the plaintiff also claims that a sum of Rs.12 lakhs was paid for the transaction. I will discuss regarding Exhibit-3 in a while. It is, however, to be noted at this stage that in Exhibit-3 also the amount was shown to have been paid to the defendant no.2 .When the lease deed at clause 1 provided for payment of balance amount of Rs. 56 lakhs on completion of registration of lease deed, it is also not explained by the plaintiff why before completion of registration, amounts of Rs.5 lakhs, Rs.10 lakh and Rs.12 lakhs came to be paid**.**

38. PW-1 in her evidence has stated that Money Receipt dated 14.11.2012, Exhibit-3, for Rs.12 lakhs was executed by defendant no. 2 and that Exhibit-3 (a) is the signature of defendant no. 2 on Exhibit-3, which she had identified. PW-2 had also deposed in the same manner. While there was no cross-examination on behalf of defendant no. 1 with regard to Exhibit-3 (a), defendant no.2 merely adopted the cross-examination made by defendant no. 1. Though PW-2 in cross-examination had stated that the amount of Rs.12.00 lakhs was paid in the chambers of the advocate of defendant no. 2 and the said Advocate, as DW-2 for defendant no. 2, had stated that no monetary transaction had taken place in him chambers, the same will not make much difference in view of the positive evidence of PW-1 and PW-2 that Exhibit-3 (a) is the signature of defendant no. 2, which has remained un-impeached. Mr. A.K. Upadhyay, DW-2 for defendant no. 2 was

categorical that the signature Exhibit-3 (a) was not there when he had made the Money Receipt in his own hand writing thereby ruling out the possibility of there being a signature of defendant no.2 on a blank paper. Thus, there is no escape from the conclusion that vide Exhibit-3, a sum of Rs.12 lakhs was received by defendant no. 2 in connection with a transaction relating to property. Unlike Exhibit-2 and Exhibit-4, Exhibit-3 demonstrates payment of money on account of a transaction relating to immovable property. It has not been brought on record by the defendants that defendant no. 1 had any other property other than the suit property and therefore, it is apparent that mistakes were committed by Mr. A.K. Upadhyay, DW-2 on behalf of defendant no.2, in describing the suit property and the purpose for which the money was paid. On the basis of preponderance of probabilities it has to be accepted that the payment was made in connection with Exhibit-1 to defendant no.2, who though not authorised, had received the amount in respect of the transaction. In view of the above discussion, issue nos. 5 and 6 are decided holding only a sum of Rs.12 lakhs was paid by the plaintiff towards payment of consideration amount of the lease deed dated 30.08.2012 and that defendant no. 2 had received the said amount.

39. So far as issue no. 3 is concerned, it is to be noted that vide Revenue Order No. 1 dated 17.05.1917, it was notified to all Kazis, Thikadars and Mandals in Sikkim that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their lands to any person other than a Bhutia or a Lepcha without the express sanction of the Durbar, or officers empowered by the Durbar in their behalf, whose order will be obtained by the landlord concerned. The term ‘mortgage' is defined to mean the whole or part of a holding on the Biyaz or Masikata system and the term sub-let was defined to mean sub-letting the whole or part of holding on the Pakuria system. 'Biyaz' is defined to mean mortgaging land to another person who enjoys the produce of the land as interest, so long as the

principle loan remains unpaid. 'Masikata' is defined to mean mortgaging of fields to a creditor who enjoys the produce of the field as annual instalment towards the loan. 'Pakuria' is defined to mean sub-letting, where a rayot allows another new rayot to settle upon a portion of his own holding, generally receiving from him some rent in cash and some assistance in cultivating his own fields.

40. The learned Trial court had held that transaction was shown to be a lease transaction only to avoid the operation of Revenue Order No. 01 of 1917. It is manifestly clear that Revenue Order No. 01 of 1917 expressly relates to land and not to any building or flats. Only because of the fact that in Exhibit-3, the word “purchase” was written by the concerned Advocate of defendant no. 2, the learned Trial court held that the transaction was not a lease transaction but was a transaction of purchase. The learned Trial court had also observed that on 30.08.2012 when the lease deed was executed, lease up to a period of 99 years was permissible. Nothing contrary is shown by the learned Counsel for the defendants to take a view that execution of lease deed was not permissible in law. Accordingly, while upholding the decision in issue no. 4, issue no.3 is decided holding the suit was not barred by Revenue Order No. 01 of 1917.

41. The learned Trial Court, in view of Revenue Order No. 01 of 1917, Exhibit-3, and also taking into account the finding arrived at that no advance payment of Rs.44 lakhs was paid to the defendants, though reflected in the lease deed, held the lease deed to be a sham document indicating a sham transaction. However, no specific finding was recorded on issue no. 7 as to whether the lease deed dated 30.08.2012 was valid in the eye of law. When a lease deed was permissible to be executed under the law and when Revenue Order No. 01 of 1917 is not attracted, it cannot be said that the lease deed dated 30.08.2012 is not valid in law only because of apparent

contradiction in between clause (1) and clause (2). It is a different matter altogether whether because of inherent contradiction in the lease deed, the plaintiff will be entitled to succeed in an action in law. Issue no.7 is, accordingly, decided holding the lease deed to be valid in law.

42. The position that has emerged is that though reflected in the lease deed, Exhibit-1, that a sum of Rs.44 lakhs was paid as advance, in reality the same was not paid and till the date of filing of the suit, only Rs.12 lakhs was paid. The plaintiff had failed to perform her obligation in accordance with the lease deed. Specific performance of immovable property is not automatic. Jurisdiction to grant specific performance is discretionary. It is one of discretion to be exercised on sound principles. The Court would have to take into consideration, amongst others, the circumstances arising in the case as also the conduct of the parties. In view of the materials on record, this Court is of the opinion that no case is made out for grant of a decree for specific performance of the lease deed. Issue no.8 is decided accordingly.

43. The plaintiff had not made defendant no. 2 a party to the suit, but he had impleaded himself in the suit. In view of the foregoing discussions, issue no.9 is decided by directing defendant no. 2 to make payment of Rs.12 lakhs to the plaintiff within a period of 45 days from today failing which it will carry interest @6% per annum from the date of filing of the suit i.e. from 01.09.2015 till payment is made. The judgment of the learned Trial Court, accordingly, stands modified as indicated above.

44. RFA No. 08 of 2018 and RFA No. 09 of 2018 are disposed of in terms of above. No cost.

Chief Justice

Avi