
(2014) 11 GAU CK 0040
In the Gauhati High Court
Case No : R.F.A. No. 105 of 2001

M.K. Shah Export Ltd.

APPELLANT

Vs

Bhawani Shankar Bagaria

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5 — Contract Act, 1872 - Section 56
— Evidence Act, 1872 - Section 58, 60 — Specific Relief Act, 1963 - Section 10, 20, 21

Citation : (2015) 1 GLT 361

Hon'ble Judges : Nishitendu Chaudhury, J.

Bench : Single Bench

Advocate : G.N. Sahewalla and B. Sharma, for the Appellant; M. Hazarika, for the Respondent

Final Decision : Dismissed

Judgement

Nishitendu Chaudhury, J.—This first appeal is directed against the judgment and decree dated 19.7.2001 passed by the learned Civil Judge (Senior Division), Dibrugarh in Title Suit No. 32 of 1977 whereby the suit for specific performance of contract was decreed. One Bhawani Shankar Bagaria as plaintiff instituted Title Suit No. 32 of 1977 in the court of Assistant District Judge at Dibrugarh (now designated as Civil Judge, Dibrugarh) on 30.9.1977 against Jokai (Assam) Tea Company Ltd. and Jokai India Ltd. praying for specific performance of contract and delivery of possession of land on the basis of an agreement for sale executed by defendants on 25.5.1970. The plaintiff claims that he is a businessman having interest in tea garden and entered into an agreement with the defendant No. 1 on 25.5.1970 to purchase area of land measuring 333.92 in the district of Dibrugarh on the following terms and conditions:--

"(a) The Defendant No. 1 (referred to in the said Agreement as the Company) shall sell and the Plaintiff (referred to in the said Agreement as the Purchaser) shall purchase the said land described more fully in the schedule to the said Agreement at and for the price of Rs. 500/- per acre and free from

encumbrances but subject to the terms and conditions governing the said land under the terms of the grant/patta and to the payment of revenue and local rates and other outgoings payable thereof and also subject to any private or public rights of way and easements and privileges concerning the schedule land.

(b) The sale of the schedule land shall be completed on the re-survey of the area by the Company i.e., the defendant No. 1 and within 45(forty five) days following the said defendant's obtaining release of the said land from the charge created thereon from the Tea Board of India and communicated in writing to the Purchaser.

(c) The purchaser shall pay to the Company the amount of Rs. 10,000/- (Rupees Ten Thousand) only as deposit by way of earnest money on account of the sale of the scheduled 1 and agreed between the parties and shall pay the residue of the purchase money to the Company on the day of proper conveyance for the scheduled land is executed and registered in the name of the Purchaser by the Company.

(d) The Company shall grant a proper receipt for the payment of Rs. 10,000/- ((Rupees Ten Thousand) only and which amount shall be adjusted towards the total consideration of Rs. 1,66,960/- (Rupees One Lac Sixty six Thousand Nine Hundred and Sixty) only at the time of completion of the sale.

(e) The Purchaser shall be at liberty to investigate the Company's title to the scheduled land and he shall complete such investigation within 60(sixty) days of the signing of this Agreement and after which date the said title shall be deemed to have been accepted by the Purchaser.

(f) The scheduled land is being sold in the state and condition as it is at the date of these presents and any change if at any time before the completion of the purchase of the said land takes place in that even the Agreement herein made shall remain in force and the purchaser shall have to buy the scheduled land paying the full consideration notwithstanding any change or changes to the said land, provided vacant possession is given.

(g) All expenses for preparation of this Agreement will be equally borne by the parties and the expenses for preparation of the sale deed on account of stamp and registration shall be borne by the Purchaser alone."

A true copy of the agreement was annexed to the plaint as Annexure-A wherein dag and patta number of suit land was furnished.

2. Plaintiff claimed that he paid Rs. 10,000/- as earnest money and in part performance of the said agreement, defendant No. 1 executed two sale deeds in his favour on 31.1.1973 and 22.2.1974 transferring in all 50.33 acres of land only and handed over vacant possession thereof. But defendant No. 1 committed breach of the agreement by refusing to sell and deliver the remaining land measuring i.e. 283.59 acres. The plaintiff, thereafter, by letter dated 10.6.1975 served a notice through his lawyer on defendant No. 1 requesting to comply with

the terms and condition of the agreement dated 25.5.1970 and to sell and convey the remaining land to the plaintiff or his nominee. This letter is annexed as Annexure-B to the plaint. Subsequently on 3.9.1975 another notice was served on the defendant No. 1 through his solicitor to the plaintiff which was replied by defendant No. 1 on 10.6.1975 refusing to carry out and perform its part of the obligation under the agreement and so plaintiff instituted the suit for specific performance of the aforesaid agreement dated 25.5.1970 and in the alternative damages of compensation to the tune of Rs. 7,08,975/- was claimed. Furnishing particulars in respect of the claim of compensation, the plaintiff alleged that market price of the unsold land as in September, 1975 was Rs. 8,50,770/- whereas contract price was only Rs. 1,41,795/- being Rs. 500/- per acre. The plaintiff therefore claimed Rs. 7,08,975/- as alternative relief to the decree of specific performance.

3. On being summoned the defendants filed the written statement on 24.6.1978 denying their liability to perform the agreement dated 25.5.1970. Usual objection as to maintainability, bar of limitation, defect of parties etc were also raised but coming to averments made in Paragraph-6 of the written statement, defendants unequivocally admitted the statements made in Paragraph-2 of the plaint. The Paragraph-6 of the written statement, therefore, assumes utmost importance and so it needs to be quoted for ready reference:--

"6. That with respect to the statement made in paragraph 2 of the plaint it is admitted that the defendant No. 1 entered into an agreement with the plaintiff to sell to the Plaintiff an area of Land measuring approximately 333.92 acres on the terms and conditions referred to in the said para."

