

(1987) 02 BOM CK 0007

In the Bombay High Court

Case No : O.S. Appeal No. 332 of 1985 and Suit No. 594 of 1981

Ahmedally G. Kathawala

APPELLANT

Vs

Jhaverbai H. Daulat

RESPONDENT

Date of Decision : 02-02-1987

Acts Referred:

Contract Act, 1872 — Section 202

Partnership Act, 1932 — Section 69

Urban Land (Ceiling and Regulation) Act, 1976 — Section 10, 2, 20, 21, 22

Citation : (1987) 89 BOMLR 277

Hon'ble Judges : M.H. Kania, C.J; Sujata Manohar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sujata Manohar, J.—Suit No. 594 of 1981 was filed originally by appellants Nos. 1 to 8 (hereinafter referred to as plaintiffs Nos. 1 to 8) against respondent Nos. 1 and 2 (hereinafter referred to as defendants Nos. 1 and 2) for specific performance of an agreement of sale dated November 9, 1973 as varied. Respondent No. 3 (hereinafter referred to as defendant No. 3) has been joined as a party defendant because he claims an interest in the suit land as hereinafter stated. The 9th appellant (hereinafter referred to as the plaintiff No. 9) is a partnership firm registered on September 16, 1982 consisting of plaintiffs Nos. 1 to 8 as partners. Plaintiff No. 9 has been joined as a party plaintiff pursuant to an application for amendment in the suit which was granted on October 20, 1982.

2. The suit pertains to plot of land at Ghatkopar admeasuring about 48.282 sq. metres. In or about 1964 it seems that Mrs. Kathawala and Mrs. Pittalwaia had agreed to purchase the said plot and had paid to defendants Nos. 1 and 2, who are the owners of the suit plot, a sum of Rs. 4 lacs in part payment of the consideration. On or about November 9, 1973 the said agreement between defendants Nos. 1 and 2 and Mrs. Kathawala and Mrs. Pittalwaia was terminated by mutual consent and the sum of Rs. 4 lacs was thereafter refunded to the two

ladies by defendants Nos. 1 and 2. On the same day i.e. November 9, 1973 an agreement of sale of the said plot was entered into between defendants Nos. 1 and 2 as vendors and plaintiffs Nos. 1 to 8 as purchasers of the said plot of land on the terms and conditions which are set out in this agreement. In the recital to this agreement it is stated that plaintiffs Nos. 1 to 8 carry on business under the firm name and style of M/s K and N Enterprises at Lily Court, Opp. Ritz Hotel, Churchgate. The agreement, however, is signed by each of the plaintiffs Nos. 1 to 8 individually.

3. It is not necessary to go into the details of this agreement, save and except that under this agreement the vendors agreed to sell the said plot to plaintiffs Nos. 1 to 8 at or for the price of Rs. 22/- per sq. yd. which worked out to approximately Rs. 12 lacs. Out of this amount, plaintiffs Nos. 1 to 8 were required to pay Rs. 4,25,000 immediately on execution of the said agreement and the balance amount was to be paid without interest within a period of three years as provided in the said agreement. This amount of Rs. 4,25,000 was paid by plaintiffs Nos. 1 to 8 to defendants Nos. 1 and 2 between November 9, 1973 and February 15, 1975.

4. Pursuant to this agreement, defendants Nos. 1 and 2 executed a power of attorney dated March 4, 1974 in favour of plaintiffs Nos. 1 and 6. It is the case of the plaintiffs that the power of attorney was executed in favour of these two persons because plaintiff No. 1 would represent the Kathawalla Group consisting of plaintiffs Nos. 1 to 5 while plaintiff No. 6 was to represent the Nagree group consisting of plaintiffs Nos. 6 to 8. The plaintiffs Nos. 1 to 8 were put in possession of the said land. Plaintiffs Nos. 1 to 8 entered into an agreement dated April 25, 1974 with one Jaipal Singh to level the said plot of land as set out in this agreement as per details and general specifications provided by the architects who were engaged by plaintiffs Nos. 1 to 8. It seems that there were a number of squatters on this plot of land. Plaintiffs Nos. 1 to 8 also entered into agreements for vacating the said land with squatters which agreements have been entered into in August 1974. On April 8, 1975 plaintiffs Nos. 1 to 8 obtained from the Municipal Corporation an approval of their building plans and "Intimation of Disapproval" (IOD). They, however, obtained Commencement Certificate from the Municipal Corporation only on February 28, 1976.

5. After plaintiffs obtained the said IOD but prior to their obtaining the said Commencement Certificate, the Urban Land (Ceiling and Regulation) Act, 1976 came into operation on February 17, 1976. It is the case of the plaintiffs Nos. 1 to 8 that on account of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the Urban Land Ceiling Act) coming into operation the agreement dated November 9, 1973 was modified by mutual consent. This modification is set out in paragraph 8 of the plaint. It is the case of the plaintiffs that it was agreed between the vendors and the purchasers that a statement as required by Section 6(7) of the Urban Land Ceiling Act should be filed in the name of defendants Nos. 1 and 2 and an application should also be made for

permission of the Competent Authority for development of the said plot u/s 201 and/or 21 of the said Act. On such permission for development being received plaintiffs Nos. 1 to 8 would develop the said plot by constructing dwelling units for the weaker sections of the Society in accordance with the permission of the Competent Authority in that behalf. Plaintiffs Nos. 1 to 8 would be at liberty to sell on "Ownership basis" the tenements in such dwelling units. Defendants Nos. 1 and 2 would, on the completion of such construction, convey the said plot or such part thereof, as they may be requested to convey, either in favour of the plaintiffs Nos. 1 to 8 or in favour of a co-operative society or a limited company constituted of the purchasers of tenements in such dwelling units against payment of the balance of the consideration.

