

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUIT NO.92 OF 1982**

1. Harikishan Vedprakash Agarwal of  
Bombay Indian Inhabitant residing at 4-E  
Giriraj, Altamount Road, Bombay-26
  2. Messrs. Sanjeev Builders Pvt. Ltd  
a company incorporated under the  
Companies Act, 1956 and having its  
registered office at 15 Military Square Lane  
Fort, Bombay 300 023
- ...Plaintiffs**

**Versus**

1. Smt. Dehbanoo Burjor Joshi (Deceased)
2. Smt. Aloo Jal Chibbeer
3. Rustom Burjor Joshi (Deceased)  
Through LRs.
- 3(a) Burjor Rustom Joshi
- 3(b) Framroze Rustom Joshi
- 3(c) Zarir Rustom Joshi
- 3(d) Mrs. Shirin R. Antia  
All residing at Heera Meher, 6<sup>th</sup> Floor,  
108, Wodehouse Road, Colaba,  
Mumbai - 400 005
4. Dr. Dara Burjor Joshi (Deceased)  
Through LRs.
- 4(a) Mrs. Margaret Dara Joshi (Deleted)
- 4(b) Miss Bakhawar Dara Joshi
- 4(c) Mr. Burjor Dara Joshi  
Both residing at Kismet, 1<sup>st</sup> Floor, 4<sup>th</sup> Pasta Lane,  
Colaba, Mumbai - 400 005  
(being and continuing heirs of deceased  
defendant no.4(a)).
5. Homi Jal Chibber
6. Persi Jal Chibber
7. Dias Jal Chibber  
All of Bombay Indian Inhabitants Defendants  
1 and 4 residing at Kismet Off 4<sup>th</sup> Pasta Lane,  
Colaba, Bombay 400 005 and Defendant  
nos.2 and 5 to 7 residing at Moayo House,  
Cooper, Bombay and Defendant no.3 residing at

Heera Mahal, 108 Wode House Road, Colaba,  
Bombay 400 005.

8. Messrs. Sumer Developments,  
a firm carrying on business at 220,  
Commerce House, Nagindas Master  
Road, Bombay 400023

...**Respondents**

Ms. Sheetal Prakash, a/w Shubha M. Dandekar, for the Plaintiffs.  
Mr. Dipan Merchant, Senior Advocate, a/w Mr. Vachan Bodke, i/b  
V & M Legal, for Defendant Nos.3(a) to 7.

**CORAM : N. J. JAMADAR, J.**  
**JUDGMENT RESERVED ON : 19/12/2019**  
**JUDGMENT PRONOUNCED ON : 30/06/2020**

## **JUDGMENT**

1. This is a Suit for specific performance of a contract for sale of immovable property, damages in addition to, and in lieu of, the specific performance, and for injunction.
2. The material averments in the Plaint can be stated in brief as under:

The Plaintiff no.1 deals in the business, *inter alia*, of real estate. The Plaintiff no. 2 is a private limited company. It also deals in the business of development of immovable properties. The Defendant nos. 1 to 4 are the owners and tenants in common of the lands, situated at Valnai Orlem, Marve Road, Malad (w), being bearing survey no. 36 hissa no.1(part), survey no. 39 (part), survey no. 50(part), survey no. 54 and survey no. 55, more particularly described in Schedule Exhibit B annexed to the Plaint (hereinafter

referred to as “the suit lands”). The Defendant nos. 5 to 7, who are the sons of Defendant no. 2, are impleaded as party Defendants, though they have no independent right, title and interest in the suit properties, since their names are mutated to the record of rights of the suit lands. The Defendant no. 8 is a partnership firm which also deals in the business of real estate.

3. The suit lands had no direct or proper access from the main Malad/Marve Road, save and except through a 7 ft. gavthan land passing through the lands of other holders. Parts of the suit lands were reserved under development plan for proposed roads, including a 100 ft. wide road passing through the entire suit lands. Approximately 15000 sq.yards area of the suit lands was reserved for road. Upon construction the said 100 ft. wide road would have provided proper and adequate access to the suit lands. The said 100 ft. road would also bifurcate the suit lands into two parts, namely, the Western portion admeasuring 46684 sq.yards comprising survey no. 36, hissa no. 1 (part), survey no. 39 (part) and survey no. 50, more particularly described in the schedule Exhibit C annexed to the Plaint (hereinafter referred to as the “Western suit lands”), and the Eastern portion comprising 81000 sq. yards (hereinafter referred to as “Eastern suit lands”).

4. In or about October, 1973, post negotiations, an agreement was arrived at between Plaintiff no. 1 and Defendants no. 1 to 4, whereunder the Defendant nos. 1 to 4 agreed to sale to the Plaintiff no. 1 the Western suit lands for the consideration of Rs.15/- per square yard. The terms and conditions of the contract were reduced into writing in an agreement executed on 4<sup>th</sup> October, 1973. While entering into the said agreement, the Defendant nos. 1 to 4 had assured the Plaintiff no. 1 that they would sale the Eastern suit lands as well to the Plaintiff no. 1, once development of the Western suit lands commences.

5. The material terms of the agreement dated 4<sup>th</sup> October, 1973 are as under:

- (1) The consideration was fixed at the rate of Rs. 15/- per square yard.
- (2) The purchaser/plaintiff no. 1 would pay Rs. 50,000/- to the vendor by way of earnest money.
- (3) The purchaser will obtain the necessary permission for sub division of the lands at his cost and expenses.
- (4) The purchaser was at liberty to sale the sub divided land and the vendor would execute the necessary conveyance in favour of those transferees.

- (5) The transaction of sale of the Western suit lands was to be completed within one year from the execution of the agreement i.e. on or before 3<sup>rd</sup> October, 1974.
- (6) The purchaser and the vendor had the right to use the roads to be constructed in the suit lands.
- (7) The purchaser was entitled to carry out all the development work, fence the Western suit lands and get the Western suit lands demarcated and measured, at his cost.

6. In pursuance of the aforesaid agreement, the Plaintiff no. 1 paid Rs. 50,000/- to the Defendant nos. 1 to 4. The former was put in possession of the Western suit lands.

7. During the course of survey by D.I.L.R, it transpired that the 7 ft. gavthan road leading to the suit lands was obstructed by two structures raised by one, Mr. R.N. Salvi. Despite efforts the Defendant nos. 1 to 4 could neither get the said encroachment completely removed nor obtain the possession of the land on which those structures stood. Thus, for want of proper access the Plaintiff could not get layout plan and sub Division of the Western suit lands sanctioned by Brihan Mumbai Municipal Corporation. Consequently,

no steps for development of the said Western suit land could be taken by Plaintiff no. 1.

8. In the meanwhile, with the enforcement of the Urban Land (Ceiling and Regulation) Act, 1976 (ULC Act) the Plaintiff no. 1 and Defendants were constrained to submit various declarations and applications under ULC Act, in respect of the Western suit lands and Eastern suit lands.

9. As considerable time elapsed, since the execution of the said agreement dated 4<sup>th</sup> October, 1973 (suit agreement), negotiations ensued between the Plaintiff no. 1 and Defendant no. 4, acting for and on behalf of Defendant nos. 1 to 4, for modification of the suit agreement. In a meeting held on 18<sup>th</sup> October, 1978 at the residence of Defendant no. 4, the Defendant nos. 1 to 4 agreed to sale the balance Eastern suit lands (in addition to the Western suit lands). The terms and conditions of the said agreement were recorded by the Plaintiff no. 1 in a draft agreement dated 2<sup>nd</sup> November, 1978 (which wrongly bear the date 2<sup>nd</sup> November, 1973). As agreed, the Plaintiff no. 1 also tendered a cheque drawn for the sum of Rs. 11,000/- in favour of Defendant nos. 1 to 4, towards the consideration of the Western suit land.

10. Instead of approving the said draft agreement dated 2<sup>nd</sup> November, 1978 the Defendant nos. 1 to 4 addressed a communication to Plaintiff no. 1 on 15<sup>th</sup> December, 1978 and professed to give an ultimatum to Plaintiff no.1 to comply with the suit agreement within a fortnight lest the suit agreement would stand terminated and the earnest amount of Rs. 50,000/- forfeited. The aforesaid stand of Defendant nos. 1 to 4 was totally unjustifiable and in derogation of the aforesaid developments in the nature of further agreement and acceptance of further consideration in respect of the Western suit lands.

11. In response, the Plaintiff no. 1 recorded the true and correct facts vide reply dated 23<sup>rd</sup> December, 1978 and called upon the Defendant nos. 1 to 4 to furnish documents of title and obtain necessary statutory permissions to facilitate completion of the sale transaction.

12. Upon receipt of the said reply the Defendant nos. 1 to 4 approached the Plaintiff no. 1. Meetings were held between the parties. In the meeting held on 15<sup>th</sup> January, 1979 the Defendant no. 4 took a stand that the matter regarding the sale of balance Eastern suit lands be considered separately and the sale of the Western suit lands under the suit agreement dated 4<sup>th</sup> October, 1973 should be

completed first and a draft of the conveyance be prepared. To facilitate the same, Defendant no. 4 delivered copies of the documents of title in respect of the Western suit land. Draft conveyance was prepared. Defendant no. 4 suggested certain alterations to the said draft in his own handwriting.

13. In the meanwhile negotiations continued between Plaintiff no. 1 and Defendant no. 4, for and on behalf of Defendant nos. 1 to 4. The Defendant no. 4 demanded a temporary loan of Rs. 15,000/-, which the Plaintiff no. 1 agreed to advance. The Defendant nos. 1 to 4 agreed to sale the balance Eastern suit land to Plaintiff no. 1 for the consideration of Rs. 15/- per square yard for the road area and Rs. 30/- per square yard for the balance land. It was agreed that in consideration of agreement to sale the Eastern suit lands, the Plaintiff no. 1 should pay the consideration for the Western suit lands at the enhanced rate of Rs. 30/- per square yard. (instead of agreed rate of Rs. 15/- per square yard). It was further agreed that the Plaintiff no. 1 would pay a sum of Rs. 1,00,000/- towards further earnest money, upon execution of the aforesaid "supplemental agreement" and the balance amount would be paid on completion of sale, after obtaining necessary permissions and exemptions under the ULC Act, 1976.

14. In terms of aforesaid agreement Mr. Bachhubhai, the Attorney of the Plaintiff no. 1, prepared a draft supplemental agreement and it was handed over to Defendant no. 4 for approval. The said supplemental agreement was to be executed on the next day i.e. 1<sup>st</sup> March, 1979. However, the agreement could not be executed as Mr. Bachhubhai became indisposed on account of heart ailment since 1<sup>st</sup> March, 1979.

15. As the things thus stood, on or about 22<sup>nd</sup> March, 1979, the Defendant no. 4 informed the Plaintiff no. 1 that Defendant nos. 1 to 4 were negotiating with another party for sale of the entire suit land, including Western suit lands. The Plaintiff no. 1 remonstrated by letter dated 23<sup>rd</sup> March, 1979. Thereupon, the Defendant no. 4 vide letter dated 11<sup>th</sup> April, 1979 took a false and unjustifiable stand that the suit agreement dated 4<sup>th</sup> October, 1973 stood cancelled and the earnest amount of Rs. 50,000/- forfeited as of 31<sup>st</sup> December, 1978, in view of the letter dated 15<sup>th</sup> December, 1978.

16. The Plaintiff no. 1 was always ready and willing to perform his part of the contract. The Plaintiff no. 1 continued to be in possession of the Western suit lands. As authorized under the suit agreement, the Plaintiff no. 1 agreed to sale the Western suit lands to Plaintiff no. 2 by executing an agreement dated 26<sup>th</sup> October, 1978. The

Plaintiff no. 2 posted guards to protect the Western suit lands. Certain small structures were also erected to facilitate the development of the Western suit lands.

17. In the meanwhile, Defendant no. 5 approached the Plaintiff no. 1 representing that he was authorized to negotiate on behalf of Defendant nos. 1 to 4. In a meeting between Plaintiff no. 1 and Defendant no. 5, held at Resham Bhuvan, Churchgate, Mumbai on 21<sup>st</sup> April, 1981 it was agreed that the Plaintiff no. 1 would pay an additional sum of Rs. 5 lakhs, over and above the consideration agreed to be paid under the supplemental agreement dated 29<sup>th</sup> February, 1979. The modified supplemental agreement could not be executed as the Defendant no. 3 and 4 sought time on the pretext of pendency of a matter under ULC Act, 1976 before the Supreme Court, wherein a judgment was then expected to be delivered.

18. The Plaintiff no. 1 claimed to have later realized that the said stand was a subterfuge as Defendant nos. 1 to 4 attempted to take forcible possession of the Western suit land on 24<sup>th</sup> April, 1981. The Plaintiff no. 1 thus instituted a suit for injunction against Defendant nos. 1 to 4 being suit no. 2547 of 1981 in Bombay City Civil Court on 27<sup>th</sup> April, 1981. The Defendants were restrained by an ad-interim injunction order.

19. Subsequently, the Defendant no. 8 claimed to have acquired right and interest in the suit lands pursuant to an agreement dated 26<sup>th</sup> April, 1981 allegedly executed by Defendant nos. 1 to 4. On or about 19<sup>th</sup> June, 1981 the Defendant no. 8 attempted to forcibly establish possession over the suit lands. Hence, the Plaintiff instituted a Suit, being Suit no. 3662 of 1981, before the City Civil Court on 22<sup>nd</sup> June, 1981.

20. The Plaintiffs disputed the execution of the said agreement dated 28<sup>th</sup> April, 1981 by Defendant nos. 1 to 4 in favour of Defendant no. 1. In the alternative, the Plaintiffs assailed its legality and validity and asserted that the said agreement did not convey any right, title and interest in the suit lands to the Defendant no. 8.

