(2011) 10 DEL CK 0045

Delhi High Court

Case No: Regular First Appeal (OS) 11 of 1984

Anis Ahmed Rushdie Thru LRs	APPELLANT
Vs	
Bhizku Ram Jain and Others	RESPONDENT

Date of Decision: Oct. 31, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 16, 20
- Constitution of India, 1950 - Article 54
- Evidence Act, 1872 - Section 114
- General Clauses Act, 1897 - Section 27
- Limitation Act, 1963 - Section 15, 15(5), 9

Hon'ble Judges: Suresh Kait, J; Pradeep Nandrajog, J

Bench: Division Bench

Advocate: A.M. Singhvi, Mr. Arun Maitri, Mr. Ashish Rana and Mr. Nidhiram Sharma, for the Appellant; Sandeep Sethi, Mr. Rakesh Saini, Advocate for R-1(D), 1(F), 2 and 3, Mr. Pradeep Dewan, Mr. Rajiv Samaiyar and Mr. Anupam Dhingra, for the Respondent

Judgement

Pradeep Nandrajog, J.
The parties went to trial on the following eight issues:

1. Whether the suit is within time?

2. Whether the suit is bad for mis-joinder of plaintiff Nos.2 and 3?

3. Whether the written statement has been signed and verified by a duly authorized person? If not to what effect?

4. Whether plaintiff No.1 has always been ready and willing to perform his part of the agreement dated 22nd December, 1970?

5. Whether the defendant has committed the breach of the agreement dated 22nd December, 1970?

6. Whether the plaintiff No.1 has committed breach of any of the terms of the agreement dated 22nd December, 1970? If so, to what effect?

7. Whether the plaintiffs are entitled to specific performance of the agreement dated 22nd December, 1970?

8. If issue No.7 is not proved, whether plaintiff No.1 is entitled to refund of earnest money and interest thereon?

2. Whereas issue No.3 was given up by the parties at the final hearing of the suit, learned counsel for the appellant stated during arguments in the appeal that issue No.2, decided in favour of the plaintiffs/respondents, is also given up.

3. Thus, issues Nos.1, 4, 5, 6, 7 and 8 survive for consideration in the present appeal, but not as framed by the learned Single Judge. For purposes of the appeal the issues which were crystallized by learned counsel for the parties are as under:

(i) Whether the respondents were entitled to the benefit of Sub-Section 5 of Section 15 of the Limitation Act 1963 while computing limitation.

(ii) Whether clause 7 of the Agreement to Sell entered into between the parties obliged the plaintiff No.1 to give money from out of balance sale consideration to the defendant to enable the defendant to furnish a bank guarantee to the income tax authorities to secure payment of income tax dues of the defendant (if any found due in the future) or obliged plaintiff No.1 to give further sum only to the Income Tax Authorities; and if the answer to the question is in the affirmative: Whether the plaintiff No.1 was in breach of said obligation; and if so to what effect.

(iii) Whether the plaintiffs would be entitled to a decree for specific performance or should be adequately compensated.

4. Deceased appellant, was the defendant and the respondents Nos.1, 2 and 3 were plaintiffs Nos.1, 2 and 3 respectively. We shall be referring to the parties by their nomenclature as per the plaint.

5. The plaintiffs filed a suit on 03.11.1977 seeking specific performance of an agreement to sell dated 22.12.1970, pleading therein that the defendant was the owner of land and building bearing Bungalow No.4, Flag Staff Road, Civil Lines, Delhi (hereinafter referred to as the ''Suit Property''). It was pleaded that the defendant had inducted the plaintiff No.1, as a tenant in half portion of the suit property, at a rent of Rs. 300/-per month on 20.12.1970 and delivered possession of said portion to the plaintiff No.1. On 22.12.1970 an Agreement to Sell was executed between the plaintiff No.1 and the defendant, whereunder the defendant agreed to sell the suit property to the plaintiff No.1 for a sale consideration of Rs. 3,75,000/-(Rupees Three Lakhs Fifty Thousand Only), out of which Rs. 50,000/-(Rupees Fifty Thousand only) was paid to the defendant by the plaintiff No.1 towards part sale consideration when the agreement was executed. That vide clauses 4, 5 and 7 of the Agreement to