6. On August 13, 1976 defendants Nos. 1 and 2 in consultation with plaintiffs Nos. 1 to 8 filed a statement u/s 6(7) of the Urban Land Ceiling Act. In this statement defendants Nos. 1 and 2 have stated that the plaintiffs Nos. 1 to 8 i.e. K and N Enterprises were in possession of the said property under the said agreement of November 9, 1973. Along with the statement defendants Nos. 1 and 2 on the same day, that is to say, August 13, 1976 submitted an application u/s 20 of the Urban Land Ceiling Act for exemption in consultation with plaintiffs Nos. 1 to 8. They also submitted on the same date an application u/s 22 of the Urban Land Ceiling Act for permission for construction of dwelling units for weaker sections. According to plaintiffs Nos. 1 to 8, this application was also submitted by defendants Nos. 1 and 2 in consultation with them. While defendants Nos. 1 and 2 contend that this application was submitted by them on their own.

7. u/s 20 of the Urban Land Ceiling Act if the State Government is satisfied:-

That having regard to the location of such land, the purpose for which land is being or is proposed to be used and such other relevant factor as the circumstances of the case may require, it is necessary or expedient in the public interest so to do, then Government may, by order, exempt...such vacant land from the provisions of this Chapter.

(i.e. Chapter III). u/s 21 of the said Act the State Government has power to exempt excess vacant land from the provisions of Chapter III if such person proposes to utilise such land for the construction of dwelling units for accommodating weaker sections of the society in accordance with a scheme which may be approved by the Competent Authority. On August 13, 1976 no such scheme u/s 21 was formulated by the competent authority. Nevertheless in view of the provisions of that Chapter, defendants Nos. 1 and 2 also filed an application u/s 21 to carry out development of the said property in accordance with such scheme as may be sanctioned by the competent authority.

8. On March 10, 1976 plaintiffs Nos. 1 to 8 received stoppage of work notice from the Bombay Municipal Corporation in view of the coming into force of the Urban Land Ceiling Act.

9. Defendants Nos. 1 and 2 thereafter received on May 2, 1977 a draft statement prepared by the competent authority regarding vacant land held by them u/s 8(2) of the Urban Land Ceiling Act, along with a notice u/s 8(4) of the said Act. This draft statement was forwarded by the defendants Nos. 1 and 2 to plaintiffs Nos. 1 to 8. After hearing defendants Nos. 1 and 2, final order u/s 8(4) of the Urban Land Ceiling Act was passed by the Additional Collector on September 28, 1977. This order was received by defendants Nos. 1 and 2 on December 1, 1977. Defendants Nos. 1 and 2 in turn informed plaintiffs Nos. 1 to 8 of this order only on January 10, 1978.

10. On September 20, 1977 a final statement u/s 9 of the said Act was also prepared by the Addl. Collector and forwarded to defendants Nos. 1 and along with the said order u/s 8, Sub-section (4), of the said Act.

11. During this period it seems that defendants Nos. 1 and 2 entered into an agreement dated November 9, 1977 with defendant No. 3 as promoter of a proposed Rashtra Sarathi Co-operative Housing Society which would consist of the employees of the Central Government. This agreement is in the form of a letter dated November 9, 1977 addressed by defendants Nos. 1 and 2 to defendant No. 3. Under this agreement defendants Nos. 1 and 2 agreed to sell the said plot of land to defendant No. 3 at the price of Rs. 10 lacs or Rs. 5/- per sq. ft. of the total carpet area available for building purpose as set out in the letter. Defendant No. 3 was required to deposit a sum of Rs. 1 lac as earnest money with the solicitors of defendants Nos. 1 and 2, which defendant No. 3 did. For the purpose of the present appeal the relevant clause is Clause 5 of this agreement. This clause is as follows:

5. We have informed you that by an Agreement for sale dated November 9, 1973 we agreed to sell the said property to Messrs K & N Enterprises. We agree that the claim of the said Messrs K & N Enterprises, if any, shall be duly settled by us prior to the completion of sale in your favour. However, it is agreed that if for any reason, the claim of the said M/s K & N Enterprises is not settled or the said Agreement for sale dated November 9, 1973 is not cancelled within two months from the date of the formal Agreement to be executed hereafter you shall not hold us responsible for the same and in that event the Agreement herein shall at the option of either of us be treated as cancelled and neither party shall have any claim against the other, except that the money if any deposited with Solicitors shall be paid to you without interest.

Thus, defendants Nos. 1 and 2 had disclosed to defendant No. 3 that there was a subsisting agreement of sale dated November 9, 1973 in respect of the same plot between defendants Nos. 1 and 2 and plaintiffs Nos. 1 to 8. The clause provided that if for any reason the claim of plaintiffs Nos. 1 to 8 was not settled or the agreement of November 9, 1973 was not cancelled, then, the agreement with defendant No. 3, at the option of either party, "shall be treated as cancelled" and the monies deposited with the solicitors by defendant No. 3 "shall be paid" to defendant No. 3.

