

(2011) 09 GAU CK 0084

In the Gauhati High Court

Case No : Regular First Appeal No. 136 of 2005

Neepco Limited & Ors.

APPELLANT

Vs

Madan Owary

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Contract Act, 1872 — Section 56, 56
Specific Relief Act, 1963 — Section 16, 16, 20, 20
Transfer of Property Act, 1882 — Section 54, 54

Citation : (2011) 5 GLT 298

Hon'ble Judges : A.K.Goswami, J

Bench : Single Bench

Advocate : Advocate appeared for the Appellants: Mr. K.P. Sarma, Sr. Advocate, Advocate appeared for the Respondent: Mr. N. Choudhury., Advocates appearing for Parties

Judgement

A.K. Goswami, J.—This appeal has been preferred by the defendants against the judgment and order dated 06.07.05 passed by the learned Civil Judge (Sr. Division) No.2, Bongaigaon, in Title Suit No. 11/03 decreeing the suit of the plaintiff directing the defendants to execute a Sale Deed in favour of the plaintiff in respect of the suit property within three months and restraining the defendants permanently from transferring the suit land to any third party other than the plaintiff.

2. The plaintiff, who is a Carriage & Civil, Mechanical Contractor and Order Supplier, filed the suit against the defendant No.1, North Eastern Electric Power Corporation Ltd., for short, NEEPCO Ltd., and its functionaries, arrayed as defendant Nos. 2 to 5, stating, inter alia, that the defendants are the owners of a plot of land measuring 10 bighas bounded by boundary wall/security fencing and steel gates in the district of Bongaigaon, hereinafter referred to as suit land, and that over the said plot of land, the defendants had constructed for the purpose of work of the Corporation, semi permanent Assam Type Building, with C.GI. sheet roofing and pucca floor with water supply system consisting of Tube Well/Deep

Tube Well Pump house with overhead storage tank and electricity supply, with independent transformer. The land and the building etc. are hereinafter referred to as suit property. The suit land was being used as storeyard and colony complex by the defendants. A sale notice was issued in the 2nd October 2000 issue of a daily, viz. the Assam Tribune under the signature of the defendant No.5 intending to dispose of the suit land and building and inviting offers from interested parties on or before 1 P.M. of 31.10.00. The details of the property including the land and building was indicated. The plaintiff submitted his quotation for land and building on 31.10.00, within the prescribed time offering Rs. 1 lakh for the building and Rs.5 lakhs for land and boundary wall, in total, a sum of Rs.6 lakhs, complying with the requirements as stipulated in the sale notice. Vide letter dated 12.02.01, the defendant No. 1 requested the plaintiff to attend a negotiation on 20.02.01 in connection with the aforesaid sale notice at the Conference Hall of the defendant No. 1 at Shillong. The plaintiff had attended the said meeting for negotiation and in the said meeting, the plaintiff revised his offer from Rs. 1 lakh to Rs.2,60,001/ for the building and Rs.5,40,000/ against the earlier quoted price of Rs.5,00,000/ in respect of land, thus offering a total of Rs.8,00,001/ only. In the said meeting, it was decided that if the management of the NEEPCO Ltd. agreed to the above offer of the plaintiff, the plaintiff would have to deposit the amount aforesaid within 15 days from the date of the issuance of the letter of allotment and upon such payment, the possession of the land would be passed on to the purchaser. It was also decided that the NEEPCO would apply for permission of registration and expenses towards registration and permission fees etc. would be borne by NEEPCO. On 26.08.02, Board meeting of the defendant No. 1 was held, wherein the Board approved the proposal for sale of the suit property at a total sum of Rs.8,00,001/. Consequent upon such decision of the Board, the defendant No. 5, by a letter dated 18.09.02, requested the plaintiff to deposit the amount of Rs.8,00,001/ in the form of demand draft of any Nationalized Bank in favour of NEEPCO Ltd. within 15 days from the date of issuance of the letter. The plaintiff on receipt of the letter dated 18.09.02 deposited the sum of Rs.8,00,001/ vide demand draft dated 21.09.02 and receipt of the same was duly acknowledged by the defendant No.5 on the body of the covering letter dated 25.09.02 by which the demand draft was enclosed. Though the plaintiff had performed his part of the contract and still was ready and willing to perform his contract, the defendants failed to execute and register the sale deed as was required under the law. In such circumstances, the plaintiff had sent a letter dated 09.01.03 to the defendant No.5 with a copy to the defendant No.3, requesting the defendants to execute and register the sale deed with delivery of possession of the suit property to the plaintiff immediately. The letter dated 09.01.03 having failed to evoke any response from the defendants, the plaintiff issued a legal notice dated 17.02.03 to be served on the defendants asking the defendants to execute and register the sale deed in respect of the suit properties and to deliver possession thereof to the plaintiff within 15 days from the date of receipt of the legal notice. As the defendants still did not perform their part of the contract, the suit was filed, praying for, amongst others, a decree directing

the defendants to deliver formal possession of the suit properties to the plaintiff and to execute and register the sale deed in question in favour of the plaintiff in respect of the suit property and also for a decree directing the defendants to execute and register the sale deed within the time specified by the Court, failing which the deed be executed and registered according to the provision of Order 21 Rule 34(5) and 6(A) of the CPC.

3. The plaint was subsequently amended by the plaintiff as after the defendants had appeared, a petition dated 17.04.2003 was filed by the defendants whereby the plaintiff was informed about the suo moto decision of the defendants for cancellation of the negotiation for sale of suit properties made between the plaintiff and the defendants. The defendants vide letter dated 31.03.2003 had intimated the plaintiff through his engaged advocate about the suo moto decision of the defendants regarding cancellation of the earlier tenders and proceedings between the plaintiff and the defendants and also about their decision to go for retendering for disposal of the suit properties and that the defendants had already published the notice about cancellation of the sale notice inviting sealed tenders dated 29.09.2000, in the 12th April, 2003 issue of the Assam Tribune. The fact of publication of the aforesaid news item came to the knowledge of the plaintiff only on 30.04.03. The defendants also published another sale notice dated 26.05.03 in the Assam Tribune for sale of the suit properties by inviting tenders from intending tenderers. Consequently, a prayer for a decree declaring the sale notice for sale of the suit properties as published in the Assam Tribune on 26.05.03 as illegal and null and void and to grant permanent injunction restraining the defendants from transferring/disposing of the suit properties by way of retendering or in any other manner and to deliver possession thereof to any third party/parties was also made.

4. The defendants had filed a written statement contending, inter alia, that there was neither any agreement to execute the sale deed nor there was any such sale deed which was required to be executed and registered in respect of the suit property; that the plaintiff filed the suit with an ulterior motive to take the property at a low rate and to create undue hindrance and obstacle in the way of the defendants to get fair market value of the suit property, which belongs to a Central Government Undertaking and the defendants were duty bound to protect the public property and to ensure that the suit property is not sold at a low rate, that it was true that the decision to dispose of the suit property to the plaintiff at a price of Rs.8,00,001/ was arrived at, but the same was due to mistake. Since the real and the actual value of the suit property was much higher and fraud was practised by the plaintiff in collusion with the district authorities, therefore, such a decision is not binding upon the defendants and that the plaintiff is not entitled to any relief. The defendants averred that the value of the suit property will be more than Rs.20,00,000/ besides the value for the buildings standing thereon. It is further stated that the Reserved Price for the temporary building as per report of the Internal Audit Section of the Corporation was assessed at Rs.2,85,600/ and the Reserved Price of the land as per the certificates dated 28.01.1999 and