4. Similarly statements made in Paragraphs-3, 4, 5, 6, 7 and 8 of the plaint were also admitted. However, in Paragraph-11 of the written statement defendants stated that in view of restriction imposed by Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act, 1973, the agreement dated 25.5.1970 for sale of land became void and defendants were not in a position to convey any land to the plaintiff. According to the defendants, plaintiff have assured them that in view of prevailing legal difficulties created by the aforesaid statutes he would not insist on completion of the sale by defendant No. 1 and he would be satisfied if out of the whole area of land covered by the subject agreement in the suit and the agreement dated 25.5.1970 which is the subject matter of Title Suit No. 31 of 1977 of the same court, the defendants would sell only 50.53 acres of land to the plaintiff. As the plaintiff readily accepted 50.53 acres for the whole area of land in view of prohibition by the aforesaid two statutes, defendant No. 1 agreed to substitute a new agreement for the said agreement of sale or to rescind or alter the agreement for sale and therefore the original agreement stood extinguished and this is why performance of the same did not arise at all. Thus Paragraph-11 of the written statement is also very significant for the purpose of arriving at a decision in the present suit. Paragraph-11 of the written statement is accordingly quoted below for ready

reference:

"11. That as to the statements made in paragraph 8 of the Plaint it is admitted that the defendant No. 1 sold and conveyed in favour of the Plaintiff 50.33 acres of land by and under two separate registered deeds of sale dated 31st January 1971 and 22nd February 1974 and made over possession of the same to the plaintiff. But it is specifically denied that the said sales were in part performances of the said agreement dated 25th May 1970 as averred to in the said paragraph. It is submitted that in view of the restriction imposed by the Assam Fixation of Ceiling on land holdings Act and Foreign Exchange Regulation Act 1973 rendering the said Agreement for sale void the defendants were not in a position to convey any land to the plaintiff. But on me plaintiff's assuring that in view of the prevailing legal difficulties so created by me said statutes he would not insist on completion of the sale by the defendant No. 1 and he would satisfied if, out of the whole area covered by the subject agreement in the suit and the agreement dated 25th May 1970 which is the subject matter of Title Suit No. 31 of 1977 of this Court and which was agreed to be sold to him, only an area of 50.53 acres was conveyed to him instead. Consequently, the plaintiff readily accepted the 50.53 acres for the whole area of land as the two statutes prohibited the performance of the said agreements. Since the parties to the agreement for sale dated the 25th May 1970 namely the plaintiff and the defendant No. 1 agreed to substitute a new contract for the said agreement for sale or to rescind or alter the agreement for sale and therefore the original agreement stood extinguished and the question of performance of the same does not arise at all."

With the aforesaid averments the defendants prayed that the suit be dismissed with cost.

5. On the basis of the rival contentions of the parties as referred to above, the learned trial court framed as many as 15 issues and put the parties to prove their respective cases by adducing evidence. Issues framed by the learned Court are as follows:--

- "(i) Whether the suit is maintainable?
- (ii) Whether there is any cause of action?
- (iii) Whether the suit is barred by limitation?
- (iv) Whether the suit is bad for misjoinder of Jokai India Ltd.?
- (v) Whether the Defendant No. 1 is carrying on business in the Dibrugarh District?
- (vi) Whether the plaintiff was and is still ready and willing to buy the land in terms of the agreement?
- (vii) Whether the sale of 50.33. acres of land on 31.1.71 by the Defendant to the Plaintiff were made in part performance of the Agreement dated 25.5.70?

(viii) Whether there was any restriction imposed by the Assam Ceiling on Land Holding Act and Foreign Exchange Regulation Act, 1973 that rendered the Agreement void and made it impossible for the Defendant to convey the land to the plaintiff?

(ix) Whether the plaintiff assured the Defendant that he would not insist on completion of the sale by the Defendant that he would not insist on completion of the sale by the Defendant No. 1 and would be satisfied if, out of the whole area covered by the subject agreement of this suit and the other agreement dated 25.5.70 which is the subject matter of Title Suit No31 of 1977, an area of 50.53 acres was conveyed to him and on such assurance on area of 50.53 acres was conveyed to him?

(x) Whether the plaintiff and the Defendant agreed to substitute a new contract or agreement for the agreement dated 25.5.70 and, as such, the original agreement dated 25.5.70 extinguished?

(xi) Whether there is any supervening interruption of other laws that made it impossible for Defendant No. 1 to carry out his obligation under the agreement dated 25.5.70 and as such the agreement became void.

(xii) Whether the plaintiff is entitled to specific performance of the Agreement of 25.5.70 and whether the Defendant wrongfully failed, neglected and refused to the lawful and reasonable requisition of the Plaintiff?

(xiii) Whether the plaintiff is entitled to claim any damage in lieu of specific performance for breach of Agreement of 25.5.70 and whether the claim of Rs. 7,08,975/- as compensation is highly inflated, imaginary and speculation?

(xiv) Whether the plaintiff is entitled to the refund of Rs. 10,000/-

(xv) Whether the agreement dated 25.5.70 has any binding effect on Defendant No. 2?"

6. Plaintiff examined himself as PW-1 and proved as many as 7 documents. Similarly, defendants also examined one witness as DW-1 and adduced 8 documents as Exhibit-A to H. The learned trial court after considering the evidence led by parties decreed the suit in favour of the plaintiff by judgment and decree dated 19.7.2001 directing the defendants to carry out obligation of the agreement dated 25.5.1970 subject to offering of balance consideration money by the plaintiff within three months from the date of decree and thereupon to execute sale deeds in respect of the land described in schedule of the agreement and to deliver khass possession of the same within three months from the date of offering the balance consideration by plaintiff failing which the plaintiff would be entitled to put the decree in execution to get the sale deed executed and possession through court. This judgment has been brought under challenge in the present first appeal by the defendants.

7. It needs to be recorded herein that during pendency of the appeal, the

ownership of the property in question was changed on more than one occasion leading to passing of orders under Order XXII Rule 10 of the Code of Civil Procedure granting leave to the transferee to continue with the proceeding. By last order passed in Misc. Case No. 2938 of 2014 on 13.11.2014, M/s. M.K. Shah Export. Ltd. being the last owner of the property was granted leave to continue the appeal under Order XXII rule 10 of the Code of Civil Procedure stepping into shoes of the original defendants/appellant.