Sell, the defendant was under an obligation to obtain a permission/certificate from the income tax authorities to sell the suit property and deliver the same to the plaintiff No.1 within 12 months from the date of the execution of the Agreement to Sell and that the plaintiff No.1 was to pay the balance sale consideration to the defendant within 3 months of the delivery of the income tax clearance certificate to him and on the asking of the defendant, the plaintiff No.1 was obliged to pay a sum not exceeding the amount of balance sale consideration to the income tax authorities to clear income tax dues of the defendant to facilitate sale permission being granted by the income tax authorities. It was pleaded that since plaintiff No.1 did not hear anything from the defendant regarding execution of the sale deed in respect of the property in question, the defendant wrote letter dated 27.12.1971 to the plaintiff enquiring the steps taken to obtain the necessary certificate from the income tax authorities but did not receive any response from the defendant. Instead he received a legal notice dated 06.11.1972 issued by Mr.Ibqal Kishan, Advocate on behalf of the defendant wherein it was falsely alleged that the defendant had written letter dated 09.09.1971 to the plaintiff No.1 calling upon him to pay Rs. 1,00,000/-(Rupees One Lakh Only) to enable the defendant to obtain the necessary certificate from the income tax authorities and that the plaintiff No.1 failed to provide the amount. The said notice called upon the plaintiff No.1 to pay the said sum of Rs. 1,00,000/-to the defendant failing which it was threatened that the Agreement to Sell dated 22.12.1970 shall stand terminated and the earnest money (part sale consideration) in sum of Rs. 50,000/-paid by the plaintiff No.1 shall be forfeited by the defendant. It was pleaded that in response to the notice dated 06.11.1972 the plaintiff No.1 wrote a letter dated 14.11.1972 to Mr.Iqbal Kishan Advocate, wherein plaintiff No.1 denied having received letter dated 09.09.1971 written by the defendant and stated that as per clause 7 of the Agreement to Sell dated 22.12.1970 the plaintiff No.1 was required to deposit a sum towards clearance of income tax dues of the defendant with the income tax authorities and not to pay said sum to the defendant as desired by the defendant. The plaintiff No.1 further pleaded that he was always ready and willing to deposit a sum towards clearance of income tax dues of the defendant with the income tax authorities. It was pleaded that when the plaintiff No.1 did not receive any response to his letter dated 14.11.1972 he wrote another letter dated 15.12.1972 to Mr.Iqbal Kishan Advocate, reiterating the contents of his letter dated 14.11.1972. Thereafter there was no correspondence between the parties till about 5 years. Since the defendant was residing in London the plaintiff could not take any action against him for execution of the sale deed in respect of the suit property. On 16.09.1977 he received a notice from Mr.M.Wadhwani Advocate, on behalf of the defendant wherein the defendant sought to terminate the tenancy of plaintiff No.1 qua the suit property. Since the defendant had breached the Agreement to Sell dated 22.12.1970 by not executing the sale deed in respect of the suit property within the prescribed period, the plaintiff No.1 who was always ready and willing to perform his part of the Agreement to Sell dated 22.12.1970 and his nominees i.e. plaintiffs Nos.2 and 3 were

entitled to a decree for specific performance of the Agreement to Sell dated 22.12.1970. In the alternative, a sum of Rs. 1,30,120.50 calculated in the following manner was claimed from the defendant:-

1.	Earnest money	- Rs. 50,000/-
2.	Interest @ 12 % p.a. thereon from 20.12.70 to 3.11.77	- Rs. 41,214.30
3.	Damages	- Rs. 25,000/-
4.	Interest @ 12 % p.a. thereon from 14.3.73 to 3.11.77	- Rs. 13,906.20
Total		- Rs. 1,30,120.50

6. In the written statement filed, the defendant admitted the tenancy created on 20.12.1970 as also the Agreement to Sell dated 22.12.1970. By way of preliminary objection it was pleaded that the suit was barred by limitation being filed beyond 3 years of the date when cause of action accrued. It was pleaded that the plaintiffs are not entitled to a decree for specific performance since plaintiff No.1 did not perform his obligations under the Agreement to Sell. It was pleaded that on 09.09.1971 the defendant wrote a letter to the plaintiff No.1 intimating him that the income tax officer had agreed to issue to him the necessary certificate but on his i.e. the defendant furnishing a bank guarantee in sum of Rs. 1,00,000/-in the favour of the Commissioner of income tax and thus the plaintiff No.1 should have paid a sum of Rs. 1,00,000/-to the defendant or credit the said amount with the defendant''s Banker, an obligation of plaintiff No.1 under clause 7 of the Agreement to Sell, so as to enable the defendant to furnish the bank guarantee but the plaintiff No.1 failed to do so. It was pleaded that due to the bank guarantee not being furnished, the defendant was unable to obtain the necessary certificate from the income tax authorities. With respect to the pleadings in the plaint qua exchange of correspondence, the defendant admitted receipt of all letters save and except the letter dated 27.12.1971. As noted above, the defendant asserted having written letter dated 9.9.1971 to plaintiff No.1.