04.05.2000 issued by the Deputy Commissioner, Bongaigaon was fixed at Rs.6,73,333/. It has also been pleaded that in view of the prevailing law and order situation in the area where the suit property is located at the relevant time when the tender was issued on 02.10.2000, a very poor response was received and in fact, the plaintiff alone was the tenderer and he had also quoted price less than the Reserved Price and it is in these circumstances that negotiations were held with the plaintiff on 20.02.2001, wherein as stated by the plaintiff, the offer was revised to Rs.8,00,001/. The defendants also admitted the fact that the apex body of the Corporation in its meeting held on 26.08.2002 had approved the final offer of the plaintiff for disposal of the said land and building at a total price of Rs.8,00,001/. The deposit of Demand Draft of Rs.8,00,001/ by the plaintiff on 21.09.2002 in response to the letter dated 08.09.2002 of the Corporation, in terms of Clause 5 of the sale notice was also admitted, stating, however, that as the Draft was purchased by "Missionaries of Sisters", Tezpur, the same had created some doubt which was, however, clarified by the plaintiff vide his letter dated 15.12.2002, annexing thereto an affidavit of the Missionaries of Sisters. Permission for sale of land was obtained from the Chairman, Bongaigaon Development Authority on 01.10.2002 and permission for sale of land was applied to the Deputy Commissioner. While granting permission, the Addl. Deputy Commissioner, Bongaigaon, vide letter dated 07.10.2002 stated the price of land to be Rs.2,00,000/ per Bigha, which was more than the price of the land fixed at Rs.67,333/ per Bigha as recorded in the certificates dated 28.01.1999 and 04.05.2000 and Rs.73,333.33/ per Bigha as fixed by the certificate dated 09.07.2001. The sudden increase in the price of the land created a confusion and doubt which resulted in making enquiries which revealed that actual price of the land is more than Rs.20,00,000/ besides the value of the building. Defendants, accordingly, after appearance had filed an application before the learned trial Court with a Demand Draft of Rs.8,00,001/ dated 16.04.2003 in favour of the plaintiff with a prayer to allow the plaintiff to withdraw the amount either under protest or without protest. The Reserved Price for the land was fixed at Rs.20,00,000/ and the Reserved Price for the building and structures was fixed at Rs.2,84,600/ while issuing the sale notice dated 22.05.2003. The plaintiff having asked for release of the earnest money, the respondent No.5 released the money in favour of the plaintiff on 09.12.2002. It has been averred that there was merely an agreement between the plaintiff and the officials of the Corporation to enter into a contract for the sale and purchase of the suit land and building which cannot be specifically enforced and no formal agreement was entered into between the plaintiff and the Corporation as per the Memorandum of Negotiation dated 20.02.2001.

5. On the basis of the aforesaid pleadings, the learned trial Court framed the following issues :

- (1) Is there any cause of action for the suit?
- (2) Whether there was any agreement to sell the suit land to the plaintiff by the

defendants ?

(3) Whether the discussions and decisions to sell the suit land at Rs.8,00,001/by the defendants to the plaintiff amounts to an agreement for sale ?

(4) Whether the decision of the defendants to cancel the tender of the plaintiff and to call for retender is valid ?

(5) Whether the plaintiff is entitled to a decree as prayed for ?

(6) What relief s parties are entitled to ?

6. In order to prove its case, the plaintiff had examined one witness in the form of PW1 and had also exhibited some documents. Defendants had examined two witnesses and had also exhibited some documents.

7. The learned trial Court on consideration of the materials available on record and after hearing the parties had decided all the issues in favour of the plaintiff and accordingly decreed the suit with a direction to the defendants to execute the Sale Deed in favour of the plaintiff in respect of the suit property within 3(three) months and also restraining defendants from transferring the suit property in any way to any 3rd party other than the plaintiff.

8. The plaintiff, Shri Madan Owary had submitted evidence in chief under Order 18 Rule 4 CPC. The plaintiff in his deposition has stated that the defendants who were the owners of land measuring 10 Bighas with boundary walls/security fencing and steel gate under Dag No. 217 of P.P. No. 36 in village Chapaguri No. 1 under Bongaigaon Revenue Circle had constructed some semi permanent Assam Type building with CGI sheet roofing and pucca floor, installed water supply system and electricity supplies with independent transformers in the said land and had been using the same as their storeyard and colony complex. The defendants, intending to dispose of the said storeyard and colony complex, as in wherein basis, issued a sale notice in the 2nd October, 2000 issue of the Assam Tribune under signature of the defendant No.5, inviting offers from the interested parties on or before 31.10.2000, wherein details of the properties were also indicated. He had submitted his quotation in response to the said notice on 02.10.2000, quoting Rs. 1 lakh for the building and Rs.5 lakhs for the land and boundary wall and along with the said quotation he had also deposited 5% of the bid amount, amounting to Rs.30,000/-. The defendant No.5 had, by letter dated 12.02.2001 invited him to attend a negotiation at Shillong on 20.02.2001 and accordingly, he had attended the meeting wherein it was agreed by the plaintiff that he would offer for the building, a sum of Rs.2,60,001/against the quoted price of Rs. 1 lakh and a sum of Rs.5,40,000/ for the land against the quoted price of Rs.5 lakhs. He further deposed that if the management of the defendant No.1 agreed to the above negotiated offer made on 20.02.2001, he would have to deposit the amount of Rs.8,00,001/ within 15 days from the date of award of letter of allotment and upon such payment, the possession of the land and building would be passed unto him and that defendants would apply for

permission for registration and the registration fee, if any, would be borne by the defendants. On 26.09.2002 the Board approved and accepted the negotiated offer and accordingly, the defendant No.5 vide his letter dated 18.09.2002 requested him to deposit the amount of Rs.8,00,001/ in the form of Demand Draft from any Nationalised Bank, whereupon he had deposited an amount of Rs.8,00,001/ vide Demand Draft dated 21.09.2002 which was forwarded by his letter dated 25.09.2002. It is also stated that he had performed his part of the contract and is still ready and willing to perform his part of the contract, if any, but the defendants, contrary to their commitment made in the meeting on 20.02.2001 did not deliver possession of the land to him in spite of depositing consideration money in full and had also failed to execute and register the Sale Deed as required under the law. It is in such circumstances that the plaintiff on 09.01.2003 issued a letter to the defendant No. 5 with a copy to the defendant No. 2, requesting them to deliver possession of the land and buildings aforesaid to him immediately and to execute and register the Sale Deed. As no response was forthcoming from the defendants, he had also caused a legal notice dated 17.02.2003 to be served on the defendants. The P W1 in his affidavital evidence had stated that the suo moto decision of the defendants regarding the cancellation of the earlier tender and also their decision to go for retendering for disposal of the suit premises as published in the 12.04.2003 issue of the Assam Tribune is illegal and void. The PW1 had exhibited the following documents as Exhibits :

- (1) Letter dated 12.9.2001 of the defendant No.5 inviting to attend negotiation on 20.2.2001 as Exhibit1.
- (2) Minutes of the negotiation meeting held on 20.2.2002 as Exhibit2.
- (3) Letter of acceptance dated 18.9.02 issued by Dy.(C) of NEEPCO Ltd. As Exhibit3.
- (4) Forwarding letter of payment of full consideration money of Rs.8,00,001/ in favour of the NEEPCO Ltd. dated 25.9.2002 as Exhibit4.
- (5) Letter dated 9.10.2003 to the Dy. Manager (C), NEEPCO to execute Sale Deed and to deliver possession of the land and properties as Exhibit5.
- (6) Office copy of the Legal Notice dated 17.2.2003 issued by Advocate Mr. K. Raza as Exhibit6.
- (7) Registered letter dated 31.3.2003 issued by Shri U.K. Jindal, Advocate of NEEPCO to Mr. K. Raza, received on 5.4.2003 as Exhibit7.
- (8) News Edition of "The Assam Tribune" dated 12.4.2003 wherein cancellation of Sale Notice dated 29.9.2000, was published by the defendants as Exhibit8.
- (9) News Edition of "The Assam Tribune" dated 26.5.2003 wherein defendants published notice inviting fresh tenders for disposal of suit properties as Exhibit9.
- (10) Cancellation of sale notice dated 31.03.2003 as Exhibit10.

