

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
SUIT NO. 1683 OF 1984

(1) KISHORE KARSANDAS TEJURA,
(since deceased)

1A. NIRUPAMA KISHORE TEJURA,
of Mumbai Indian Inhabitant, residing
at 15, Park View, Little Gibbs Road,
Mumbai 400 006

1B. MAYANK KISHORE TEJURA,
of Mumbai Indian Inhabitant, residing
at 7B, Shahnaz, 7th Floor, 90, Nepean
Sea Road,
Mumbai 400 006

1C. RAKESH KISHORE TEJURA,
of Mumbai Indian Inhabitant, residing
at 15, Park View, Little Gibbs Road,
Mumbai 400 006

... **PLAINTIFFS**

versus

(1) PAUL VAZ
(since deceased)

(2) MARTIN VAZ

2a. LILIA ELIZABETH VAZ

2b. DOMNIC VAZ

2c. ZITA D'SOUZA VAZ

- 2d. NOEL VAZ**
- 2e. CARMO LIMA SAVIA JUDE VAZ**
- 2f. CARMEN MARIA IRIA VAZ**
- 2g. AUTONIO VALENTINO VAZ**
All of Mumbai Indian Inhabitants,
being heirs and legal representatives of
Defendant No. 2, residing at 7, Abu
Mansion, 3rd Floor, Jehangir
Meherwanji Street, Parel, Mumbai
400 012 and presently residing at
Dominglow's Court, Flat No. 4, 2nd
Floor, Kalina church Road, Santacruz
(East), Mumbai 400 029
- (3) ANNA QUITERIANE VAZ,**
residing at 7, Abu Mansion, 3rd Floor,
Jehangir Meherwanji Street, Parel,
Mumbai 400 012
- (4) NET WORTH FINSTOCK PVT
LTD,**
having its registered address at Ratan
Apartment, 1st Floor, SV Road, Opp
Pantaloons, Borivali (West), Mumbai
400 092
- (5) FLORA MARBLE,**
presently running their business at
Main Marble Market, International
Airport Side Service Road, Western
Express Highway, Vile Parle (East),
Mumbai 400 099
- (6) QUALITY MARBLE,**
presently running their business at
Main Marble Market, International
Airport Side Service Road, Western
Express Highway Vile Parle (East),
Mumbai 400 099

- (7) **ROHINI KISHOR GANDHI**,
Residing at 19, Shamiana co-op
Housing Society Ltd, Irla Lane, Vile
Parle (West) Mumbai 400 056
- (8) **KISHOR VASANTRAI GANDHI**
(HUF),
Through its Karta, Kishor Vasantrai
Gandhi residing at 19 Shamiana Co-op
Housing Society Ltd, Irla Lane, Vile
Parle (West), Mumbai 400 056 ... **DEFENDANTS**

APPEARANCES

- FOR THE PLAINTIFFS** **Mr Karl Shroff**, *with Mrs Neha Bhatt, i/b
M/s Bilawala & Co.*
- FOR THE DEFENDANT** **Mr Farhan Dubhash**, *with Mr Rajiv
NOS. 2(B) & 3 Narula, i/b Jhangiani Narula &
Associates.*
- FOR THE DEFENDANT** **Mr Sanjay Jain**, *Mr Wasim, i/b Pravin
NOS. 6 TO 8 Mehta & Mithi & Co.*
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CORAM : G.S.Patel, J.

HEARD ON : 11th January 2018

DATED : 11th & 18th January 2018

ORAL JUDGMENT:

1. On 11th January 2018, I heard Mr Shroff for the Plaintiffs, Mr Narula for Defendants Nos. 1 and 2 and Mr Jain for Defendants Nos. 6 to 8 at considerable length. With their assistance, I considered documentary and oral evidence on record. Having

regard to the manner in which the plaint in this suit is cast and the evidence on record, I have not been able to held in favour of the Plaintiffs. For the reasons that follow, I have held that the Plaintiffs have failed to prove the necessary ingredients in a suit for specific performance. Readiness and willingness are not established. Most importantly, there is a very serious dispute, never adequately resolved, about the present the agreement of which the Plaintiffs claim specific performance. This ambiguity introduced by the original sole Plaintiff is utterly fatal to the case. I have proceeded to dismiss the Suit but awarded no costs.

2. This is a suit for specific performance of an Agreement for Sale of an immovable property. Since the time when the Suit was filed, 33 years ago, many of the original parties to the agreement and to the Suit have passed on. Some of the heirs have also passed on. The plaint has been amended quite extensively, and, as we shall see, the amendment itself has a quite considerable effect on the reliefs. Certain parties have also been added as Defendants Nos. 5 to 8 although they are not parties to the agreement itself. This is on the basis that these Defendants claimed to be in possession of a part of the property in question. These Defendants also claimed under separate conveyance of 2002 to have acquired title to portions of the property that is the subject matter of the Agreement for Sale. Defendant No. 4 is said to be a subsequent transferee of the suit property. The Plaintiff say that Defendants Nos. 5 to 8 have no valid right, title and interest in the property. An issue has been framed in this regard. Continuing with the description of the array of parties, Defendant No. 1B and 1C are the two sons of the original sole Plaintiff Kishor Tejura. His wife Nirupama was joined as Plaintiff

No. 1A. She too has passed on. The original Defendants Nos. 1 and 2, Paul Vaz and Martin Vaz have both passed on. Their heirs are on record though I am informed that Defendant No. 2a has been deleted and that Defendants Nos. 2b to 2g now represent the original two vendors. Defendant No. 3, Anna Quiteriane Vaz is or was the wife of Defendant No. 1. She joined with the 1st and 2nd Defendants in their original Written Statement but has entered no additional Written Statement after the plaint has been amended.

3. In the trial itself the original Plaintiff filed an Evidence Affidavit but passed away before he could be cross-examined. Plaintiff No. 1C, Rakesh Tejura, his son, filed two Evidence Affidavits and was cross-examined. The Plaintiffs' documents were marked. PW2 was a person who video-graphed a site measurement but that evidence is almost entirely immaterial to the consideration at hand.

4. None of the Defendants led any oral evidence, though some of their documents were marked in evidence.

5. The agreement itself came to be marked as Exhibit "K" in evidence at page 304. It is on Rs.5 stamp paper. It seems to be common ground that it was not registered. The property is described as about 1361 sq yds of vacant land, CTS No. 2009, Survey No. 114, Hissa No. 20 at village Vile Parle (East), Mumbai. The agreement is between Paul and Martin, original Defendants Nos. 1 and 2, on the one hand, and the original Plaintiff, Kishor Tejura, on the other. These are the only parties to the agreement.