7. The plaintiffs reiterated the case pleaded by them in the plaint and denied that defendant No.1 ever wrote or handed over letter dated 9.9.1971 to plaintiff No.1.

8. Issues were settled between the parties as noted in para No.1 hereinabove.

9. Before trial commenced, the defendant sought to amend the written statement and was permitted to do so and the effect of the amendments is that the defendant was permitted to plead the defence of undue hardship to him if the suit was decreed. Qua the letter dated 9.9.1971 and the demand raised upon plaintiff No.1 by the defendant to provide Rs. 1,00,000/-so that a bank guarantee could be furnished

to the Commissioner Income Tax, additional pleadings came on record that said request was additionally conveyed verbally to plaintiff No.1 through the common broker, Sh.Lajjya Ram Kapoor through whom the Agreement to Sell was executed between the parties.

10. Since, as noted hereinabove in para 3, the appeal was argued not with respect to all issues which were debated before the learned Single Judge, we propose to note only such evidence as would be relevant for a discussion on the points urged in the appeal and thus would recapitulate for the benefit of the reader of the present judgment that with respect to the factual matrix debated such evidence as is relevant on the willingness of plaintiff No.1 to discharge his obligations under the Agreement to Sell dated 22.12.1970 are relevant inasmuch as, from the rival pleadings of the parties it would be apparent that the dispute would be whether clause 7 of the Agreement to Sell obliged plaintiff No.1 to give Rs. 1,00,000/-to the defendant to enable the defendant to furnish a bank guarantee to the income tax authorities so that he could obtain permission from the income tax authorities to sell the subject property and further, whether the defendant ever requested plaintiff No.1 to give him Rs. 1,00,000/-so that he could furnish a bank guarantee to the income tax authorities and this issue had a lot to do with the dispute pertaining to the letter dated 09.09.1971 which defendant claimed to have written and personally handed over to plaintiff No.1 and denial of said fact by plaintiff No.1. Thus, we ignore the testimony of PW-1 and PW-4 as it has no relevance on the issues debated before us during hearing of the appeal.

11. We may note that the plaintiffs examined only 4 witnesses but surprising enough, nobody was assigned the number PW-2 and thus we have PW-1, PW-3, PW-4 and PW5. Since the debate before us does not require noting testimony of PW-1 and PW-4, we would note the testimony of PW-3 and PW-5 as the same is relevant, besides noting the relevant documentary evidence.

12. Lajjya Ram Kapur PW-3, deposed that he is a property broker and that the Agreement to Sell dated 22.12.1970 was executed between the plaintiff No.1 and the defendant through his firm. On several occasions the plaintiff No.1 requested him to get the sale deed executed. When the defendant came to Delhi from London on 3-4 occasions he requested him to execute the sale deed but could not remember whether the defendant even applied to the income tax department for a no objection certificate to be issued. He stated that on an occasion the defendant told him that some money is required to be deposited with the income tax authorities but said that he did not remember what happened thereafter. This he deposed by way of examination-in-chief. Certain portions of his testimony during cross-examination are relevant and thus we note the same. He stated as follows:

....This is correct that I wrote several letters to the defendant at London. This is correct that I wrote to him to come to India in connection with this transaction in question and he did come to India. I do not remember if defendant told me that he

had been called upon by the income tax authorities to either deposit money or bank guarantee before he could be given income tax clearance.

Ques. Is it correct that the defendant asked you to catch hold of some money from Shri Bhiku Ram Jain for depositing the same with Income Tax authorities so that income tax clearance certificate might be issued?

Ans. This is correct. I conveyed the matter to Shri Bhiku Ram Jain who told me that he was ready to deposit the amount with the income tax authorities whatever was needed. I duly conveyed that reply and readiness of Sh. Bhiku Ram Jain.