(11) Order dated 22.08.2003 of the High Court in MAP No. 97/2003.

9. In his cross examination, the PW1 deposed that the houses in the suit land are about 1520 years old and are almost in damaged condition. He had also deposed that he had withdrawn the earnest money amount. It also came out in his evidence that he was the lone tenderer. The amount of Rs.8,00,001/ that was paid by him to the defendants was returned back and deposited in the Court but he had not accepted it. He denied a suggestion that he cooperated with the defendants while obtaining the valuation certificate from the office of the Deputy Commissioner, Bongaigaon and that he had influenced to fix lower rate of valuation in the suit land. According to him, after negotiation was being finalized, the defendants had filed petition before the Deputy Commissioner, Bongaigaon for transfer in which he did not put his signature. He denied the suggestion that he was aware that the valuation of the suit land was fixed at Rs.2 lakhs per Bigha excluding the structure standing thereon in the suit land in while issuing permission by the Office of the Deputy Commissioner. He also denied the suggestion that since there was no formal contract with the defendants with regard to the sale of land, the defendants are not bound to execute and register the Sale Deed and to deliver the possession of the land.

10. The defendants had submitted evidence under Order 18 Rule 4 CPC of one Sri Jadu Nath Bora as DW1. However, the evidence of aforesaid Jadu Nath Bora was struck out as he had failed to present himself for crossexamination. The Affidavit under Order 18 Rule 4 CPC filed by one Sri Lakshmi Kanta Barua was treated as the evidence of D W1 and the Affidavit under Order 18 Rule 4 CPC submitted by one Sri Kangkan Sarma was treated to be the evidence of D W2. The DW1, Lakshmi Kanta Barua, who is Dy. Manager (C) of the defendant Corporation had tendered in the evidence, the copy of the authorization letter directing him to depose on behalf of the defendants as ExhibitA. In his evidence, the D W1 had stated that the suit was filed by the plaintiff with an ulterior motive to take property at a low rate and to create obstacle in the way of the defendant getting fair market value of the suit property. He had stated that the negotiations and the decisions to dispose of the said property to the plaintiff at the price of Rs.8,00,001/ was admittedly arrived at due to mistakes as regards real and actual value of the property as well as the fraud played by the plaintiff in collusion with the district authority and as such the negotiations and decisions to dispose of the property to the plaintiff at such a low price is not binding upon the defendants inasmuch as the value of the land would be more than Rs.20 lakhs besides the value of the building standing thereon. He has also stated that he reserved price of the building stood at Rs.2,85,600/ as per the report of the Internal Audit Section of the Corporation Office and the reserved price of land was fixed at Rs.6,73,333/ as per the valuation certificates dated 28.1.1999 and 4.5.2000 issued by the Deputy Commissioner, Bongaigaon and the approval of the competent authority was obtained on the basis of the Internal Audit Report of the two certificates aforementioned, hi response to the tender notice dated 2.10.2000, only the plaintiff had submitted tender, that too quoting price less

than the reserved price. He also stated that the poor response to the said tender notice was due to prevailing law and order situation in the locality where the suit property is situated. The D W1 stated that the total offer of the plaintiff at Rs.8,00,001/ made in the negotiations held on 6.2.2001 was approved by the management of the Corporation and the plaintiff had also deposited the draft of Rs.8,00,001/ in terms of Clause 5 of the tender notice. Permission of the sale of land was obtained from the Chairman, Bongaigaon Development Authority on 1.10.2002 and necessary permission for transfer of land was sought for from the Deputy Commissioner, Bongaigaon on 7.10.2002. While granting permission of sale, the Additional Deputy Commissioner, Bongaigaon stated that the price of land is Rs.2 lakhs per Bigha. The increase of the price of land as reflected in the certificated dated 7.10.2002 from the price of land as indicated in the earlier valuation certificates dated 28.1.1999 and 4.5.2000 created doubt and confusion in the minds of the officers of the Corporation and thereafter, on personal inquiries being made, it was revealed that the actual price of the land would be much more than Rs.20 lakhs besides the value of the building. It is in these circumstances, in order to protect the public property and money, the competent authority of the Corporation decided to cancel the entire transaction and to go for retendering for the sale of land and building in question. The Deputy Commissioner, Bongaigaon was also requested to assess the present value of the land on 17.2.2003 but the same was not done. It is also stated by him that in the sale notice issued on 22.5.2003, the reserved price of the land is fixed at Rs. 20 lakhs and the reserved price of the building and structures was fixed at Rs.2,84,600/. He has also stated that on 3.10.2002, on being requested by the plaintiff, the earnest money was returned back to the plaintiff. It is further stated that the decision of the Board which was conveyed to the plaintiff by the defendants vide letter dated 18.09.2002, did not mention that on payment of consideration amount, possession of the land will be passed on to the purchaser. The plea of specific performance of contract as made by the plaintiff is denied. On the basis of a mere agreement entered into, a contract for sale and purchase of the land and building cannot be specifically enforced.

11. Apart from ExhibitA referred to earlier, the D W1 had also tendered into evidence the following documents :

(1) Letter dated 11.1.99 issued to DC Bongaigaon for issue of land valuation certificate as ExhibitB.

(2) Land valuation certificate dated 25.1.99 issued by the DC, Bongaigaon as ExhibitC.

(3) Land valuation certificate dated

19.7.2001 issued by the Addl. D.C. Bongaigaon as ExhibitD.

(4) Land valuation certificate dated 7.10.2002 issued by the Addl. Deputy Commissioner, Bongaigaon as ExhibitE.

(5) Letter dated 3.4.2003 issued by Asstt. Manager (Law), NEEPCO Ltd. to the General Manager C&C& P NEEPCO Ltd. Shillong as ExhibitR

(6) Sale Notice dated 22.5.2003 with publication dated 26.5.2003 as ExhibitG

(7) Time Extension Notice dated 28.6.2003 as ExhibitH.

(8) Letter dated 17.02.2003 to Deputy Commissioner, Bongaigaon by Deputy Manger (C), S & T Division, NEEPCO Ltd. Guwahati24 as Exhibit1.

(9) Letter dated 17.2.2003 to Deputy Commissioner, Bongaigaon by Deputy Manager (C), S & T Division, NEEPCO Ltd. Guwahati24 for assessment of valuation of the land as ExhibitJ.

12. In his crossexamination, the DW 1 stated that he cannot say at what price the suit land was purchased by the company in the year 1981. He stated that he was not involved in the process of disposal of the suit premises and in the tender dated 02.10.2000 as published in the Assam Tribune, reserved price of the suit land was not mentioned. He also stated that due to prevailing law and order situation in the locality nobody was interested to submit a tender and also in such law and order situation, the value of the land was also low. He admitted that the defendants had agreed vide Exhibit2 that upon payment, the possession of the suit premises would be passed on to the purchaser. He acknowledged the fact that the plaintiff had made payment within time but the defendants did not hand over the possession of the suit land to the plaintiff as agreed in Exhibit2. He had also said that the negotiated settlement was approved by the Board in the meeting held on 26.08.2002, considering recurring monthly expenditure and also considering the prevailing situation in the area in the best interest of the Corporation. He deposed that vide Exhibit10, the transaction was cancelled on 31.03.2003.

