

**(1994) 04 SHI CK 0010**  
**In the High Court Of Himachal Pradesh**  
**Case No : Civil Suit No. 64 of 1984**

|                            |    |            |
|----------------------------|----|------------|
| Raj Kumar Gupta and Others | Vs | APPELLANT  |
| Des Raj and Others         |    | RESPONDENT |

**Date of Decision :** 06-04-1994

**Acts Referred:**

Contract Act, 1872 — Section 56, 9  
Evidence Act, 1872 — Section 115, 85  
Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 118(A)  
Himachal Pradesh Town and Country Planning Act, 1977 — Section 16  
Interest Act, 1978 — Section 1

**Citation :** AIR 1995 HP 107

**Hon'ble Judges :** D.P. Sood, J

**Bench :** Single Bench

**Advocate :** Bhupender Gupta, for the Appellant; B.B. Vaid, for the Respondent

## Judgement

D.P. Sood, J.—Plaintiffs are Chairman and Vice-Chairman, respectively of United Group of Industries, Chandigarh. Plaintiff No. 2 for and on behalf of plaintiff No. 1, entered into agreement for sale (Ex. DW-1 / A) on May 26, 1981 with the defendants to purchase the suit land situated in village Kalyanpur, Pargna Dharampur, Teh. Nala-garh, District Solan for valuable consideration of Rs. 3,39,625.00 allegedly for the purpose of establishing an industry. An amount of Rs. 84,906.26 was paid by the plaintiff No. 2 to the defendants. According to its terms, the balance amount of sale consideration was to be paid in three instalments, the first instalment of Rs. 84,906.25 on August 26, 1981, second instalment of Rs. 1,34,062.50 to be paid on November 26, 1981 and the third instalment along with all expenditures incurred on the execution of the sale deed, at the time of registration thereof. The sale deed was agreed to be executed within one year either in the name of purchaser or a company or companies in whose favour the necessary sanction was accorded. Plaintiffs assert that the land in question was agreed to be purchased for the purpose of establishing an industry. It is asserted that before the third instalment could be

paid to be defendants, a Notification was issued by the Director, Town and Country Planning Organisation, Himachal Pradesh, Shimla notifying that the existing land use of Barotiwala Planning area including the suit land, stood frozen with immediate effect u/s 16 of the H. P. Town and Country Planning Act, 1977 (hereinafter shortly referred to as the 1977 Act). Plaintiffs further assert that agreement was frustrated and the sale deed could not be executed for the above said reasons, they laid a demand upon the defendants to refund the amount realised by them towards the sale of the aforesaid land. However, defendants instead of refunding the same, served a notice dated December 24, 1981 on the plaintiffs through their counsel, revealing that the amount stood forfeited because of breach of the terms of the contract. However, according to the plaintiffs, they are legally entitled to recover the said amount along with damages by way of interest @ Rs. 18% per annum from the defendants which the latter withheld, without any reasonable and sufficient cause. The above said facts and circumstances ultimately culminated into the filing of the instant suit for recovery of Rs. 2,57,700/-.

2. Defendants resisted, and contested the claim of the plaintiff by raising various preliminary objections with respect to maintainability, estoppel and verification. On merits, the alleged purpose for which the land was to be purchased, was emphatically denied. As per the defendants, the plaintiffs wilfully avoided the contract. It has also been contended that the plaintiffs being non-agriculturists, were not entitled to purchase the land in question in view of Section 118(A) of the H. P. Tenancy and Land Reforms Act, 1972 (Act No. 8 of 1974) (hereinafter to be referred to as the Act) and, thus such an agreement being invalid, is unenforceable. Simultaneously, defendants contend that plaintiffs committed breach of the contract by their own acts and conduct, consequent to which the amount of the advance paid to the defendants stood forfeited. Publication of Notification u/s 16 of the 1977 Act has been denied. Further, it is contended that plaintiffs could obtain permission from the Director for the use of the land for a purpose other than the one mentioned in the Notification which the plaintiffs failed to seek and accordingly their being no cause of action against the defendants, plaintiffs suit is not maintainable. Alternatively, defendants contend that under the Indian Interest Act, plaintiffs are not entitled to the payment of interest at the claimed rate of 18% per annum.