6. Clause 1 of the agreement expresses the parties' intention that the Vaz brothers would sell and Tejura would buy this entire property at a price calculated at Rs. 300/- per square yard. Clause 1 also specifies the manner in which this has to be paid: Rs.20,000/- was as earnest money by bank draft at the time of execution of the agreement itself, and the balance amount "on the completion of the sale in accordance with the provisions hereinafter appearing".

7. Clause 2 of the agreement then required the Vaz brothers to deliver title documents to Tejura for verification and investigation. It is Mr Shroff's case that this was not done in the time provided. He also says that the Vaz brothers did not make out a marketable title as required in Clause 3.

8. The crucial clause in the agreement is Clause 4. It is reproduced below:

"4. Subject to the obtaining of the necessary **by the purchaser** permissions and sanctions from the authorities concerned, the Sale of the said property mentioned in Schedule hereunder written shall be completed by the Vendors in favour of the Purchaser or his nominee or his nominees within a period of six months from the date hereof. After the expiry of the period, either party may make time of the completion of the Sale to be of the essence of the contract."

9. The agreement copy annexed to the plaint appears to be a typed version of the original. I say this because Clause 4 contains an insertion in typescript. This insertion is clearly seen in the original document marked in evidence but not in the typed copy annexed to

the plaint. I believe it is necessary to emphasis this because the averments in the plaint both before and after the amendment are tied hand and foot to this particular clause. This is what the original agreement looks like.

... this agreement, without claiming any costs, expenses etc. which he might have incurred herein, and in that event the Vendors shall refund and pay to the Purchaser the entire sum of Rs. 20,000/- paid as earnest money under this agreement without any interest.

4. Subject to the obtaining of the necessary -
permissions and sanctions from the authorities concerned, by the Purchaser, /
the Sale of the said property mentioned in Schedule -
hereunder written shall be completed by the Vendors in
favour of the Purchaser or his nominee or his nominees ?
within a period of six months from the date hereof.
After the expiry of the period, either party may make
time of the completion of the Sale to be of the essence
of the contract.

5. The Vendors shall make and execute a proper
Deed of Conveyance in respect of the said property
described in Schedule hereunder written in favour of

10. Clauses 5 and 6 are also relevant:

"5. The Vendors shall make and execute a proper Deed of Conveyance in respect of the said property described in Schedule hereunder written in favour of the Purchaser and/or any person or person nominated by the Purchaser.

6. In the event of the Sale failing through default of the Purchaser within the stipulated date the vendors shall be

entitled to forfeit the earnest money deposited under this Agreement."

11. The next two important clauses are 12 and 13:

"12. The Purchase shall be entitled at his discretion at any time after the title to the said property is approved by him, to pay the full purchase price of the said property and to require the Vendors to deliver to him the vacant possession of the said property in pursuance of and in part performance of this Agreement for Sale.

13. The Vendors shall before completion of the sale apply for and obtain Certificate under Section 230A of the Income Tax Act for enabling the Purchaser to procure effectual registration of the said conveyance."

12. I turn to the plaint itself.¹ Tejura said that by this writing the Vaz brothers agreed to sell him the Vile Parle land at Rs. 300/- per square yard. In paragraph 3, he set out certain salient terms of the agreement. He said he had paid the earnest money of Rs. 20,000/- and, in paragraph 5, that although he engaged an Advocate to investigate title, the Vaz brothers did not produce any title deeds. In paragraph 6, Tejura said he was at all times ready and willing to fulfil his obligations under the contract and to pay the balance purchase price. Tejura also claimed to have put out a public notice.

13. We came now to paragraph 7 of the plaint:

"7. The Plaintiff says that under the said Agreement, the Plaintiff was to obtain the necessary sanction and

1 Vol II, *pp.* 110-160.

permission, if any, from the concerned State Government authority, Collector and other authorities at his own costs for development of the said property. However, the permissions required under the Urban Land (Ceiling and Regulation) Act for the purpose of sale and transfer of the said property were to be obtained by the 1st and 2nd Defendants. The 1st and 2nd Defendants were also required to arrange to remove the structures lying on the said property. The 1st and 2nd Defendants were also required to obtain Certificate Under Section 230A of the Income Tax Act for registering the Conveyance of the said property in favour of the Plaintiff. The 1st and 2nd Defendants did not take any steps for fulfilling their aforesaid obligations and merely kept the Plaintiff on promises."

14. In paragraph 8, Tejura said that on 11th August 1983, Paul Vaz met the Plaintiff and told him that his wife Anna also had a right, title and interest in the property, but did not clarify how she acquired title to any part of it. Vaz allegedly gave Tejura a draft of an Agreement for Sale. On studying the documents, Kishor Tejura found that Paul Vaz wanted to change the entire agreement. In paragraph 8 of his plaint, Tejura went on to say that on 25th August 1983, he met Paul Vaz and informed him that there was already a subsisting Agreement for Sale which should be honoured. Though not averse to an amendment, Tejura was unwilling to consider a fresh agreement altogether. In paragraph 9 of the Plaint, Tejura referred to correspondence starting from 1st September 1983. This correspondence is marked in evidence and I will be addressing it in due course. It is only necessary to note at this stage that there were two letters that are part of this correspondence that were never

mentioned in the plaint. One letter from Tejura to the Vaz brothers has never been produced at all either in original or in copy.

15. Tejura then submitted in the Plaint, that the agreement of 2nd May 1980 was valid, subsisting and binding, and the 1st and 2nd Defendants' termination of it was unlawful. Specific performance was sought in the following terms — I set these out because though there are extensive amendments to the rest of the plaint and certain additional prayers as well, these principal prayers for specific performance have remained untouched.

"(a) That it may be declared that there is a valid and subsisting agreement under which the Defendants are liable and bound to sell and convey to the Plaintiff the property described in Exhibit 'A' upon terms and conditions contained in the Agreement for sale dated 2nd May 1980 Exhibit 'B' hereto.