13. Sri Kangkan Sarma, who was the Assistant Manager(C) of the Corporation, on being authorized, deposed as D W2 by filing his evidence on affidavit. He also deposed towards fixing of reserved price at Rs. 2,85,600/ as per report of the Internal Audit Section of the Corporation of the land at Rs.6,73,333/ as per valuation certificates dated 28.1.1999 and 4.5.2000 issued by the Deputy Commissioner, Bongaigaon. He has stated in such affidavit that the plaintiff was a lone tenderer and he had also quoted price lower than the reserved price. The poor response to the said tender notice was also attributable to the prevailing law and order situation. He has also stated that the negotiated offer arrived at on 6.2.2001 was approved by the Management of the Corporation and thereafter, the plaintiff had deposited a Draft of Rs.8,00,001/ in terms of Clause 5 of the tender notice. In his statement, DW2 has echoed the version of DW1 with regard to grant of permission by the Deputy Commissioner to sell the land at Rs.2 lakhs per Bigha and the consequent doubt and confusion in the minds of the Officers of the Corporation, as also with regard to the Sale Notice dated 22.5.2003. The expost facto approval granted on 9.3.2005 for cancellation of sale of 10 Bighas of land and the building thereon to the plaintiff at the consideration of Rs.

8,00,001/ was tendered in evidence as ExhibitH. (There was, however, already a document Exhibited as ExhibitH and this ExhibitH would be described as ExhibitH as exhibited by the DW2). In his crossexamination, DW2 had stated that he was not involved in the process of tender. He also deposed that due to raising the valuation of land to @ Rs.2 lakhs per Bigha as per permission to sell the land as granted by the Addl. Deputy Commissioner, Bongaigaon, the Sale Deed was not executed.

14. I have heard Mr. K.P. Sarma, learned Senior counsel for the appellants as well as Mr. N. Choudhury, learned counsel for the respondent.

15.1 propose to deal with the contentions of the learned counsel for the parties as hereunder.

Issue No. 1 :

16. The learned counsel for the appellants has not addressed on this issue and did not advance any arguments contending that there is no cause of action for the suit and, therefore, it would appear that the appellants have conceded that there is sufficient cause of action to go for trial of the plaintiff's suit.

Issues No. 2 & 3 :

17. Mr. K.R Sarma, learned Senior counsel for the appellants submits that the learned trial Court was wholly wrong in deciding Issues No. 2 & 3 in favour of the plaintiff. According to him, Exhibits1,2 & 3 do not lead to the conclusion that there was an agreement to sell in between the plaintiff and the defendants. In the instant case, there was no formal contract which may entitle a plaintiff to seek specific performance of a contract. Exhibits 1,2 & 3, at the most, may indicate that there was an agreement to enter into a contract for the sale and purchase of the land and buildings and that being the position, the same cannot be specifically enforced. On the basis of Exhibits2 & 3, it cannot be said that a contract was arrived between the parties inasmuch as Exhibit2 is hedged with conditions, namely, (i) that plaintiffs final offer of Rs.8,00,001/ would be placed before the Management for consideration, (ii) that subject to approval by the Mangement and payment by the plaintiff within 15 (fifteen) days from the date of award of the letter of allotment, NEEPCO will apply for permission of registration. Therefore, Exhibit2, according to him, visualizes formalities to be complied with and therefore, Exhibit2, per se, does not result in a concluded contract. Likewise, according to him, Exhibit3 also manifests that further formalities with regard to the transfer of land and building would be required to be followed on receipt of payment to be received within 15 days from 18.9.2002 i.e. the date of issue of Exhibit3. Therefore, Exhibit3 also does not in any manner portray a concluded contract. No doubt, the plaintiff had deposited a sum of Rs. 8,00,001/, pursuant to the Exhibit3 letter dated 18.09.2002, yet such payment, being also conditional and as would be evident, being not absolute and unqualified, does not result in a concluded contract as has wrongly been held by the learned trial Court. In the alternative, the learned Senior counsel for the appellants has contended that

assuming but not admitting that Exhibits 1, 2 & 3 result in an agreement, then also no contract was entered into under the law as the consideration was not lawful. With reference to Exhibit E, the learned Senior Counsel points out that the Addl. Deputy Commissioner had allowed the land to be sold to the plaintiff @ Rs. 2 lakhs per Bigha and therefore, the amount of Rs. 5,40,000/ fixed for the value of 10 Bighas of land is not a lawful consideration. Learned Senior Counsel submits that the money for the Demand Draft, as it has transpired, was paid by Missionaries of Sisters, Tezpur and therefore, it invites the provision of Benami Transaction (Prohibition) Act, 1988. The learned Senior Counsel submits that in a suit for specific performance for contract, conduct of the plaintiff is very relevant and the conduct of a plaintiff, who had not disclosed his connection with Missionaries of Sisters, had disentitled him to obtain the discretionary relief. It is also his submission that even otherwise, even if there is a conclusive contract, in view of Exhibit E, fixing the price of land by the Addl. Deputy Commissioner, Bongaigaon at Rs. 2 lakhs per Bigha, it was impossible on the part of the defendants to perform its part of the contract and, therefore, the contract was void. In this context, the learned Senior Counsel for the appellants has invoked the provisions contained in the Contract Act, 1872 relating to Doctrine of Frustration. The learned Senior counsel for the appellants in order to substantiate his arguments aforesaid has placed reliance on the following Judgment:

- (1) AIR 1968 SC 1028 : Kollipara Sriramulu Vs. T. Aswathanaravana & Ors.,
- (2) AIR 2006 SC 871: Dresser Rand SA. Vs. Bindal Agro Chem Ltd. and K.G. Khosla Compressors Ltd.,
- (3) AIR 1992 Delhi 305: J.K. Industries Limited Vs. Mohan Investments and Properties Pvt. Ltd.,
- (4) (2003) 4 SCC 86 : M. V Shankar Bhat & Anr. Vs. Claude Pinto since (deceased) by LRs. & Ors.,
- (5) (2011) 4 SCC 171 : Kerala Financial Corporation Vs. Vincent Paul & Anr.,
- (6) AIR 1992 SC 1414 : Bhoop Singh Vs. Union of India & Ors.,
- (7) AIR 1954 SC 44: Satyabrata Ghose Vs. Mugneeram Bangur & Co. & Anr.,
- (8) 1994 (1) GLJ 177: Shri Chuba Temsu Ao & Ors. Vs. Shri Nangponger & Ors.,
- (9) (2010) 7 SCC 717: Laxman Tatyaba Kankate & Anr. Vs. Taramati Harishchandra Dhatrak.