Ques. Is it correct that Mr.Rushdie defendant told you that he wanted to give bank guarantee rather than depositing the amount with income tax department because he had no taxable income in India?

Ans. Yes.

Ques. Is it correct that Shri Bhiku Ram Jain, plaintiff refused to give money for enabling defendant to give bank guarantee?

Ans. I do not remember.

....

Ques. Do you remember that in September, 1971 defendant came to India?

Ans. As far as I think he did come.

Ques. Is it correct that he so came in response to your writing letter that he should come to India to finalize the transaction?

Ans. Yes.

Ques. Is it correct that at that time he told you that he had to give bank guarantee for getting income tax clearance?

Ans. I do not remember.

Ques. Is it correct that on account of said talk of the defendant you told Shri Bhiku Ram Jain, plaintiff for depositing a sum of Rs. 100000/-in a bank to enable the defendant to give bank guarantee?

Ans. Shri Bhiku Ram Jain was ready to deposit Rs. 100000/-with the income tax authorities because in that way defendant could not withdraw that amount but he was not willing to deposit the said amount in the name of the defendant in a bank because in that way defendant could have withdrawn the amount.

Ques. Is it correct that you persuaded Shri Bhiku Ram Jain to arrange for bank guarantee for the defendant for filing in the Income Tax department bu the said plaintiff flatly refused and said that he would not arrange?

Ans. In fact the plaintiff Shri Bhiku Ram Jain refused to arrange bank guarantee in the name of defendant so that he may not withdraw the several meetings between Shri Bhiku Ram Jain and the defendant in your office?

Ans. Yes.

Ques. Is it correct that defendant told Shri Bhiku Ram Jain that the former could not arrange any money in India except what he had to receive on account of agreement to sell?

Ans. I do not remember.

(Emphasis Supplied)

13. Bhiku Ram Jain PW-5, after perusing the passport of the defendant stated that between the period from September, 1970 to May 1981 the defendant was in India from 24.09.1970 to 15.10.1970, 17.12.1970 to 28.12.1970, 16.08.1971 to 11.09.1971, 29.10.1972 to 10.11.1972, 02.09.1977 to 01.10.1977, 10.10.1978 to 21.10.1978, 12.04.1979 to 23.04.1979 and 10.05.1981 to 20.05.1981. He deposed to the various letters he had sent to the defendant including the letter dated 27.12.1971 and proved the postal receipt under which the letter was sent to the defendant at his address in London and he categorically denied that the defendant ever handed over letter dated 09.09.1971 to him. Certain portions of his testimony during cross examination are relevant and we note the same. They read as under:

...It is wrong to suggest that defendant asked me to obtain bank guarantee in respect of the amount payable to the income tax department in favour of the Commissioner, Income Tax. It was only once through notice sent by Shri Iqbal Krishan, Advocate that such a demand was made. I did not consult any advocate or Chartered Accountant as to what that bank guarantee demanded by Shri Iqbal Krishan, Advocate meant because I did not think it to be necessary and the agreement to sell did not provide for the same.

Q. Is it correct that you told Shri Lajjya Ram Kapur that he should tell the defendant to come to India and execute the sale deed?

Ans. I did tell Shri Lajjay Ram Kapur but not exactly in the language mentioned in the question. I told him to get the execution of the sale deed expedited.

Q. Is it correct that whenever the defendant came to India, you met him several times in the office of Shri Lajjay Ram Kapur as well as your own residence?

Ans. The question of the defendant''s coming to India several times does not arise. He first came when the agreement to sell was executed. Then he came in 1972 when he sent a registered letter sent through Iqbal Krishan, Advocate and then he came to India in 1977 when I filed the present suit. Therefore, there was no question of his meeting me several times. Actually he never met me at the place of Shri Lajjay Ram Kapur or my residence.

Shri Lajjay Ram Kapur never told me for a bank guarantee.....I have been shown the copy of the letter dated 9th September, 1971. I never received the original of the same, from the defendant. (At the request of the learned counsel for the defendant, the copy of the letter dated 9th September, 1971 has been marked for identification only as Mark IV).

Q. It is suggested to you that defendant and Shri Lajjay Ram Kapur once came together and then defendant handed over original of the letter marked as IV to you personally? Is it correct?