(b) That the Defendants may be ordered and decreed to specifically perform of the said agreement dated 2nd May 1980 Exhibit 'B' hereto and may be ordered to fulfil and carry out all their obligations under the said agreement Exhibit 'B' and in particular to obtain certificate under Section 230A of the Income Tax Act and permission under the Urban Land (Ceiling & Regulation) Act and to sign and execute the appropriate Sale Deed and other documents in favour of the Plaintiff or his nominee or nominees upon a payment of the balance purchase price in accordance with the terms and conditions of the Agreement Exhibit 'B'.

(c) That the Defendants may be ordered and decreed to deliver to deliver to the Plaintiff the vacant possession of the said property described in Exhibit 'A'.

(d) That in the alternative to the foregoing prayers (a) and (b) the 1st and 2nd Defendants may be ordered and decreed to sell and convey to the Plaintiff their share, right, title and interest in the property upon payment of the proportionate purchase price in accordance with the terms and conditions of the Agreement Exhibit 'B'."

16. Prayer (d) is possibly for a decree in part performance demanding a conveyance by the Vaz brothers of their share in the suit property on the (presumably) without prejudice basis that Anna, Defendant No. 3, the wife of Defendant No. 1, did have a share in the property.

17. What is important is neither prayer clauses (a) or (b) were ever sought to be amended. Prayer (b), closely read, is not in consonance with prayer (a). The reason is that it has been the argument of Mr Shroff throughout that the agreement of 2nd May 1980 was modified by an oral understanding of January or February 1981, and that the original Plaintiff was relieved of his obligation to obtain the necessary permission for sale from the Competent Authority under the Urban Land (Ceiling and Regulation) Act ("ULC Act"). But prayer (b) does not accord with prayer (a). The first prayer seeks a declaration of subsistence of the 2nd May 1980 agreement but without any mention of any such modification at all. This is the heart of the matter. There were extensive amendments in 2009 and I have understood Mr Shroff to urge that there was in fact an oral understanding of January or February 1981.

18. A few portions of the 2009 amendments to the Plaint are relevant.

"3(a) The draft of the Agreement for Sale was prepared by the Plaintiff's Advocate, which was duly approved by the deceased Defendant No. 1 and 2 and/or, their Advocates. However, at the time of execution, the said Defendants had surreptitiously added the words "by the Purchaser" in clause 4 of the said Agreement, which went, unnoticed by the Plaintiff at the time of execution thereof. By the reason of the aforesaid change, it became the responsibility of the Plaintiff to obtain the necessary permissions and sanctions from the authorities concerned instead of the Defendants.

7(a) The Plaintiff states that inspite of repeated oral requests made to the deceased Defendants they failed to obtain necessary/requisite permissions and certificates. The Plaintiff vide his letter dated 31st October 1980 once again called upon the Vendors to obtain certificates under Section 230-A of the Income Tax Act so that the transaction could be concluded by executing the Deed of Conveyance. The Plaintiff craves leave of the Hon'ble Court to refer to and rely upon the said letter as and when it is produced.

7(b) The deceased Defendants in reply to the said letter dated 31st October 1980, vide their letter dated 4th November 1980 put forward lame excuses for not concluding the transaction. Hereto annexed and marked as **Exhibit 'B-1'** is a copy of the said letter dated 4th November 1980.

7(c) The Plaintiff thereafter again by his letter dated 11th November 1980 called upon the deceased defendants to get the certificates under section 230-A of the Income Tax Act so that the Deed of Conveyance could be executed and balance consideration could be paid to them. However, the deceased Defendants failed to revert back to the Plaintiff.

Hereto annexed and marked as **Exhibit 'B-2'** is a copy of the said letter dated 11th November 1980.

7(d) The Plaintiff submits that thereafter in January 1981, on making an inquiry in the Office of the Competent Authority under Urban land (Ceiling & Regulation) Act it was learnt that major portion of the said land agreed to be sold was shown as vacant surplus land and the deceased Defendants being the owners of the land were required to apply and obtain necessary permissions under the provisions of section 20 or in the alternative they had to execute a Power of Attorney in favour of the Plaintiff so that the Plaintiff could pursue with the Competent Authority and get the requisite permission.

7(e) The Plaintiff therefore from time to time orally called upon the deceased Defendants to make necessary application for obtaining necessary permission required for conveying the said land to him or otherwise execute a Power of Attorney in his favour so that he could pursue with the Competent Authority and get the requisite permission. However, the Defendants on one pretext or another not only avoided in getting the requisite permission and certificates but also failed to execute Power of Attorney in favour of the Plaintiff so that the Plaintiff could pursue with the concerned authority and get the requisite permission and thus delayed the execution of the Conveyance.

7(f) The Plaintiff states that the deceased Defendants finally in or about process of obtaining the necessary permission from the Competent Authority under the Urban Land (Ceiling & Regulation) Act and on obtaining the permission they would revert back to him. **However, the deceased Defendants for next 2 years failed to get the requisite permission from the Competent Authority**

essentially required to complete the sale transaction and convey said land to the Plaintiff, although the Plaintiff was ready and willing to fulfil his obligation under the said agreement.

7(g) The deceased Defendants subsequent to entering and executing the aforesaid agreement, in or about July 1981 somehow managed and got included the name of Defendant No. 3 as a co-owner in the Record of Rights in place of one Carmelin Vaz who had died."

(Emphasis added)

19. Defendants Nos. 1, 2 and 3 — Paul Vaz, Martin Vaz, and Paul's wife Anna — entered a Written Statement denying that there was any surviving Agreement for Sale. They denied that the Plaintiff had shown or demonstrated his readiness and willingness. They said that despite repeated reminders, the Plaintiff did not perform his obligations under the 2nd May 1980 agreement. In the meantime, there was a distinct threat that the part of the land would be declared surplus and would vest in the Government, compelling those Defendants to make an application under Section 8 of the ULC Act. According to those Defendants, Tejura did not, until as late as September or November 1983, do anything other to pay Rs.20,000/- as earnest money. There was no investigation of title. There was no demand for completion. There was no application made or pursued for permission for sale from the ULC authorities. According to those Defendants, they validly terminated the agreement. They also said that apart from there being no subsisting agreement capable of specific performance or enforcement, the

Plaintiff was not entitled to specific performance having shown neither readiness nor willingness.