8. In the main impugned judgment challenged in the present appeal, the learned trial court held that contesting defendants had admitted in their written statement as to entering into agreement on 25.5.1970, as to acceptance of earnest money of Rs. 10,000/- to sell an area of land measuring approximately 333.92 acres on terms and conditions referred to in the agreement, that Exhibit-1 being the copy of the agreement was proved by plaintiff during evidence whereas in schedule of Exhibit-1 description of the land is available. Although defendants attempted to create doubt as to authenticity of Exhibit-1 in course of cross-examination of plaintiff but in Paragraph-7 of the written statement defendants had admitted Exhibit-1 to be true copy of the original agreement dated 25.5.1970. It was further observed that had the execution of the agreement been denied in the written statement it would have been the duty of the plaintiff to prove the agreement in original. Observing that sole plea of the defendants was in regard to prohibition by Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act 1973, the learned trial court recorded that in course of argument the learned advocate for the defendants fairly conceded and admitted that provision of Foreign Exchange Regulation Act 1973 had no application in the present suit. The learned court thereafter considered the effect of Section 4 and 5 of the Assam Fixation of Ceiling on Land Holdings Act, 1956 on the agreement in question and held that there is no prescribed limit for ceiling of land in tea cultivation as well as purposes ancillary to ceiling. The definition of ancillary user occurring under explanation to Section-4 of the Act has also been noticed by the learned trial court and thereupon, it is held that it was incumbent on the defendant to specifically state as to whether land agreed to be sold to the plaintiff under the agreement was outside the special cultivation of tea and outside the ceiling and/or is being used for ancillary purpose. The defendants did not make any specific statements about the nature of the land supposed to have been transferred. Rather plaintiff by adducing evidence made it clear that an agreement for sale is there in existence. Exhibit-1 is the copy of agreement which contains description of the land supposed to be transferred. The defendants examined only one witness through whom eight certified copies of Jamabandi containing 26 sheets were exhibited by Exhibits -A to H showing ceiling surplus land acquired by government. The learned court noted the endorsements made in red ink therein by concerned authority evidencing acquisition of ceiling surplus land through Exhibit-A to H. But at the same time, learned trial court also noticed that land described in Exhibit-A to H did not tally with the schedule of Exhibit-1 except 15

Bighas of land covered by dag No. 22 under patta No. 1 in village Dhekerigaon under Mancotta Mouza vide Exhibit-E. The defendants did not file any copy of return submitted to the Collector so as to show description of the ceiling surplus land surrendered to the Government. On the other hand, PW-1 adduced Exhibit-7 which is a certificate issued by Additional Deputy Commissioner, Dibrugarh to show that land shown in Exhibit-1 were not acquired by Government as ceiling surplus land. Considering the judgments reported in AIR 1947 Nagpur 254, AIR 1969 SC 110, AIR 1980 SC 1149 and AIR 1981 SC 38, the learned trial court did not find any support to hold that Exhibit-1 became void by operation of doctrine of frustration under Section- 56 of the Indian Contract Act. The issue No. 8 and 9, therefore, as referred to above were decided against defendant and in favour of the plaintiff. Consequently, issue Nos. 1 to 5 and 6 were also decided in favour of the plaintiff. Coming to Issue No. 7 and 9 which is the basic objection of the defendants vide Paragraph-11 of the written statement, the learned trial court held that it was burden of the defendants to establish that land intended to be sold under the agreement was ceiling surplus land and was surrendered to the State. Having found that Exhibit-1 is valid agreement the question of obstacle created by statute did not arise at all. Accordingly, issue No. 7 and 9 were also decided in favour of the plaintiff and against the defendants. Consequently, suit of the plaintiff was decreed. Against this judgment and decree, present First Appeal has been preferred.

9. I have heard Mr. G.N. Sahewalla, learned senior counsel assisted by Ms. B Sharma for the appellant and Ms. M. Hazarika, learned senior counsel assisted by Ms. E. Bharali, learned counsel for the sole respondent/plaintiff.

10. Mr. Sahewalla, learned senior counsel for the appellant made the following submissions:

"(i) That the suit having been filed on 30.9.1977 is itself barred by limitation inasmuch as the last sale deed was executed by defendants on 22.2.1974. More than 3 years had elapsed thereafter and so without waiting for this period the plaintiff was duty bound to file the suit within 3 years from 22.2.1974 and the same not having been done, the suit of the plaintiff is barred by limitation.

(ii) That the plaintiff did not produce original agreement and did not prove the agreement for sale in accordance with law and this is why there is no question of granting decree for specific performance of that agreement. According to Mr. Sanewalla, the original agreement not being on record it is not possible to find as to which land was sought to be transferred by defendants' company. The learned trial court committed error in decreeing the suit by failing to notice these deficiencies of the plaintiff.

(iii) Pointing out the cross-examination of PW-1, learned senior counsel would argue that plaintiff himself was not aware as to whether the agreement was at all signed and as to what were the dag number and patta number of the land supposed to be sold.

(iv) That plaintiff really intended to get some amount of money from the defendants and this is why alternative prayer for compensation of Rs. 7,08,975 was made by the plaintiff and the plaintiff himself admitted in his evidence that value of the land was as high as Rs. 35,000/-/Rs. 40,000/- as on the date of institution of the suit and so it will be iniquitous to the extreme to decree the suit at the agreed value by parties."

11. To buttress his argument the learned senior counsel for the appellant has placed reliance on the following judgments:--

- "(a) K.S. Vidyanadam and Others Vs. Vairavan,
- (b) Vimalleshwar Nagappa Shet Vs. Noor Ahmed Sheriff and Others,
- (c) K. Narendra Vs. Riviera Apartments (P) Ltd.,
- (d) V. Muthusami by Lrs. Vs. Angammal and Others,
- (e) M. Meenakshi and Others Vs. Metadin Agarwal (D) by LR.s. and Others,
- (f) Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others, ."