Ans. This is wrong.

Q. It is further suggested to you that the letter aforesaid was delivered to you and at that time you told the defendant that you could not get sale deed executed because you did not have the funds to pay the price?

Ans. This is totally wrong.

....

Q. Kindly go through the Ex. P-6 which is a letter written by Shri Iqbal Krishan, Advocate to you. It is pointed out to you that Shri Iqbal Krishan referred to a letter dated 9th September, 1971 of defendant having been written to you. Did you at any time deny by way of writing to Shri Iqbal Krishan, Advocate that you never received such a letter dated 9th September, 1971 from the defendant?

Ans. The reply mentioned in the question was sent under my instructions by Rameshwar Dayal & Co.

.....I cannot tell exactly as to when I met the defendant for the first time in m life because the same happened a number of years ago. If my memory can help me, it was once before the execution of the agreement to sell Ex.P-5. But I am not very sure. I also met him on the date of the execution of the agreement Ex.P-5. I think I had no chance to meet him after the execution of the agreement Ex.P-5 at all....

(Emphasis Supplied)

14. The defendant examined himself as his sole witness and reiterated having met plaintiff No.1 in September 1971 and having handed over letter dated 09.09.1971 as also demanding Rs. 1,00,000/-from plaintiff No.1 so that he could obtain necessary sale permission from the income tax authorities after furnishing a bank guarantee in favour of the Commissioner Income Tax. He denied having received the letter dated 27.12.1971 from the plaintiff No.1. Certain RFA (OS) 11/1984 Page 14of 51 portions of his testimony are relevant to be noted and we note the same as under:

...I did take steps for obtaining wealth tax certificate as mentioned therein. What I understand from the wealth tax certificate that the same is issued by the I.T.O. to the effect that the person concerned named in the certificate has made satisfactory

provision for the payment of his tax dues and that he is allowed to get the documents regarding his property registered. The first step I took was that I went to see the I.T.O. concerned. The I.T.O. told me that certain ex-parte assessments were made during my absence from India. When I stated to him that according to me there was no tax dues either in respect of income or wealth because I had migrated in 1962 and I had no income or taxable wealth in India. The I.T.O. said that in that event these assessments will have to be reviewed, revised or set aside and that will involve considerable time. I explained to him that I had entered into an agreement to sell and I had to complete it by a certain date. The I.T.O. then said that in that event I should furnish a bank guarantee which should be enough protection to recover any dues that may be found payable by me ultimately. I had taken the usual application forms and duly filled in for obtaining the certificate which he kept with him and asked me to come back with the bank guarantee. He stated that within two or three days of the furnishing of the bank guarantee, the certificate would be issued. I will have to refer to my passport or my notes for the purpose of replying the date on which I so visited the I.T.O.....That happened during my visit to India from 16th August 1971 to 11th September 1971. I came from London to India. My object was to complete the sale, after getting the price and be free from the property. Shri Lajjay Ram Kapur, the broker was in correspondence with me. He asked me to come to India and it was for the purposes of completing the sale that I came....When I came to India during the period from 16th August, 1971 to 11th September, 1971, I met Shri Bhiku Ram Jain, plaintiff No.1 as well as Shri Lajjay Ram Kapur, the broker. I met them two or three times. I asked Bhiku Ram Jain to give me about one lac or so for facilitating the grant of wealth tax certificate to me so that transaction of sale could be completed. I explained to him that I had seen the I.T.O. and that I.T.O. himself had suggested that the final demand will take some time for determination and the best way for me was to furnish a bank guarantee in favor of the commissioner of income tax which would give up enough provision for payment of such dues as may be finally determined and the clearance certificate would be issued within a few days. The I.T.O. has also told me that if I will make each deposit, he refund would be a very tedious and long process. I explained all that to Bhiku Ram Jain. I asked him money for the aforesaid purpose only. Of course the aforesaid money was to eventually debited to me in the matter of payment of price. I did not want payment of money to me but I wanted that the money should be deposited in any bank he liked in my name so that I could get bank guarantee in my account in favor of the Commissioner of Income Tax. That guarantee could be discharged only by aforesaid Commissioner and I could not draw any amount from the Bank. He did not acede to my request and on the contrary he pleaded with me his inability to find money at that time.....When after couple of meetings, I did not get any satisfactory answer, I wrote a letter to him (Shri Bhiku Ram Jain). I believe that letter was written on 9th September, 1971, copy of which is Mark IV. The copy bears my initial. (Now the letter has been exhibited as Exhibit DW1/1). The letter aforesaid was typed at the office of Shri Lajjay Ram Kapur and Exhibit DW1/1 is the carbon copy. 3 or 4 copies