18. Mr. N. Choudhury, learned counsel for the respondent submits that materials on record would demonstrate that there was no intention of the parties to sign any formal agreement as a condition or term of the bargain. It is also his contention that execution of a formal contract is not necessary to bind the parties. Exhibits 1, 2 & 3, according to him, satisfies all the elements of a concluded contract in the instant case. The learned counsel for the respondent/plaintiff has also submitted that the fact that there was a concluded contract is

also fortified by the letter dated 31.3.2003 written by the standing counsel of NEEPCO Ltd. to the counsel for the plaintiff/respondent, which was exhibited as Exhibit? by the plaintiff. The said letter, according to him, gives three explanations for cancellation of the previous tender and the decision to go for retendering for disposal of the suit land and building (i) that it was revealed subsequently that the district authority had assessed the price of the land @Rs.2 lakhs only per Bigha and (ii) that thus the total value of the land itself comes to Rs.20 lakhs and (iii) that the officials of the NEEPCO Ltd. being employees of a Government of India Undertaking are accountable for their actions and cannot allow the property of the Government to be sold at a lower price. The learned counsel has pointed out that there was no pleading that ExhibitD imposed a prohibition as a result of which it had become impossible on the part of the appellants to perform the contract. The learned counsel goes on to submit that ExhibitsC, D & E having not been proved in accordance with law, although they are exhibited as Exhibits, are not worthy of consideration. It is his further contention that sale and purchase is purely in the realm of commercial activity and there is no question of any public interest element involved in it. It is not the case of the appellants that even at a time when the payment was made by the plaintiff, the price of the land was Rs. 2 lakhs per Bigha. The pleadings and the evidence go to show that the defendants' projected case was that of escalation of the price of the suit property over a period of time and that is what prompted the appellants to cancel the tender notice pursuant to which a concluded contract was arrived at between the parties. The plea set up by the defendants in the written statement regarding alleged fraud and mistake do not even find a place in the evidence of the witnesses examined on behalf of the defendants, thereby abandoning such plea. It is contended by Mr. Choudhury that over a period of time, price of property which was agreed to be sold, may increase but such escalation of price, cannot afford a ground to resile from a concluded contract. The plea of Benami Transaction, as argued by the learned Senior Counsel for the appellants, according to Mr. Choudhury, is wholly imaginary and unfounded. There is no whisper in the evidence of the witnesses of the defendants with regard to such a plea as canvassed by Mr. Sarma. The learned counsel also submits that valuation of the land by the Deputy Commissioner is to be made for the purpose of Stamp Act, 1899 and the same is not required to be done under the provisions of the Transfer of Property Act, 1882. It is his contention that Deputy Commissioner of a district cannot fix the price of land.

19. In order to substantiate his manifold submissions and arguments, Mr. Choudhury has placed reliance on the following decisions:

- (1) (1999) 1 SCC 1: Rickmers Verwaltung GMBH Vs. Indian Oil Corporation Ltd.,
- (2) AIR 1968 SC 1028: Kollipara Sriramulu Vs. T. Aswathanaravana & Ors.),
- (3) AIR 1933: Privy Council 29 Currimbhoy & Co. Ltd. Vs. LA. Greet & Ors.,
- (4) (1977) 3 SCC 457 : M/s Radhakrishna Aganval & Ors. Vs. State of Bihar &

Ors.,

(5) AIR 1995 SC 1607: S. VR. Mudaliar (Dead) by Lrs. & Ors. Vs. Rajabu F. Buhari (Mrs.) (Dead) by Lrs. & Ors.,

(6) (2010) 7 SCC 717: Laxman Tatyaba Kankate & Anr. Vs. Taramati Harishchandra Dhatrak,

(7) AIR 1971 SC 1949 : Biswanath Rai Vs. Sachhidanand Singh,

(8) 2008 (1) GLT 301 : Abdul Aziz Vs. State of Assam & Ors.

20. In reply, learned Senior counsel for the appellants has submitted that Exhibits C, D & E had been exhibited without any objection and the plea that the documents were not proved in accordance with law cannot be entertained at the subsequent point of time. He emphasized that the Sale Deed could not be executed because of the prohibition imposed by Exhibit E. With reference to paragraph 8 of the written statement and the evidence of DW1 and DW2 and the Exhibit H, the learned Senior Counsel has pointed out that from the aforesaid it becomes clear that only because of such prohibition imposed by the Exhibit E, Sale Deed could not be executed. He has contended that the plaintiff being a party to the negotiation in which it was mutually decided that permission of the Deputy Commissioner would be sought for transfer of the land, the plaintiff cannot be heard to argue that Exhibit E is of no consequence. In no uncertain terms, Exhibit E stipulated that permission was refused by the Deputy Commissioner to sell land at a price less than Rs.2 lakhs per Bigha, Mr. Sarma contends. In absence of any challenge and relief prayed for declaration of Exhibit E to be void, NEEPCO Ltd. has committed no illegality in not executing the Sale Deed. The learned Senior counsel also while distinguishing the Judgment cited by the learned counsel for the respondents, places reliance on the following Judgments:

(1) AIR 1972 SC 608 : P.C. Purushothama Reddiar Vs. S. Perumal,

(2) 1999 (I) GLT30: Manindra Kumar Dey & Ors. Vs. Mahendra Suklabaidya & Ors.

21. The competing pleadings and the debate at the bar have received due and anxious consideration of this Court. From the evidence of DW1, it is clear that even though the Internal Audit Section of the Corporation Office had fixed Reserved Price of land and the building, in the tender notice dated 2.10.2000 as published in the Assam Tribune, Reserved Price of the suit land was not mentioned. Both DW 1 and DW 2 were not involved in the process of tender. Another position that emerges from the evidence of DW1 and DW 2 that on or about the time when the tender notice was published on 2.10.2000, the law and order situation prevailing in that area where the suit land is located had witnessed such a situation that nobody was even willing and interested to submit any tender. The DW 1 was categorical that due to prevailing law and order situation the value of the land in the area was low. This explains why the plaintiff

was the only person who had submitted the tender. The implication can well be imagined that due to prevailing law and order situation it was not considered a right time to invest in immovable properties. The defendants also wanted to dispose of the suit property in the best interest of the Corporation as deposed by DW 1. It has also been admitted by DW1 & DW 2 in their evidence that a negotiated offer arrived at on 6.2.2001 was approved by the Management of the Corporation and in terms of Clause 5 of the tender notice, the plaintiff had also deposited a Draft of Rs.8,00,001/. It is also note disputed by them that necessary permission for transfer of land was sought for from the Deputy Commissioner, Bongaigaon on 7.10.2002.

22. As it is well known in law that fraud vitiates everything, it is only proper to deal, at the very outset, with the submission advanced by Mr. Sharma with regard to fraud played by the plaintiff. Neither in the pleadings nor in the evidence a foundation has been laid by the defendants to establish fraud. A general omnibus and sweeping statement has been made by DW1, who, it is to be noted, as per his own admission, was not associated in the process of disposal of the suit property, that the decision to arrive to sell the suit property at Rs.8,00,001/ was taken because of the fraud played by the plaintiff. In view of absence of any material, the argument raised by Mr. Sharma merits no further consideration and, accordingly, the same is rejected. Before I examine the quintessential aspect presented before me with scholarship by the learned counsel of both the parties, I had better make short shrift of the point raised by Mr. Sharma that payment of the money for the draft having been paid by Missionaries of Sisters and this fact having not been disclosed by the plaintiff, the plaintiff is not entitled to any discretionary relief. I would agree with Mr. Choudhury that not even a fleeting mention finds place in the evidence of the defendants. Further, I find that in the written statement itself the defendants have acknowledged that the doubt generated by such payment was clarified by the plaintiff. The contention, thus, fails. Another point urged by him is that the Additional Deputy Commissioner, Bongaigaon, who had issued the certificate dated 07.10.2002 permitting sale of the land at Rs.2,00,000/ per bigha, has not been made party though he was a necessary party to the proceedings and therefore, in any view of the matter, the suit is liable to be dismissed and in support of his aforesaid submission he places reliance in the case of Shri Chuba Temsu Ao & Ors. Vs. Shri Nangponger & Ors., reported in 1994 (1) GLJ 177. The aforesaid ground was not pleaded in the written statement and even though, in the memo appeal, a ground has been taken to the effect, having regard to the pleadings of the parties, I am of the considered opinion that the Additional Deputy Commissioner, Bongaigaon, is not a necessary party.