12. On December 8, 1977 defendants Nos. 1 and 2 seem to have made a fresh application u/s 20(7) of the Urban Land Ceiling Act. On December 29, 1977 defendant No. 2 addressed a letter to the Additional Collector intimating to him that a new scheme was being submitted and requesting him to withhold any orders till the said application was decided. It seems that this fresh application and the letter of December 29, 1977 were actually forwarded by defendants Nos. 1 and 2 only on February 22, 1978 along with a scheme, which it seems, was prepared for defendant No. 3 in view of the said agreement of November 11, 1977.

13. On January 10, 1978 defendants Nos. 1 and 2 sent a letter to plaintiffs Nos. 1 to 8 forwarding to them copies of orders dated September 28, 1977 u/s 8(4) and Section 9 of the Urban Land Ceiling Act. Defendants Nos. 1 and 2 also contend that thereafter on March 13 1978 they forwarded to the plaintiffs Nos. 1 to 8, their agreement with defendant No. 3 dated November 9, 1977.

14. Under the terms of the said agreement between defendants Nos. 1 and 2 and defendant No. 3, defendant No. 3 was required to obtain an exemption under the provisions of the Urban Land Ceiling Act by January 31, 1978. This period was extended by mutual consent up to May 31, 1978 and thereafter for one more year, that is to say, up to May 31, 1979.

15. In respect of the application for exemption which was made by defendants Nos. 1 and 2 with the help of defendant No. 3 an order by the Assistant Secretary to the Government granting exemption was made on January 24, 1979. In spite of this order of exemption it seems that defendants Nos. 1 and 2 submitted another declaration and scheme u/s 21(7) of the Urban Land Ceiling Act on March 30, 1979. Since the annexures to this declaration have not been produced in evidence, it is not possible to say whether this scheme was submitted only by defendant No. 1 and 2 for themselves or was submitted for the benefit of any other person or persons.

16. After the said order of exemption dated January 24, 1979 in favour of defendant No. 3, certain correspondence has ensued between defendants Nos. 1 and 2 and defendant No. 3 regarding the renewal of deposit of Rs. 1 lac which defendant No. 3 had made with the solicitors or defendants Nos. 1 and 2. On April 19, 1979 defendants Nos. 1 and 2 through their attorney addressed a letter to the advocate of defendant No. 3 terminating their agreement with defendant No. 3 on the ground that

Several things which had to be completed within the time limit prescribed under the agreement recorded in our letter of November 19, 1977 addressed to Shri Swarup. the Chief Promoter of Greater Bombay organisation of Central Government Quarters Residents Co-operative Housing Society (Proposed) have not been carried out or completed within the time limit provided....

Defendant No. 3 disputed this termination. He got a notice published in Indian Express on September 5, 1979 in this connection. Defendant No. 3 has

ultimately filed a separate suit being Suit No. 1010 of 1983 in this Court against defendants Nos. 1 and 2 for specific performance of the said agreement of November 9, 1977.

17. By their letter dated April 3, 1980 defendants Nos. 1 and 2 terminated their agreement with plaintiffs Nos. 1 to 8 on the ground that plaintiffs Nos. 1 to 8 had failed to carry out the terms of the said agreement dated November 9, 1973 and had failed and neglected to pay the amount due and payable by plaintiffs Nos. 1 to 8 to defendants Nos. 1 and 2. On receipt of this letter of termination, one M/s N & K Enterprises, which was another partnership firm consisting of 7 out of plaintiffs Nos. 1 to 8 and two other persons, which firm had throughout financed the said agreement, forwarded to Defendants Nos. 1 and 2 on April 14, 1980 a cheque for Rs. 2,50,000/- which cheque was dated October 20, 1979, along with a letter dated October 21, 1979, which they claim they had tried to deliver to defendants Nos. 1 and 2 in October 1979. Defendants Nos. 1 and 2 returned the said cheque. In any event they could not have encashed it because by the time they received the said cheque its period of validity had expired. We need not go into various other disputes which arose in this connection between defendants Nos. 1 and 2 and plaintiffs Nos. 1 to 8.

18. It seems that on February 19, 1981 defendants Nos. 1 and 2 Tiled a suit in the City Civil Court at Bombay being Suit No. 1141 of 1981 for an order and injunction restraining plaintiffs 1 and 6 from in any manner entering upon the said land. There were interim proceedings in the said suit as a result of which both sides have been allowed to keep their watchman on the site. Plaintiffs Nos. 1 to 8 filed the present suit on March 30, 1981 against defendants Nos. 1 and 2 for specific performance of the agreement dated November 9, 1973 as modified. They have also joined defendant No. 3 as party defendant to the suit.