12. Per contra, Ms. Hazarika, learned senior counsel for the respondent would argue that as pointed out in Paragraph-11 of the written statement, same plaintiff instituted two suits on the same day i.e. on 30.9.1977 based on two different but identical agreements executed on the same day i.e. on 25.5.1970. The land supposed to have been transferred under the present case belonged to Bokel Tea Estate whereas land supposed to be sold in the other suit belonged to Decon Tea Estate. The suit with respect to land under Decon Tea Estate was numbered as Title Suit No. 31 of 1977 as mentioned in Paragraph -11 of the present written statement and the suit in the present case was title Suit No. 32 of 1977. Both the suits were based on identical facts and identical objections were also taken up by the same defendants. Title Suit No. 31 of 1977 was decreed by the learned Trial Court on 20.1.1995 and the first appeal preferred thereagainst before this court was numbered as FA No. 59 of 1995 which was dismissed by this court on 22.12.2006. A Special leave petition against the judgment of this court in the said first appeal was preferred before the Hon"ble Supreme Court but the same was also dismissed and thus trial court decree passed in Title Suit No. 31 of 1977 based on identical agreement entering into between the same parties on the same date on identical terms has attained finality. Ms. Hazarika would argue that in former appeal also similar argument as to bar of limitation and frustration of the agreement for sale was unsuccessfully raised. The same objection raised in the present appeal, therefore, is also required to be set aside on the same ground as noted in the judgment passed in F.A. No. 59 of 1995. In reply to argument of Mr. Sahewalla, Ms. Hazarika, learned senior counsel, made the following submissions:--

"(i) The suit cannot be held to be barred by limitation inasmuch as the cause of action arose on 3.9.1975 only after the defendants refused to perform the

contract dated 25.5.1970. By two separate sale deeds executed on 10.6.1975 and 3.9.1975 the same defendants had partly performed the agreement with respect to some part of the land mentioned in Exhibit-1 agreement and so it was legitimate on the part of the plaintiff to expect that a third or fourth sale deed also would be executed by defendants with respect to remaining land. Defendants having disclosed for the first time on 3.9.1975 that they would not execute any further sale deed, the suit had to be instituted for specific performance of contract and the same having been instituted on 30.9.1977 it was well within the period of three years from 3.9.1975 and thus suit was not barred by limitation. The learned senior counsel would further argue that earlier suit being Title Suit No. 31 of 1977 as mentioned in Paragraph-11 of the written statement in the present suit was also instituted on the same date on the basis of an agreement for sale executed on 25.5.1970 as in the present case and if the former suit was held to be not barred by limitation by all the courts till the Apex court of the country, mere is no scope to raise any objection as to bar of limitation in the present suit as well.

(ii) Coming to the question of non-production of original agreement (Exhibit-1) the learned senior counsel for the respondent would argue that plaintiff cited the terms and conditions of the agreement in Paragraph-2 of the plaint itself. A true copy of the agreement was also annexed to the plaint as Annexure-A. While defendant specifically admitted in Paragraph-7 of the written statement as to correctness of the statements made in Paragraph-2 of the plaint, the defendants did not say a word that true copy of the agreement annexed with the plaint as Annexure-A was not the copy of the original agreement and that Annexure-A to the plaint does not tally to the original agreement entered into on 25.5.1970. Since defendants specifically admitted in Paragraph-7 of the written statement as to existence of agreement and acceptance of the terms and conditions mentioned in Paragraph -2 of the plaint and there was no denial as to authenticity of Annexure-A to the plaint, there was no denial of Exhibit-1 at all and so by operation of Order VIII Rule 5 of the Code of Civil Procedure plaintiff's case stood admitted and so there was no necessity for production of the original document at all in view of provision of Section -58 of the Indian Evidence Act.

(iii) Coming to the question of cross-examination of the plaintiff, the learned senior counsel for the respondents would argue that there is nothing in the cross-examination to hold that plaintiff did not support Annexure-A of the plaint to be true version of the agreement dated 25.5.1970. The suggestion made to the plaintiff was as vague as anything and that, too, was specifically denied by plaintiff. Having so found mere is nothing on record to come to hold that defendants could shake credibility of the plaintiff while in the witness box.

(v) The learned senior counsel further pointed out that Jamabandi adduced by Exhibit-A to H have nothing to do with the suit at all inasmuch as by Exhibit-7 the certificate issued by Additional Deputy Commissioner it is made clear that land mentioned in Exhibit-1 and for that Annexure-A to the plaint were not

acquired by Government at all and so there was no bar on the defendants to transfer this land in favour of the plaintiff."

13. According to Ms. Hazarika, the judgments relied on by the learned counsel for the appellants have no application to the case in hand as necessary foundation of facts for attracting those judgments have not been laid by the appellant in the written statement or in the evidence. She rather placed reliance on the following judgments:--

"1. Gobind Ram Vs. Gian Chand,

2. Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others,

3. Prakash Chandra Vs. Narayan,

4. Narinderjit Singh Vs. North Star Estate Promoters Ltd.,

5. V. Muthusami by Lrs. Vs. Angammal and Others,

14. On the basis of the arguments made by the parties the following two points for determination arises in this appeal:

"(i) Whether the suit of the plaintiff is barred by limitation?

(ii) Whether plaintiff is entitled to a decree of specific performance of Exhibit-1?"