23. I pick up the thread of the argument advanced by Mr. Sharma that the interpretation of Exhibits1,2 & 3 do not lead to the conclusion that there was a concluded contract. As much of the argument has veered around the interpretation that can be attached on the reading of Exhibits1,2 & 3, it is only appropriate that the documents are given a close look. Exhibit1, which was on

the subject of disposal of land and buildings of Store SubDivision, Bongaigaon was dated 12.2.2001, whereby the plaintiff was informed that the price quoted by the plaintiff was found below the Reserved Price fixed by the Corporation and therefore, the Corporation was considering to have a negotiation with the plaintiff on 20.2.2001 at Shillong. 24. Relevant portion of Exhibits2 & 3, for better appreciation, need to be reproduced and therefore, they are reproduced hereinbelow:

Exhibit2

".....At the outset Sri

R. Mullick, expressed that the quoted price of Rs. 1,00,000.00 and Rs.5,00,000.00 towards building and land respectively are too low as compared to reserve price fixed by the Corporation and accordingly requested Mr. Ovary to enhance the price considerably so that the Corporation can decide the case in his favour. Sri R. Mullick also express that in case the offered price is too low, proposal may be abandoned.

Reacting to this Mr. Ovary expressed that he has quoted the price considering the additional charges toward registration of the land and other local conditions etc. and that some of the existing buildings is in extremely dilapidated condition.

However, after a protracted negotiation, Mr. Ovary finally offered as follows:

a) Building Rs. 2,60,001.00 against quoted price of Rs. 1,00,000.00

b) Land Rs. 5,40,000.00 against quoted Price of Rs.5.00.000.00

Total Rs. 8,00,001.00

(Rupees eight lakh one) only.

Representatives of NEEPCO stated that his final offer will be placed to the management of NEEPCO for consideration. If the Management agrees to the above prices Mr. Ovary will have to deposit the above amount within 15(fifteen) days from the date of award of the letter of allotment. Upon such payment the possession of the land will be passed on to the permission fees, if any, will be borne by NEEPCO."

Exhibit3 Sri Madan Ovary P.O.Dhaligaon783385

Camp Bengtol Gate

Dist. Bongaigaon (Assam).

Sub: Disposal of land and Buildings of store

SubDivision at Bongaigaon.

Dear Sir,

With reference to the above, NEEPCO is pleased to inform you that your

negotiated offer dated 20.02.2011 is accepted. You are requested to deposit an amount of Rs.8,00,001 (Rupees eight lakh and one) in the form of demand draft from any Nationalised Bank in favour of "NEEPCO LTD., Guwahti" within 15(fifteen) days from issue of this letter.

On receipt of the payment, further formalities in regards to transfer of land and Building of Store SubDivision at Bongaigaon will follow.

An early action is requested.

Yours faithfully, (R. Mallick)

Dy.Manager(C)S&T

Division, NEEPCO Ltd,

Guwahti24."

25. From Exhibit2, which is the minutes of the meeting held between the officials of the Corporation and the plaintiff held on 20.2.2001, wherein after protracted negotiation, the plaintiff revised his quoted price for the building from the earlier quoted price of Rs. 1,00,000/ to Rs.2,60,001/ and from Rs.5,00,000/ to Rs.5,40,000/ in respect of the land. The minutes records that this final offer would be placed to the Management of NEEPCO for consideration and if the Management agrees to the above process, the plaintiff will have to deposit the above amount within 15 days from the date of award of the letter of allotment and upon such payment, the possession of the land would be passed on to the purchaser whereafter, NEEPCO will apply for permission of registration and permission fees if any will be borne by NEEPCO. Deliberations in the meeting as recorded in the minutes would also indicate that the plaintiff had expressed that he had quoted the price considering the additional charges towards registration of the land, dilapidated condition of the building and the prevailing local condition. It is also noticeable that in the meeting, it was decided finally that fee for permission for registration, if any, would be borne by NEEPCO. The Exhibit3 dated 18.9.2002 is at the centre of controversy. By the said letter dated 18.9.2002 it was indicated that the plaintiff was informed that his negotiated offer dated 20.2.2001 was accepted and he was required to deposit an amount of Rs.8,00,001/ in the form of Demand Draft from any Nationalized Bank within 15 days from the date of issue of the letter. While Mr. Sharma would argue on the basis of the last sentence of the aforesaid letter dated 18.9.2002 to the effect that:

"on receipt of the payment, further formalities in regard to transfer of land and building of Store SubDivision at Bongaigaon will follow", that Exhibit3 cannot be said to be without any condition and it clear that the acceptance is not unequivocal. Mr. Choudhury, on the other hand, submits that the Exhibit3 letter is nothing but an unequivocal acceptance of the negotiated offer as it has recited that the negotiated offer dated 20.2.2001 is accepted. Taking a cue from the words "further formalities" in regard to transfer of land and building as appearing

in Exhibit3, the learned Senior Counsel submits that this gives rise to only an agreement to sell and it visualizes execution of further contract between the parties.

26. In *Kollipara* (supra), the Supreme Court had stated that mere reference to a future formal contract will not prevent binding bargain between the parties and the fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of binding contract. The Supreme Court had also stated that the intention of the parties and the special circumstances of each particular case would determine whether the reference to a future contract is made in such terms as to show that the parties do not intend to be bound until a formal contract is signed. The Supreme Court quoted with approval the following proposition laid down in *Hatzfelat Oldenburg Vs. Alexandra*:(1921) 1 Ch.284 as was stated by Parker:

"It appears to be well settled that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the future contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

27. In other words, there may be a case where the signing of a future formal agreement is made a condition or term of the bargain, and if a formal agreement is not approved and signed there is no concluded contract. In *Rassier Vs. Miller* 3 A. C. 1124, Lord Cairns said:

"if you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract."

While relying *Kollipara* (supra) in *J.K. Industries Ltd. (supra)*, on the basis of the factual matrix as emerged from the materials on record, the Apex Court had concluded in the facts of the case that no contract had come into existence between the parties. As has been held in *Dresser Rand* (supra) the cardinal principle that should be remembered by the Court is that it is the duty of the Court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence. The Court is also obliged to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the

correspondence was to bring into existence a mutually binding contract. The same view was reiterated in Rickmers Verwaltung GMBH Vs. Indian Oil Cooperation Ltd., reported in (1999) 1SCC1. The passage in Hatzfelat Wildenburg quoted hereinabove was also met with approval in Currimbhay & Co. Ltd. (supra).

28. Supreme Court in M.V. Shankar Bhat (supra) had laid down that where an agreement is entered into subject to ratification by others a concluded contract is not arrived at. This Court may also briefly indicate that Mr. Sharma had also relied on this case to contend that discretionary jurisdiction of this Court in terms of Section 20 of the Specific Relief Act, 1963 should not be exercised in the facts and circumstances of this case. This aspect of the matter will be discussed later when the said point is considered. In Kerela Financial Corporation (supra), the letter dated 31.10.1988 gave rise to a question as to whether on the basis of the said letter, it could be concluded that a valid contract had been entered into between the parties. The letter dated 31.10.1988 is quoted below:

"Sub: Sale of the assets of M/s Cables India Punkunnam, Irichur. Ref: Your tender letter dated 31.10.1988 and further discussion with us. With reference to the above we may inform that we are agreeable to sell the assets viz. the landed properties comprised in Sy. Nos. 1856/6 (19 cents) and 1856/7 (43 cents) together with building thereon and machinery including the electrical fittings and accessories for Rs. 8,25,000/ subject to compliance with the following conditions :

(1) 25% of the sale consideration should be remitted to us within a week from the date of confirmation of the transaction.

(2) The balance should be remitted in a lump sum within one month from the date of remittance of the initial payment.

(3) All the formalities in this regard should be complied within two months.