3. In replication, the plaintiffs reiterated the allegations made in the plaint and controverted the stand which cannot be taken by the defendants. The pleas taken by the defendants are self contradictory and self destructive. Defendants had no right to forfeit the amount paid by the plaintiffs towards the purchase of the suit land. Rather, plaintiffs have always been ready and willing to perform their part of the contract. It is further alleged that non-payment of the third instalment was because of frustration of the agreement and in any case, time was not the essence of the contract. According to them, defendants were aware of the purpose of establishing an industry on the land intended to be purchased by the plaintiffs.

4. On the pleadings of the parties, this Court vide its order dated October 9, 1985, framed the following issues :

1. Whether the plaintiffs are estopped from filing this suit due to their own acts and conduct? OPD.

2. Whether the plaintiffs validly called upon the defendants to refund the amount of Rs. 169812.50 P and are entitled to its refund? OPP.

(The plea in defence raised by the defendants that the above mentioned amount has been validly forfeited will be covered by this issue).

3. Whether the plaintiffs are entitled to recovery any interest. If so, how much? OPP.

4. Relief.

5. I have heard the learned Counsel for the parties at length and have also carefully gone through the record.

6. Mr. Bhupender Gupta, learned Counsel for the plaintiff has urged that agreement was for and on behalf of plaintiff No. 1 though advance by plaintiff No. 2 was made in respect of the purchase of land. He has submitted that sanction to purchase the land was legally required as envisaged u/s 118(1) of the Act. According to him, permission was not accorded and secondly, that the agreement had been frustrated by the publication of the Notification u/s 16 of the 1977 Act, therefore, performance of the agreement had become impossible in terms of Section 56 of the Indian Contract Act. Thus, he had no alternative but to file the suit for the recovery of the amount advanced by the defendants along with the loss by way of damages in the shape of interest @ 18% per annum. It is urged that execution of the agreement for sale (Ex.DW-I/A) and receipt of the amount of two instalments stands admitted by the defendants; that though plaintiffs were eager to perform their part of the obligation but due to the freezing of the land use of the suit land as also no sanction being accorded by the State Government, the performance of the contract had gone beyond their control and in that view of the matter, they are entitled to the passing of a decree against the defendants. Reliance has been placed on the observations made in the case of Smt. Sushila Devi and Another Vs. Hari Singh and Others, , Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, , Firm Bachhraj Amolakchand and Another Vs. Firm Nandlal Sitaram and Others, and Sambhunath Chakravarty Vs. Sm. Sushama Sinha, by Shri Bhupender Gupta, learned Counsel appearing on behalf of the plaintiffs,

7. On the other hand, Mr. B.B. Vaid, learned Counsel for the defendants, has vehemently contended that firstly, the agreement being for and on behalf of the company, plaintiffs have no locus standi to file the instant suit; secondly that agreement (Ex. DW-1 /A) was a lawful agreement, capable of being entered into between the parties at the material time as it was neither void nor voidable in view of Section 118(1) of the Act No. 8 of 1974. However the plaintiffs neither

pleaded nor adduced any evidence to show that they ever made any attempt seeking sanction of the State Government for the completion of the deal in question; thirdly, it is urged that even after the publication of Notification u/s 16 of the 1977 Act, the agreement cannot be deemed to have been frustrated for the reason, that purpose for which the land was agreed to be purchased by the plaintiff, was neither disclosed nor incorporated in the aforesaid agreement for sale and plaintiffs could have made an attempt for seeking sanction for the land use of the suit land for agriculture purpose from the State Government u/s 118(2)(i) of the Act, as under the 1977 Act, no such sanction was required. Fourthly, he has pointed out that even if the plaintiffs' claim as disclosed in this pleadings is admitted, there is no legal and admissible evidence in support thereof. Rather, best evidence with respect to the attempt for seeking permission from the Government for the completion of the deal in question, has been withheld by the plaintiffs. In that view of the matter, the suit is liable to be dismissed on merits.