20. On these pleadings, issues were framed on 11th March 2005 (SK Shah J). I set these out below with my findings against each:

SR. NO.	ISSUES	FINDING
1.	Whether the Agreement dated May 02, 1980 in respect of the suit land is valid and subsisting and is binding upon the defendants as alleged in paragraph Nos. 13 and 16 of the Plaint?	NO
2.	Whether Plaintiff has intentionally failed to comply with condition laid down in suit agreement as alleged in paragraph 8 and 9 of the Written Statement?	NO
3.	Whether the defendants have committed any breach of the Agreement for Sale dated May 02, 1980 as alleged in paragraph 19 of the Plaint?	DOES NOT SURVIVE
4.	Whether time is the essence of the Agreement for Sale as alleged in paragraph No. 7 of Written Statement?	NO
5.	Whether Plaintiff had constructive Notice of alleged agreement dated 16th January, 1976 as alleged in para-4 of the Written Statement?	DOES NOT SURVIVE
6.	Whether Plaintiff was and is ready and willing to perform his part of the suit contract as alleged in paragraph-12 of the Plaint?	NO
7.	Whether Plaintiff has committed breach of terms of agreement dated 2nd May, 1980 as alleged in para-3 of the Written Statement?	DOES NOT SURVIVE

SR. NO.	ISSUES	FINDING
8.	Whether suit is bad for non-joinder of defendants No. 3 as party to agreement for sale dated 2nd May, 1980 as alleged in para-4 of the Written Statement?	DOES NOT SURVIVE
9.	Whether suit is not maintainable for reason alleged in para-1 of the written statement?	DOES NOT SURVIVE
10.	Whether the suit is barred by the Law of Limitation?	DOES NOT SURVIVE
11.	Whether Plaintiff is in any event entitled to specific performance against the defendant No. 1 and 2 as to the extent of their share as alleged in paragraph 18 of the Plaint?	NO
12.	Whether the Plaintiff is entitled to compensation in lieu of the specific performance and/or as damages for breach of the contract as alleged in paragraph No. 19 of the Plaint?	NO
13.	Whether Plaintiff is entitled to recover from the defendants the amount of Rs. 20,000/- together with the interest thereon at the rate of 18% p.a. given as earnest money to the defendants as alleged in para-20 of the Plaint?	NO
14.	Whether the defendants are entitled to forfeit earnest money as alleged in paragraph No. 12 of Written Statement?	YES
15.	Whether Plaintiff is entitled to the reliefs prayed for in the Plaint?	NO

21. In 2013 Defendant Nos. 4 to 8 were added, and additional issues came to be framed (SJ Kathawalla J). These are now set out below with my findings against each.

Sr. No.	ISSUES	FINDINGS
(a)	Whether the Suit is maintainable against Defendant Nos. 6 to 8?	DOES NOT SURVIVE
(b)	Whether the Plaintiffs prove that Defendant Nos. 6 to 8 are in possession of the suit property?	DOES NOT SURVIVE
(c)	Whether the Plaintiffs prove that the Suit against the Defendant Nos. 6 to 8 is filed within the prescribed period of limitation?	DOES NOT SURVIVE
(d)	Whether the Defendant Nos. 6 to 8 prove that they are the bonafide purchasers of the suit property without notice for a value, under registered Conveyances dated 03rd September, 2002 and 09th September, 2002?	DOES NOT SURVIVE
(e)	Whether the Defendant No. 4 proves that it is a bonafide purchaser for value in respect of the suit property under the Conveyances dated 23rd November, 2007 and 29th December, 2007?	DOES NOT SURVIVE
(f)	What orders?	SUIT DISMISSED

22. Before I proceed to a discussion of the evidence, a quick analysis of the issues might be in order. Issues Nos. 1, 2, 6, 11 and 12 are clearly fundamental and the burden of proving these is on the Plaintiffs. Issue No. 2 relates to the obligation to obtain permission for sale from the ULC authorities. The Plaintiff must show that

there was a valid and subsisting agreement and that the Plaintiff was not required to obtain permission for sale from the ULC authorities, there being a modification of the original contract in that regard. In Issue No. 2, I will take it that the word “intentionally” is unnecessary. Issue No 6 sits with Issues Nos. 1 and 2 as does Issue No. 11. Issue No. 12 will only arise if it is found that the Plaintiff is entitled to a decree for specific performance but for some reason such a decree cannot be passed. That can be eliminated straight away because no evidence is led on this aspect of the matter. I propose to club Issues Nos. 1, 2, 6 and 11 altogether and deal with them in one group. It is only if the Plaintiff is able to succeed and finding his return in favour of the Plaintiff on these issues that the other issues will at all survive. For instance, the question of the maintainability of the suit against Defendants Nos. 6 to 8, their possession or whether they are *bona fide* purchasers for value without notice are all subsidiary questions. These may be required to be addressed if it is found that the Plaintiff is entitled to get a decree for specific performance to begin with. If so then all these other issues would have to be considered as reasons to not grant the decree, considering the grant of damages or to mould the relief. If on the other than, it is found that the Plaintiff has failed to prove that there was a sufficient pleading and adequate proof; and if it is found that the Plaintiff is not entitled to a decree for specific performance at all, then the other issues simply do not survive. To put it conversely, if the Plaintiff fails on these two issues, nothing survives in the suit and it must necessarily be dismissed.

23. The rest of this discussion is therefore restricted to a detailed consideration of the first group of issues. Issues Nos. 13 and 14,

regarding the refund of the earnest money — matters not seriously argued or pressed — are dealt with together, separately from the first group.

24. Some 53 documents of the Plaintiffs were marked in evidence. There are several hundred documents produced by the Defendants, of which seven documents were marked by the Defendants. As we shall see, apart from the agreement itself,² there is correspondence of 4th November 1980³ and from 1st September 1983 to 16th September 1983⁴ which is crucial to the Plaintiff's case.

25. As I have noted above, Clause 4 of the agreement in question lies at the heart of the matter. I will here refer to the document marked Exhibit "K" in evidence rather than the typed copy annexed to the plaint. The reason is on account of the amendment later introduced by the Plaintiffs. We will have to examine how this amendment affects the Plaintiff's case. In Clause 4, the words "*by the purchaser*" are inserted not by hand but in a typescript at the end of line two. It is at once apparent that the insertion was after the document was initially typed. There is a difference in the typed font as well but it had to have been done before the document was signed. As we shall see, it is not the Plaintiff's case that the insertion was fraudulent or was done at a later stage. If I might be permitted to run slightly ahead of the narrative, the case is, after the amendment, that such an insertion was made but that it went

2 Exhibit "K", *pp.* 304-311.

3 Exhibit "L", *p.* 312.

4 Exhibit "N", collectively, *pp.* 327-333.

unnoticed. In itself, that is hard to believe for there is, I find, a set of initials between Clause 4 and beginning of Clause 5.