21. The Plaintiffs further claimed that the Plaintiffs were at all material time ready and willing to perform their part of contract under the suit agreement dated 4<sup>th</sup> October, 1973, the supplemental agreement and modified supplemental agreement. The Defendant nos. 1 to 4 are falsely denying that there were such supplemental agreement and modified supplemental agreement. The Defendant nos. 1 to 4 have committed the breach of the obligations under the suit agreement dated 4<sup>th</sup> October, 1973. The Defendant nos. 1 to 4

failed to obtain the necessary statutory permissions and exemptions to facilitate the completion of said transaction.

22. Hence, the Suit for specific performance of the contract contained in the Suit agreement dated 4<sup>th</sup> October, 1973, as modified by the modified supplemental agreement, in respect of the Western suit lands and balance Eastern suit lands, for damages in addition to, and in lieu of, decree for specific performance, and injunction restraining the Defendants from causing obstruction to the possession of the Plaintiffs over the suit lands.

23. The Defendant nos. 1 to 8 appeared in response to the writ of summons. Out of Defendant nos. 1 to 7 only Defendant no. 4 filed written statement. Rest of the Defendants have neither filed independent written statement nor adopted the written statement filed by Defendant no. 4. The Defendant no. 8 who claimed to be the transferee of Defendant nos. 1 to 4 filed a written statement. However, the suit against Defendant no. 8 came to be withdrawn by the Plaintiff on 15<sup>th</sup> June, 2015. Thus, what remains is the sole resistance put forth by Defendant no. 4.

24. At the outset, defendant no.4 assailed the tenability of the suit on multiple grounds. The Suit is alleged to be barred by law of limitation. The Suit is stated to be barred by the principles of *res-*

*judicata*. It is stated to be bad for mis-joinder of parties and causes of action and, therefore, liable to be dismissed on all or any of the above counts.

25. On facts, the Defendant no. 4 has denied all the averments in the Plaint which are adverse to the interest of Defendant nos. 1 to 4. Though the factum of ownership of the suit lands and the broad description thereof are not put in contest, yet, it is controverted that there was no direct or proper access to the suit lands from the main Malad-Marve road. The Defendant no. 4 contends that at all times there was proper access to the suit lands from the said road through the property of Defendant nos. 1 to 4.

26. The execution of suit agreement dated 4<sup>th</sup> October, 1973 and the material terms thereof have not been put in contest. However, it was specifically denied that the Defendant nos. 1 to 4 had given assurance to sale the balance Eastern suit lands to the Plaintiff no. 1, while entering into the suit agreement.

27. On the aspect of possession, the Defendant no. 4 contends that the Plaintiff no.1 was never put in possession of Western suit land or any part thereof, under the suit agreement. The claim of Plaintiff no. 1 that access to the Western suit lands was blocked on account of the structures raised by Mr. R.N. Salvi was stated to be

incorrect. The alleged inability of the Defendant nos. 1 to 4 to get the said structure removed was also denied. The Defendant no. 4 has refuted the claim of the Plaintiff no. 1 that no steps could be taken for the development of Western suit lands as the layout and sub division plan could not be sanctioned by Municipal Corporation. In contrast, the Defendant no. 4 contends the sale of land was not conditional upon the sub division thereof or the sanction of the layout or sub division plan. The Plaintiff no. 1 was expressly disabled under the terms of the suit agreement from putting an end to the suit agreement on the ground that the Plaintiff no.1 was unable to obtain sub division of the suit lands.

28. While denying the alleged negotiations between the Plaintiff no. 1 and Defendant no. 4 for modification of the suit agreement in or about after 1978, the Defendant no. 1 contended that the suit agreement had come to an end by reason of efflux of time stipulated for its performance and thus there was no question of any negotiations for modification of the suit agreement.

29. As regards the agreement, allegedly arrived at in the month of October, 1978, the Defendant no. 4 contends that upon the Defendant nos. 1 to 4 making their stand clear that in view of default on the part of the Plaintiff no. 1 to complete the transaction under

the suit agreement the suit agreement would be terminated, the Plaintiff no. 1 approached the Defendant no. 4 and offered to complete the transaction within six weeks thereof and in the meanwhile make substantial payment towards the consideration under the suit agreement. Yet on 18<sup>th</sup> October, 1978 the Plaintiff tendered a cheque of Rs. 11,000/- only. The Defendant nos. 1 to 4 were thus not agreeable to accept the said amount and keep the contract alive. Hence, the said cheque was not encashed. Nor any agreement was arrived at to sale the balance Eastern suit lands to the Plaintiff no. 1. Thus, there was no occasion for approval of the alleged draft agreement dated 2<sup>nd</sup> November, 1978.

30. It is contended that on account of failure and neglect of the Plaintiff no. 1 to complete the transaction under the suit agreement, the Defendant nos. 1 to 4 by letter dated 15<sup>th</sup> December, 1978 called upon the Plaintiff no. 1 to complete the same within 15 days, failing which the suit agreement would stand terminated and earnest amount forfeited. The contents of reply dated 23<sup>rd</sup> December, 1978, to the aforesaid letter, issued on behalf of the Plaintiff no. 1, were stated to be false and misleading.

31. The Defendant no. 4 contends that since the suit agreement was duly terminated vide letter dated 15<sup>th</sup> December, 1978;

subsequent thereto he had attended no meetings, as alleged by the Plaintiff no. 1, save and except the meetings held on 28<sup>th</sup> February, 1979 and 5<sup>th</sup> June, 1979. However, no agreement whatsoever was arrived at in any of the said meetings and the suit agreement continued to be duly terminated. It was specifically denied that in the meeting dated 28<sup>th</sup> February, 1979 it was agreed that the price of the Western suit lands be enhanced to Rs. 30 per square yard and the balance Eastern suit lands would also be sold to the Plaintiff no. 1 at the rate of Rs. 15/- per square yard for the road area and Rs. 30/- per square yard for the balance land. The Defendant no. 4 claimed that the said meeting was attended by Defendant no. 4 with intent to enter into a fresh agreement in respect of the Western suit lands on fresh terms and conditions as the suit agreement stood terminated. However, no agreement could be arrived at as the Plaintiff no. 1 insisted for sale of balance Eastern suit lands. Thus, there was no supplemental agreement as claimed by Plaintiff no. 1. Hence, by letter dated 11<sup>th</sup> April, 1979, the termination of the suit agreement with effect from 30<sup>th</sup> December, 1978 was reiterated.

32. The factum of arriving at alleged modified supplemental agreement between Plaintiff no. 1 and Defendant no. 5, for and on behalf of Defendant nos. 1 to 4, was strongly controverted. Neither such modified supplemental agreement was ever arrived at nor the

Defendant no. 5 had the authority to represent Defendant nos. 1 to 4, as claimed by the Plaintiff, contended Defendant no. 4.

33. On the aspect of alleged obstruction to possession, the Defendant no. 4 claimed that Defendant nos. 1 to 4 had never put the Plaintiff no. 1 in possession of the Western suit lands under the suit agreement. The Plaintiff no. 1 was at no point of time in possession of the Western suit lands. Thus, there was no cause or occasion for the alleged obstruction to the Plaintiff's possession over the suit land. On the contrary, the Defendant nos. 1 to 4 have entered into an agreement dated 28<sup>th</sup> April, 1981 and put the Defendant no. 8 in possession of the suit lands thereunder.

34. Lastly, it was contended that there was no subsisting contract of which specific performance could be enforced, as the suit agreement stood duly terminated with effect from 30<sup>th</sup> December, 1978, in pursuance of the letter dated 15<sup>th</sup> December, 1978. Even otherwise, the Plaintiff no. 1 was not ready and willing to perform his obligations under the suit agreement. There was breach of contract on the part of Plaintiff no. 1 as the transaction was to be completed within a period of one year i.e. on or before 3<sup>rd</sup> October, 1974. Conversely, there was no breach of any obligation under the suit agreement on the part of the Defendant nos. 1 to 4. Nor specific

performance can be claimed on the basis of alleged supplemental agreement and/or modified supplemental agreement as no concluded contract came into existence thereunder. Even if the averments in the Plaint are taken at par, the said supplemental agreement and modified supplemental agreement do not travel beyond the realm of proposal. Thus, the Plaintiffs are not entitled to any of the reliefs. Hence, the suit deserves to be dismissed with costs.

35. The Defendant nos. 1 to 4 died, during the pendency of the suit. The Defendant no. 1 left behind no legal representatives. The Defendant no.2's estate is represented by Defendant nos. 5 to 7 who had already been impleaded as party Defendants. Defendant no. 3(a) to 3(d) have been brought on record in the capacity of legal representatives of deceased Defendant no. 3. Whereas Defendant no. 4(a) to 4(c) have been impleaded as legal representatives of deceased Defendant no. 4. Out of them Mrs. Margaret, the Defendant no.4(a), also passed away. None of the legal representatives of either Defendant nos. 2, 3 and 4 have filed any additional written statement appropriate to their character as the legal representatives of the deceased Defendants.

36. In the light of aforesaid rival pleadings by an order dated 3<sup>rd</sup> October, 2003, the issues were framed. Subsequently, in the light of the written statement filed by defendant no.8, by order dated 16<sup>th</sup> April, 2007, additional issues were framed. I have reproduced the issues and additional issues with my findings against each of them for the reasons to follow:

| No. | Issues                                                                                                                                                                                                                                                                                                 | Findings                                                                                               |
|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|
| 1.  | Whether the Plaintiffs prove that the Plaintiff no. 1 was at all relevant and material time ready and willing to perform his obligations and the agreement dated 4 <sup>th</sup> October, 1973 as well under the modified supplemental agreement and are entitled for specific performance thereof?    | In the negative.                                                                                       |
| 2.  | Whether the Plaintiffs prove that the suit has been filed within the period of limitation?                                                                                                                                                                                                             | In the negative.                                                                                       |
| 3.  | Whether the Defendants prove that the agreement in question had come to an end by reason of efflux of time and there was neither any modification nor any negotiations for modifications thereof?                                                                                                      | In the affirmative to the extent that there were no supplemental and modified supplemental agreements. |
| 4.  | Whether the Plaintiffs prove that there was a breach of terms of the agreement on the part of the Defendants and consequently the Plaintiffs suffered loss to the tune of Rs.1,82,45,260/- and that the Plaintiffs were entitled to recover the same along with interest at the rate of 18% per annum? | In the negative.                                                                                       |

| No. | Additional Issues                                                                                                                                                                                                                                                                                                                                                                                                                 | Findings                            |
|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| 1.  | Whether Defendant no. 8 prove that Defendant no. 8 were not aware about the earlier existing agreement dated 4 <sup>th</sup> October, 1973 between Plaintiff no. 1 and Defendant nos. 1 to 4, supplemental agreement and the modified supplemental agreement between the Plaintiff no. 1 and Defendant nos. 1 to 4 which were valid, binding and capable of being enforced between the Plaintiff no. 1 and Defendant nos. 1 to 4? | Does not survive.                   |
| 2.  | Whether the present suit is barred by res-judicata or principles analogous thereto?                                                                                                                                                                                                                                                                                                                                               | In the negative.                    |
| 3.  | Whether the Plaintiffs prove that the Plaintiffs were put in possession of the Western side of the said property exclusively or jointly, as claimed in the suit?                                                                                                                                                                                                                                                                  | In the affirmative.                 |
| 4.  | Whether the Plaintiffs prove that an alleged oral agreement took place between the Plaintiffs and Defendant nos. 1 to 4 in respect of the remaining land as contended and if so, at what consideration and on what terms and conditions?                                                                                                                                                                                          | In the negative.                    |
| 5.  | Whether the Plaintiffs are entitled to any reliefs, and if so, what?                                                                                                                                                                                                                                                                                                                                                              | In the negative.<br>Suit dismissed. |

#### : R E A S O N S :

37. In order to substantiate the averments in the Pliant the Plaintiff no. 1 Mr. Harikishan Agarwal (P.W.1) entered into the witness box. The Plaintiffs have also tendered a number of documents in support

of their claim. Though Mr. Agarwal (P.W.1) was cross examined at length on behalf of Defendant nos. 3 to 7 and Defendant no. 8 (deleted), the Defendant nos.3 to 7 have not led any evidence in the rebuttal. After the closure of the evidence, I have heard Ms. Shital Prakash, the learned Advocate for the Plaintiffs and Mr. Dipen Merchant, the learned Senior Counsel for Defendant nos.3 to 7.

38. **Admitted facts:-**

Before adverting to deal with the contentious issues it may be apposite to note certain uncontroverted facts, as emerged from pleadings and unimpeached evidence. First and foremost, the factum of ownership of the Defendant nos. 1 to 4 over the suit lands is not in dispute. Secondly, the parties are not at issue over the initial transaction of contract for sale of Western suit land evidenced by the suit agreement dated 4<sup>th</sup> October, 1973. Neither the execution of the suit agreement nor the material terms thereof are in contest. Thirdly, the payment of an advance of Rs. 50,000/- thereunder is indisputable. Fourthly, the fact that the transaction could not be completed within one year of the execution of the suit agreement as stipulated therein is not in dispute though the question of the said stipulation as to time being the essence of contract is at the hub of the controversy. Fifthly, the fact that the Defendant nos. 1 to 4 professed to terminate the suit agreement by letter dated 15<sup>th</sup>

December, 1978, with effect from 30<sup>th</sup> December, 1978 is incontestible though the authority and competence of Defendant nos. 1 to 4 to so terminate the suit agreement, and the consequences which emanate therefrom are matters for adjudication. Lastly, though the question as to whether the Plaintiff no. 1 was put in possession of the Western suit lands in pursuance of the suit agreement is in contest yet there is no duality of view on the point that since more than a decade neither the Plaintiffs nor the Defendants are in actual physical possession of the suit lands and the same has been encroached upon by alleged unauthorized occupants.