19. In the suit the trial Court framed various issues as between plaintiffs Nos. 1 to 8 and defendants Nos. 1 and 2. One of these issues related to the maintainability of the suit because it was the contention of defendants Nos. 1 and 2 that plaintiffs Nos. 1 to 8 had entered into the said agreement as partners of an unregistered partnership firm called K & N Enterprises. The suit which was by an unregistered partnership was not maintainable u/s 69(2) of the Partnership Act, 1932, In view of this objection, plaintiffs Nos. 1 to 8 formed themselves as a partnership firm under a partnership deed dated September 4, 1982 and got themselves registered as a partnership firm on September 1.6, 1982. The said partnership firm has been allowed to be joined as plaintiff No. 9 by an order dated October 20, 1982. This preliminary objection was taken only by defendants Nos. 1 and 2 and not by defendant No. 3. The learned trial Judge upheld the contentions of plaintiffs Nos. 1 to 9 on merits and decided all issues on merits in favour of plaintiffs Nos. 1 to 9. He, however, held that plaintiffs 1 to 8 were a partnership at all material times after he examined evidence led in this connection. This partnership was not registered. He, therefore, upheld the preliminary objection u/s 69(2) of the Partnership Act and dismissed the suit of

the plaintiffs. The present appeal is filed by the original plaintiffs in view of dismissal of their suit on this preliminary ground. Defendants Nos. 1 and 2 have filed cross-objections in view of the decision on merits going against them.

20. The issues between the plaintiffs and defendants Nos. 1 and 2 need not be gone into in this appeal in view of certain consent terms which have been arrived at between them. Defendants Nos. 1 and 2 have also now given up their contention that plaintiffs 1 to 8 were a partnership firm at any relevant time. Hence their preliminary objection also does not survive.

21. The only question that needs to be examined as between these parties is in connection with the said letter of March 13, 1978. According to defendants Nos. 1 and 2, on March 13, 1978 they forwarded to plaintiffs Nos. 1 to 8 a copy of their agreement with defendant No. 3. The letter, which is exhibited as Ex. 14-B, bears the initials alleged to be of the 1st plaintiff in token of his having received the letter. It also bears the date March 13, 1978 beneath these disputed initials. Plaintiffs Nos. 1 to 8 have challenged this letter. It is their contention that the initials of plaintiff No. 1 on this letter are forged. The learned trial Judge has held that this letter, which is at Ex. 14-B, is a got up letter and the initials of the 1st plaintiff are not the initials of the 1st plaintiff but are a forgery. He has also disbelieved the evidence of one Aspi Patel who is said to have delivered this letter to plaintiff No. 1 and obtained his initials on the copy letter in token of receipt. The learned judge has observed that Aspi Patel has committed perjury. In view of these observations of the learned trial judge, it is necessary to examine the relevant evidence.

22. In this connection both sides have led the evidence of hand-writing experts. The initials purported to be those of the 1st plaintiff have been compared by these hand-writing experts with the initials of the 1st plaintiff as appearing at three places in the margin of the agreement of November 9, 1973. There are also initials of the 1st plaintiff in the margin of a partnership agreement of December 5, 1974. In the witness box the 1st plaintiff gave his sample initials in court which were also made available to the hand-writing experts. Needless to add, the hand-writing expert of the plaintiffs has supported the plaintiffs' case by stating that the initials are forged, while the hand-writing expert of defendant Nos. 1 and 2 has given evidence to the effect that the initials are genuine.

23. The evidence of both these hand-writing experts leaves much to be desired. For example, the hand-writing expert Mr. Wagh, who has been examined by defendants Nos. 1 and 2, has stated that he had taken photographs of various initials of the 1st plaintiff appearing in the aforesaid documents and he has enlarged these photographs in order to compare the initials of plaintiff No. 1 appearing at various places in these documents. On such comparison he finds the initials said to be of plaintiff No. 1 on the letter of March 13, 1978 to be genuine. In his cross-examination he has admitted that the photograph 1 at Ex. 19 has been enlarged in such a way that the line of writing appears to be straight, although in fact it was slanting and he has agreed in cross-examination

that he had changed the position of the photograph as a result of which the line of writing is distorted. In the course of enlargement he has also cut off a part of the flourish which the witness has called the "rubric line" in photograph 1 of Ex. 19. He has also, at times, said that there is a difference between a simulated forgery and a free-hand forgery while immediately thereafter he has admitted that there is no difference between simulated forgery and free-hand forgery.

24. Both the experts agree that this is not a traced forgery in any event. The hand-writing expert Mr. Gajjar, who has been examined by the plaintiffs has initially stated that the forgery of initials is revealed by seeing the document itself with the naked eye. He agrees with the other hand-writing expert that this is not a traced forgery. According to him, it is a memory simulated forgery. He says that in a memory simulated forgery the strokes would be smooth or fluent unlike a traced forgery where the strokes would be more hesitant. He is unable to explain why in that case in the present case the strokes are hesitant. He has given some evidence about pen-lifts and pen-skipping. But he has admitted that when the initials are written with a ball-pen as in the present case, it is extremely difficult to make out whether there are pen-lifts or pen-skipping.

25. He has also deposed that forgery could have been committed by the forger keeping a model of initials in front of him. He, however, is unable to explain why in that case the final stroke of initials goes downwards and to the left instead of upwards as in some other admitted initials, and "rubric line" or flourish is longer in the disputed initials, than on the admitted initials. He tried to explain this by saying that this reveals a personal trait of the forger. It is difficult to see how the personal traits of the forger come into operation when forgery is committed by the forger by keeping a model of initials in front of him.

26. He has also admitted that in the course of enlargement of initials he has also cut off the final stroke on one of the initials which had a downward start to the left.