8. Now advertng to the first objection being raised by Mr. B.B. Vaid, learned Counsel for the defendants with respect to locus stand to file the suit, suffice it to state that no such objection in the pleadings has been raised nor any issue has been framed. It is at the time of arguments that this objection has been raised. Even on merits of the pleadings, this objection is not tenable, inasmuch as agreement Ex.DW-1/ A is in between plaintiff No. 1 and the defendants. Plaintiff No. 2 had acted for plaintiff No. 1 at the time of execution of the contract for sale (Ex.DW-1/A). Even in para 1 of the plaint, it has emphatically been asserted that plaintiff No. 1 through plaintiff No. 2, i.e. in his individual capacity, entered into the aforesaid agreement. Though, this assertion has been denied in a casual manner without indicating as to who were the parties to the agreement, yet the receipt of sale consideration there- under has been admitted. The agreement is assailed by the defendants on the ground that it is void ab initio as the suit land could not have been transferred to the plaintiffs. As regards the evidence adduced by the parties, Sh. Raj Kumar Gupta (plaintiff No. 1) (PW-3), has appeared as his own witness and he has stated that the land in question was agreed to be purchased on behalf of the company and Directors Amar Singh Sarao had also executed the agreement with the defendants consequent thereto. In cross-examination, he has stated that he cannot produce the authorisation which was given on behalf of the company to the Directors to execute the agreement as it was not called from him. No doubt, this statement would prima facie show that Sh. Raj Kumar Gupta (PW-3) was acting for and on behalf of the company, yet the agreement in question has been entered in his name indicating himself to the Chairman of United Group of Industries. Further, this agreement shows that a clause has been agreed to in between the parties that in case the purchaser i.e. Raj Kumar Gupta (plaintiff No. 1) or any number of companies are accorded sanction obviously by the Government for the purchase of the land, the defendants undertake to execute one or more sale deeds, as the case would ultimately emerge, out of the necessary sanction so required. No doubt, money

had been handed over to Raj Kumar Gupta by the company for entering into a deal with the defendants and that was paid to the latter through plaintiff No. 2. However, the payment and recovery of that amount by the company is a matter pertaining to it and Raj Kumar Gupta, its Chairman. In this respect, it must be emphasized that a very important question arises as to whether and in what circumstances, a contract between the parties can be implied. In the instant case, the question is whether contract for the sale of the suit land can be implied in between the company and the defendants, if so, which company? The contract can be implied u/s 9 of the Indian Contract Act in so far as the proposal or acceptance of any promise is made in words, the promise is said to be express and in so far as such proposal or , acceptance is made otherwise than in words, the promise is said to be implied. However, it is fundamental principle of law that the Court should not make a contract for the parties. It follows that a clear case must be made out before doing so. A contract implied in fact requires meeting of minds. The Court should refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of term. However, when the stipulations are clear and in contemplation of the parties or it necessarily arise out of the controversy between the parties, these will be implied, i.e. stipulations on the part of the employer to allow him to enter into the deal concerned, whether in his own name or on behalf of the company. In the instant case, the clause pertaining to the execution of the sale deed of the suit land in favour of the buyer or company or companies in whose favour, the sanction was to be accorded by the State Government, was an express term of the contract. In that view of the matter too, in case the contract for sale has been entered into by Shri Raj Kumar Gupta in his own name, then it shows that the contract was entered in his individual capacity in the initial stage. Firstly, this objection is to be deemed to have been waived for the reason that it was neither pleaded nor any issue framed and secondly, on the express terms of the contract, it is held that the contract in question was entered in between the parties i.e. plaintiff No. 1 and the defendants, and plaintiff No. 1, as such, had locus standi to institute the suit. The argument to the contrary, being meritless, is rejected.

9. After having decided the preliminary objection so raised, I now proceed to decide the suit issue-wise.

Issues 1 and 2

10. Both these issues are intrinsically inter-connected with each other and decision thereof depends upon the discussion of the same evidence. As such, both these issues are being decided together.