39. In the aforesaid backdrop, the controversy between the parties as regards the Western suit lands revolves around the entitlement of the Plaintiff to seek specific performance of the suit agreement as allegedly modified by the supplemental agreement, and as regards the Eastern suit lands the very factum of there being a concluded contract for the sale of the Eastern suit lands is in dispute. The existence of a concluded contract as regards the Eastern suit lands and modification of the terms of the contract under the suit agreement by the modified supplemental agreement, being at the heart of the dispute, it may be advantageous to appraise the evidence in a reverse order, namely, the proof of modified

supplemental agreement and supplemental agreement first and then the entitlement for specific performance under the suit agreement, the execution of which is not controverted.

40. A bare perusal of the issues would indicate that the issues and additional issues overlap. In the backdrop of the nature of the controversy, it may not be possible to adjudicate the issues in watertight compartments as the finding on one may seal the fate of the other issues. Thus I propose to determine the connected issues by a common reasoning, with distinct observations wherever warranted.

41. Before proceeding to determine the contentious issues, at this juncture, it may be appropriate to deal with a preliminary submission on behalf of the Plaintiffs that in the peculiar facts of the case, adjudication on merits on the basis of the evidence led by the Plaintiff no.1 is strictly not warranted. Since Defendant nos. 3 to 7 have not filed any written statement and the suit as against Defendant nos. 3 to 7 is practically an undefended suit, it would be appropriate to pass a judgment for want of pleadings on the part of Defendant nos. 3 to 7. Inviting the attention of the Court to the provisions contained in Order VIII of the Code and Rule 74, 89, 90 and 91 of the Bombay High Court Original Side Rules, Ms. Shital

Prakash urged that the Court would be within its rights in pronouncing a judgment on the basis of the facts contained in the Complaint for non-traverse on the part of Defendant nos. 3 to 7.

42. It was submitted that since only Defendant nos. 4 and 8 had filed written statements and the suit as against Defendant no. 8 came to be disposed of as withdrawn and the Defendant no. 4 also expired during pendency of the suit and neither rest of the Defendants have adopted the written statement filed by Defendant no. 4 nor the legal representatives of Defendant no. 4, upon being impleaded, have either adopted the said written statement or filed any additional written statement, there is in fact no written statement which controverts the allegations in the Complaint, urged Mrs. Shital Prakash. Attention of the Court was also invited to the order passed by this Court on 10<sup>th</sup> April, 2015 in Notice of Motion Nos. 2658 of 2012 and 1002 of 2010. By the said Notice of Motion the Plaintiff had sought reliefs of debarring the Defendants from cross examining Mr. Agarwal (P.W.1) and also for an ex-parte decree on the count of failure to file the pleadings.

43. The order passed by this Court on 10<sup>th</sup> April, 2015 sets the controversy, which is now sought to be raised on behalf of the Plaintiffs, at rests. This Court had specifically observed that the

Defendant nos. 3 and 5 to 7 would be entitled to cross examine the Plaintiff's witness, albeit the scope of cross examination would be restricted for want of pleading. The Court expressly repelled the contention that a judgment be passed under the provisions of Order VIII Rule 5 of the Code. After noting that the Defendant nos. 4 and 8 had filed the written statements, it was, in terms, observed that those Defendants can lead evidence and produce documents and rest of the Defendants must rest only with cross examining the Plaintiff to disprove the case of the Plaintiff, if at all, and to argue on the evidence led by the Plaintiffs. In pursuance of this order, Mr. Agarwal (P.W.1) was extensively cross examined on behalf of the Defendant nos. 3 to 7.

44. In the aforesaid view of the matter, the endeavour of the Plaintiffs to seek judgment for want of written statement does not deserve countenance, especially after a full fledged trial. The Defendant no. 4 did file a written statement. The contention sought to be urged on behalf of the Plaintiffs that after the demise of Defendant no. 4 the legal representatives of Defendant no. 4 did not adopt the written statement or file the additional written statement and thus the said written statement filed by deceased defendant no.4 is of no consequence, is legally unsustainable. Sub Rule (2) of Rule 4 of Order XXII incorporates an enabling provision which

provides an opportunity to the legal representative of a deceased Defendant to file written statement appropriate to his character. The non filing of an additional written statement, however, can not be visited with adverse consequences. The written statement filed by the deceased Defendant is not wiped of the record.

45. Even otherwise, the nature of the suit can not be lost sight of. No Court is expected to pass a decree for specific performance blindly or mechanically for want of written statement. The Court is enjoined to examine whether all the conditions for grant of a decree for specific performance, which is discretionary, have been made out. Thus, the submission on behalf of the Plaintiffs to pass a judgment against the Defendants, who failed to file the written statement, at this fag end of the suit, does not merit acceptance.

46. This takes me to the consideration of the challenge to the maintainability of the suit raised on behalf of the defendants.

47. **Additional Issue No.2:-**  
**Bar of Res-judicata or principle analogous thereto / O.II Rule 2**

The tenability of the suit for specific performance was sought to be assailed on the count of the institution of suits, being Suit No. 2547 of 1981 and 3562 of 1981, before the City Civil Court, Bombay in respect of the suit lands. It would be contextually relevant to note

that Suit no. 2547 of 1981 was instituted by the Plaintiffs against Defendant nos. 1 to 4 on 27<sup>th</sup> April, 1981, principally for injunctive reliefs, with the allegations that the Defendant nos. 1 to 4 threatened to dispossess the Plaintiffs from the Western suit land. Suit No. 3562 of 1981 was instituted against the Defendant no. 8 with the allegation that the Defendant no. 8 threatened to dispossess the Plaintiffs from the suit lands on the strength of an agreement executed by the Defendant nos. 1 to 4 in favour of Defendant no. 8.

48. It was brought out in the cross examination of Mr. Agarwal (P.W.1) that the Suit No. 2547 of 1981 came to be withdrawn on 15<sup>th</sup> September, 1982, after the institution of the instant suit for specific performance, and the Suit No. 3562 of 1981 also came to be disposed of for want of prosecution as a statement was made on behalf of Defendant no. 8 before the City Civil Court that the Defendant no. 8 would not erect any construction at site.

49. Evidently, none of the above numbered previous suits between the parties were finally adjudicated on merits. Thus, there was no “judicata” i.e. adjudication on a matter which is directly and substantially in issue by a Court of competent jurisdiction. Thus, the bar of res judicata is not at all attracted. Nor the requirement

envisaged by section 11 of the Code can be said to have been made out.

50. Faced with the aforesaid situation, Mr. Merchant, the learned senior counsel for the Defendant nos. 3 to 7, would urge that the instant suit though not barred by the principles of res judicata is, yet, surely barred by the interdict contained in the provisions of Order II Rule 2 of the Code. Mr. Merchant would urge that Mr. Agarwal (P.W.1) has conceded in the cross examination in no uncertain terms that the subject matter of the instant suit and the previous suits instituted before the City Civil Court, Bombay, is one and the same. Mr. Agarwal (P.W.1) was candid enough to further concede that he was not aware whether any leave under Order II Rule 2 to omit to sue in respect of the relief of specific performance of the contract was obtained. According to Mr. Merchant, since the Plaintiffs could have sought the relief of specific performance as well when the above numbered suits were instituted, and no leave of the Court was obtained, the Plaintiffs are precluded from instituting the suit for specific performance which is based on the very same cause of action.

51. Mrs. Shital Prakash, the learned counsel for the Plaintiffs joined the issue by canvassing a submission that no issue on the

aspect of bar under Order II Rule 2 of the Code has been framed as the said ground was not raised by the Defendants. At this juncture, this question cannot be adjudicated, urged Mrs. Shital Prakash. Even otherwise, according to Mrs. Shital Prakash, the Defendants have miserably failed to demonstrate that the instant suit is barred by the provisions of Order II Rule 2. Since the causes of action for the previous suits, instituted before the City Civil Court, were materially distinct from the cause of action for the instant suit, the interdict contained in Order II Rule 2 is plainly not attracted, submitted Mrs. Shital Prakash.

52. In order to bolster up the aforesaid submission the learned counsel for the Plaintiffs placed a strong reliance upon the Judgments of the Supreme Court in the cases of **Gurbux Singh vs. Bhooralal, AIR 1964 SC 1810** and **Alka Gupta vs. Narendra Kumar Gupta, (2010) 10 SCC 141**, the judgment of Rajasthan High Court in the case of **Prithvi Raj Singh vs. Dalip Kulkarni, AIR 1999 Rajasthan 201** and of the Punjab and Harayana High Court in the case of **Jagat Singh vs. Jeet Singh and Anr. AIR 2007 Punjab and Hariyana 154**.

53. Since the pronouncement of the Supreme Court in the case of **Gurbux Singh** (supra) illuminatingly postulates the law, especially

as regards the onus which rests upon a Defendant to establish the said plea, it may be suffice to reproduce the relevant observations of the Supreme Court in para nos. 6 and 7.

“6. In order that a plea of a bar under Order 2 Rule 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.......”

7 ..... Just as in the case of a plea of res judicata which cannot be established in the absence on the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2 Rule 2, Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits the, defence which raises the bar has necessarily to establish the, cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed.....”

*(emphasis supplied)*

54. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of **Rathnavathi and anor. vs. Kavita Ganashamdas, (2015) 5 SCC 223**, the facts of which have some resemblance to the facts of the case at hand. In the said case, the Plaintiff therein had initially instituted a suit for permanent injunction. Later on, the Plaintiff instituted a suit for specific performance alleging breach of the Contract for sale of immovable property. Both the suits were decreed by the High Court.

Before the Supreme Court a question arose as to whether the bar contained in Order II Rule 2 CPC was attracted so as to preclude the Plaintiff from filing the suit for specific performance of the Contract after having instituted a suit for permanent injunction without obtaining the leave envisaged by Order II Rule 2.

55. The Supreme Court after placing reliance upon the observations of the constitution Bench in the case of **Gurbux Singh** (supra) expounded the legal position in the following words:

*“22. Coming first to the legal question as to whether bar contained in Order II Rule 2 CPC is attracted so as to non-suit the plaintiff from filing the suit for specific performance of the agreement, in our considered opinion, the bar is not attracted*

*23. At the outset, we consider it apposite to take note of law laid down by the Constitution Bench of this Court in [Gurbux Singh v. Bhooralal](#), AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order II Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Ayyangar, J. speaking for the Bench held as under:*

*“6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.....”*

*(Emphasis supplied)*

*24. This Court has consistently followed the aforesaid enunciation of law in later years and reference to only one of such recent decisions in [Virgo Industries \(Engg.\) P. Ltd. Vs Venturetech Solutions \(P\) Ltd.](#), (2013) 1 SCC 625, would suffice, wherein this Court reiterated the principle of law in following words:*

*“11. The cardinal requirement for application of the provisions contained in Order II Rules 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit.*

*It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee JT 2012 (6) SC 149. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury's Laws of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted herein below:*

*“ ‘Cause of Action’ has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the Plaintiff to succeed, and every fact which a Defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that particular action on the part of the Defendant which gives the Plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”*

25. *In the instant case when we apply the aforementioned principle, we find that bar contained in Order 2 Rule 2 CPC is not attracted because of the distinction in the cause of action for filing the two suits:*

25.1 *So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant no. 2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no. 2 to perform her part.*

25.2 *In our considered opinion, bot the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of the agreement.*

25.3 *In case of former, the plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963 (in short “the Act”) read with Order 39 Rules 1 and 2 CPC. Whereas, in case of the latter, the plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of the agreement and to further prove that the defendant failed to perform her part of the agreement as contained in Section 16 of the Act.*

26. *One of the basic requirements for successfully invoking the plea of Order 2 Rule 2 CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the ame cause of action as that on which the previous suit was based. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a*

*plea of bar contained in Order 2 Rule 2 CPC to successfully non-suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants.*

*27. Indeed when the cause of action to claim the respective reliefs were different so also the ingredients for claiming the reliefs, we fail to appreciate as to how a plea of Order 2 Rule 2 CPC could be allowed to be raised by the defendants and how it was sustainable on such facts."*

56. In the backdrop of the aforesaid exposition of the legal position reverting to the facts of the case at hand, it is abundantly clear that the Defendants made no endeavour to substantiate the plea that the previous suits instituted before the City Civil Court were based on the same cause of action as set out in the instant suit. No pains were taken to place on record the certified copies of the Plaint in the previous suits and invite the Court to examine the said aspect. Even otherwise, from the material on record, it becomes evident that the Plaintiffs had instituted the above numbered suits before the City Civil Court in the wake of the alleged obstruction to their possession at the hands of Defendant nos. 1 to 4, on 24<sup>th</sup> April, 1981, and at the hands of Defendant no.8, on 19<sup>th</sup> June, 1981. The Plaintiffs claimed that they were unaware of the execution of the alleged development agreement by Defendant nos. 1 to 4 in favour of Defendant no. 8 on 28<sup>th</sup> April, 1981. The claim of the Plaintiffs that the suits instituted before the City Civil Court were based on a different cause of action, thus cannot be said to be unjustifiable. In the absence of any endeavour on the part of the Defendants to demonstrate that the

previous suits were indeed based on the same cause of action, the Plaintiffs cannot be non-suited. Hence, I am persuaded to answer additional issue no. 2 in the negative.