27. Both the experts have however admitted that when a ball-pen is used, it is extremely difficult to make out whether there are pen-lifts or not. They have also deposed about the height and width of the first initial "A". There are a number of variations in the height and width of letter "A" in various admitted initials also. It is necessary to bear in mind that the admitted initials are in the margin of various documents. These initials were placed when there were some alterations in the document in question along with seven or eight other initials of other parties also. The initials are, therefore, necessarily in a cramped narrow space. The disputed initials are on a letter. There was ample space for putting these initials and the date underneath.

28. What is more curious, the sample initials which plaintiff No. 1 gave in the witness box are quite different from any of those initials. Oddly enough, in the admitted group of seven or eight initials in the margin of the said documents, there are other initials which are similar to the sample initials given by plaintiff

No. 1 in the witness box. The attention of handwriting experts does not seem to have been drawn to them. No questions have been asked to plaintiff No. 1 also regarding these initials. In these circumstances and looking to the evidence given by both the hand-writing experts, it is, in our view, not possible to come to a definite conclusion that the initials are forged.

29. There is also an alteration in the date put below the initials. The figure "13" from "13.3.78" seems to have been altered to that figure from figure "12". Neither party had noticed this. It was during the cross-examination of Wagh that Gajjar said his attention was drawn to this alteration. Nothing turns on this. The person putting the initials seems to have made the change. We have not been told by either party that any special significance is to be attached to this alteration.

30. It is also necessary to bear in mind that ordinarily it is dangerous to rely solely on the evidence of a hand-writing expert summoned by a party interested for arriving at a conclusion of forgery in the absence of any supporting evidence. It is, therefore, necessary to look at other circumstances, such as, contents of the said letter and the likelihood of initials being a forgery in view of the circumstances surrounding that letter. In this connection, the contents of the letter do not throw much light. The letter of March 13, 1978, which is addressed by the 2nd defendant to the 1st plaintiff sets out that it encloses letters of November 9, 1977 and January 30, 1978 addressed to the 3rd defendant as required by the 1st plaintiff. The second paragraph requests the 1st plaintiff to furnish to defendants Nos. 1 and 2 the necessary papers notifying the change in the constitution of the firm. According to the evidence given by the 2nd defendant, he had written this letter pursuant to a telephonic conversation he had with the 1st plaintiff in which the 1st plaintiff had informed him about the change in the composition of the partnership firm.

31. According to the plaintiffs, this letter has been got up for the purposes of limitation. The argument as we understand it is: Along with the alleged letter of March 13, 1978 the plaintiffs are supposed to have received the agreement of November 9, 1977 with defendant No. 3. They, therefore, came to know that defendants Nos. 1 and 2 were not agreeable to perform their agreement with the plaintiffs. The plaintiffs' suit for specific performance is filed on March 30, 1981 i.e. beyond 3 years from March 13, 1978. Hence it is barred by limitation. In contrast, the suit of defendants Nos. 1 and 2 in the City Civil Court for possession, which is filed on February 19, 1981, is within 3 years of March 13, 1978. It is, therefore, within time.

32. We fail to appreciate this entire reasoning. Even if the plaintiffs had seen the agreement of November 9, 1977 with defendant No. 3 on March 13, 1978, it would in no way have conveyed to them that their agreement of November 9, 1973 was terminated. Because the subsequent agreement with defendant No. 3 of November 9, 1977 is expressly subject to plaintiffs' rights under their agreement of November 11, 1973. The letter of March 13, 1978 cannot,

therefore, be the strings point of any period of limitation. The letter has no bearing on the readiness and willingness of defendants Nos. 1 and 2 to perform or not to perform the agreement of November 9, 1973. In these circumstances, the alleged forgery appears pointless. Looking to all these circumstances, in our view, it is not possible to come to any definite conclusion that the said initials are forged. The learned trial judge's findings in this connection are therefore set aside.

33. Defendants Nos. 1 and 2 have led the evidence of Aspi Paid in this connection, it seems that Aspi Patel was working for defendants Nos. 1 and 2. There is a dispute as to whether he was a full-time employee drawing a fixed salary or whether he was an independent designer submitting textile designs to defendants Nos. 1 and 2 and was paid on a piece rate basis. But in any case Aspi Patel was employed by defendants Nos. 1 and 2 and he used to work in the rear room of the office of defendants Nos. 1 and 2. It is his case that he also occasionally did personal work of defendants Nos. 1 and 2, such as depositing and withdrawal of monies from the bank or occasionally delivering a letter. He has deposed that defendants Nos. 1 and 2 had not employed a peon. According to his evidence he had gone only once to the office of the plaintiffs for the purpose of delivering this letter and had delivered this letter to the 1st plaintiff in his cabin. The 1st plaintiff put his initials and date on the copy of the letter in token of receipt. Aspi Patel was unable to give a detailed description of the office of the plaintiffs. The learned trial judge has disbelieved the evidence of Aspi Patel mainly on account of discrepancies in the registers maintained by defendants Nos. 1 and 2 in which Aspi Patel is described not as an employee working on a regular salary but as a person who supplies designs and is paid on piece work basis.