26. The last portion of Clause 4 says that if the obligations set out in the preceding clause are not completed within six months either party was at liberty to make time the essence of the contract. It is settled law that this required a notice and it is an accepted position that this was never done.

27. What is the obligation, precisely, of the purchaser that is set out in the first portion of Clause 4 of this agreement? The obligation is that he is required to obtain “the necessary permissions and sanctions from the authorities concerned”, and subject to this, the sale is to be completed within six months. The controversy in the suit is about obtaining the permissions and sanctions. It is not in dispute that at the relevant time, the provisions of the ULC Act were very much in force; and, in addition, there were tax permissions needed. At least two different permissions were required. The first was a permission for sale under the ULC Act. The second was a permission under the Income Tax Act. The entire controversy turns on the failure to obtain the necessary permission under the ULC Act.

28. Again, shortly stated, the case argued on behalf of the Plaintiff today is that while written document made this obligation of the purchaser/Plaintiff, there was, a few months later, sometime in January or February 1981 and understanding that this obligation to obtain permission was taken over by Defendants Nos. 1 and 2. I

will proceed immediately next to a discussion of how this case of the Plaintiff evolves, for it seems to me that it has taken different shapes and forms over time, but to complete this portion of it I should perhaps set out the provisions of some other clauses. Clause 11 contains a declaration by Defendants Nos. 1 and 2 that they and they alone have full title to the property. This becomes material in the submission of Mr Shroff because it is the defence raised that the 1st Defendant's wife, Defendant No. 3 also had title. This, however, is a subsidiary question. Clause 12 of the agreement gives a wide choice to the purchaser. It allows him to accelerate a part of the transaction or in other words to demand part performance. It says that once the purchaser has satisfied himself as to title, he may make payment of the full purchase price and demand possession. The words 'part performance' are specifically used in this clause, and I should imagine that what this clause therefore contemplates is that the permissions might follow, these being required from various authorities, itself a time-consuming task, but the Plaintiff as the purchaser was entitled to possession even without those permissions being in hand upon payment of the full purchase price. Again, admittedly, this was an option that was never fully exercised.

29. Before I turn to the evidence itself, some paragraphs of the plaint must be more fully considered in view of the amendment that was made. I will also then consider the relevant portions of the Written Statement. I have, in the preceding portion, already quoted some of the relevant portions of the plaint. As I have noted, the original paragraph 7 made a clear cut statement that all permissions under the ULC Act were to be obtained by Defendants Nos. 1 and 2. *Ex facie*, this is contrary to Clause 4 of the agreement. There is no

explanation for this discrepancy. More importantly there is no pleading in the unamended plaint of there being any oral understanding whatsoever. Paragraph 3 of the unamended plaint merely sets out some clauses of the agreement including Clause 4. When it sets out Clause 4, the unamended paragraph 3 of the plaint includes the words “by the purchaser” but does not say that this was a ‘surreptitious’ insertion. That comes in an amendment of 6th April 2009 in which it is for the first time said that the draft agreement was prepared by the Plaintiff’s lawyers, approved by the 1st and 2nd Defendants and their Advocates, but at the time of execution — again there are no details — these two Defendants smuggled in the words ‘by the purchaser’. Tejura claims he did not notice this. More importantly, he now accepts in amended Clause 3(a) that it was his obligation to obtain the necessary permissions. He does not say that this obligation *excluded* the necessary permissions under the ULC Act. Resultantly, amended paragraph 3(a) runs directly contrary to paragraph 7 which is not corrected or amended.

30. Apart from that there is even to this day no specific pleading of any oral agreement at a later date or of a modification of the original agreement. Several paragraphs were then added after paragraph 7, being paragraph 7(a) to 7(g). In these, the Plaintiff says that he repeatedly asked the 1st and 2nd Defendants to obtain the permissions and he narrates some correspondence that was wholly omitted in the original plaint. Some of that correspondence is in evidence and I will turn to that now. There is also an assertion in amended paragraph 7(e) saying that the Defendants failed to get these permissions and then, in paragraph 7(f), that in January or

February 1981 they orally informed the Plaintiffs that they had initiated the process of obtaining the necessary permission would revert. Nothing happened, the Plaintiff says, for two years and then the Plaintiff says that he was always ready and willing to fulfil his obligations. It is paragraph 7(f) that is the only paragraph that mentions the period of January/February 1981. Even here there is no specific pleading of a modification or variation of the agreement at all.

31. Then comes the real difficulty which is that the relevant prayers in the Suit have remained unamended. Prayer clause (a), set out above, demands a declaration but it demands a declaration of the agreement of 2nd May 1980, Exhibit “B” to the plaint, i.e., the agreement which has the words ‘by the purchaser’. It does not demand a declaration that there is an agreement between the parties of 2nd May 1980 as modified, varied or altered in January/February 1981. The decree of specific performance sought in prayer clause (b) again asks for this to be in terms of the 2nd May 1980 agreement at Exhibit “B” but then proceeds to demand that the 1st and 2nd Defendants obtain the necessary permissions, both under the Income Tax Act and the Urban Land Ceiling Act.

32. From this, Mr Shroff has strived long and hard and most valiantly to persuade me that the necessary pleadings do exist in the plaint. I do not think it is remotely possible for me to accept this submission. If the Plaintiff obtains a decree in terms of prayer clause (a) and I see no reason why I should tempt myself into a misadventure of ‘moulding a relief’ to grant something not sought

and not properly pleaded, then the Plaintiff is confined to the terms of that agreement and cannot travel beyond it.

33. As I have noted above, the cause of action in the plaint has evolved over time, and is something of a work in progress. There are at least four or five distinct stages that I am able to tell. The first is the agreement itself. Then there is the correspondence. This is then followed by what is stated in the unamended plaint. Thereafter we have the amendment. And finally there is the evidence and the arguments that are advanced across the bar.