57. **Issue No. 3 and additional Issue No. 4:-**  
**(Supplemental/Modified Supplemental/Oral Agreement)**

The substance of the claim of the Plaintiff is that the contract contained in the suit agreement dated 4<sup>th</sup> October, 1973 (P1) came to be modified by the supplemental agreement, which was arrived at between Plaintiff no. 1 and Defendant no. 4, acting for and on behalf of Defendant nos. 1 to 4, in a meeting held in the office of the Plaintiff's attorney Mr. Bachhubhai Munim, on 28<sup>th</sup> February, 1979. Under the supplemental agreement the Defendant nos. 1 to 4 agreed to convey the balance Eastern suit lands as well for the consideration of Rs. 15/- per sq. yard for the road area and Rs.30/- per sq. yard for the balance land in addition to Western suit lands agreed to be sold under the suit agreement. The Plaintiffs claimed that the said supplemental agreement came to be further modified in a meeting held between Plaintiff no. 1 and Defendant no. 5, acting for and on behalf of Defendant nos. 1 to 4, on 21<sup>st</sup> of April, 1981 whereunder it was agreed that the Plaintiff no. 1 would pay a further sum of Rs. 5 lakhs towards the consideration for the entire suit lands

(over and above the consideration agreed to be paid under the supplemental agreement).

58. It is trite that in a suit for specific performance of a contract, the existence and proof of the contract, the specific performance which is sought, assumes primary significance. In the absence of proof of a valid contract, the further inquiry as to whether the Plaintiff is entitled to seek the equitable relief of specific performance becomes unwarranted. Thus, in a suit for specific performance the evidence as regards, and the proof of the contract, the specific performance of which is sought, must be absolutely clear and certain.

59. A profitable reference, in this context, can be made to a Judgment of the Supreme Court in the case of **Ganesh Shet vs. Dr. C.S.G.K.Shetty and Ors. (1998) 5 SCC 381** wherein the special rules applicable in a suit for specific performance were spelled out.

“12. Section 20 of the Act reads as follows:

“20: Discretion as to decreeing specific performance: -- (1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2)--(4) \* \* \*

It is well settled that the circumstances referred to in sub-clauses (2) to (4) in regard to exercise of discretion for granting a decree for specific performance are not exhaustive. The relief for specific performance is discretionary and is not given merely because it is legal but it is governed by sound judicial principles. (See [Madamsetty Satyanarayana vs. G. Yellogi Rao](#) [1965 (2) SCR 221], and [Sardar Singh vs. Smt. Krishna Devi & Another](#) [1994 (4) SCC 18]).

13. It is again well settled that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain.

14. In Pomeroy on 'Specific Performance of Contracts' (3rd Edn) (para 159) it is stated clearly that a

"greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases....."

60. The primary question which thus wrenches to the fore is whether the supplemental agreement and modified supplemental agreement have been proved. A brief resume of the evidence of Mr. Agarwal (P.W.1), on this aspect, would be appropriate. Mr. Agarwal (P.W.1) affirms that the transaction of sale under the suit agreement (P1) could not be completed on account of hindrances posed by the encroachment by Mr. Salvi, non approval of sub Division and layout plan by B.M.C. and the change in circumstances brought about with the enforcement of ULC Act, 1976. Mr. Agarwal (P.W.1) wants the Court to believe that in view of lapse of considerable time from the execution of the suit agreement (P1), on or about October, 1978, there were negotiations between him and Defendant no. 4, acting for and on behalf of Defendant nos. 1 to 4, for modification of the suit agreement and also for the sale of balance Eastern suit lands. In one of such meetings, held on 18<sup>th</sup> October, 1978, at the residence

of Defendant no. 4, the Defendant nos. 1 and 4 agreed to sale the balance Eastern suit lands on terms and conditions which were subsequently incorporated in the draft agreement dated 2<sup>nd</sup> November, 1978 (wrongly dated 2<sup>nd</sup> November, 1973). In the said meeting the Defendant nos. 1 and 4 also acknowledged the receipt of the further consideration of Rs. 11,000/-, evidenced by the receipt dated 18<sup>th</sup> October, 1978 (P4), towards the Western suit lands.

61. Mr. Agarwal (P.W.1) further affirmed that after the draft of the said agreement (November, 1978 agreement) was shared with Defendant nos. 3 and 4, instead of approving the said draft the Defendant nos. 1 to 4 addressed the letter dated 15<sup>th</sup> December, 1978 (P11), whereby and whereunder the Defendant nos. 1 to 4 threatened to terminate the suit agreement and forfeit the advance of Rs. 50,000/-, if the transaction was not completed within a fortnight thereof. A reply to the said communication was addressed on behalf of the Plaintiff no. 1 on 23<sup>rd</sup> of December, 1978 (P12), pointing out the breaches and lapses on the part of Defendant nos. 1 to 4 which resulted in the non completion of the transaction under the suit agreement (P1). The Plaintiff no. 1 claimed to have called upon the Defendant nos. 1 to 4 to furnish documents of title and the requisite statutory sanctions and permission. Mr. Agarwal (P.W.1) endeavoured to impress upon the Court that after the receipt of the

said reply dated 23<sup>rd</sup> December, 1978 (P12) the Defendant no. 4 again approached the Plaintiff no. 1 and stated that the said letter dated 15<sup>th</sup> December, 1978 (P11) stood withdrawn, and they entered into further negotiations as regards the sale of entire suit land including the balance Eastern suit lands.

62. In one of such meetings held on 28<sup>th</sup> February, 1979 in the office of Mr. Bachhubhai Munim, the attorney of Plaintiff no.1, it was agreed that the Plaintiff no. 1 should pay the consideration of Rs. 15/- per sq. yard for the road area and Rs. 30/- per sq. yard for the balance Eastern suit lands as well as the Western suit lands, which was agreed to be sold under the suit agreement (P1), and the Plaintiff no. 1 should pay a sum of Rs. 1 lakh to the Defendant nos. 1 to 4 as and by way of further Earnest money on execution of the supplemental agreement, the draft of which was to be finalized on the next day. However, the said supplemental agreement could not be finalized and executed as Mr. Bachhubhai Munim became indisposed till 9<sup>th</sup> April, 1979, on account of heart ailment.

63. Mr. Agarwal (P.W.1) further affirmed that in the meanwhile on 22<sup>nd</sup> March, 1979 the Defendant no. 4 informed him that the Defendant nos. 1 to 4 were negotiating with another party for sale of the entire suit land. Thereupon Mr. Agarwal (P.W.1) claimed to have

addressed a letter dated 23<sup>rd</sup> March, 1979 to Defendant nos. 1 to 4 apprising them of their obligation under the suit agreement and the supplemental agreement. A false reply dated 11<sup>th</sup> April, 1979 was allegedly sent by Defendant no. 4. Mr. Agarwal (P.W.1) claimed to have sent a suitable reply to the same on 24<sup>th</sup> April, 1979 (P15). According to Mr. Agarwal, there were further negotiations and exchange of correspondence. Ultimately, in the month of April, 1981 the Defendant no. 5 approached the Plaintiff no. 1 and proposed to further negotiate the transaction, claiming authority from Defendant nos. 1 to 4. In a meeting held on 21<sup>st</sup> of April, 1989 at Reshim Bhuvan, Churchgate, between Plaintiff no.1 and Defendant no. 5, it was agreed that the Plaintiff no. 1 would pay an additional consideration of Rs. 5 lakhs to Defendant nos. 1 to 4 over and above the consideration agreed to be paid under the supplemental agreement dated 28<sup>th</sup> February, 1979. Mr. Agarwal (P.W.1) wants the Court to further believe that the said modified supplemental agreement also could not be reduced into writing and the Defendant nos. 1 to 4 threatened to dispossess the Plaintiff from the Western suit lands and hence the Plaintiffs were constrained to institute a suit being Suit No. 2547 of 1981 in the City Civil Court at Bombay on 27<sup>th</sup> April, 1981 for injunctive reliefs.

64. The tenor of the aforesaid evidence indicates that in addition to the suit agreement, the Plaintiff no.1 claims that there were 3 more agreements between the parties. The first agreement was arrived at in the month of October, 1978, which is referred to as the November, 1978 agreement. The second agreement was arrived at in a meeting between Plaintiff no.1 and Defendant no.4 held on 28<sup>th</sup> February, 1979, referred to as the supplemental agreement. And the third was arrived at in a meeting held between Plaintiff no. 1 and Defendant no. 5 on 21<sup>st</sup> April, 1981, which is referred to as the modified supplemental agreement.

65. To a pointed question as to whether the Plaintiff no. 1 is seeking specific performance of the aforesaid three further agreements, Mr. Agarwal (P.W.1) replied that he is seeking specific performance of the suit agreement (P1) and the supplemental agreement dated 28<sup>th</sup> February, 1979 as modified by the agreement dated 21<sup>st</sup> April, 1981. Mr. Agarwal (P.W.1) conceded that he is not seeking specific performance of the alleged oral agreement dated 18<sup>th</sup> October, 1978, incorporated in the draft November 1978 agreement.

66. It would be contextually relevant to note that during the course of cross examination an endeavour was made to demonstrate that

neither the supplemental agreement nor modified supplemental agreement have been reduced into writing. Indeed, there is no instrument *inter partes* except the suit agreement which has been executed to evidence the agreement arrived at between the parties. Mr. Agarwal (P.W.1), however, did not cave in to the suggestion that there was neither the supplemental agreement nor the modified supplemental agreement. Mr. Agarwal (P.W.1) stoutly affirmed that the supplemental agreement was arrived at on 28<sup>th</sup> February, 1979 and the formality of reducing the said agreement into writing on a stamp paper, remained to be completed. Otherwise, the said supplemental agreement was final and binding.

67. In the aforesaid backdrop, Mr. Merchant, the learned senior counsel for the Defendant nos. 3 to 7, urged with a degree of vehemence that the case set up by the Plaintiff no. 1 of the supplemental agreement and modified supplemental agreement is imaginary one. The entire Plaint bristles with proposed agreement and draft agreement. No concluded contract was ever executed between the parties, apart from the suit agreement (P1). In the absence of a concluded contract, which is evidenced by a document of unimpeachable probative value, the claim of supplemental agreement and modified supplemental agreement falls flat. Thus, without delving into the appraisal of evidence, the Plaintiff no.1's

claim, based on supplemental agreement and modified supplemental agreement, deserves to be jettisoned away, urged Mr. Merchant.

68. In opposition to this Ms. Shital Prakash, the learned counsel for the Plaintiff urged with tenacity that the claim of the Plaintiffs cannot be thrown overboard for absence of an instrument inter-partes. Amplifying the submission, Ms. Shital Prakash would urge that it is not the requirement of law that an agreement for sale of an immovable property must be evidenced by an instrument in writing. In a given case, a verbal agreement for sale commands equal sanctity and can be lawfully enforced. According to Ms. Shital Prakash, in the case at hand there are overwhelming circumstances which lend support to the claim of Mr. Agarwal (P.W.1) on the aspect of the supplemental agreement and modified supplemental agreement.

69. To lend support to the aforesaid submission Ms. Shital Prakash placed strong reliance upon the judgment of the Supreme Court in the case of **Brij Mohan vs. Sugra Begum and Ors. (1990) 4 SCC 147.** In the said case, the Supreme Court was confronted with a case of specific performance of an oral agreement of sale. The Supreme Court in terms observed that there is no requirement

of law that an agreement or a contract of sale of immovable property should only be in writing. The Supreme Court, however, went on to expound the heavy burden which rests on a party, which seeks the specific performance of an oral contract. The observations of the Supreme Court in paragraph no. 20 are instructive. They are extracted below:

“20. We have given our careful consideration to the arguments advanced by Learned Counsel for the parties and have thoroughly perused the record. We agree with the contention of the Learned counsel for the appellants to the extent that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad-idem between the parties for a concluded oral agreement for sale of immovable property. Whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties orally and a written agreement if any to be executed subsequently would only be a formal agreement incorporating such terms which had already been settled and concluded in the oral agreement.”

*(emphasis supplied)*

70. The Supreme Court also adverted to and extracted the observations in the case of **Kollipara Sriramulu vs. T. Aswathnarayana, AIR 1968 SC 1028 : (1968) 3 SCR 387**, (on page 394 of SCR), which read as under:

“It is, therefore, not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed.”

71. Banking upon the aforesaid exposition of legal position, Ms. Shital Prakash would urge that the Plaintiff no.1's case stands on a much better footing. There are contemporaneous documents in the nature of exchange of correspondence which evidence the factum of the said supplemental agreement and modified supplemental agreement. In the absence of any evidence, which contradicts the claim of Mr. Agarwal (P.W.1), the oral agreements can be said to have been duly proved, submitted Ms. Shital Prakash.

72. It is not an immutable rule of law that an agreement for sale of immovable property must be evidenced by a written instrument. However, since in a suit for specific performance the proof of concluded contract is of pivotal importance, heavy onus rests on a party who approaches the Court for the relief of specific performance of a verbal contract. It has to be established beyond the pale of controversy that there was consensus *ad-idem* between the parties for a concluded oral agreement. The material terms of the contract, agreed to between the parties verbally, must be proved to the satisfaction of the Court with precision and clarity.

73. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to note that the endeavour of the Plaintiffs has been to press into service the case of verbal agreements as supplemental to

the suit agreement (P1). It was flatly denied by Mr. Agarwal (P.W.1) that the supplemental agreement and modified supplemental agreement were in supersession of the suit agreement. It was firmly asserted that apart from the enhancement in the price, brought about by the modified supplemental agreement, the terms of the suit agreement governed the rights and liabilities of the parties. Thus, it is evident that the Plaintiff no. 1 endeavoured to draw home the point that the material terms of the contract between the parties which were reduced into writing in the form of the suit agreement (P1) continued to govern the rights and liabilities of the parties save and except the consideration which came to be enhanced by the supplemental agreement and modified supplemental agreement.