34. Looking to the evidence given by Patel that he occasionally did the personal work for defendant No. 2 and looking to the fact that there was no peon employed by defendant No. 2 for delivering letters, it is possible that this person may have been asked by defendant No. 2 to deliver a letter. There is, however, no despatch book/peon book maintained by defendant No. 2 or any other evidence which would in any way support the oral testimony of Patel to the effect that the letter was hand-delivered by Patel to the 1st plaintiff. In these circumstances, not much reliance can be placed on the oral testimony of Patel. It is, however, not possible, from this evidence, to come to a conclusion that Patel has told deliberate lies or has committed perjury. The learned trial judge has made observations to the effect that defendant No. 2 and Patel have perjured themselves and told deliberate lies in connection with the said letter. In our view, there is no adequate material to come to such a conclusion and the observations of the learned trial judge to the above effect are not warranted.

35. Defendant No. 3 in his written statement had contended that plaintiffs Nos. 1 to 8 had waived their rights under the agreement of November 9, 1973 in favour of defendant No. 3 and/or had acquiesced in the said agreement which had been

entered into between defendants Nos. 1 and 2 and defendant No. 3. There is, however, no evidence led by defendant No. 3 on this aspect. Clause 5 of the agreement of November 9, 1977 clearly in terms sets out that the agreement of defendant No. 3 is subject to the prior agreement which was entered into between plaintiffs Nos. 1 to 8 and defendant Nos. 1 and 2. Learned Counsel for defendant No. 3 has fairly not argued this point before us.

36. Defendant No. 3, however, contends that the rights of the plaintiffs under the agreement of November 9, 1973 have come to an end on coming into operation of the Urban Land Ceiling Act on February 17, 1976 in view of the provisions contained in Sections 5(5) and 10(4) read with Section 42 of the Urban Land Ceiling Act. He also contends in the alternative that on the order of exemption dated January 24, 1979 being passed by the Competent Authority in favour of the scheme sponsored by defendant No. 3, the rights of the plaintiffs under their earlier agreement with defendants Nos. 1 and 2 had come to an end. He also now contends that the consent terms which are arrived at between the plaintiffs and defendants Nos. 1 and 2 are also void for the same reasons as the original agreement is void. In our view, these contentions cannot be accepted.

37. u/s 5, Sub-section (3) of the Urban Land Ceiling Act it is provided as follows:

5. Transfer of Vacant land.-

X X X X

(3)...no person holding vacant land in excess of the ceiling limit immediately before the commencement of this Act shall transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished statement u/s 6 and a notification regarding toe excess of vacant land held by him has been published under Sub-section (4) of Section 10; and such transfer made in contravention of this provision shall be deemed to be null and void.

38. Section 10, Sub-section (4) of the Urban Land Ceiling Act provides as follows :

10. Acquisition of vacant land in excess of ceiling limit-

X X X X

(4) During the period commencing on the date of publication of the notification under Sub-section (J) and ending with the date specified in the declaration made under Sub-section (5)-

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land.

Section 42 provides that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force. In view of the provisions of these sections it is contended by defendant No. 3 that the transfer of the said plot of land under the said agreement of November 9, 1973 in favour of plaintiffs Nos. 1 to 8 is prohibited and hence the agreement of November 9, 1973 has become null and void. This submission ignores the modification of the agreement dated November 9, 1973 which is pleaded by the plaintiffs and which is now accepted by both the plaintiffs as well as defendants Nos. 1 and 2. Under the modification the original agreement of November 9, 1973 which was an agreement for sale simpliciter has been modified in view of the provisions of the Urban Land Ceiling Act. The parties have agreed that defendants Nos. 1 and 2 as the owners of the said land would apply to the competent authority u/s 20 as well as Section 21 of the said Act for development of the said property by constructing dwelling units for the weaker sections of Society in accordance with any scheme which may be framed by the competent authority. The plaintiffs in their turn have agreed that they would develop the said property in accordance with such scheme which may be sanctioned and would, on completion of the construction of such dwelling units, ask defendants Nos. 1 and 2 to convey the said plot or any part thereof in favour of a co-operative society or a limited company constituted of purchasers of tenements in such dwelling units. On such conveyance being executed, they would pay the balance consideration to defendants Nos. 1 and 2, There is nothing contrary to the provisions of the Urban Land Ceiling Act in this modified agreement. On the contrary, the agreement has been modified specifically in order that there may not be any breach of the Urban Land Ceiling Act. The prayer for specific performance which is asked for in the plaint is also of this agreement as modified. The parties have agreed that the specific performance of the agreement will be entirely in accordance with any scheme which may be sanctioned under the provisions of the Urban Land Ceiling Act. Such an agreement cannot become null and void under the Urban Land Ceiling Act. There is nothing contrary to law in such modification of the original agreement. In fact in the case of Bai Dosabai Vs. Mathurdas Govinddas and Others, the Supreme Court has held that in a case where the Urban Land Ceiling Act intervened after the passing of the decree of specific performance by the High Court and before the decree of the Supreme Court, that decree of specific performance can be so moulded as to accord with the changed statutory situation. The Supreme Court in that case, while upholding the decree for specific performance of the agreement of sale, modified the decree in order to bring it in conformity with the provisions of the Urban Land Ceiling Act. In the place of the direction to the lessor to sell the land by public auction or by private treaty a direction was issued for the appointment of a Receiver to take all necessary steps to seek exemption from the operation of the said Act u/s 20 and/or Section 21 of the said Act by taking the help of an organiser and/or builder to build residential premises for weaker sections of the Society, and/or by joining with a Co-operative Society in applying for an exemption under the said Act, etc.