34. No amount of evidence or arguments can take the place of an essential pleading; that is settled law. What we should turn to now is the correspondence and rather than spend time on interpretations and conclusion drawn by counsel, a far more accurate test is to see how the parties actually conducted themselves, as reflected in the correspondence. This correspondence runs from about November 1980 onwards. The first document in question is of 4th November 1980. It is from Defendants Nos. 1, 2 and 3 to the Plaintiff.⁵ It is obviously in response to a letter from the Plaintiff dated 31st October 1980 but for reasons that none are able to explain, that letter has never been put into evidence. What does this letter from the first three Defendants say? To begin with, it denies that the Defendants are required to produce the income-tax certificate. It says that the purchase price is not yet paid. In paragraph 3 it clearly demands from the Plaintiff the necessary certificate under the ULC Act. Then there is an assertion that the Plaintiff's signature is not

5 Compilation, *pp.* 312, Exhibit "L" in evidence.

witnessed and the statement that six months have expired. Here, therefore, we see the beginnings of a dispute. But we are as yet in early-November 1980 and if there is one thing that this letter makes clear it is that until this time — bearing in mind that the agreement is of 2nd May 1980 — there is no evidence of the Plaintiff's obligation to obtain the ULC permission having been altered, amended or changed. On the contrary, there is re-affirmation of it.

35. The next document is a response from the Plaintiff to Defendants Nos. 1 and 2 after few days later, 11th November 1980.⁶ Here the Plaintiff states in paragraph 1 that the certificate under Section 230A of the Income Tax Act 1961 is required; and in paragraph 2 that the purchase price would be paid at the time of the conveyance (and therefore not in exercise of the part performance option in Clause 12). In paragraph 3, in relation to the ULC permission there is a clear-cut admission that under the agreement that permission is the liability of the Plaintiff. The document says this:

"Please note that under the agreement it is my liability and I will bear it."

I stress this because even in November 1980, several months on, it was not Tejura's case that the words 'by the purchaser' were clandestinely inveigled into the agreement, a case that is made for the first time only some 29 years later in April 2009 when the plaint was amended.

⁶ Compilation, *pp.* 315-318, Exhibit "P21" in evidence marked after cross-examination.

36. Exhibit “N” (collectively)⁷ is a set of correspondence of several years later from September 1983 onwards. These documents must also be considered in some detail. The first is a letter of 1st September 1983.⁸ It is from the Defendants Nos. 1 to 3 to the Plaintiff. It refers to a meeting held on 11th August 1983 at which certain draft documents were handed over. The Defendants said there was no progress. They enquired with the Plaintiff’s brother-in-law. There were certain delays and finally a meeting was fixed but even this was not held. The paragraphs in this letter are numbered, which leaves me to believe, apart from the manner of the wording, that the Defendants had by this time already taken legal advice. In paragraph 3, the Defendants assert that precious time has been lost. It is at this stage that I believe I must make a careful distinction because to the Competent Authority under the ULC Act there were two different applications required. One was in respect of declaration of surplus land, which, if not attended to, would result in portions of the property vesting in the Government; and the second was for permission to effect a sale. I do not think these can be muddled. Obtaining the permission for sale was, as I have noted, the original Plaintiff’s obligation. In paragraph 4 of this letter, the Defendants Nos. 1 to 3 gave the Plaintiff four days’ time to clear all issues and said that if not the transaction would be terminated.

37. The next document is of 5th September 1983⁹ from the Plaintiff to Defendants Nos. 1 and 2. It does not specifically reference their letter of 1st September 1983. Here the Plaintiff

7 Exhibit “N”, *pp.* 327-333.

8 Exhibit “N”, *p.* 327.

9 Exhibit “N”, *p.* 328.

confirms his readiness and willingness and now for the first time says that the Defendants have not obtained a certificate under the Income Tax Act and the requisite permission under the ULC Act.

38. Pausing here briefly, I do not believe that it is possible to accept the argument that from this one letter one must necessarily conclude that there was a variation or modification of the agreement and that this was of January or February 1981. This is a unilateral assertion and it was not accepted by the Defendants Nos. 1 and 2.

39. In very quick succession, there followed a response from the 1st and 2nd Defendants on 12th September 1983.¹⁰ This now makes it clear beyond all doubt that the parties' lawyers were already involved. The Defendants repudiated the agreement. They raised the question of Defendant No. 3's title. Mr Shroff argues that there is no denial here by these Defendants of their obligation to obtain the ULC permissions. I do not think that this is correct. The first sentence of paragraph 2 of this letter says that the two Defendants are unaware of any documents to be signed. In paragraph 4 there is an assertion that the Plaintiff is in breach of his obligations.

40. Four days later the Plaintiff responded on 16th November 1983.¹¹ He re-asserted that he was ready and willing and was always ready and willing to fulfil his obligations. He disputed the alleged termination. He once again said that the 1st and 2nd Defendants were to obtain permissions under the IT Act and the ULC Act.

10 Exhibit "N", *p.* 330.

11 Exhibit "N", *p.* 331.

41. The inter-partes correspondence stops at this and there followed in October 1983 correspondence between the Advocates.

42. Is it impossible from this correspondence to unequivocally and conclusively return a finding that the agreement of 2nd May 1980 suffered a novation or was modified in January or February 1981. I do not believe that this correspondence lends itself to any such conclusion. What remains then is to see whether the testimony of the Plaintiff, he being the only witness of consequence, supports this or whether there is an averment in the written statement that could constitute an admission that could be held against Defendants Nos. 1 and 2.

43. Mr Shroff draws my attention to paragraph 7 of the Written Statement:¹²

"7. With reference to paragraphs 3, 4, 5, 6, 7, of the plaint of the above suit these defendants state that prior to the alleged execution of the Agreement to Sell dated 2nd May 1980, which is at Exhibit 'B' attached to the Plaint of the above suit, these defendants have already given the necessary documents of title much prior to the execution of Agreement to Sell along with the said list dated 20th March 1980. These defendants state that the Plaintiff had an ample time to go through all the said documents and to have complete search as well as inspection of all the Government documents in respect of the suit plot. These Defendants state that after satisfying with the contents of the said documents of title after satisfying with the contents of the said documents of title the Plaintiff had