74. In contrast, the Defendant nos. 3 to 7 endeavoured to demonstrate that the suit agreement (P1) came to be duly terminated. There was no agreement to supplement which further agreements could be arrived at. The aspect of the alleged termination of the suit agreement (P1), by letter dated 15<sup>th</sup> December, 1978 (P11), with effect from 30<sup>th</sup> December, 1978 assumes significance in this context.

75. The question which comes to the fore is whether Plaintiff no. 1 has succeeded in establishing that there were supplemental

agreement and modified supplemental agreement post the alleged termination letter dated 15<sup>th</sup> December, 1978 (P11). This question is impregnated with another moot question; was there consensus *ad-idem* between the parties to modify the suit agreement (P1)? It is imperative to note that the suit agreement (P1) and the letter dated 15<sup>th</sup> December, 1978 (P11), whereby the suit agreement was sought to be terminated by the vendors, were executed by all the co-owners i.e. Defendant nos. 1 to 4. It is the claim of the Plaintiffs that the supplemental agreement was arrived at between Plaintiff no. 1 and Defendant no.4, acting for and on behalf of Defendant nos. 1 to 4, in the meeting held on 28<sup>th</sup> February, 1979 in the office of the Attorney Mr. Bachhubhai Munim. Whether the Defendant no. 4 can be clothed with the requisite authority to represent and bind Defendant nos. 1 to 3?

76. Indisputably, in the written statement the Defendant no. 4 did concede that the meeting was held in the office of Mr. Bachhubhai Munir on 28<sup>th</sup> February, 1979. However, the purpose of the said meeting was to arrive at a fresh agreement on fresh terms and conditions as regards the sale of the Western suit lands as the suit agreement came to be terminated. Since, there was no consensus, the Defendant no. 4 asserted that no agreement was arrived at.

This implies that the factum of the meeting on 28<sup>th</sup> February, 1979 can hardly be controverted.

77. The contemporaneous record and conduct of the parties provides a legitimate answer. Mr. Agarwal (P.W.1) claimed that the agreement was to be executed on the next day i.e. 1<sup>st</sup> March, 1979. However, on account of ill health of Mr. Bachhubhai the said agreement could not be executed. In the meanwhile, on 22<sup>nd</sup> March, 1979 the Defendant no.4 informed the Plaintiff no. 1 that the Defendant nos. 1 to 4 were negotiating with another party for sale of the entire suit land. Thereupon, the Plaintiff no. 1 claimed to have addressed a letter on 23<sup>rd</sup> March, 1979. The Defendant no. 4 joined the issue by addressing a letter dated 11<sup>th</sup> April, 1979.

78. A reference to aforesaid sequence of events and communications finds place in the letter dated 24<sup>th</sup> April, 1979 (P15), addressed on behalf of the Plaintiff no.1 to Defendant no. 4. It is pertinent to note that in the said letter dated 24<sup>th</sup> April, 1979 (P15) it is mentioned that in the letter dated 23<sup>rd</sup> March, 1979 it was recorded that the supplemental agreement was prepared on 28<sup>th</sup> February, 1979 and a copy thereof was handed over to Defendant no. 4. Further, the claim made in the letter dated 11<sup>th</sup> April, 1979 by Defendant no. 4 that the suit agreement stood terminated w.e.f. 30<sup>th</sup>

December, 1978, was sought to be refuted in the letter dated 24<sup>th</sup> April, 1979 (P15).

79. It thus becomes evident that the earliest occasion for the Plaintiff no. 1 to advert to the alleged supplemental agreement dated 28<sup>th</sup> February, 1979 was presented by the stand of the Defendant no. 4 that the Defendant nos. 1 to 4 were entering into a transaction in respect of the suit lands with another party. Plaintiff no. 1 claimed to have asserted that the supplemental agreement was arrived at on 28<sup>th</sup> April, 1979 and even a draft thereof was prepared and its copy furnished to Defendant no. 4. The affidavit of Mr. Bachhubhai filed in Notice of Motion was sought to be pressed into service in support of the said claim.

80. The letter dated 23<sup>rd</sup> March, 1979 thus constitutes an integral part of the response of Plaintiff no. 1 to the communication dated 11<sup>th</sup> April, 1979. Indeed a copy of the said letter dated 23<sup>rd</sup> March, 1979 was relied upon and annexed to the Plaint. It is interesting to note as to what was asserted in the said letter dated 23<sup>rd</sup> March, 1979. After refereeing to the meeting held on 28<sup>th</sup> February, 1979 it was asserted therein that there was a discussion regarding the proposal for selling of the balance Eastern land and it was agreed that increase in price payable for the said balance Eastern land

should be apportioned between the whole property and it was arranged to meet on the next day to finalize the agreement for sale of the said remaining portion. The said letter dated 23<sup>rd</sup> March, 1979 is conspicuously silent about a concluded agreement between the parties. Though an endeavour was made in the letter dated 24<sup>th</sup> April, 1979 (P15) to demonstrate that a draft agreement was prepared on 28th February, 1979 itself and a copy thereof was also furnished to Defendant no. 4 and the said fact was also recorded in the letter dated 23<sup>rd</sup> March, 1979, the same does not find mention in the letter dated 23<sup>rd</sup> March, 1979. It does not appeal to human credulity that, had the supplemental agreement been arrived at and a draft thereof already prepared and furnished to Defendant no. 4, the Plaintiff no. 1 would have missed to state the same in the letter dated 23<sup>rd</sup> March, 1979, especially when it was drafted by the Attorney for the Plaintiff no. 1.

81. The absence of the case, which was sought to be developed in the subsequent communication dated 24<sup>th</sup> April, 1979 (P15), in the communication dated 23<sup>rd</sup> March, 1979, erodes the veracity of the claim of the Plaintiff. This factor assumes critical significance if considered in juxtaposition with the fact that the Defendant nos. 1 to 4 had collectively professed to terminate the suit agreement for sale of the Western suit land with effect from 30<sup>th</sup> December, 1978, by

communication dated 15<sup>th</sup> December, 1978 (P11). A very strong evidence is thus warranted in the face of a communication which professed to terminate the initial contract a couple of months prior to the alleged supplemental verbal agreement. The claim of Mr. Agarwal (P.W.1) that in the subsequent meetings the Defendant no. 4 professed to withdraw the said letter of termination (P11) and thus the suit agreement continued to bind the parties is not sufficient to wriggle out of the situation.

82. The matter can be looked at from another perspective. Though the Plaintiff no.1 conceded that he does not seek the specific performance of the November 1978 agreement, which was allegedly arrived at on 18<sup>th</sup> October, 1978, the day the defendant nos.1 and 4 allegedly agreed to sell the Eastern suit land as well, purportedly for consideration of Rs.25/- per square yard, yet the genesis of the alleged supplemental agreement is in the said meeting. Mr. Agarwal (P.W.1) admitted in the cross-examination in clear and explicit terms that the said alleged oral agreement arrived at on 18<sup>th</sup> October, 1978 was never approved by defendant nos.1 and 4. This factor throws a cloud of doubt over the aspect as to whether there was ever any consensus to sell the Eastern suit land. It is pertinent to note that on 18<sup>th</sup> October, 1978, when defendant nos.1 and 4 allegedly agreed to sell Eastern suit lands as well, no

consideration was admittedly parted with, even by way of token, in respect of the Eastern suit lands. The receipt (Exhibit-P4) expressly records that the receipt of cheque for Rs.11,000/- was acknowledged thereunder towards the Western suit lands. It is indisputable that the said cheque was not encashed. The very aspect as to whether there was any negotiation with respect to sale of Eastern suit lands, much less a concluded contract, is in the corridor of uncertainty.

83. In the absence of clear and cogent evidence regarding the authority of Defendant no. 4 to represent and bind Defendant nos. 1 to 3 by entering into transactions not only in respect of the Western suit lands but also the balance Eastern suit lands, it would be rather hazardous to draw an inference that alleged verbal agreement between Plaintiff no. 1 and Defendant no. 4, binds the Defendant nos. 1 to 3.

84. The upshot of aforesaid consideration is that the claim of the Plaintiff no. 1 that post alleged termination of the suit agreement (P1), there was withdrawal thereof and further supplemental agreement between the parties on 28<sup>th</sup> February, 1979, which incorporated all the essential terms of the contract and what remained was the formality of execution of an agreement on the

next day, does not allure confidence. Evaluated through the prism of the contemporaneous record and conduct of the parties the said claim of Plaintiff no. 1 does not appear nearer to the truth.

85. The claim as regards modified supplemental agreement stands on a much weaker foundation. The Plaintiffs have approached the Court with a case that when the transaction was entered into Defendant no. 5 had no right, title and interest in the suit lands, though his name was mutated as one of the prospective heirs of Defendant no. 2. The supplemental agreement dated 28<sup>th</sup> February, 1979 is alleged to have been further modified in a meeting between Defendant no. 5 and Plaintiff no. 1, on 21<sup>st</sup> April, 1981. First and foremost, the question of authority of Defendant no. 5 to bind Defendant nos. 1 to 4 comes to the fore. The fact that the Defendant no. 5 has not controverted the said case by filing written statement or entered into the witness box pales in significance, as from the own showing of the Plaintiffs the Defendant no. 5 had no right, title and interest in the suit lands. Secondly, there is no contemporaneous material to establish the said claim of Mr. Agarwal (P.W.1). The oath put behind the said assertion by Mr. Agarwal (P.W.1) does not carry the matter any further in the backdrop of the onus which rests on a party who sets up a case based on verbal agreement especially when there is material on record to indicate

that the vendors were consistently taking the stand that the suit agreement stood terminated with effect from 30<sup>th</sup> December, 1978.

86. Even otherwise the fate of modified supplemental agreement hinges upon the proof of supplemental agreement allegedly arrived at on 28<sup>th</sup> February, 1979. In view of the fact that Plaintiff no.1 has not succeeded in establishing the existence of a concluded supplemental agreement between the parties on 28<sup>th</sup> February, 1979, the substratum of the claim of modified supplemental agreement gets dismantled. Hence, I am persuaded to hold that the Plaintiffs have not succeeded in establishing that there were supplemental agreement and modified supplemental agreement between the parties. Hence, I am persuaded to answer Issue No.3 in the affirmative to the extent that there were no supplemental agreement and modified supplemental agreement, and additional Issue No.4 in the negative.

87. In view of the aforesaid findings, the consideration on rest of the issues, of necessity, gets restricted to the enforceability of the suit agreement (P1) and the entitlement of the Plaintiffs to seek the specific performance of the suit agreement (P1) only, since the modification thereto set up by the Plaintiffs is not proved.

**88. Limitation - Issue No. 2:-**

On the aspect of limitation a two-pronged submission was canvassed on behalf of the Defendants. One, the parties had stipulated the time for performance of the contract, under clause 6 of the suit agreement i.e. one year from the execution thereof. Thus, the suit ought to have been instituted within 3 years of 3<sup>rd</sup> October, 1974 being the date fixed for the performance of the contract. However, since the suit came to be instituted on 11<sup>th</sup> January, 1982, the same is hopelessly barred by limitation. Two, even if it is assumed that the time so stipulated was not the essence of the contract, yet the refusal of performance came to be unequivocally communicated to the Plaintiff no. 1 by Defendant nos. 1 to 4 vide letter dated 15<sup>th</sup> December, 1978, whereunder the suit agreement came to be terminated and the earnest amount forfeited, with effect from 30<sup>th</sup> December, 1978. As the Plaintiff did not institute the suit within 3 years of termination of the suit agreement, it is barred even under the second part of Article 54 of the Schedule to the Limitation Act, 1963.

89. Learned counsel for the Plaintiffs urged that the aforesaid challenge based on bar of limitation is totally misconceived. It was urged with a degree of vehemence that the evidence on record conclusively demonstrates that the stipulation of time for the

performance of contract was not determinative of the intent of the parties to make the time essence of the contract. Thus, the Plaintiff cannot be non-suited for not instituting the suit within 3 years of the expiry of the time stipulated in the suit agreement (P1). Assailing the claim that Defendant nos. 1 to 4 had terminated the suit agreement vide letter dated 15<sup>th</sup> December, 1978 (P11) it was submitted that, firstly, the Defendant nos. 1 to 4 had no authority to terminate the suit agreement (P1) and, secondly, the said communication cannot be construed as the refusal of performance of the contract on the part of the Defendant nos. 1 to 4.

90. The learned counsel for the Plaintiffs also made a feeble attempt to draw home the point that the suit instituted on 11<sup>th</sup> January, 1982 is well within the period of limitation as the Plaintiffs have asserted that the cause of action to institute the suit for specific performance essentially arose on 24<sup>th</sup> April, 1981, the day the Defendant nos. 1 to 4 threatened to dispossess the Plaintiffs. This unlawful action on the part of Defendant nos. 1 to 4 furnished the cause of action for the Plaintiffs to sue for specific performance. The earlier communications including the alleged letter of termination (P11) dated 15<sup>th</sup> December, 1978, did not constitute the imminent threat of infringement of rights of the Plaintiffs and thus the Plaintiffs

were not obliged to rush to the Court, urged Mrs. Shital Prakash, the learned counsel for the Plaintiffs.

91. To lend support to the aforesaid submission the learned counsel for the Plaintiffs banked upon the juristic connotation of the term “cause of action”, which is a bundle of facts which give rise to the right to relief. Reliance was sought to be placed on the judgment of the Supreme Court in the case of **ABC Laminart Pvt. Ltd. Vs. AP Agencies, Salem, AIR 1989 SC 1239** wherein the import of the term ‘cause of action’ was expounded.