15. Before giving reply to the aforesaid points for determination, it is necessary to keep in mind that the defendants did not deny agreement for sale executed on 25.5.1970. Apart from specific admission in Paragraph-6 of the written statement as to factum of agreement and its terms and condition what is pleaded by defendants in Paragraph-11 of the same written statement is also of utmost importance, in these paragraphs, defendants have raised only one objection to avoid the liability to perform the agreement According to the defendants because of application of Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act 1973 agreement dated 25.5.1970 became void. It is further claimed that plaintiff assured of not pressing for further execution of sale deed and was satisfied with 50.53 acres of land as full and final settlement against the agreement of the present suit as well as agreement dated 25.5.1970 which is the subject matter of Title Suit No. 31 of 1977. It is further pleaded that a new contract for the agreement of sale or to rescind or to alter the agreement for sale would be made and so the original agreement dated 25.5.1970 stood extinguished and so question of performance of the same did not arise at all. Since Title Suit No. 31 of 1977 has been mentioned by defendants in their written statement and the learned senior counsel appearing for the respondents made mention about the said suit and F.A. No. 59 of 1995 arising there from, this court called for the records of disposed of appeal i.e. FANo-59 of 1995 to examine as to whether agreement of the said suit and the agreement of the present suit were between the same parties and were executed on the same date and whether similar circumstances exist in so far as the terms and conditions are concerned. This court also wanted to examine as to whether objection raised by

defendants in the former suit i.e. Title Suit No. 31 of 1977 as to bar caused due to Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act 1973 were also the only objection in the former suit Upon the records of the disposed of appeal being compared and shown to the learned senior counsel of both the sides it is found that the on 25.5.1970, the plaintiff and defendants of both the suits executed two agreements for sale of land belonging to two different gardens. The terms and conditions of the agreements were identical and objection raised by defendants in the former suit i.e. T.S. No. 31 of 1977 and the same in the present suit are also identical, namely, bar under Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act 1973. The findings arrived at by this court in the former appeal i.e. FA No. 59 of 1995, therefore, have persuasive value in the present appeal as well.

16. The defendants having taken the stand in Paragraph-11 of the written statement that defendants No. 1 had agreed to substitute a new contract for the agreement dated 25.5.1970 or to rescind or alter the agreement for sale, did not lead any evidence in support of this pleading. Only one witness as DW-1 was examined by defendants to establish their case as to consent given by plaintiff of being happy with 50.53 acres of land and of i.e. languishing all claims against the other land mentioned in agreement for sale dated 25.5.1970 as well as prohibition brought by Assam Fixation of Ceiling on Land Holdings Act, 1956 and Foreign Exchange Regulation Act 1973. The other witness is a Clerk of Bokel Tea Estate who even in examination-in-chief did not make any assertion that he was present when the plaintiff had abandoned claim against balance land of agreement dated 25.5.1970 after two sale deeds were executed by defendants in favour of plaintiff for total area of 50.53 acres of land. This witness also could not say as to whether Ex-hibit-7 brought on record by plaintiff evidencing that land described in Exhibit-1 except 15 Bighas under Dhekerigaon was not acquired by Government under the Assam Fixation of Ceiling on Land Holdings Act, 1956. The assertion made in Paragraph-11 as to rescission of contract or extinguishment of agreement dated 25.5.1970 also could not be established by defendant No. 1 in any way who from his very statement appeared to be mere hearsay witness. Section-60 of the Evidence Act requires that the fact which can be seen or which can be heard can be proved by adducing oral evidence by such witness who can depose that he has heard or he has seen such facts to happen. In the case in hand, if it is the case of the defendants that plaintiff had abandoned his claim for the balance land then it was incumbent upon the defendants to establish its stand either by producing a document in support thereof or by leading oral evidence under Section-60 of the Evidence Act through such witness who could depose in the witness box that he heard the plaintiff that he heard the plaintiff or seek plaintiff in abandoning/ relinquishment his claim to the suit land. This witness did not utter a single word to lay a foundation as to comparative hardship of the parties or spiralling rise of the land during intervening period. He did not say a line about bar of limitation as well when plaintiff brought on record

the refusal of the defendants vide reply notice dated 3.9.1977 (Annexure-B) to the plaint claiming that cause of action for the suit arose on that day. This DW-1 did not say a word to destabilise the consistent stand of the plaintiff in this regard. In Paragraph-19 of the plaint, plaintiff pleaded that cause of action of the suit arose, inter-alia on 3.9.1975 when the defendant No. 1's solicitor refused to specifically perform the said agreement on behalf of defendant No. 1. This reply notice has been annexed to the plaint as Annexure-B and has been exhibited as Exhibit-4 by the plaintiff. Plaintiff exhibited Exhibit-4 in course of his examination-in-chief but conspicuously there is no cross-examination at all in regard to Exhibit-4. The only cross-examination that has been done by defendants is that Exhibit-1 is not original document and there is no signature of the parties on it. The defendants wanted to elicit from the mouth of the plaintiff as to the dag and patta number of the land proposed to be sold which the plaintiff could not furnish. It was an agreement for sale of 333.92 acres of land involving large number of dags of land and so it is natural that plaintiff may not be capable of memorising all dags on the face of cross-examination. The basic question, therefore, that there was an agreement on 25.5.1970 for sale of 333.92 acres of land is an admitted fact. The defendants denied its liability to perform this agreement after executing two sale deeds for a total of 50.53 acres of land is also an admitted fact and the fact that defendants for the first time by letter dated 3.9.1975 expressed their inability to perform the contract is also undisputed fact. No evidence has been brought on record by defendant to show that even before 3.9.1975 defendant had refused to perform the agreement dated 25.5.1970 and so the assertion made by plaintiff at Paragraph-19 of the plaint that cause of action arose, inter-alia, on 3.9.1975 cannot be held to be incorrect. Once it is held that cause of action last arose on 3.9.1975; filing of the suit on 30.9.1977 is well within three years from 3.9.1975 and so the suit cannot be held to be barred by limitation. The learned trial court has considered the evidence on record and the pleadings of the parties to hold that suit is not barred by limitation. In view of the discussion made herein above, this court also finds that suit has been filed well within the period of limitation. The first point for determination, therefore, is decided in favour of the respondents/plaintiff and against the appellant/defendants.