39. In this connection it was also contended by the learned advocate for defendant No. 3 that an exemption u/s 20, which is an exemption in public interest, would never have been granted and can never be permitted in favour of plaintiffs Nos. 1 to 8 because they are builders. We do not see any force in this contention. In fact, in the directions which were given by the Supreme Court in the case of Bai Dosabai just cited above, the Supreme Court had in terms directed the Receiver to take the assistance of a builder for the purpose of submitting a suitable scheme for exemption u/s 20 or 21 of the Urban Land Ceiling Act. Whether the scheme or exemption is in public interest or not will depend upon the nature of the scheme and the relevant material before the competent authority in that connection. An application cannot be rejected only because the person applying for exemption or the person associated with the scheme is a builder.

40. In the case of Shah Jitendra Nanalal v. Patel Lallubhai Ishverbhai [1984] AIR Guj 145 (F.B.) a Full Bench of the Gujarat High Court has also taken the view that in view of the provisions of the Urban Land Ceiling Act the Court can pass a conditional decree for specific performance subject to exemption being obtained under the relevant provisions of the Urban Land Ceiling Act. The Full Bench of the Gujarat High Court has relied upon the judgment of the Supreme Court in Bai Dosabai's case cited above. It is, therefore, not possible to hold that the agreement as modified has become void after the coming into operation of the Urban Land Ceiling Act.

41. In this connection Mr. Zaiwalla, learned advocate for plaintiffs Nos. 1 to 8, has also contended that the plaintiffs who were in possession under a power of attorney were also holders of the said land. He drew our attention to the definition of "to hold" u/s 2(1)(ii) of the said Act, which defines "to hold" to mean, inter alia, to possess such land under an irrevocable power-of-attorney. According to Mr. Zaiwalla, the plaintiffs were in possession of the said land under a power of attorney. This power of attorney had become irrevocable because the plaintiffs by doing various acts on the said land, such as leveling the said land, removing some of the squatters on the said land etc. had acquired interest in the said land. Their possession was, therefore, as agents under the power of attorney coupled with interest. u/s 202 of the Indian Contract Act, 1872 where the agent has himself an interest in the property which forms the subject-matter of agency, his agency cannot, in the absence of express contract, be terminated to the prejudice of such interest. In view of this statutory provision, Mr. Zaiwalla contended that they are in possession under an irrevocable power of attorney and therefore they are also the holders of the said land. For the purpose of the present appeal, it is not necessary to go into the merits of this contention at all because in the present case the parties are seeking specific performance of the agreement on the basis of an application for exemption being made u/s 20 or 21 of the Urban Land Ceiling Act by defendants Nos. 1 and 2 who are owners.

Neither of these sections require that an application under that section should be

for the benefit of or should be with the help of a holder. The application in the present case is being made by defendants Nos. 1 and 2 who are the owners of the said land and are therefore holders of the said land. The plaintiffs are only asking for development of the said land in accordance with any scheme which may be sanctioned as a result of the application being made by defendants Nos. 1 and 2 under the said two sections. These two sections, in terms, override other provisions of the said Act. Hence it is not necessary to decide the above contention of Mr. Zaiwalla.

42. It is also contended by the 3rd defendant that as a result of the exemption order dated January 24, 1979 granted in respect of the schemes which were submitted by defendants Nos. 1 and 2 with the assistance of defendant No. 3, the agreement in favour of the plaintiffs has come to an end. This contention also cannot be accepted. The application which was made by defendants Nos. 1 and 2 u/s 20(1) of the said Act with the help of defendant No. 3 was pursuant to their agreement of November 9, 1977 with defendant No. 3. This agreement, to the knowledge of all the defendants, was subject to the agreement in favour of plaintiffs Nos. 1 to 8. The exemption order which was made for the benefit of defendant No. 3, therefore, cannot be considered in isolation from the original agreement between defendants Nos. 1 and 2 and defendant No. 3.

43. Moreover, under Clause 2 of the said order of exemption, the said persons, that is to say, defendants Nos. 1 and 2 who are required to execute their scheme through the proposed society of defendant No. 3, are required to commence construction of tenements within a period of one year from the date of the exemption order and are required to complete the construction work within a period of 3 years from the date of the order,

Failing which the exemption shall stand withdrawn. If only a part of the land is utilised and a part remains vacant at the end of period of three years, exemption shall be deemed to have been withdrawn.

In view of these express conditions of the exemption order in the present case, the exemption stands withdrawn because none of the defendants have commenced the construction of tenements under the sanctioned scheme within a period of one year from January 24, 1979, which is the date of the order or have completed the construction within a period of 3 years from the said order.

44. Secondly, the exemption order, under Clause 5, permits transfer of exempted land with buildings thereon to any other person with the prior permission of the State Government as specified in Clause 5 of the order. The order, therefore, does not prohibit creation of any rights in favour of any third party provided permission of the State Government is obtained. Since the original agreement with defendant No. 3 under which the scheme has been submitted is subject to the rights of the plaintiffs, the exemption order, which is merely pursuant to that agreement also cannot bring to an end the rights of the plaintiffs.