11. Plaintiffs, in support of their claim, have produced S/Sh. C.K. Sethi, A.C. Aggarwal, PWs 1 and 2 respectively in affirmative and Sh. Raj Kumar Gupta (plaintiff No. 1) in rebuttal as PW-3. On the contrary, Sh. Des Raj (defendant No. 1) has appeared as DW-1. He is the sole witness on behalf of the defendants.

12. PW-1 has proved notification issued by the Government of H. P. and letter

published in H..P. Rajpatra, Barotiwala Planning Area (Cyclostyled copy) Ex.PW-1 / A. He has also stated that aforesaid village Kalyanpur falls within Barotiwala area. Notification Ex. PW-I/A pertains to the preparation and publication of the existing and use map of the aforesaid planning area dated February 25, 1987, to which objections and suggestions were invited u/s 15(1) of the 1977 Act and it was notified that there being no objections or suggestions to the same, the existing land use map of Barotiwala Planning Area, stood frozen with immediate effect u/s 16 of the aforesaid Act and no person/local authority shall institute or change the use of any land or carry out any development of land for any purpose other than that indicated in the said land use map of Barotiwala Planning Area without permission in writing of the Direct? as envisaged under 1977 Act. The aforesaid notification has also been published in the Eetraordinary Official Gazette, Himachal Pradesh. In his cross-examination, this witness has stated that there exists a gazette notification to the effect that village Kalyanpur falls within the Barotiwala Planning Areas. However he has not brought that notification with him.

13. PW-2, Sh. A.C. Aggarwal, proves the special power of attorney (Ex."PW-2/A). The production as also proof thereof was objected to by the learned counsel for the defendants, on the ground that it was neither executed nor authenticated in accordance with Section 85 of the Evidence Act. At this stage, it may be stated that a close perusat of his document shows that the endorsement in the form of certificate has been appended to this document which shows that it was presented by the executant before the Notary Public. It also shows that the contents thereof were read over and explained to the executant which he admitted to be correct and thereafter, it had been attested by the Notary Public Chandigarh. The mere fact that the document had not been drafted or typed out by the executant before the Notary Public, and typed matter duly signed by the executant was presented before the Notary Public, does not in any way, miltate the presumption as to the execution and authentication of the power of attorney. In other words, the objection raised by the learned Counsel for the opposite side, is fallacious one and this document has duly been proved. In addition to the above, PW-2 proved the execution of agreement for the sale of the suit land (Ex.D W-1 / A). He also stated that after the payment of second instalment in August, 1981, as the area in question was frozen by the Country and Town Planning Department through notification, the third instalment was not paid. According to him, the suit land was intended to be purchased for establishing an industry. He further proved the receipt of notice Ex.PW-2/B, revealing the forfeiture of the advance amount paid to the defendants, as also reply sent by the plaintiff No. 1 through his Advocate (Ex.PW-2/C). In cross-examination, he has admitted that though the amount was paid by Sh. R.K. Gupta, plaintiff No. 1 (PW-3), but it was on behalf of United Group of Industries (Pvt.) Ltd., as he was its Chairman. He further states that the amount advanced was by way of part payment of the consideration and not as earnest money. He also states that attempts were made for seeking permission for the completion of the sale but

unsuccessfully. The suggestion that land could be purchased by the purchaser/ company for any other purpose, i.e. agricultural and thereby the agreement was not frustrated, has been" denied. This witness, however, has admitted the fact that for release of the land from freezing, the company was not expecting any co-operation from the defendants.