92. As a second limb of the aforesaid submission, premised on the accrual of cause of action, the learned counsel for the Plaintiff canvassed a further submission that the right to sue would accrue only when the Defendant clearly and unequivocally threatened to infringe the rights of the Plaintiff. To buttress this submission, reliance was sought to be placed on a judgment of the Supreme Court in the case of **Mst. Rukmabai vs. Lala Laxminarayan and Ors. AIR 1960 S.C. 335** and a judgment of this Court in the case of **BOLO vs. KOKLAN 1596 Bombay Law Reporter Vol.XXXII.** In the case of **Mst. Rukmabai** (supra) the provisions contained in Article 120, Limitation Act, 1908 (old), were under consideration. In that context, the Supreme Court observed that the right to sue under

Article 120 of the Limitation Act accrues when the Defendant has clearly and unequivocally threatened to infringe the right asserted by the Plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, can not be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to compulsory cause of action depends on the question whether the threat effectively invades or jeopardizes the said right.

93. I am afraid to accede to the aforesaid submission. The reliance sought to be placed on the judgments which deal with Article 120 of the Limitation Act, 1908 (old), which corresponds with the residuary Article 113 of the Limitation Act, 1963 is not well founded. Evidently, Article 120 of the Old Act dealt with the suits for which no period of limitation was elsewhere provided in the Schedule. A suit for specific performance of a contract is governed by Article 54 of the Limitation Act, 1963. Thus, the recourse to the residuary article is wholly unwarranted.

94. Article 54 of the Limitation Act, 1963 reads as under:

|                                            |              |                                                                                                                              |
|--------------------------------------------|--------------|------------------------------------------------------------------------------------------------------------------------------|
| 54. For specific performance of a contract | Three years. | The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. |
|--------------------------------------------|--------------|------------------------------------------------------------------------------------------------------------------------------|

95. To start with it may be advantageous to reproduce clause 6 of the suit agreement (P1) which stipulated the time for performance. It reads as under:

“6. The sale shall be completed by the Purchaser within a period of one year i.e. on or before 3<sup>rd</sup> October, 1974 from the date hereof i.e. 4<sup>th</sup> October, 1973”

96. From a plain reading of the aforesaid clause, it becomes evident that the parties had provided that the sale would be completed within a period of one year of the execution of the suit agreement (P1) i.e. on or before 3<sup>rd</sup> October, 1974. Prima facie, a date for performance was indicated. Before adverting to deal with the question as to whether by the said stipulation the parties had resolved to make time so stipulated essence of the contract, it may be advantageous to consider as to what the date fixed in Article 54 implies.

97. In the case of Ahmmadshab Abdul Mulla (2) (Dead) vs. Bibijan and Ors., (2009) 5 SCC 462, a three Judge Bench of the Supreme Court considered the question as to whether the use of the expression, “date” used in the Article 54 of the schedule to the Limitation Act, 1963 is suggestive of a specific date in the calendar?

98. After adverting to the previous pronouncements and etimological meaning of the word “date” the aforesaid question was answered in para nos. 10, 11, 12 as under:

10. ‘Fixed’ in essence means having final or crystallized form or character not subject to change or fluctuation.

11. The inevitable conclusion is that the expression ‘date fixed for the performance’ is a crystallized notion. This is clear from the fact that the second part “time from which period begins to run” refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on ‘when the plaintiff has notice that performance is refused’. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.

12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression ‘date’ used in [Article 54](#) of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression ‘date’ used in [Article 54](#) of the Schedule to the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly.

99. In the light of the aforesaid enunciation of the legal position it has to be determined whether the performance of the contract on or before 3<sup>rd</sup> October, 1974 was the essence of the contract and, in the alternative, was there refusal on the part of the Defendant nos. 1 to 4 to perform the contract and whether the suit is instituted within three years of such refusal.

100. It is trite that mere stipulation of the period within which the contract for sale of immovable property is to be performed by itself does not make the time so specified essence of the contract. The

stipulation of time for performance in the instrument is thus not of conclusive significance in ascertaining as to whether the said stipulation constitutes an essence of the contract. On the contrary, there is a presumption that normally in a contract for sale of immovable property time is not the essence of the contract. The emphasis is on the substance of the contract and not the time within which the contract is to be performed.

101. It would be profitable to consult the pronouncement of the Constitution Bench in the case of **Smt. Chandrani (Dead) by LRs. vs. Smt. Kamalrani (Dead) by LRs, (1993) 1 SCC 591**, wherein the Supreme Court considered the question in the backdrop of the previous pronouncements including the judgment of the Supreme Court in the case of **Govind Prasad Chaturvedi vs. Hari Dutt Shastri and Anr. (1977) 2 SCC 539**, on which a strong reliance was placed on behalf of the Plaintiff. The legal position was expounded by the Supreme Court in paragraph nos. 19 and 25 as under:

*“19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.*

*25. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of*

*the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:*

*1. from the express terms of the contract;*

*2. from the nature of the property; and*

*3. from the surrounding circumstances, for example: the object of making the contract.*

*(emphasis supplied)*

102. In the case of **Govind Prasad** (supra), the agreement contained a stipulation that the appellant therein must get the sale deed executed within two months of the execution of the agreement and in default the earnest amount would stand forfeited. The Supreme Court held that it is a settled law that the fixation of period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of a contract (vide *Gomati Naraygam Pillai vs. Palani Swami Nadar*, AIR 1967 SC 868). It may be also mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is essence of the contract. The intention to treat time as the essence of a contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

103. On the aforesaid touchstone, reverting to the facts of the case, indisputably, in clause 6 of the suit agreement (P1) (extracted

above), the parties did provide the date before which the sale transaction was to be completed. In clause 15, there is a stipulation for forfeiture of the earnest amount in the event of default to complete the sale, in the manner stipulated in the preceding clauses of the suit agreement (P1). Whether these stipulations lead to an unmistakable inference that the parties had intended that the time would be the essence of the contract?

104. For an answer, recourse to the suit agreement (P1) becomes inevitable. The nature of the contract for sale and its purpose; what the purchaser was expected to do thereunder, are of immense significance. Indubitably, the suit agreement was in respect of sale of an open land. The suit agreement thus provided that the purchaser would get the land measured. The purchaser was also required to get the sub division of the land and lay out sanctioned for its division into plots for further sale. The vendors had agreed to provide the necessary cooperation in getting the land measured, sub divided and demarcated. The vendors had further agreed to execute conveyances in favour of the nominees and /or the purchasers of the plots, into which the suit land was to be divided.

105. In the aforesaid backdrop, there is evidence on record to indicate that the Plaintiff no. 1 did make efforts to get the land

measured and also obtain the sub division and layout plan sanctioned. The Plaintiff no. 1 affirmed that there was obstruction in the development of the land on account of access to the suit land having been blocked by Mr. R.N. Salvi. It is imperative to note that, in the written statement of Defendant no. 4 though it was disputed that the access to the Western suit land was blocked by Mr. R.N. Salvi, yet it was contended that at the instance of Plaintiff no. 1 the Defendant nos. 1 to 4, through their then advocate's letter dated 14<sup>th</sup> February, 1974, called upon the said Mr. Salvi to remove the alleged structure from the said land and to handover to Defendant nos. 1 to 4 vacant and peaceful possession of the said land. It was further conceded that the Defendant nos. 1 to 4 had also addressed a communication on 26<sup>th</sup> March, 1974 to one Mr. Achyutkumar Inamdar, from whom Mr. R.N. Salvi claimed to have obtained a lease in respect of the said premises. To add to this, in the letter dated 2<sup>nd</sup> October, 1976 (P2) addressed by Plaintiff no. 1 to the Defendant nos.1 to 4 the said aspect of the assurances on the part of the Defendants to remove the encroachment by Mr. Salvi was referred to, with a reference to the aforesaid communications addressed on behalf of Defendant nos. 1 to 4 to the alleged encroachers. The fact that the Plaintiff no. 1 was making efforts to get the Western suit lands measured, have an appropriate access to

it and get the lay out sanctioned finds support in the letter dated 2<sup>nd</sup> October, 1975 (P5) addressed by the architect of the Plaintiff to the Executive Engineer (Development), Municipal Corporation, Greater Mumbai and copy of the plan of the suit land from the office of District Superintendent, Land Records (P6). What is of significance is the fact that the aforesaid evidence predates the controversy which seems to have arisen in the month of October, 1978.

106. The events which transpired in the month of October, 1978 also militate against the time being the essence of the contract. It is incontrovertible that a meeting was held on 18<sup>th</sup> October, 1978. The aspect as to whether in the said meeting there was agreement to sell the balance Eastern land can be a matter of contest. However, it is indubitable that in the said meeting the Plaintiff no. 1 tendered a cheque for the sum of Rs. 11,000/- towards the consideration for the Western suit lands. The receipt (P4), dated 18<sup>th</sup> October, 1978 acknowledges the tender of said cheque drawn on Punjab National Bank, Napeansea Road Branch, Bombay. Lastly, the very communication dated 15<sup>th</sup> December, 1978 (P11), which constitutes the linchpin of the defence of the Defendants nos. 1 to 4, indicates that the Defendants had not treated the stipulation of one year in clause 6 of the suit agreement as the essence of the contract. The submission on behalf of the Defendant nos. 3 to 7 that by the said

letter dated 15<sup>th</sup> December, 1978 (P11) the Defendant nos. 1 to 4 made the time provided thereunder (15 days), the essence of the contract works out the retribution of their defence that the stipulation as to time contained in clause 6 of the suit agreement (P1) was the essence of the contract.

107. The learned counsel for the Plaintiff was justified in advancing a submission that as against the overwhelming evidence led by the Plaintiffs to demonstrate that the time was not the essence of the contract there is next to no evidence led by the Defendants. In the circumstances, in view of the pronouncement of the Supreme Court in the case of **Balasaheb Dayandeo Naik (Dead) through LRs. And Ors. vs. Appasaheb Dattatraya Pawar, (2008) 4 SCC 464**, it has to be held that the stipulation as to time for performance of the contract was not its essence. In the case of **Balasaheb Naik** (supra) the Supreme Court, after advertng to the previous pronouncements including the constitution bench judgment in the case of Chandrani (supra), observed that:

“12. This Court in Swarnam Ramachandran (Smt.) and Another vs. Aravacode Chakungal Jayapalan, (2004) 8 SCC 689 has once again reiterated that time is not the essence of contract relating to immoveable property. The following statement of law in para 12 are rightly applicable to the case on hand:

“12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of

lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the contract.”

13. As observed in the said decision, in the case on hand the appellants/plaintiffs clearly established their claim to secure specific performance of the agreement by leading cogent evidence whereas the respondent/defendant having pleaded that time was the essence of the contract neither entered the witness box nor led any evidence whatsoever. The High Court lost sight of the above material aspect and the conduct of the defendant in not strengthening his plea by placing acceptable evidence. In such circumstances, as rightly argued by learned counsel for the appellants, the High Court should have confirmed the decree of specific performance granted by the trial Court.”

108. The upshot of the aforesaid consideration is that the stipulation of time for performance of the contract i.e. 3<sup>rd</sup> October, 1974 cannot be construed as the date fixed for the performance of the contract within the meaning of the first part of Article 54 of the Limitation Act. It has to be seen whether the institution of the suit is within three years of the notice of refusal?

109. Mr. Dipen Merchant, the learned senior counsel for Defendant nos. 3 to 7, urged with a degree of vehemence that the endeavour on the part of the Plaintiffs to contest the factum of refusal of performance as communicated by letter dated 15<sup>th</sup> December, 1978 (P11) is legally unsustainable. Amplifying the submission it was urged that it is one thing to say that the Defendant nos. 1 to 4 had no authority to terminate and/or rescind the contract but it is completely different thing to contend that the said communication did not constitute the refusal of the performance. Looked from any angle, the said communication amounts to refusal on the part of the Defendant nos. 1 to 4 to perform contract with effect from 30<sup>th</sup> December, 1978. Since the suit has not been instituted within three years thereof, the suit is barred by limitation, urged Mr. Merchant.

110. As submissions revolved around the alleged letter of termination dated 15<sup>th</sup> December, 1978 (P11), its relevant part is extracted below:

*“We entered into an agreement of sale for land in Valnai village at Marve Road, Malad on 4.10.1973.*

*More than five years have passed and you have not carried out/fulfill the agreement in question.*

*Please note that if you do not fulfill the agreement within a fortnight from today the agreement for sale will be null and void and your deposit of Rs.50,000/- will be forfeited.”*

111. In reply to the aforesaid letter on behalf of plaintiff no.1 dated 23<sup>rd</sup> December, 1978 (Exhibit-P12), it was, *inter alia*, asserted that:

“Our client has placed in our hands your letter to him dated 15<sup>th</sup> December, 1978 purporting to make time essence of the contract and calling upon our client to complete the sale within a fortnight from the receipt thereof by our client and threatening in default to rescind the contract and forfeit the earnest money with instructions to attend to the same.

At the outset we are instructed to state that by reason of the facts hereinafter stated as also otherwise your aforesaid notice making time essence of the contract is premature and not binding on our client and you are not entitled to rescind the contract and forfeit the earnest as threatened therein.”

112. It would be contextually relevant to note the assertions in the letter dated 24<sup>th</sup> April, 1979 (P15) addressed on behalf of the Plaintiff no. 1 in response to the letter dated 11<sup>th</sup> April, 1979 addressed by Defendant no. 4 to Plaintiff no. 1. In the letter dated 11<sup>th</sup> April, 1979 (the copy of which was annexed to the Plaint), it was purportedly reiterated that by letter dated 15<sup>th</sup> December, 1978 (P11) the contract stood cancelled and the deposit of Rs. 50,000/- forfeited as and from 31<sup>st</sup> December, 1978.