12 Record, *pp.* 166-169.

executed the Agreement for sale at Exhibit 'B' attached to the plaint of the above suit. Further it was clearly mentioned in Clause 4, 7 and 14 in the said Agreement to sell dated 2-5-1980 that subject to the obtaining of the necessary permission and sanction from the Authorities concerned by the Purchase the Sale of the said property mentioned in Schedule hereunder written shall be completed by the Vendors in favour of the Purchaser or his nominee or his nominees within the stipulated period either party may rescind the Agreement of sale, which is the essence of the contract. **The aforesaid clauses viz. 4, 7, 14 and 15 of the aforesaid Agreement to Sell show that the purchaser is required to obtain N.O.C. from the concerned authorities and other necessary permission to sell the suit plot in question.** These Defendants state that from time to time Defendant used to call at the office of the Plaintiff and they were remaining him about the conditions mentioned in the aforesaid clauses of the Agreement to sell at Exhibit 'B' attached to the plaint of the above suit. **These Defendants state that the plaintiff was telling them that he would be responsible for the N.O.C. being not brought within the stipulated period and the Plaintiff was telling falsely that the expeditious steps are being taken up in this behalf.** These Defendants state that since period of three years have passed and the Plaintiff did nothing in this behalf. Further the Plaintiff was not prepared even to spend money in this behalf. These defendants state that prior to obtaining the said certificate the Plaintiff and the defendants had several meetings in this behalf and from time to time **these defendants were asking the Plaintiff to get the certificate from U.L.C. Authority as early as possible and further within the stipulated period he did nothing at all after lapse of 3 years.** Plaintiff said to the Defendants to forget the Past and start a fresh agreement. **Ultimately these defendants**

had to move the concerned authorities and the Deputy Collector and Competent Authority-III (U.L.C.), Bombay Urban Agglomeration was pleased to grant N.O.C. Certificate in respect of the suit plot and other lands.

The said Authority has issued certificate bearing No. C/ULC/Desk-XV/6(i)/SR-IV/1014, 286, dated 31st May 1983, which was received by these defendants on 19th August 1983. **These defendants state that they have taken strenuous efforts to get the said Certificate and because of other sharers the said certificate was issued and otherwise the land would have been declared excess and the said land would have been vested in the Government.** These defendants state that the Plaintiff had done nothing in this behalf nor did he care to make enquiry with regard to obtaining the N.O.C. Certificate. These defendants crave leave to refer to and rely on the said Certificate issued by the Deputy Collector and Competent Authority No. III (U.L.C.) Greater Urban Agglomeration when produced."

44. I do not think it is possible on the basis of the emphasized (bold and underlined) portions above to conclude that the Defendants had taken over or assumed the Plaintiff's primary obligation. The reference in this paragraph is clearly to the applications under ULC in regard to the declaration of the vacant surplus land. This is evident because a few paragraphs later in paragraph 9,¹³ the Defendants re-affirmed and re-asserted that the Plaintiff had failed to obtain the necessary permissions. There is, therefore, no material that can be obtained from the Written Statement in support of the Plaintiffs' case. In any event, I imagine that the Plaintiff must stand or fall on the strength of his pleadings

13 Record, *pp.* 170-171.

and his evidence and in a suit for specific performance it would be stretching things too far that a decree should be obtained on the basis of some averment made in the Written Statement.

45. Plaintiff No. 1(c) entered an Affidavit in lieu of examination-in-chief dated 18th November 2011. The original Plaintiff had by then passed on and Plaintiff No. 1(c) was left in an unenviable position where he was compelled to depose to incidents that took place between his father and the Defendants at the time when he was a young child of no more than six years of age. Of necessity this meant that his deposition would have to be read as being derivative based on documents and not to his own knowledge. In paragraphs 15 to 17,¹⁴ this is what PW 1 says:

“15. I submit that thereafter in January 1981, the deceased Plaintiff made an inquiry in the Office of the competent Authority under Urban Land (Ceiling & Regulation) Act and it was learnt that major portion of the said land agreed to be sold was shown s vacant surplus land and the deceased Defendants being the owners of the land were required to apply and obtain necessary permissions under the provisions of section 20 or in the alternative they had to execute a Power of Attorney in favour of the deceased Plaintiff so that the deceased Plaintiff could pursue with the Competent Authority and get requisite permission.

16. I further say that the deceased Plaintiff from time to time orally called upon the deceased Defendants to make necessary application for obtaining necessary permission required for conveying the said land to him or otherwise

14 Record, *pp.* 272-274

execute a Power of Attorney in his favour so that the he could pursue with the Competent Authority and get the requisite permission. However, the Defendants on the pretext or another not only avoided in getting the requisite permission and certificates but also failed to execute Power of Attorney in favour of the deceased Plaintiff so that he could pursue with the concerned authority and get the requisite permission and thus delayed the execution of the conveyance.

17. I say that the deceased Defendants finally in or about January/February 1981 orally informed the deceased Plaintiff that they had initiated the process of obtaining the necessary permission from the Competent Authority Under the Urban and (Ceiling & Regulation) Act and on obtaining the permission the would revert back to deceased Plaintiff. However, the deceased Defendants for next 2 years failed to get the requisite permission from the Competent Authority essentially required to complete the sale transaction and convey said land to the deceased Plaintiff, although the deceased Plaintiff was ready and willing to fulfil his obligation under the said agreement. It is pertinent to note that in the written statement of the Defendant it is stated that they had obtained the requisite permission from ULC Authorities prior to the filing of this suit. **Item no. 12 of the Compilation of Documents** is the final statement of land held by the Defendants under section 9 of ULC Act, 1976. This material fact was suppressed from the deceased Plaintiff by the deceased Defendants as then the deceased Defendants would have left with no excuse not to execute the conveyance in favour of the deceased Plaintiff. This is a testimony that the deceased Defendants never intended to perform their part of the contract while the deceased Plaintiff was always ready and willing to do so."

46. Obviously what is stated in paragraphs 16 and 17 is not and could not be to PW1's personal knowledge. Any evidence that he gives in regard to an oral agreement is necessarily inferential. While this may be unfortunate, we must take the record as we find it and therefore there is no more mileage that the Plaintiff can obtain today from this. In the cross-examination, the Plaintiff could have fared no better. The questions put to him do not establish a modification at all.¹⁵

47. Having regard to the assertions in the amended plaint, PW1 was then asked to furnish a reason why the allegation that the words 'by the purchaser' were subsequently added was not made by the original Plaintiff, PW1's father, in any letter or correspondence. I need do no more than set out that question and its answer:

Q 28) Can you give me reason why this allegation that the word "by the purchaser" was added subsequently was not made by your father in this letter or in any other correspondence?

A. We were very keen in pursuing this land deal and executing this transaction, hence instead of trying to create any blockages we took the responsibility, so that we could see the transaction through.