14. PW-3 has reiterated the assertions so made in the plaint. He has stated that on behalf of the company, its Director Amar Singh Sarao, executed the agreement with the defendants in his own name, Ex.DW-1A and two instalments were paid consequent thereupon. He also affirmed that suit land was frozen which was agreed to be purchased on behalf of the company; that Directors did approach the defendants to seek necessary permission from the Government, but they did not care. He also states to have approached the Chief Minister and other concerned officers, as also the Managing Director of H.P. Slate Industrial Development Corporation to help them to complete the deal. According to him, establishment of industry was time-bound and due to delay in the purchase of the land in question, the industry was set up in Bhopai. He also states that despite repeated demands for the refund of the amount of part payments advanced to the defendants, the latter forced them to enter into litigation. In cross-examination, he has admitted that both Directors, namely, S/Sh. A.C. Aggarwal (PW-2) and A.S. Sarao are alive and available. Further, he admitted that amount of part payments, so made to the defendants, has also been incorporated in the Account Books of the company. However, the suggestions that Directors had no authority to execute the agreement for sale Ex.DW-1; A for and on behalf of the company in the name of plaintiff No. 1, has been denied. He admitted the fact that the purpose for which the land was to be purchased i.e., setting up of an industry, has not been mentioned in the agreement (Ex.DW-1/ A). However, he denied that defendants were not apprised of the purpose for which suit land was being purchased by him.

15. In rebuttal, Sh. Des Raj (DW-1) has admitted the execution of agreement for sale (Ex. DW-1. A) and receipt of two instalments. In his testimony, he further states that plaintiffs or the United Group of Industries, never made a demand for the refund of the advance money or the interest thereupon. According to him, when the plaintiff defaulted making the payment of third instalment, they issued a notice (Ex.PW-2/B) apprising them that the earnest money so paid, stood forfeited. He admitted the receipt of reply thereto as Ex.PW-2."C and further letter sent to the plaintiffs as Ex.DW-1/B. As regards the extension of help to get the permission in the sale of land from the Government or any other authority, he has stated that defendants had no occasion to extend any help to the plaintiffs. In fact, the plaintiffs never contacted them for this purpose. In his cross-examination, he admits that whole of the land was to be sold to United Group of Industries. He further admits that negotiations continued for two days before the agreement for sale of the suit land was entered into in between the parties. He admits the receipt of two instalments. However, he shows his ignorance in identifying the signatures of the opposite party, appearing on

agreement for sale. He has admitted that village Baddi is at a distance of 4/5 kms. from Barotiwala and during the last 7-8 years, number of industries have been established in the vicinity of the said village. He further admitted that at the time of agreement for sale of the suit land, no factory was established in the vicinity of Baddi village. He also admits that when this agreement was executed, there was no ban on sale of land in question. The suggestion that two instalments were paid towards the part payment of the sale consideration, has been denied, He has stated that it was earnest money. This is the entire evidence adduced by both the parties.

16. From the pleadings of the parties, as also the evidence adduced, the first question which arises for consideration by this Court is, as to why sanction from the Government was required for completion of the deal entered into in between the parties, as per the recitals detailed in agreement for sale, (Ex. DW-I/A)? The answer to this question is obvious, as u/s 118 of Act No. 8 of 1974, no transfer of land by way of sale, gift, exchange, lease, mortgage with possession or creation of tenancy, was deemed valid in favour of a person who was not an agriculturist. The expression "land" has been defined u/s 2(7) of this Act, meaning; "land which is not occupied as the site of any building in a town or a village and is occupied or has been let for agricultural purposes or"for purposes subservient to agriculture or for pasture and includes....." The reading of two sections together shows that sale of all kinds of lands including agricultural land was legally prohibited in favour of a non-agriculturist. As the suit land was admittedly of the nature of agricultural land and plaintiffs were outsiders belonging to other State than that of 1995 H.P./8 VIII G--27-28 Himachal Pradesh, they were presumably non-agriculturists, the need for seeking sanction from the Government was anticipated by the parties. This appears to be one of the factor as to why recital with respect to seeking of sanction has been mentioned in agreement for sale (Ex. DW-I/A).