113. In response thereto it was asserted in the aforesaid letter dated 24<sup>th</sup> April, 1979 (P15) as under:

*“With reference to para 3 of the said letter we had already in our letters referred to by you denied that you had or your co-owners had any right to terminate the contract or that the said contract stood terminated. In fact as stated above the supplemental agreement of the rest of the property was also prepared which was to be signed. One of which draft is taken by you and other drafts are in our possession.”*

114. The crucial question which crops up for consideration is whether the said letter dated 15<sup>th</sup> December, 1978 (P11) constitutes refusal to perform the contract on the part of the Defendant nos. 1 to

4. The contentions in the letter, extracted above, are clear and unequivocal. The Plaintiff no. 1 was called upon to perform the contract under the suit agreement (P1) by 30<sup>th</sup> December, 1978, lest the contract would stand terminated and earnest amount forfeited. The said intention on the part of the Defendant nos. 1 to 4 was reiterated in the letter dated 11<sup>th</sup> April, 1979, to which the reply dated 24<sup>th</sup> April, 1979 (P15) makes a reference.

115. Since the limitation commences to run from the date of notice of refusal, it has to be seen as to how the Plaintiff no. 1 understood the said communication. The reply dated 23<sup>rd</sup> December, 1978 (P12), extracted above, betrays the knowledge and understanding on the part of the Plaintiff no. 1 that Defendant nos. 1 to 4 professed to terminate the suit agreement with effect from 30<sup>th</sup> December, 1978 by making the time essence of the contract. The Plaintiff no. 1 thus asserted that the Defendant nos. 1 to 4 had no right to rescind the contract and forfeit earnest amount, as threatened therein. Even when the said stand of Defendant nos. 1 to 4 was reiterated in the letter dated 11<sup>th</sup> April, 1979, the Plaintiff no. 1 joined the issue by again asserting that the Defendants had no right to terminate the contract or that the contract stood terminated.

116. The reply dated 23<sup>rd</sup> December, 1978 (P12) and 24<sup>th</sup> April, 1979 (P15) justify an inference that the Plaintiff no. 1 understood the said communication as the refusal to perform the contract on the part of the Defendant nos. 1 to 4 but contested the authority and competence of Defendant nos. 1 to 4 to so terminate the contract.

117. If there was any doubt as regards the impact of the said communication dated 15<sup>th</sup> December, 1978 (P11) the same was put to rest by the communication dated 27<sup>th</sup> July, 1979 (P10), addressed by the Competent Authority, ULC, Greater Bombay, to the Plaintiff no.1. By the said communication, the Plaintiff no.1 was apprised that the Defendant nos. 1 to 4 informed the Competent Authority on 2<sup>nd</sup> July, 1979 that the suit agreement dated 4<sup>th</sup> October, 1973 between the Plaintiff and Defendants has been cancelled/terminated.

118. In the backdrop of the aforesaid material an inference becomes irresistible that the letter dated 15<sup>th</sup> December, 1978 (P11) constituted an effective and sufficient notice of refusal of performance of the contract on the part of Defendant nos. 1 to 4 with effect from 30<sup>th</sup> December, 1978. A profitable reference in this context can be made to a judgment of Supreme Court in the case of **Thakkama Mathew (Smt.) vs. M. Azamtullha Khan, (1993)**

**supplement (4) SCC 492** wherein, in somewhat similar fact situation as regards the termination of contract, it was observed as under:

“9. Moreover, in view of [Article 54](#) of the [Limitation Act](#), 1963, a suit for specific performance of contract has to be filed within three years of the date fixed for the performance or if no such date is fixed where plaintiff has notice that performance is refused. In the present case, the appellant by his notice dated February 10, 1975 had clearly indicated that he had cancelled the agreement and had forfeited the advance amount of Rs. 18,000 deposited by the defendant. By the said notice, it was clearly indicated that the appellant was no longer willing to perform the agreement to sell dated November 12, 1974. In the circumstances, it was incumbent upon the defendant to have filed a suit for specific performance of the contract within a period of three years from the date of the said notice dated February 10, 1975 and if such a suit had been filed by the defendant, it would have been open to the appellant to show that it was barred by the provision contained in [Section 16](#) of the Specific Relief Act. The defendant did not choose to adopt that course and remained content with defending the suit filed by the appellant for cancellation of the agreement to sell dated November 12, 1974 and for recovery of the possession of the property. Even if it is found that the appellant was not entitled to succeed in the said suit and the said suit is liable to be dismissed, it would not entitle the defendant to obtain a decree for specific performance of the contract in those proceedings. The High Court, with due respect, was not right in invoking its discretionary power under Order 7 Rule 7 C.P.C. to grant such a relief to the defendant. The said power conferred on the court does not enable it to override the statutory limitations contained in [Section 16](#) of the Specific Relief Act, 1963 and [Section 54](#) of the Limitation Act, 1963 which preclude the grant of the relief of specific performance of a contract except within the period prescribed by the section.”

119. In the case of **Van Vibhag Karmachari Griha Nirman Sanstha vs Ramesh Chander & Ors (2010) 14 SCC 596** the Supreme Court had construed publication of a public notice in the newspaper whereby the Respondent refused to acknowledge the right of Appellant over the suit land, based on the agreement for sale executed by the Respondent, as making clear the intention of the Respondent about refusing the performance of the agreement and to cancel the same, and the said public notice was held to furnish

the Appellant with a cause of action to file a suit for specific performance.

120. In the case at hand, there is no dispute about the service of the communication dated 15<sup>th</sup> December, 1978 (P11) nor there is any ambiguity about the matter it conveyed. The Plaintiff no. 1 understood it to be an endeavour on the part of the Defendant nos. 1 to 4 to unilaterally terminate the contract but questioned the authority of Defendant nos. 1 to 4 to make the time essence of the contract and terminate the same. The factum of refusal on the part of the Defendant nos. 1 to 4 to perform the contract is thus established beyond the pale of controversy. Since the suit has not been instituted within three years of the date, with effect from which the Defendant nos. 1 to 4 sought to terminate the contract and forfeit the earnest amount, i.e. on or before 30<sup>th</sup> December, 1981, the suit is barred by limitation. Hence, I am inclined to answer Issue no. 2 in the negative.

**121. Additional Issue No. 3, Issue Nos. 1 & 4 and Additional Issue No. 5:-**

A controversy was sought to be raised as to whether the Plaintiffs were put in possession of the Western suit lands under the terms of the suit agreement (P1). The determination of the question as to whether the Plaintiff no. 1 was in fact put in possession of the

Western suit lands, in the backdrop of the subsequent developments during the pendency of the suit in the nature of the suit lands having since been encroached upon and none of the parties being in actual physical possession of the suit lands, has no significant bearing on the adjudication of the Plaintiff's claim for specific performance. Undoubtedly, the said aspect bears upon the issue of readiness and willingness on the part of the Plaintiffs to perform their part of the obligation under the terms of the suit agreement (P1). Thus, I propose to determine the additional issue no. 3 with a brief reasoning.

122. In the cross examination of Mr. Agarwal (P.W.1) an endeavour was made to draw home the point that there is no mention of the fact that the possession of the Western suit lands was delivered thereunder to the Plaintiff no. 1 nor there is any other document to evidence the delivery of possession, like a possession receipt. Mr. Agarwal (P.W.1) conceded that there is no possession receipt to evidence the delivery of the possession of the Western suit land. However, Mr. Agarwal (P.W.1) stoutly asserted that the clauses 10, 11 and 13 of the suit agreement which authorized the Plaintiff no. 1 to carry out certain developmental activities imply and establish the factum of handing over of possession of the Western suit lands to Plaintiff no. 1.

123. Under clause 10 of the suit agreement the purchaser was authorized to carry out all developmental works, over the Western suit land, including construction of internal roads and erection of temporary shades for his workmen, office, go-down etc. albeit after obtaining due sanction as required in law. Clause 11 authorized the purchaser to fence the area of the land agreed to be sold for obtaining the sub division of the Western suit land. Under clause 13 it was provided that since the area of the Western suit land agreed to be sold was shown in the plan approximately, the purchaser should get the said land demarcated and measured by D.I.L.R. or City Survey for ascertaining the correct area and boundaries of the said lands. Aforesaid clauses of the suit agreement, on their plain construction, lend requisite support to the claim of Plaintiff no. 1. No developmental activity could have been carried out over the Western suit lands without entering upon the suit land. Clause 10 of the said agreement empowered the Plaintiff no. 1 to even construct internal roads and erect structures to house the staff and offices. This factor if considered in conjunction with the nature of the suit agreement, under which the purchaser was authorized to get the land measured, demarcated, subdivided into plots and thereafter sale those plots, leads to a legitimate inference that the Plaintiff no. 1 was in a sense given a free hand to develop the Western suit lands.

124. The evidence brought on record in the nature of the Plaintiff no. 1 making a grievance of obstruction at the hands of Mr. R.N. Salvi for access to the Western suit lands and the action on the part of the Defendant nos. 1 to 4 to address letters to Mr. R.N. Salvi and Mr. Achyutkumar Inamdar for removal of the said obstruction, the conduct on the part of Plaintiffs in approaching the City Civil Court when threatened with dispossession by Defendant nos. 1 to 4 and absence of any contra evidence to demonstrate that from the date of the suit agreement till the institution of the suit by the Plaintiff against Defendant nos. 1 to 4 before the City Civil Court, the Defendant nos. 1 to 4 carried out any activity in respect of the Western suit lands, to evidence their possession, cumulatively justify an inference that the Plaintiff no. 1 was put in possession of the Western suit lands under the terms of the suit agreement (P1). Hence, I am inclined to answer additional Issue No.3 in the affirmative.

125. **Readiness and willingness** :-

Under section 20 of the Specific Relief Act, 1963 a decree for specific performance is discretionary. Indubitably the discretion has to be exercised judicially. The exercise of discretion is governed by statutory provisions and well recognized principles. One of the bars to the relief of specific performance is envisaged by the provisions contained in section 16(c) of the Act. It is well settled that in a suit for

specific performance it has to be proved that the Plaintiff has always been ready and willing to complete the terms of the contract in accordance with its true construction and that he has not abandoned the contract and his intention has been to keep the contract alive and subsisting till it is executed. The continuous readiness and willingness to perform the obligations under the contract, the specific performance of which is sought, has to be demonstrated from the date of the contract till the passing of a decree. The conduct of the Plaintiff prior to and after the institution of the suit and the attendant circumstances are required to be taken into account in adjudging the readiness and willingness.

126. A profitable reference, in this context, can be made to the judgment of the Supreme Court in the case of **J.P. Builders and Anr. Vs. A. Ramdas Rao and Anr. (2011) 1 SCC 429** wherein the governing principles, which have been established by precedents, were enunciated. Paragraph nos.20 to 27 are instructive. They are thus extracted below:

“20. Section 16(c) of the Specific Relief Act, 1963 provides for personal bars to relief. This provision states that specific performance of a contract cannot be enforced in favour of a person,

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

21. Among the three sub-sections, we are more concerned about sub-section(c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & Ors., (1995) 5 SCC 115 at SCC para 5, this Court held: (SCC pp. 117-18)

"5. ...Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

24. In P.D'Souza vs. Shondriilo Naidu, (2004) 6 SCC 649 this Court observed: (SCC p.654, paras 19 and 21)

"19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to

perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstance of each case. No strait-jacket formula can be laid down in this behalf....

21. ....The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale."

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

26. It has been rightly considered by this Court in *R.C. Chandiok & Anr. vs. Chuni Lal Sabharwal & Ors.*, (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

127. In the light of aforesaid exposition, the question as to whether the Plaintiff no. 1 was and has always been ready and willing to perform his part of the contract under the suit agreement (P1) now falls for determination. Mr. Dipen Merchant, the learned senior counsel for the Defendant nos. 3 to 7 would urge that the evidence on record indicates that the Plaintiff no. 1 was not at all ready and willing to perform his obligation under the suit agreement (P1). On the aspect of readiness, it was submitted that there is no material on record to indicate that at any point of time the Plaintiff no. 1 had offered to pay the entire amount of consideration under the suit

agreement before 30<sup>th</sup> December, 1978, the day it came to be terminated. It was further submitted that under the terms of suit agreement the transaction was to be completed within a period of one year. The evidence on record, according to Mr. Merchant, unmistakably demonstrates that no steps whatsoever were taken by the Plaintiff no. 1 under the terms of the suit agreement. Neither any steps were taken for investigation of title nor requisitions on title were administered nor steps were taken to get the Western suit land sub divided. Thus, the Plaintiff no. 1 cannot be said to have been always ready and willing to perform his part of the contract.

128. Per contra, Mrs. Shital Prakash, the learned counsel for the Plaintiff would submit that the Plaintiff no. 1 had done all that he could do to perform the obligations on his part under the suit agreement (P1). Inviting the attention of the Court to the manner in which P.W.1 fared in the cross examination, especially in reply to question nos. 20 to 25, Vol.6, it was urged that the Plaintiff no. 1 has taken all the requisite steps to get the Western suit lands measured, demarcated and sub divided. It has come in the evidence of Mr. Agrawal (P.W.1) that the survey of the Western suit lands by D.I.L.R was carried out in the month of January, 1974. Mr. Agarwal (P.W.1) claimed that the Western suit land could not be fenced as there was obstruction at the hands of Mr. R.N. Salvi. As

adverted to above, there are documents on record which reinforce this claim of Mr. Agarwal (P.W.1). The letter dated 2<sup>nd</sup> October, 1976 (P2) records the said fact with reference to notices which were addressed by Defendant nos. 1 to 4 on 14<sup>th</sup> February, 1974 and 26<sup>th</sup> March, 1974 to Mr. R.N. Salvi and Mr. Achyutkumar Inamdar, respectively, purportedly for the purpose of removal of the said obstruction. The letter dated 2<sup>nd</sup> October, 1975 (P5) addressed to the Executive Engineer, Municipal Corporation of Greater Bombay in respect of providing access to the suit land and the reply thereto dated 30<sup>th</sup> November, 1978 addressed by the Asstt. Engineer Acquisition, (Western Suburb), enclosing therewith a copy of the plan showing the portion of 100 ft. Relief Road taken over by the Municipal Corporation and calling upon the Plaintiff no. 1 to contact the Executive Engineer, Building Proposal (Western Suburb) for getting access from the said municipal land, provide support and sustenance to claim of Plaintiff no. 1 that he has been diligently pursuing the matter with the authorities to perform the obligations under the suit agreement.