Leaving the amount of Rs. 10,000/ remitted on 31.10.1988, the balance consideration amounting to Rs.8,15,000/ should be remitted to the Corporation to execute the sale deed and transfer the possession to you.

Yours faithfully, Manager (Recovery)"

The Trial Court had dismissed the suit whereas the High Court had concluded that there was a valid contract and accordingly had granted a decree. The Apex Court, noting that the condition of confirmation of the transaction was not fulfilled by the tenderer, which was one of the three conditions, held that deposit of Rs. 10,000/ towards earnest money deposit would not result in a concluded contract. Bhoop Singh (supra) which is pressed into service by Mr. Sharma is not attracted in the fact situation of this case inasmuch as the proposition laid down in the said case that inordinate and unexplained delay or laches is by itself a ground to refuse relief to the petitioner, irrespective of the merits of the case. The plaintiff approached this Court promptly without any delay and as such there is no merit in such contention of Mr. Sharma.

29. Bearing in mind the proposition of law as discussed above, on consideration of Exhibits 2 & 3, I find that "further formalities in regards to transfer of land and building of Store SubDivision at Bongaigaon will follow", cannot be construed to mean that it visualized preparation of an agreement by which the terms agreed upon are to be put in a more formal shape. The negotiated offer dated 20.02.2001 was accepted without any condition and the plaintiff was requested to deposit an amount of Rs.8,00,001/ in the manner indicated in Exhibit 3 dated 18.09.2002 within 15 days from the date of issue of the letter. Plaintiff by letter dated 25.09.2002 enclosed Bank Draft dated 21.09.2002 which was duly received on 25.09.2002 itself. The plaintiff had fulfilled the conditions as prescribed in Exhibit 3. The possession of the land, in terms of Exhibit 2, was to be passed on to the "purchaser" and the NEEPCO was to apply for permission for registration. In Exhibit 3, delivery of possession to the purchaser was not mentioned. The NEEPCO, subsequent to the receipt of the entire consideration amount, applied for permission for registration before the Deputy Commissioner. On perusal of the materials on record including Exhibits 2 & 3 and the course of action adopted by the defendants, I am of the opinion that a concluded contract was arrived at between the parties and it was not subject to execution of any formal agreement. In Exhibit I, which was issued by the defendant No. 5, it is clearly mentioned that the deal to sell the land to Madan Owar (Plaintiff) was finalized at Rs.5,40,000/. The final act of the defendants in applying for registration before the Deputy Commissioner, Bongaigaon, leaves no room for doubt that there was a concluded contract between the parties. "Further formalities in regard to transfer of land and building" as appearing in Exhibit 3 means the formality of applying for permission for registration of transfer of land. DW 1's own evidence is that value of the land due to prevailing law and order situation was low and the fact that despite Government's valuation of the land at Rs.67,333/ per bigha, the management of NEEPCO had agreed to accept the offer of land at Rs.5,40,000/ for ten bighas land, the plea raised by Mr. Sharma that the consideration was not lawful is without any foundation.

30. The arguments of Mr. Sharma that even if there is conclusive contract, in view of Exhibit E, it had become impossible on the part of the defendants to perform the contract and as a result thereof the contract had become void, now requires to be addressed. In a sense, the learned counsel has invoked Section 56 of the Contract Act, 1872, which reads as follows:

"56. Agreement to do impossible act An agreement to an act impossible in itself is void. Contract to do an act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by a reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful." Compensation for loss through nonperformance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to

be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.

31. Section 56 relates to performance of contracts and it deals with circumstances under which performance of a contract is excused or dispensed with on the ground of the contract being void. The performance of an act has not been used in the sense of physical or literal impossibility but it may be impracticable and if an untoward event or change of circumstances totally upsets the foundation upon which the parties rested the bargain, it can be said that the promisor found it impossible to do the act which he promised to do. In *Satyabrata Ghose (supra)*, the Supreme Court stated thus:

"10. Although various theories have been propounded by the judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The parties shall be excused, as Lord Loreburn says in *Tamplin Steamship Co. Ltd. Vs. AngloMexican Petroleum Products Co. Ltd.* (1916) 2 A.C. 397, 403 "if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible."

"11. In *Joseph Constantine Steamship Line Limited Vs. Imperial Smelting Corporation Ltd.* (1942) A.C. 154 at 168, Viscount Maugham observed that the "doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made. "Lord Porter agreed with this view and rested the doctrine on the same basis. The question was considered and discussed by a Division Bench of the Nagpur High Court in *Kesari Chand Vs. GovernorGeneral in Council* I.L.R. 1949 Nag. 718 and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes under Section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this Court in *Ganga Saran Vs. Ram Charan* (1952) SCR 36 at 52, where Fazl Ali J., in speaking about frustration, observed in his judgment as follows: "It seems necessary for us to emphasis that so far as the Court in this country are concerned, they must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act, 1872." 12. We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to

cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also that to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law dehors these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before our Court."

32. The position that emerges is that while deciding cases, the Court is to go by the concept of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word impossible in its practical and not in literal sense. Section 56 lays down a positive law and does not leave the matter to be determined according to the intention of the parties.

33. There is no pleading in the written statement filed by the defendants that they are unable to perform their part of the contract because of circumstances beyond their control. Mr. Sharma contends that the fact that Additional Deputy Commissioner, Bongaigaon by the certificate dated 07.10.2002 had allowed the defendants to sell the land at the rate of Rs.2,00,000/ only per Bigha, itself, is a prohibition to sell the land at Rs. 5,40,000/ and therefore, Section 56 of the Contract Act is clearly applicable. He has stated that in the additional written statement, it was indicated that the management had to cancel the earlier tender at its own discretion due to re-fixation of the valuation of the said properties at much higher rates by the Additional Deputy Commissioner, Bongaigaon. The evidence of DW2 is that sudden increase of the price of land as stated in the certificate dated 07.10.2002, created a doubt and that the entire transaction was suspected and the Executive Director (Technical) of the Corporation with a view to protect public property and money, cancelled the entire transaction and decided to go for retendering of the sale of land and the building in question subject to approval of the Board of Directors. In Exhibit1 issued by the defendant No.5 to the Deputy Commissioner, Bongaigaon, he had mentioned that NEEPCO was finding it difficult, in view of fixing of value of land at Rs.2,00,000/ per bigha in the certificate dated 07.10.2010, to transfer the land at the negotiated amount of Rs.5,40,000/. In Exhibit7, which was issued by the Standing Counsel of the defendants on 31.03.2003, there is no mention of the permission dated 07.10.2002 of the Deputy Commissioner, Bongaigaon. In this letter, nonexecution of a formal sale deed was for the first time brought out while informing the plaintiff about the decision of the Corporation to treat the previous tenders and proceedings with him as cancelled. While stating that there was informal agreement to sell, it gave reasons for cancellation as due to revealing of assessment of the price of land by the District Authority at Rs.2,00,000/ per bigha, and the officers of NEEPCO being a Government of India Undertaking, being accountable, could not allow the property to be sold at a lower price. Even in this notice, it was not stated that it was impossible on the part of NEEPCO to execute the sale deed on the touchstone of Section 56 of the Contract Act. Mr.