17. The second reason for the mention of the same in the said document, appears to be that the suit land being agricultural was intended to be sold to a private company which was carrying on business and, thus, the purpose of purchase, in fact, was the change of user of the land. Thus, it necessitated the seeking of permission from the Government. Even if the second purpose is ignored, the plaintiffs could not, as of right, purchase the suit land through a direct deal with the defendants, except with the permission of the State Government, for the purpose that may be prescribed, as is envisaged u/s 118(2) (i) of Act No. 8 of 1974. Even otherwise, the defendants were agriculturists and they were entering into a deal for the transfer of the agricultural land which in terms of Section 118, was by law, prohibited except as otherwise provided in Chapter XI pertaining thereto. It, thus, appears that the sanction was absolutely essential. There is no iota of evidence on record adduced by either party that plaintiffs or either one of them or the company or companies for whom the sanction was to be sought from the State Government, was an agriculturist. Therefore, the permission was a condition precedent for the completion of the

sale.

18. No doubt, the plaintiffs have not made the seeking of permission as a ground for frustration of the contract for sale entered into in between the parties, yet it is a legal question and it can be considered for the purpose of deciding the question as to whether the deal in question has been frustrated in terms of Section 56 of the Indian Contract Act or not. There is a categorical statement of PW-3 that he did approach the concerned officers besides the Chief Minister and also the Managing Director of Horticulture for the purpose of completion of the deal in question, but he failed. The contention of Shri Vaid to the effect that it was for the plaintiff to have adduced evidence that an attempt for seeking permission in this behalf was made, as onus heavily lay upon him, is equally applicable to the defendants as well. Section 118 of the Act No. 8 of 1974 prohibits the transfer of land notwithstanding anything contained in any Act, law, contract or custom etc. Thus, it was for the defendants to see whether the plaintiff was capable of purchasing the land or not. If not, it was equally their responsibility to have extended help for seeking permission for the completion of the deal. Both parties appear to be of one mind at the time of execution of the agreement for sale of the suit land (Ex. DW-I/A) that such sanction was absolutely essential for validating the transaction which was being entered into in between them. Over and above these circumstances prevailing at the material time, the fact still remains that Section 118 did not create any bar for entering into a contract for sale of a particular land in favour of a non-agriculturist as well. However, the legal prohibition is extended only to the completion of the sale and consequent transfer of the possession of agricultural land. In other words, the agreement entered into in between the parties was legal to the extent aforesaid only.

19. Now the next question which arises for determination is as to whether the plaintiffs has been able to prove that land use of the suit land was frozen on 18th of January, 1981, as pleaded by them. Though, no cogent evidence has been adduced, however, my attention has been drawn to the Extra ordinary Official Gazette, Himachal Pra-desh, dated 18th July, 1981, wherein a Notification dated June 29, 1981 under subsection (1) of Section 15 of 1977 Act has been notified. Judicial notice of this Notification can also be had in relation to the legal prohibition placed on the sale of the agricultural land by the Act of 1977. In this Act, expression "land" has been stated to include benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. This definition is in addition to the definition of land given in Act No. 8 of 1974. At this stage, it is to be noted that the underlying object under Act No. 12 of 1977 has been stated to be "to make provision for planning and development and use of land; to make better provision for the preparation of development plans and sectoral plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective; to constitute Town and Country Development Authority for proper implementation of town and country development plan; to provide for the development and administration of