48. While we are on this aspect the next question 29 may also be seen.

15 Q&A 13 and 14 in the cross-examination at pages 561 to 562.

Q 29) On what basis have you made the statement that the words “by the purchaser” have been subsequently added by the Vendors?

A. It is based on what was informed to me by my father and further by the way it is written in the Agreement to Sell and the Complaint.

49. Mr Jain on behalf of the Defendants Nos. 6 to 8 points out that the letter of 11th April 1980,¹⁶ is not referenced in the complaint at all and there is no explanation for this omission even after the amendment. The pleading is that the obligation to obtain the ULC permission was that of the 1st and 2nd Defendants in paragraph 7 of the complaint remain untouched but this is contrary to the evidence that was finally led. The reference to the letter dated 11th November 1980 was made for the first time nearly three decades after the Suit was filed only in the amendment of 1989. He submits that there is no evidence whatsoever of the original Plaintiff’s readiness and willingness. Both he and Mr Narula for Defendants Nos. 1 to 3 point out that a good indicator of readiness and willingness might have been whether the Plaintiff at any time exercised his option under Clause 12 of the agreement to demand part performance and to take vacant possession. Mr Narula draws my attention to questions 40 to 46 of the cross-examination.¹⁷ When asked what steps the original Plaintiff took to investigate title, PW1 said that the original Plaintiff engaged an Advocate. He was asked whether there were any documents to show that the title was investigated; his response was

16 Exhibit “P21”, p. 317.

17 Record, pp. 568-569.

that he would have to check. Then come questions and answers 40 to 46:¹⁸

Q 40) According to you, what steps were taken to investigate the title?

A. My father engaged an Advocate for investigating the title.

Q 41) Do I take that you do not have any document on record to show that the title was investigated?

A. I will have to check my records.

Q 42) Have you produced any documents to show that the title was investigated by the Plaintiff?

A. To the best of my knowledge, it is not there.

(Witness Volunteers: This is a technical question, my lawyers would be best to answer the same.)

Q 43) (Witness shown paragraph 8 of his affidavit of evidence.)

18 I will not trouble myself with the other controversy regarding identification of the signatures on the receipts as I do not believe that is strictly material for our purposes today.

According to you which were the title deeds of the property that the Defendant did not produce?

A. This is a legal issue and therefore, I cannot answer. I am a layman.

Q 44) (Witness shown a laminated original of Agreement dated 2nd May 1980 executed between the Plaintiff and the Defendant)

Is this the suit agreement signed by your father?

A. Yes.

Q 45) (Witness is shown a receipt of documents dated 5th May 1980)

Is this receipt signed by your father?

A. The signature on this receipt looks slightly different from the signature of my father, which is in the Agreement to Sell (Article D-1).

Q 46) (Witness is shown a receipt of documents dated 11th February 1981)

Is this receipt signed by your father?

- A.** This looks more similar to my father's signature.

50. It is in this context that Mr Jain relies on the decision of the Supreme Court in *Ganesh Shet v Dr CSGK Setty & Ors*.¹⁹ This dealt precisely with a question of variance between pleadings and evidence. The Supreme Court held that while a Court hearing such a suit does have discretion, that discretion is not to be exercised randomly. In the words of the Supreme Court in such a suit the evidence and proof must be absolutely clear and certain. The normal principle of allowing some latitude in pleadings is not applied, the Supreme Court said, in suits for specific performance. Returning quickly to the issues in this Suit, what this means is that the Plaintiff must have unequivocally pleaded not only the agreement but the oral amendment or modification that is now canvassed. In fact, he ought to have pleaded it in the original Suit. As we have seen, he did not, but pleaded something entirely contrary. Even in the amendment that followed nearly 30 years later, there is no unequivocal or unambiguous pleading. The evidence does not support the theory either. The hypothesis of a January/February 1983 modification is thus entirely a matter of conjecture and seems to be a case that has been retrofitted at some point during evidence and in arguments.

51. Mr Narula relies on the decision of the Supreme Court in *Aniglese Yohannan v Ramlatha & Ors*.²⁰ This is on the aspect of

19 (1998) 5 SCC 381.

20 (2005) 7 SCC 534.

readiness and willingness and the manner in which this is to be complied. The Supreme Court held that the averments in the plaint must demonstrate readiness and willingness and must show a faultless or unblemished conduct. What this means is that a plaintiff seeking specific performance must not only demonstrate that he did everything that he was required to do under the agreement but that nothing else remained to be done that was not dependent on a prior corresponding obligation to be discharged by the other side. This would, in the facts and circumstances of this case, require the demonstration of Tejura having investigated title and of having made or having attempted to make an application for permission under the ULC Act. It was one thing, for instance, for Tejura to say and show by evidence that although he tried to make the necessary application to the ULC authorities, he could not succeed for want of cooperation from the Defendants. There is no such evidence at all. In fact, there is no cogent evidence of Tejura having done anything at all in this regard.

52. Mr Shroff relies on the decision of the Supreme Court in *Syed Dastagir v TR Gopalkrishna Setty*.²¹ The decision says that readiness and willingness must be understood in the pleadings by taking them as a whole but without insisting on any particular form. That is undoubtedly correct but it is equally true that merely saying readiness and willingness but not proving it is also fatal. No plaintiff can succeed merely only on an assertion that he was at all ready and willing if he is unable to, at the trial, demonstrate this readiness and willingness.

21 (1996) 6 SCC 337.

53. All three counsel have relied on a vast number of authorities on various aspects of this matter. I do not think it is necessary having regard to the evidentiary conspectus and the state of the pleadings to get into any more intricate questions of law. None arise.

54. This leaves the question of forfeiture of the earnest deposit of Rs.20,000 or its refund. No arguments were advanced on this basis. Clause 6 of the agreement provided that if the sale failed through default of the purchaser within the stipulated date, the vendors would be at liberty to forfeit the money deposited. In view of my findings of the failure of the original Plaintiff to discharge his obligation, I must necessarily conclude that the Plaintiffs today, the original Plaintiff's heirs, are not entitled to a refund of this amount.

55. In my view, the Plaintiff is not entitled to a decree for specific performance. It is not shown that the agreement continues to be valid, subsisting and binding. The Plaintiff has failed to discharge his evidentiary burden.

56. The Suit is dismissed. In the facts and circumstances of the case, there will be no order as to costs.

57. As a consequence, and for the reasons noted above, the other issues will not survive.

(G.S. PATEL, J.)