17. Coming to the second point for determination the argument of Mr. G.N. Sahewalla, learned senior counsel can be divided in two different heads. On the one hand he relies on the pleadings made in Paragraph-11 of the "written statement to argue that because of operation of Assam Fixation of Ceiling on Land Holdings Act, 1956 neither plaintiff can purchase any land nor do the defendants have any land at their disposal to sell. According to him the land excess over ceiling were already acquired by government and no land is left for being transferred by defendants. The plaintiff is very much aware of the fact and so was happy in getting 50.53 acres of land on execution of two sale deeds one on 10.6.1975 and the other on 3.9.1975. But subsequently two years thereafter all on a sudden the plaintiff instituted the suit being motivated by greed for extra

money and not for getting any specific performance of contract. Drawing attention of the court to Exhibit-A to H, the learned senior counsel wanted to show that huge land has been acquired by Government under ceiling operation. But in so doing nothing could be shown to hold that Exhibit-7 certificate issued by jurisdictional ADC as to non-acquisition of land described in Schedule to the Exhibit-1 is incorrect or does not reflect the actual state of affairs. Exhibit-7 contains dag number and Mouza under Bokel Tea Estate which were not acquired by Government under ceiling operation. Those dag numbers as well as names of Mouza are also available in the Schedule to Exhibit-1 which is a part of the plaint as Annexure-A thereof. As pointed out above correctness or authenticity of Annexure-A to the plaint has not been denied by defendants expressly or by necessary implication as required under Order VIII Rule 5 of the Code of Civil Procedure and so this court is constrained to hold that the defendants admitted Annexure-A to the plaint to be the true copy of the agreement executed by defendant No. 1 on 25.5.1970. This being the position this court examined the Schedule-1 of Exhibit-1 and compared the same with the dags and mouza number appeared in Exhibit-7 and found that all the dags mentioned in Exhibit-1 and for that Annexure-A to the plaint exist in Exhibit-7. This means that land mentioned in Exhibit-1 has not been acquired by Government under ceiling operation and so the only objection raised by defendants in Paragraph-11 of the written statement for its inability to execute sale deed is found to be baseless.

18. Mr. Sahewalla then passed on to his second leg of argument by saying that agreement was executed on 25.5.1970 and suit was filed in 1977. As per his own saying plaintiff claimed that value of land became five times higher than the original price and so plaintiff is not entitled to a decree for specific performance at the rate mentioned in the agreement. Mr. Sahewalla, learned senior counsel argues that this would amount to hardship to the defendants and so under Section-20 of the Specific Relief Act, court is not duty bound to pass decree for specific performance basing on the plea that time is not the essence of contract in regard to agreement for sale of immovable property in India. The relevant extract of the judgments relied on by the learned counsel for the appellant to buttress his argument in this regard are quoted below:--

"1. K.S. Vidyarnadam and Others Vs. Vairavan,

"10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties

in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the Court by both Sections 10 and 20. As held by a Constitution Bench of this court in *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, , "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident)?: (1) From the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract". In other words, the court should look at all the relevant circumstances including the time-limits specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973. In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months" "period specified therein for completing the sale expired with 15th of June, 1979. The suit notice was issued by the plaintiff only on 11.7.1981, i.e., more than two years after the expiry of six months" period. The question is v/hat was the plaintiff doing in this interval of more than two years? The plaintiff says that he has been calling upon Defendants 1 to 3 to get the tenant vacated and execute the sale deed and that the defendants were postponing the same representing that the tenant is not vacating the building. The defendants have denied this story. According to them, the plaintiff never moved in the matter and never called upon them to execute the sale deed. The Trial Court has accepted the defendants" story whereas the High Court has accepted the plaintiffs story. Let us first consider whose story is more probable and acceptable. For this purpose, we may first turn to the terms of the agreement. In the agreement of sale, there is no reference to the existence of any tenant in the building. What it says is that within the period of six months, the plaintiff should purchase the stamp papers and pay the balance consideration whereupon the defendants will execute the sale deed and that prior to the registration of the sale deed, the defendants shall vacate and deliver possession of the suit house to the plaintiff. There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11.7.1981. It is not the plaintiffs case that within six months, he purchased the stamp papers and offered to pay the balance consideration. Defendants" case is that the tenant is their own relation, that he is ready to vacate at any point of time and that the very fact that the plaintiff has in his suit notice offered to purchase the house with the tenant itself shows that the story put forward by him is false. The tenant has been examined by the defendant as DW-2. He stated that soon after the agreement, he was searching for a house but could not secure one. Meanwhile

[i.e., on the expiry of six months from the date of agreement], he stated, the defendants told him that since the plaintiff has abandoned the agreement, he need not vacate. It is equally an admitted fact that between December 15, 1978 and July 11, 1981, the plaintiff has purchased two other properties. The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2 1/2 years, the prices went up by three times and that only because of the said circumstance has the plaintiff [who had earlier abandoned any idea of going forward with the purchase of the suit property] turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, we are inclined to accept the case put forward by Defendants 1 to 3. We reject the story put forward by the plaintiff that during the said period of 2 1/2 years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above finding means that from 15.12.1978 till 11.7.1981, i.e., for a period of more than 2 1/2 years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the defendants to execute the sale deed and deliver possession of the property. We are inclined to accept the defendant's case that the values of the house property in Madurai town was rising fast and this must have induced the plaintiff to wake up after 2 1/2 years and demand specific performance.

2. Vimalleshwar Nagappa Shet Vs. Noor Ahmed Sheriff and Others,

It is settled law that Section 20 of the Specific Relief Act, 1963 confers discretionary powers. [vide: M. Meenakshi & Ors. v. Metadin Agarwal Nirmala Anand v. Advent Corporation (P) Ltd. & Ors. Parakunnan Veetill Joseph's Son Mathrew v. Nedumbara Karuvila's Son & Ors. It is also well settled that the value of property escalates in urban areas very fast and it would not be equitable to grant specific performance after a lapse of long period of time.

3. K. Narendra Vs. Riviera Apartments (P) Ltd.,

Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee while nonperformance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable

hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in *Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others*, by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.