special areas through the Special Area Development Authority; to make provision for the compulsory acquisition of the land required for the purpose of development plans and for purposes, connected with the matters aforesaid". It is true that excepting the statement of PW 1, there is no other evidence on record to show that village Kalyanpur where the suit land is situated falls within Barotiwala Planning Area. However, it has been made clear by the defendants themselves in cross-examination of this witness, who has categorically stated that Village Kalyanpur falls within the aforesaid planning area and in respect thereof a Notification has been published. However, the witness had not brought the said notification with him as he was not asked for the same. Even if it is deemed that this fact has not been established on record, the statement of PW 3, Raj Kumar Gupta, remains un-rebutted to the extent that this area had been frozen and he did make an attempt to seek the permission of the Government for the purpose of establishing an industry on the suit land. For the sake of arguments, if it be believed that the purpose qua the purchase of the suit land was not disclosed to the defendants at the time of entering into agreement for sale (Ex. DW-I/A), even then the fact remains that the suit land was of agricultural nature and plaintiffs attempted to seek permission with respect to the establishment of the industry thereupon. The area of the land is 35 bighas. The factum of the plaintiffs being businessmen, was at least in the knowledge of the defendants. They were, in fact, non-agriculturists. No attempt on the part of the defendants even, had been made to seek this information as to whether plaintiffs were agriculturists and if not, whether they were competent to purchase the land. Rather, it was otherwise, as has been observed above. In the circumstances, the statement of the plaintiffs that they did make an attempt to seek permission of the State Government to achieve their goal consequent to the completion of the purchase of land but they failed, remains satisfactorily proved on record. My conclusion is highlighted by the important correspondence by way of notice and replies entered into between the parties to the instant suit. The defendants vide notice Ex. PW-2/ B apprised the plaintiffs that as they had defaulted, their amount paid in advance to them as earnest money, stood forfeited. In reply thereto, it has been clearly mentioned by the plaintiffs that the efforts on their part were made to obtain permission from the office of Director. Town and Country Planning Organisation, Himachal Pradesh, under Act No. 12 of 1977 to set up an industry in the suit land and since the permission was not granted due to the notification published in the Official Gazette dated 18th July, 1981, the deal has frustrated. This part of the averment made by the plaintiffs in the aforesaid notice was not replied to either in the subsequent letter Ex. DW-1 / B nor in the pleadings of the defendants. Obviously, under notification dated June 21, 1981, published in Official Gazette dated July 18, 1981 of which judicial notice has been taken by this Court, objections and suggestions to the land use of the area falling within Barotiwala area had been sought for. The above said issuance of notification meant that attempts on the part of the Government was to see that which area could be developed in accordance with the provisions of Act No. 12 of 1977 and which area can be frozen in terms of Section 16 thereof.

In fact, notification u/s 15, after consideration of the objections and suggestions etc. if any, is legally required to be published under sub-section (3) thereof. However, there is no such obligation for freezing the area u/s 16 of the 1977 Act. Ultimately, this area is found to have been frozen vide notification published on May 2, 1987, pursuant to issuance of another notification under Sub-section (1) of Section 15, dated February 25, 1987. Considering the evidence adduced by the parties and the legal position existing at the material time and subsequent thereto till the area was frozen, to my mind, the completion of the transaction entered into between the parties, had become impossible.

20. Now, Section 56 of the Contract Act lays down that an agreement to do an act impossible, is itself void. If that be the position, the deal entered into between the parties, though initially was legally entered into, had become impossible to be completed. Thus, the defendants in such circumstances, were not entitled to benefit themselves by the advance amount paid to them either by way of earnest money or by way of part payment of the sale consideration. They are legally bound to refund the amount to the plaintiffs.

21. The arguments—that there is variance between the pleadings and proof with respect to the factum of permission to be sought from the State Government which has not been expressly stated in the plaint and made basis of the suit or in evidence, is of no avail in view of the discussion made in the earlier part of the judgment. The second argument that permission could have been accorded under the 1977 Act to the purchaser, namely, Sh. Raj Kumar Gupta or company or companies for the purpose of tilling the land i.e. for using it for the purpose of agriculture by the Director as envisaged under the provisions thereof, is also not tenable inasmuch as the sale of the land, of the nature of agricultural land in favour of a non-agriculturist is legally prohibited, as discussed above. In addition thereto, Act No. 12 of 1977 deals with the preparation of development plans and sectoral plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective. It cannot, in any way, be taken into consideration that a person who was not legally authorised to sell the land, can be allowed to benefit out of the deal entered into between the parties, ultimately found to be unlawful. Further, submission of Sh. Vaid that attempt was made with respect to seeking permission for establishment of an industry and no attempt was made by the plaintiffs for the use of the suit land as an agricultural land, is also not tenable, in view of the basic intention of the parties to their knowledge at the time of entering into contract for sale, as discussed above. In addition, Sh. Vaid has also submitted that land use map had also not been produced or proved on record and this fact goes contrary to the basis laid by the plaintiffs for the filing of the suit in question. It means that the land had not been frozen, as pleaded by the plaintiffs. I have already observed above that sale of the agricultural land to a non-agriculturist was legally barred except with the permission of the State Government under Sub-section (2) (i) of Section 118 of Act of 1974. In that view of the matter, even if this fact was not pleaded by the plaintiff, this has been taken as a ground for the refund of the suit amount at the

time of argument and this legal objection can be raised and taken note of by this Court.