129. It is true that the Plaintiff did not offer to pay the entire consideration at any point of time before 30<sup>th</sup> December, 1978. However, this factor does not detract materially from the claim of readiness on the part of Plaintiff no.1. As indicated above, the

Plaintiff no.1 did tender the cheque for an amount of Rs.11,000/- towards further consideration on 18<sup>th</sup> October, 1978, evidenced by the receipt (P4). It was not at all suggested to the Plaintiff no.1 that he had no financial capacity to pay the amount of consideration. On the contrary, it was suggested to Mr. Agrawal (P.W.1) that in view of the transaction with Plaintiff no. 2, he had sumptuous funds with him to pay the balance consideration to Defendant nos. 1 to 4.

130. It is not the requirement of law that Plaintiff who seeks the specific performance of contract must show his readiness by repetitively offering consideration to the vendors. In the case at hand, for determination of exact consideration the measurement of the Western suit lands was necessary in order to ascertain the exact area of the land which was offered to be sold under the suit agreement. The consideration was fixed at the rate of Rs. 15/- per square yard. In this backdrop, the claim of Plaintiff no.1 that he was ready and willing to perform his part of the obligations under the terms of the contract (P1) appears nearer to the truth. The fact that the Plaintiff no. 1 executed an agreement on 26<sup>th</sup> October, 1978 to transfer the suit land in favour of Plaintiff no.2 vouches for the willingness of the Plaintiff no.1 to treat the contract with Defendant nos. 1 to 4 as valid and subsisting and further convey the property in terms of the authorization under the suit agreement (P1). Thus, I am

persuaded to hold that till the date of the institution of the suit the Plaintiff was ready and willing to perform his part of the contract.

131. The developments which occurred during the pendency of the suit, however, deserve cautious cognizance. Indisputably, the Plaintiff no. 1 is not in actual physical possession of the Western suit lands. The mere factum of dispossession by itself may not impinge upon the claim of the Plaintiff no. 1. However, there are concomitant circumstances which impair the Plaintiff no.1's claim of continuous willingness to perform his part of the contract.

132. On being confronted as to how the Plaintiff no. 1 lost possession of the Western suit land, Mr. Agrawal (P.W.1) asserted that in terms of the order dated 18<sup>th</sup> November, 1983 in Notice of Motion No. 198 of 1982 the Plaintiff no. 1 and Plaintiff no. 2 along with original Defendant no. 8 were required to protect the property by deputing their watchmen till the disposal of suit. Mr. Agarwal (P.W.1) further asserted that the Plaintiff no. 2 and Defendant no. 8, under some illegal joint venture agreement of the year 1990 were protecting the suit property by employing their watchmen and he relied upon the Plaintiff no. 2 and Defendant no. 8 for protecting the suit property. The Plaintiff no. 2 and Defendant no. 8 have since abandoned the property. No watchman has been deputed by

Plaintiff no. 2 and Defendant no. 8 since many years and thus apart from the road area the rest of the Western suit lands as well as the balance Eastern suit lands have been occupied by hutments and the anti-social elements and thus none of the parties to the suit is in possession of the suit lands.

133. The aforesaid developments are required to be appreciated in the backdrop of the claim of the Plaintiff no.1 as against Plaintiff no. 2 and Defendant no. 8, rather the litigative strategy against the Plaintiff no. 2 and Defendant no. 8. Mr. Agarwal(P.W.1) claimed to have entered into an agreement with Plaintiff no.2 for sale of the Western suit lands on 26<sup>th</sup> October, 1978. However, Mr. Agarwal (P.W.1) went on to add that the said agreement ceased to be enforceable after 15 months from the date of the said agreement i.e. with effect from 26<sup>th</sup> January, 1980. Yet, the Plaintiff no. 2 came to be joined not only as a co-plaintiff, but relief in the alternative (prayer clause a) was sought in favour of Plaintiff no. 2. Mr. Agarwal (P.W.1) candidly conceded that plaintiff no.2 has absolutely no right, title and interest in the suit property and was in no way concerned with the instant suit. Mr. Agarwal (P.W.1) went to the extent that none of the reliefs are to be granted in favour of Plaintiff no. 2 and he was deposing for himself only (not for Plaintiff no. 2).

134. In contrast, the execution of the development agreement by Defendant nos. 1 to 4 in favour of Defendant no. 8 on 28<sup>th</sup> April, 1981 was stated to be the breach of obligation on the part of Defendant nos. 1 to 4 and thus a part of cause of action for the institution of this suit for specific performance. Under said agreement the Defendant nos. 1 to 4 claimed to have parted with possession of the suit lands. Indisputably, the Plaintiffs approached the City Civil Court for injunctive reliefs against Defendant no. 8 as well, being Suit no. 3562 of 1981, with a case that the Defendant no. 8 threatened to cause obstruction to the possession of the Plaintiffs over the Western suit lands. Yet, Plaintiff no. 1 claimed to have entrusted the responsibility of protecting the possession of the suit land to Plaintiff no. 2 and Defendant no. 8 and relied upon their assurances to protect the possession thereof. Interestingly, the Plaintiff chose to withdraw the suit against the Defendant no. 8. The situation which thus obtains is that Plaintiff no. 2, who purportedly has no interest in the subject matter of the suit property, has all along been dragged as a co-Plaintiff and the suit against the Defendant no. 8, who claimed to be the transferee of Defendant nos. 1 to 4 and also in possession of the suit land, was abandoned.

135. Another factor has some salience. Mr. Agarwal (P.W.1) conceded in the cross-examination that in the year 1992 he had

entered into an agreement in respect of the suit lands with Plaintiff no.2 and original Defendant no.8. At the next breath, Mr. Agarwal (P.W.1) asserted that the said agreement or arrangement being in violation of the status quo consent order dated 17<sup>th</sup> November, 1983 stood ineffective since its execution. This factor also reflects upon the conduct of Plaintiff no.1.

136. The aforesaid subsequent developments and conduct of Plaintiff no. 1 betray an animus on the part of the Plaintiff no. 1 to use the instant proceeding as a lever to settle scores with multiple parties and keep the options open to adopt a litigative strategy which suits the convenience of the Plaintiff no. 1 at a given point of time. It is trite law that in a suit for specific performance, the motive behind litigation should also inform the exercise of judicious desecration. Admittedly the Defendant nos. 1 to 4 are not in possession of the suit land. They claimed to have entered into an agreement assigning right and interest in the suit land in favour of Defendant no. 8. The Plaintiff no. 1 claimed to have entrusted the responsibility of protecting the possession of the suit land to Defendant no. 8. The withdrawal of the suit against the Defendant no. 8, in the circumstances, can only be at the peril of the Plaintiff no. 1. In my considered opinion these subsequent developments and conduct

militate against the Plaintiff no. 1's claim of continuous willingness to perform the obligations under the suit agreement (P1).

137. Mr. Dipen Merchant, the learned senior counsel for Defendant nos. 3 to 7, mounted another legal challenge to the tenability of the suit for specific performance of the suit agreement (P1), without seeking a declaration that the termination thereof by Defendant nos. 1 to 4 vide letter dated 15<sup>th</sup> December, 1978 is null and void. In the absence of such a declaration, according to Mr. Dipen Merchant, there is no subsisting contract of which the Court can enforce specific performance. Meeting the challenge on behalf of the Plaintiff that no such ground was taken in the written statement, Mr. Dipen Merchant urged that this being a legal challenge which goes to the root of the matter, the absence of pleading is of no consequence.

138. To bolster up the aforesaid submission Mr. Dipen Merchant placed a very strong reliance upon a judgment of the Supreme Court in the case of **I. S. Sikandar (D) by LRs. vs. K. Subramani and Ors. 2013 (15) SCC 27.** In the said case, the Supreme Court was confronted with, *inter alia* the following question:-

*“Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?”*

The said question was answered by the Supreme Court in the following terms.

*“As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5.”*

*(emphasis supplied)*

139. Reliance was also placed on two judgments of this Court wherein the aforesaid pronouncement of the Supreme Court was followed. The first, in the case of **C. Padmavati Naidu and Ors. Vs. Friends Co.Hsg.Soc. Ltd. and Ors., Second Appeal No. 235 of 2012 dated 4<sup>th</sup> March, 2016, reported in 2016 (3) Bom. C.R. 236 and 2016(4) Mh.L.J. 289.** In the said case also there was a refusal to perform the contract by a communication dated 12<sup>th</sup> July, 1982 (Exh.82). After referring to the aforesaid observations of the Supreme Court it was enunciated that in view of the aforesaid clear pronouncement there was no reason to hold that the suit would be maintainable in the absence of any challenge to the termination of contract (Exh.82).

140. Second, the judgment in the case of **Unique Estates Development Co. Ltd. Vs. Eldred Anthony Necolus Lobo, Suit No. 743 of 1993 dated 1<sup>st</sup> March, 2018** wherein a learned single

judge of this Court after referring to the aforesaid judgment of the Supreme Court in the case of **I.S. Sikandar** (supra) concluded that, “Absent a prayer for declaration that the termination was unlawful and void, the claim for specific performance would not lie.”

141. Ms. Sheetal Prakash, the learned counsel for the Plaintiffs submitted that the Defendant nos. 1 to 4 have not taken the said plea of absence of the prayer of declaration as regards the alleged termination of the suit agreement(P1) in the written statement and thus no issue has been framed. Therefore, at this stage the Defendants are precluded from agitating the said ground. I am afraid to accede to this submission. The fact that the suit agreement was allegedly terminated by the Defendant nos. 1 to 4 vide letter 15<sup>th</sup> December, 1978 (P11) with effect from 30<sup>th</sup> December, 1978 has been specifically contented by the Defendant no. 4 in the written statement at multiple places. In fact, it constituted the sheet-anchor of the resistance put forth by Defendant no. 4. It is not the case that the Plaintiffs were unaware of the intent on the part of Defendant nos. 1 to 4 to terminate the suit agreement by the said letter dated 15<sup>th</sup> December, 1978 (P11). There were at least two replies, one dated 23<sup>rd</sup> December, 1978 (P12) and another dated 24<sup>th</sup> April, 1979 (P15), wherein the Plaintiff no. 1 questioned the competence and

authority of Defendant nos. 1 to 4 to so terminate and rescind the contract.

142. In this view of the matter, it would be too late in the day to urge that the said ground cannot be urged as the tenability of the suit was not questioned on that count, in the written statement. In the totality of circumstances, no prejudice can be said to have been caused to the Plaintiffs. The absence of the prayer which seeks a declaration that the said termination of contract is void and illegal, has the effect of leaving the said letter of termination (P11) to stand unscathed and at large.

143. A faint endeavour was also made on behalf of Plaintiff no. 1 to put forth the submission that the evidence of Mr. Agrawal (P.W.1) that Defendant no.4 in the meetings subsequent to the receipt of reply dated 23<sup>rd</sup> December, 1978 (P12), verbally withdrew the said termination, has gone unchallenged during the course of cross examination. Therefore, the said letter of termination (P11) loses probative value. It would be suffice to note that in the reply dated 24<sup>th</sup> April, 1979 (P15) the Plaintiff no. 1 was again constrained to refute and challenge the claim of Defendant no. 4 made in the letter dated 11<sup>th</sup> April, 1979 that the agreement stood cancelled and terminated. In this view of the matter the theory of withdrawal of the

said letter of termination (P11) verbally does not stand to reason, viewed in the context of continuous assertions on the part of Defendant nos. 1 to 4 that the suit agreement stood terminated and cancelled.

144. The failure of the Plaintiffs to challenge the termination of the suit agreement by letter dated 15<sup>th</sup> October, 1978 (P11) impairs the claim for damages as well. In the absence of such declaration that the said termination was null and void, the Plaintiffs cannot succeed in establishing that there was breach of obligation on the part of Defendant nos. 1 to 4 to perform their part of contract. It is imperative to note that it was the specific case of Plaintiff no.1 that till the execution of the agreement by Plaintiff no.1 in favour of Plaintiff no.2, i.e. 26<sup>th</sup> October, 1978, there was no breach committed by defendant nos.1 to 4 in respect of the suit agreement. During the course of the cross-examination also Mr. Agarwal (P.W.1) admitted in unequivocal terms that there was no breach of obligation on the part of defendant nos. 1 to 4 till 15<sup>th</sup> December, 1978, the day the Letter of Termination (Exhibit-P11) was addressed by defendant nos.1 to 4. The situation which thus emerges is that, on the one hand, there was no breach till the refusal evidenced by the said Letter of Termination (Exhibit-P11) and, on the other hand, the plaintiffs have not sought the declaration that the said

termination is unlawful and void. Even otherwise, the institution of the suit has been held to be beyond the statutory period of limitation. Resultantly, on both the counts, the Plaintiff is not entitled to seek any damages including the relief of refund of the earnest amount.

145. The conspectus of aforesaid consideration is that the issue No. 1 and 4 are required to be answered in the negative.

146. For the foregoing reasons and findings on aforesaid issues, the Suit deserves to be dismissed. Hence, the following order.

**ORDER**

- 1] The Suit stands dismissed.
- 2] In the facts and circumstances of the case, there shall be no order as to costs.
- 3] Decree be drawn accordingly.

**(N. J. JAMADAR, J.)**