Chitty on Contracts (27th Edn., 1994, Vol. 1, at p. 1296) states:--

"Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the defendant rather than the subject-matter of the contract, and for which the plaintiff is in no way responsible." Very recently in *K.S. Vidyanadam and Others Vs. Vairavan*, , this court has held:

It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani v. Kamal Rani* (SCC p.528, para 25) "...it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973." (Para 10) Referring to the principle that mere rise in prices is no ground for denying the specific performance the Court has emphasized the need for being alive to the realities of life and inflationary tendencies judicially noticeable and observed:

Indeed, we are inclined to think that the rigor of the rule evolved by courts that

time is not of the essence of the contract in the case of immovable properties evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so." (Para 11) The Court has further proceeded to hold:--

"All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and diat me said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)" (Para 11) Having noticed the Constitution Bench decision in Chand Rani (supra), the Court has further held:--

"Even where time is not of the essence of the contract the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.

"38. However, in our opinion the present one is a fit case where the respondents should be awarded some compensation in spite of its specific performance being refused. Section 21 of the Specific Relief Act provides for award of compensation either in addition to or in substitution of such performance. The explanation appended to the Section expressly enacts that the Court is not precluded from exercising jurisdiction to award compensation even in a case where the contract has been rendered incapable of specific performance. Compensation to some extent is a matter of guess work. An amount of Rs. 3,25,000/-, equivalent to the amount which was paid by the respondents to the appellant would be a reasonable amount of compensation in the facts and circumstances of the case which in our opinion deserves to be paid by the appellant to the respondents in substitution of the decree for specific performance. The respondents have also in their plaint claimed the relief of compensation in addition to other reliefs.

39. For the foregoing reasons, the appeals are allowed. The judgment and decrees passed by the trial court and confirmed in appeal are set aside. Instead the following consolidated decree is passed in both the suits:

- 1) the suit for specific performance of agreement to sell dated 25.7.1972 filed by the respondents is directed to be dismissed;
- 2) the appellant shall return the amount of consideration paid by the respondents to the appellant with interest calculated @ 12% p.a. from the date of payment to the appellant till the date of return by the appellant to the respondents;
- 3) the appellant shall also pay an amount of Rs. 3,25,000/- by way of compensation in lieu of specific performance to the respondents which amount shall carry interest at the rate of 12 percent per annum from the date of decree (that is, today) till realisation;

4) possession over the part of the property admeasuring 45 sq.yards (approximately) shown in red in the plan attached with the plaint filed by the appellant shall be delivered by the respondents to the appellant by removing structures, if any, raised by the respondents;

5) the costs shall be borne by the parties as incurred throughout."

4. V. Muthusami by Lrs. Vs. Angammal and Others,

Defendant Nos. 3-6 purchased this suit land on February 21, 1975 and they are in possession of suit land by investing a considerable sum for improvement. On these facts, we are of the opinion that a decree for specific relief of the contract would involve hardship on the purchasers defendant Nos. 3-6 and no hardship would be caused to the plaintiff and he can be compensated by a decree of compensation. We are also of the view that it will also be inequitable, on the facts and in the circumstances of this case, to enforce specific performance of the agreement, Ex. B-1.

5. M. Meenakshi and Others Vs. Metadin Agarwal (D) by LRs. and Others,

Furthermore, Section 20 of the Specific Relief Act confers a discretionary jurisdiction upon the courts. Undoubtedly such a jurisdiction cannot be refused to be exercised on whims and caprice; but when with passage of time, contract becomes frustrated or in some cases increase in the price of land takes place, the same being relevant factors can be taken into consideration for the said purpose. While refusing to exercise its jurisdiction, the courts are not precluded from taking into consideration the subsequent events. Only because the Plaintiff-Respondents are ready and willing to perform their part of contract and even assuming that the Defendant was not entirely vigilant in protecting their rights in the proceedings before the competent authority under the 1976 Act, the same by itself would not mean that a decree for specific performance of contract would automatically be granted. While considering the question as to whether the discretionary jurisdiction should be exercised or not, the orders of a competent authority must also be taken into consideration. While the court upon passing a decree for specific performance of contract is entitled to direct that the same shall be subject to the grant of sanction by the concerned authority, as was the case in Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, and Nirmala Anand Vs. Advent Corporation Pvt. Ltd. and Others, ; the ratio laid down therein cannot be extended to a case where prayer for such sanction had been prayed for and expressly rejected. On the face of such order, which, as noticed hereinbefore, is required to be set aside by a court in accordance with law, a decree for specific performance of contract could not have been granted.

6. Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others,

The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific

performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs. One lakh and received Rs. Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs. Ninety Thousand, when the property value has risen to a crore of rupees.

19. The argument as to comparative hardship made by appellant has been opposed by the learned counsel for the respondents saying that such an objection as to comparative hardship has been raised for the first time at the appellate stage and that, too, 37 years after the suit was instituted. It is not the case of the defendants that because of lapse on the part of the plaintiff, sale deed could not be executed immediately after execution of the agreement on 25.5.1970. I have perused the pleadings of the parties and the evidence led by them in entirety. I do not find any assertion on the part of the defendants in the whole of the written statement by holding the plaintiff responsible for delay in execution of sale deed. As per the terms of the agreement mentioned in Clause-(b) thereof, the defendants were duty bound to make survey of the land, to release the land from the charge and thereafter to intimate the plaintiff to such release in writing. Defendants could not show any scrap of paper to show that in any point of time such a communication in writing was made by defendants to the plaintiff and within 45 days thereafter the plaintiff did not perform his part of the contract. The defendants were to perform his part of demarcating the land and to get the same released from charge and thereupon to communicate the same to the plaintiff in writing and it is only thereafter the burden would be shifted to the plaintiff to perform his part of the contract by tendering balance sum of money to the defendants for getting sale deed executed. Had it been the case of the defendants that even after communicating the plaintiff in writing about release of the land from the charge after making survey thereof the plaintiff did not perform his part of the contract within 45 days thereafter, in that event plaintiff would have been held liable for the delay. Here it is the defendants

who did not perform their part of the contract and once the principle of comparative hardship is imported under such facts in hand, in that event it would amount to giving benefit to the defendants of their own lapse to the detriment of the plaintiff. This, therefore, would not be equitable to hold that that plaintiff is not entitled to get a decree of specific performance because of spiralling rise in price of the property. In support of the contention that necessary foundation for making argument on the plea of comparative hardship has to be laid in the pleading, the learned counsel for the respondent has placed reliance on a judgment of the Hon"ble Supreme court in a number of cases. The relevant extracts of these judgments are quoted below:--

"1. Gobind Ram Vs. Gian Chand,

9. In view of the above dear finding of the High Court that the appellant tried to wriggle out of the contract between the parties because of escalation in prices of real estate properties, we hold that the respondent is entitled to get a decree as he has not taken any undue or unfair advantage over the appellant, it will be inequitable and unjust at this point of time to deny the decree to the respondent after two courts below have decided in favour of the respondent. While coming to the above conclusion we have also taken note of the fact that the respondent deposited the balance of the consideration in the Trial Court and also the amount in the High court, as directed.