22. In any case, from whatsoever angle the case may be viewed, even on equitable grounds, the defendants are not entitled to retain the amount advanced to them, whether as earnest money or as part payment of the sale consideration. I need not go into the question as to whether the amount advanced was earnest money or otherwise. In view of the above discussion, both these issues are decided accordingly.

### Issue No. 3

23. This issue involves the question as to the award of damages by way of interest as claimed by the plaintiffs. As regards this issue, suffice it to state that in case a party is found to have retained the amount advanced to it without a reasonable or sufficient cause, the opposite party is entitled to the losses which he incurs on account of unlawful retention thereof. In the instant case, damages in the shape of interest have been sought @ 18% per annum. It is true that there is no evidence of an agreement or usage to pay interest with respect to the payment of damages or the interest as claimed thereupon. I have already detailed the evidence, adduced by both the parties. Reply to notice had already been served on the defendants demanding refund of the advanced amount paid to the latter as early as January 23, 1982. Instead of refunding the same, the defendants had taken a recourse to apprise the plaintiff that the amount in question stood forfeited because of the breach in payment of third instalment, committed by the plaintiffs, as per the terms of the agreement. I have already discussed above the circumstances under which the agreement became impossible to be completed lawfully. In addition, I have already discussed that the reasons for demand of the refund of the amount had been disclosed in the reply (Ex. PW-2/C), which was not denied by the defendants in their letter Ex. DW-I/B. In the circumstances, the plaintiffs are definitely entitled to the refund of the amount, so advanced and the defendants were not entitled to the retention thereof, since the deal became impossible to be performed on the part of both the parties to the instant lis. In that view of the matter, defendants, to my mind, have retained the amount in question unlawfully subsequent to 23rd January, 1982. Resultantly, the plaintiffs are entitled to damages by way of interest, prevailing at the material time. What was the interest at the material time, no evidence has been adduced. Learned counsel for the plaintiffs submits that prevailing bank rate of interest to its customers on the deposits, was 9% per annum. However, there is no iota of evidence, oral or documentary, on record. It is also well settled that interest may be awarded under four circumstances:

- (i) where there is an agreement to pay interest;
- (ii) where there is a usage to pay interest;
- (iii) where there is any law making specific provision for interest; and

(iv) where the Courts dealing between the parties, justify the payment of interest by way of damages, on equitable grounds.

Sh. B. B. Vaid, learned counsel for the defendants, has vehemently contended that under the Interest Act, as plaintiffs had not made any demand for the same, nor there was any term in the agreement Ex. DW-I/A to pay interest or damages, the plaintiffs can at the most, be held entitled for the refund of the actual amount advanced to defendants, and they are not liable to pay interest.

24. True, there was neither a ground to pay interest nor there is any such term incorporated in the agreement in question (Ex. DW-I/A) nor there appears to be any usage under which it could be claimed. It is only the outcome of the unlawful retention of the amount advanced to the defendants, which they continued to make use for their own benefits subsequent to the demand made by the plaintiffs. Thus, in my view, the plaintiffs are entitled to damages, on equitable grounds, by way of interest which is awarded on guess work @ 6% per annum . from 23rd January, 1982 till the date of realisation of the actual advance amount, namely, Rs. 1,59,812.50 paise. Issue is decided accordingly.

#### Relief

25. In view of my findings on the aforesaid issues, a decree for an amount of Rs. 1,59,812.50 paise along with damages by way of interest @ 6% per annum from 23-1-1982 till the date of realisation of the amount, is passed in favour of plaintiff No. 1 and against defendants, jointly and severally, with proportionate costs of the suit.