45. Under the consent terms, which have now been arrived at between the

plaintiffs and defendants Nos. 1 and 2, the parties to the consent terms are agreed to a decree being passed in favour of plaintiff No. 9 in terms of prayers (a) and (b) of the plaint, that is to say, they are agreeable to a decree for specific performance of the said agreement as modified. In the event however of defendants Nos. 1 and 2 paying to plaintiff No. 9 a sum of Rs. 21,00,000/- as set out in the consent terms, decree for specific performance is to stand set aside and/or cancelled. It is not necessary to go into the other provisions of the consent terms at present. Defendant No. 3 has contended that these consent terms are also void because they are violative of the provisions of the Urban Land Ceiling Act. We have set out earlier our reasons why the agreement as modified is not in violation of any provision of the Urban Land Ceiling Act. For the same reason, the consent decree for specific performance of the agreement as modified is also not in violation of the provisions of the Urban Land Ceiling Act and, therefore, is not void or contrary to any provision of the said Act.

46. In the premises, the cross-objections of defendant No. 3 are dismissed with no order as to costs. As far as the plaintiffs (i.e. appellants) and defendants Nos. 1 and 2 (i.e. respondents Nos. 1 and 2) are concerned, they have arrived at the following consent terms:

(1) Decree in terms prayers (a) and (b) in favour of Appellant No. 9. Decree however not to be executed till April 21, 1987.

(2) In the event of Respondent Nos. 1 and 2 paying to Appellant No. 9 through their Attorneys Messrs. Eastley Lam & Co. a sum of Rs. 21,00,000/- (Rupees twenty-one- Lacs) in the manner following, the decree mentioned in Clause 1 do stand set aside and cancelled,

(a) Rs. 5,00,000/- (Rupees Five Lacs only) on or before February 27, 1987 and-

(b) Rs. 16,00,000/- (Rupees Sixteen Lacs only) on or before 20th day of April 1987, together with interest at 18 per cent per annum on the said sum of Rs. 16,00,000/-(Rupees Sixteen Lacs) from the date hereof till payment.

(3) Respondents 1 and 2 undertake to this Hon"ble Court not to make any application for extension of time for payment of the amounts mentioned in Clause 2 above.

(4) In the event of Respondents 1 and 2 making payment as provided in Clause 2 above, Appellants 1 to 9 do forth with withdraw their watchman from the suit property and not claim possession or any right title or interest in respect of the suit property or any part thereof.

(5) In the event of Respondents 1 and 2 failing to make payment as provided in Clause 2 above, Respondents 1 and 2 do forthwith withdraw their watchman from the suit property and not claim possession or any right, title or interest in respect of the suit property or any part thereof, and Respondents 1 and 2 do withdraw suit No. 1141 of 1981 filed in the Bombay City Civil Court, with no order as to costs.

(6) Appellants undertake not to assign this decree in any manner or to any person or persons whosoever till April 20, 1987 except with the consent in writing of Attorneys of Respondents No. 1 and 2 and given to the Attorneys for Appellants Nos. 1 to 9.

(7) No Order as to costs in the suit and in the Appeal as between the Appellants and Respondents 1 and 2.

47. The consent terms signed by the parties concerned and their advocates are tendered and marked "X" for identification. There will be a decree in terms of the above consent terms as between the plaintiffs, that is to say, the Appellants and Respondents Nos. 1 and 2 (defendants Nos. 1 and 2).

48. For implementing Clause 1 of the consent terms, if so required as per the consent terms i.e. for the performance of the Agreement of Sale dated November 9, 1973 as modified, Respondents Nos. 1 and 2 are directed to make an application, if necessary, for permission to the Competent Authority for development of the suit land in accordance with such scheme as may be framed by the State Government and may be then in existence. Appellant No. 9 shall develop the suit land in accordance with the permission of the Competent Authority and subject to such terms and conditions which may be imposed by the Competent Authority. Respondents Nos. 1 and 2 shall on completion of the development of the suit land execute a conveyance of the suit land or such part or parts thereof as the case may be in favour of Appellant No. 9 or a Co-operative Society or a limited Company or such person as may be required or permitted by the Competent Authority.

49. By consent as between the Appellants and Respondents Nos. 1 and 2 it is further ordered that in the event of permission of the Competent Authority as aforesaid being refused, the decree in terms of prayers (a) and (b) shall be set aside and shall cease to operate and Respondents Nos. 1 and 2 shall pay to the Appellants a sum of Rs. 21 lacs as and by way of damages and/or compensation in lieu of specific performance.

50. Undertaking given by the parties in the consent terms is accepted.

51. Respondents Nos. 1 and 2 through their counsel withdraw the cross-appeal and cross-objections and counsel for Respondents Nos. 1 and 2 accept the finding of the learned Single Judge that there is a valid assignment of the agreement dated November 9, 1973 in favour of the Appellant No. 9.

52. Mr. I.M. Chagla, learned Counsel for Respondents Nos. 1 and 2 further states that Respondents Nos. 1 and 2 accept that the agreement dated November 9, 1973 was between Appellants Nos. 1 to 8 as individuals and not as partners and withdraws his objections u/s 69(2) of the Indian Partnership Act, 1932.

53. The objections raised by defendant No. 3 to the consent decree being passed as set out above are dismissed for reasons set out earlier.

54. Appeal is allowed as aforesaid. Order for costs is set aside. There will be no order as to costs.

55. Respondent No. 3 applies for leave to appeal to the Supreme Court.

56. P.C.: In our view, there is no substantial question of law of public importance arising in this case which requires any leave being granted.

57. Leave to appeal to the Supreme Court is rejected.