On the other hand appellant as held by the High Court tried to wriggle out of the contract in view of the tremendous escalation of prices of real estate properties. However, to mitigate the hardship to the appellant we direct respondent to deposit a further sum of Rs. 3,00,000/- within 4 months from today with the registry of this Court and the amount shall be kept in Short Term Deposit in a nationalised bank. While giving the above direction we have taken note of the offer made to us on behalf of the respondent. This amount is to be paid to the appellant on giving his possession of the suit property to the respondent within 6 months from the date of the deposit of the - above amount. The appellant shall also be entitled to withdraw the amount already deposited in the Trial Court and the amount of Rs. 1,00,000/- which has been kept in Interest bearing fixed deposit in the registry of the High Court.

2. Mrs. Saradamani Kandappan Vs. Mrs. S. Rajalakshmi and Others,

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is

not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs. One lakh and received Rs. Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs. Nihety Thousand, when the property value has risen to a crore of rupees.

41. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in K.S. Vidyanadam and Others Vs. Vairavan, (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

"It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect.

In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.... We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties -fuelled by large scale migration of people from rural areas to urban centres and by inflation.

Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so."

3. Prakash Chandra Vs. Narayan,

17. The question as to whether the grant of relief for specific performance will cause hardship to the defendant within the meaning of Clause (b) of sub-section (2) of Section 20 of the Specific Relief Act, 1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract.

4. Narinderjit Singh Vs. North Star Estate Promoters Ltd.,

26. In the present case, the appellant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather, the important plea taken by the appellant was that the agreement was fictitious and fabricated and his father had neither executed the same nor received the earnest money and, as mentioned above, all the Courts have found this plea to be wholly untenable.

5. V. Muthusami by Lrs. Vs. Angammal and Others,

22. Defendant Nos. 3-6 purchased this suit land on February 21, 1975 and they are in possession of suit land by investing a considerable sum for improvement. On these facts, we are of the opinion that a decree for specific relief of the contract would involve hardship on the purchasers defendant Nos. 3-6 and no hardship would be caused to the plaintiff and he can be compensated by a decree of compensation. We are also of the view that it will also be inequitable, on the facts and in the circumstances of this case, to enforce specific performance of the agreement, Ex. B-1."

20. Upon perusal of the aforesaid observations of the Hon'ble Supreme Court there is no room left for doubt that unless there is foundation in the pleading and proof that the plaintiff was guilty of not performing his part of the contract but for which the sale deed could not be executed in time and that there was spiralling price rise during intervening period, defendants in a suit for specific performance of contract cannot take the plea of comparative hardship.

21. The judgments relied on by the learned Senior Counsel of the appellant, therefore, cannot be applied to facts of the case. Consequently, the objection as to comparative hardship shall also fail. In pleadings, the only objection raised by defendants were as to prohibition brought about by Assam Fixation of Ceiling of Land Holding Act, 1956. It is discussed above that by perusal of Exhibit-A to H as well as Exhibit-7, it is clear that land mentioned in Exhibit-1 were never brought under ceiling operation by government and so land described in Schedule to Exhibit-1 are still lying under the possession of the defendants. Defendants, therefore, cannot be heard to say that sale deed could not be executed for ceiling operation. At the cost of repetition it can be said that defendants do not attribute any lapse on the plaintiff. Defendants did not bring any material on record to show that agreement dated 25.5.1970 was rescinded, withdrawn or replaced by another agreement as mentioned in Paragraph-11 of the written statement and so the second point for determination as to entitlement of the plaintiff to get the decree of specific performance is also decided in favour of the respondents and against the appellants.

22. The learned trial court has elaborately discussed the evidence on record including the exhibits adduced by the parties and the deposition made by witness. The relevant law holding the field as to specific performance of contract has also been duly discussed by the learned trial court in the impugned judgment. There is an agreement for sale with respect to land mentioned in Exhibit-1 which

was executed on 25.5.1970. The agreement for sale is an admitted fact. Payment of consideration to the tune of Rs. 10,000/- by plaintiff is also not denied. Moreover, pursuant to this agreement defendants already executed two sale deeds on 10.6.1975 and 3.9.1975 with respect to some of the land mentioned in Schedule to the Exhibit-1 and so there is no doubt that there is concluded contract in between the parties for sale of land at consideration of Rs. 500/- per acre. The terms and condition having been specifically admitted by plaintiff there is no doubt as to balance consideration to be paid by plaintiff. It is stated at the bar that after the decree passed by the learned trial court, plaintiff deposited the balance sum of money with the court and thus plaintiff has already performed his part of the contract. The learned trial court found that there is concluded contract, that the earnest money was paid by plaintiff, that defendants did not perform their part of the contract and above all the only ground raised by defendants to avoid the rigour of the agreement for sale is non-existent. Having so found the learned trial court held that it is a fit case for decreeing the suit of the plaintiff for specific performance of contract and accordingly judgment has been passed and decree framed under Order XX Rule 12-A of the Code of Civil Procedure fixing time for execution of sale deed. Having gone through the pleadings and evidence on record, this court does not find any reason to hold a different view than the one held by the trial court. Accordingly, both the points of determination are decided against the appellant and in favour of the respondents.

23. Consequently, the appeal fails and it is accordingly dismissed. No order as to cost. Draw up decree and send down the records immediately.