Choudhury's argument that ExhibitE has not been proved in accordance with law as nobody from the office of the Deputy Commissioner had been examined is without any merit in view of the fact no objections were raised when the documents were admitted. The said document as well as ExhibitsC & D were marked without any objection and there was no cross examination also of the witnesses of the defendants on that score. In PC. Purushotama Reddiar (supra), it has been held that once documents were marked without any objection, it is not open for the party to object to its maintainability. It was also held that once documents are properly admitted, the contents of the documents are also admitted in evidence though those contents may not be conclusive evidence. In similar vein, in Manindra Kumar Dey & Ors.(supra), this Court had held that once a document was admitted into evidence without objection, admissibility of the documents cannot be challenged at a later point of time. In Bishwanath Rai (supra), the Supreme Court in the context of the facts of that case had said thus:

"It is true that, in the absence of examination of Swamiji, the correctness of those statements cannot be held to be proved. Thus, the evidence of Ram Chandra Sharma proves the contents of the letter, but not the correctness of those contents. The letter was, therefore, admissible to the extent to which the fact that Swamiji wrote such a letter to Ram Chandra Sharma with its contents has bearing on the issues involved in this case. To that extent, the letter was relevant and admissible".

34. It would thus appear that contents of ExhibitE, though is proved, its correctness has not been proved. Even if assume that ExhibitE read with Exhibit7 proves that value of the land has been assessed at Rs.2,00,000/ per bigha by the District Authority, no case was set up by the defendants that the inability to perform the contract was because of fixation of price of the land at Rs.2,00,000/ per bigha.

35. This Court in Abdul Aziz (supra), had noted that the instances for obtaining no objection certificate prior to the registration of sale deed is not in consonance with the provision of the Registration Act, 1908 inasmuch as the said requirement was introduced by the Government of Assam through executive instructions. It was held that no registration was to be refused in respect of documents which fulfill the requirement of the Registration Act, 1908 by further insisting on no objection certificate without necessary amendments of the law to lend legal support for such additional requirement. Since the parties had agreed that no no objection certificate from the Deputy Commissioner would be obtained, it may not lie in mouth of the plaintiff to contend that no objection certificate from the Deputy Commissioner was required. In the aforesaid case, it was contended on behalf of the Government that instructions placing restriction on registration of documents pertaining to transfer of immovable properties, without a no objection certificate from the revenue authorities of the District or the SubDivision was issued to prevent, inter alia, transfer of agricultural land to non farmers; to restrict a foreign national from acquiring landed property; to

check benami transfer. Section 54 of the Transfer of Property Act, 1882 defines sale as a transfer of ownership for a price paid or promised or partpaid and partpromised. Therefore, Mr. Choudhury is right in saying that in any view of the matter, the Deputy Commissioner, Bongaigaon could not have determined the sale price and such price, assuming that was fixed by the Deputy Commissioner, Bongaigaon, can at best be referable to valuation for charging of duty on an instrument or document under the Stamp Act, 1899. In view of lack of pleading and consequently evidence, the plea of Mr. Sharma invoking the doctrine of frustration falls through.

36. The learned trial Court on consideration of the materials on record had decided the issues in affirmative in favour of the plaintiff. This Court also, in view of the foregoing discussions, is of the opinion that the decision in issue Nos. 2 and 3 requires no interference.

Issue No.4:

37. This issue is interlinked with Issue Nos. 2 & 3. ExhibitH, exhibited by DW2 contains the resolution of the board meeting dated 09.03.2005 resolving to grant expostfacto approval for the cancellation of settlement for sale of the land and building in question to the plaintiff and ratifying the decision dated 24.01.2003 of the Director (Technical) in this regard. The Director (Technical) had presented the agenda and had explained to the board the background of the case. The said ExhibitH also clearly indicates that the Director (Technical) cancelled the entire transaction due to wide difference between the negotiated sale consideration and the prevailing land valuation rate and decided to go for retendering of the said property. When there is a concluded contract and Section 56 of the Contract Act, 1872 is also not applicable, the decision of the defendants to cancel the tender of the plaintiff and to call for retender is not valid. Accordingly, this issue is decided against the defendants.

Issue Nos. 5 and 6 :

38. Mr. Sharma had placed reliance in the context of grant of relief to the decision of the Supreme Court in Tarak Singh Vs. Jyoti Basu, reported in (2005) 1SCC 201 to emphasize that when private interest is pitted against public interest, the latter must prevail over the former. There is no dispute on the above proposition of law. Tarak Singh (supra) considered propriety of a Judge of a High Court to accept allotment of a plot of land from the Chief Minister's quota. The Supreme Court had also recorded the finding that the learned Judge had misused his judicial function to obtain personal interest. The facts here are totally different inasmuch as the dispute had arisen out of a contract between the parties. He has also placed reliance on the decisions in the case of Sardar Singh Vs. Krishna Devi (Smti) & Ann, reported in (1994) 4 SCC 18, in the case of Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Harbhai Patel & Ors., reported in (2001) 5 SCC 101 and in the case of Laxman Tatyaba Kankate & Anr. Vs. Taramati Harishchandra Dhattrak, reported in (2010) SCC 717 to contend that

Section 20(1) of the Specific Relief Act, 1963 provides that jurisdiction to grant decree of specific performance is discretionary, and the Court is not bound to grant such relief, merely because it is lawful to do so. The decision rendered in the case of Kanshi Ram Vs. Om Prakash Jawal & Ors., reported in 1996 SC 2150 is pressed into service to impress upon this Court that when the Courts gets into equity jurisdiction, it should be guided by principles of justice, equity, and good conscience and should act with fairness to both the parties. He also relied on a decision in the case of CMD/Chairman, B.S.N.L. & Ors. Vs. Mishri Lal & Ors., reported in April 2011 issue of Supreme Laws Today at page 434 to submit that law prevails over equity if there is a conflict because equity can only supplement the law, and not supplant it. Mr. Choudhury's contention is that the transaction in question that was entered into was in the nature of commercial activity and there is no element of public interest involved in it.

39. Specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on some principles. The Court would take into consideration the circumstances in each case, the conduct of a parties and the respective interest under the contract. In S. V.R. Mudaliar (Dead) by Lrs. & Ors. Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. & Ors., reported in (1995) 4 SCC 15, the Supreme Court had noted that if the prices had risen during the pendency of litigation, the same should not be taken as a ground to deny relief of specific performance, if otherwise due, as by the time the litigation comes to an end sufficiently long period of time is likely to elapse in most of the cases with consequent rise in prices. The materials on record in the instant case discloses that the highest authority of the Corporation had decided to accept price of Rs.5,00,000/ offered by the plaintiff because of the acknowledged law and order situation prevailing in the area in spite of the fact that the reserve price, as per the certificate dated 28.01.1999 and 04.05.2000 issued by the Deputy Commissioner, Bongaigaon was fixed at Rs. 6,73,3 3/, was much higher, as the DW1 had deposed, in the best interest of the Corporation. The plaintiff had deposited the eentire amount of consideration as required by Exhibit3 dated 18.09.2002 issued by defendant No.5 within the stipulated period. In the facts and circumstances of the Case, it will be inequitable to the plaintiff if the relief of specific performance is not granted. Issue No.5 :

40. In view of the discussions above, this Court is of the opinion that the plaintiff has proved his case against the defendants and the plaintiff is entitled to get a decree as prayed for. Plaintiff being ready and willing, the defendants are liable to execute the sale deed in respect of the suit property as per the concluded contract. This issue is also decided in favour of the plaintiff.

Issue No.6:

41. In view of decisions rendered in the foregoing issues, the plaintiff is entitled to get a decree as prayed for. Accordingly, the suit of the plaintiff is decreed, as prayed for, with costs. The defendants are directed to execute the sale deed in respect of the suit property in favour of the plaintiff within a period of 3 (three)

months.

42. In the result, the appeal fails and is dismissed. The judgment and decree of the Trial Court dated 06.07.2005 is affirmed. The Trial Court shall return the demand draft to the defendant (s) when an application is made before it by the defendant (s) for return of the demand draft.

43. Lower Court Records be sent back.