of the letter aforesaid were made. I delivered one copy to Shri Lajjay Ram Kapur and give him an extra copy with which he and I same evening went to Shri Lajjay Ram''s house, from where we went to next door to the house of plaintiff no.1. We met him in the office of plaintiff no.1 and delivered the letter to the said plaintiff. This time plaintiff no.1 was very brusque and rather curt about this matter. He said, "I have already explained to you my difficulties. If you want to go on, do whatever you like. I can not at the moment accept your request as contained in the letter." In fact he appeared to be completely dis-interested in the completion of the sale....Within two days of delivering the letter on 9.9.1971, I left for London.....After that, on my own, I wrote a letter to Shri Lajja Ram Kapur and asked him whether I should come again to India to complete the sale and whether he has been able to persuade the buyer to do the needful as requested in my letter dated 9.9.1971.....On 30.10.1972 he informed on the telephone that the meeting had been arranged for 31.10.1972 at the office of Shri Bhiku Ram Jain which is a part of his residence. As was usual, I went to Shri Lajja Ram Kapur first and then he and I together went to the office of Shri Bhiku Ram Jain plaintiff at his residence aforesaid-A talk took place about the completion of the sale and the arrangement of bank guarantee on which depended the completion of the sale. At first plaintiff No.1 was evasive and dodging, but when I insisted on a clear cut answer, Shri Bhiku Ram Jain told me that he was unable to complete the transaction and told that he was unable to pay the money for furnishing the bank guarantee....

15. Certain answers given by the defendant during cross examination are relevant and we note the same as under:

...I did make a written application in the duly prescribed form to the income tax authorities for the issuance of tax-clearance certificate.....I did keep a copy of that application but I do not have the same with me. That copy is with my income tax advisor who is residing at Delhi. I might be able to get it, if required. I cannot produce any acknowledgment slip because the aforesaid application was given by me to the income tax Officer at his desk. That application was not given at the counter where the acknowledgment slip is issued.

.....

Que. It is suggested to you that you never met Bhiku Ram Jain on 9th September, 1971 and never delivered the letter, copy of which is Ex.DW1/1. What have you to say?

Ans. This is wrong. I definitely met Bhiku Ram Jain and also delivered the letter dated 9th September, 1971. I reaffirmed my statement in this respect earlier. This is also wrong to suggest that I never met him on 31st October, 72. This is also wrong to suggest that Bhiku Ram Jain did not tell me in September 1971 that there was a raid on him and that he was unable to pay the money for enabling me to arrange bank guarantee. He definitely told me in September 1971 that a raid had taken place

and that he was unable to provide the money for enabling me to arrange bank guarantee and therefore, it is wrong to suggest that he never told me in this respect.

16. Since the defendant did not prove by filing any document that he applied to obtain clearance from the income tax authorities nor did he prove any communication sent to him by the income tax authorities, after closing defence evidence he sought permission to produce letters statedly written by him to the income tax officer, but vide order dated 28.9.1981 the said documents were not taken on record and the defendant was not permitted to lead any further evidence. The order in question was never challenged and attained finality.

17. Vide impugned judgment and decree dated 05.10.1983 the learned Single Judge decreed the suit and directed specific performance of the Agreement to Sell dated 22.12.1970. It has been held by the learned Single Judge that if for any reason the plaintiffs fail to get the relief for specific performance, they shall be entitled to a sum of Rs. 1,30,120.50 claimed by them in the suit from the defendant together with the interest @12% per annum for the period from 04.11.1977 till the payment was made.

18. Briefly noted, the reasoning of the learned Single Judge is that:-(i) the evidence adduced by the plaintiffs shows that the plaintiff No.1 was in a position to pay balance sale consideration to the defendant at all material points of time; (ii) the evidence adduced by the plaintiffs, particularly the letter dated 27.12.1991 written by the plaintiff No.1 to the defendant, establishes that the plaintiff No.1 was always ready and willing to perform his obligation under Agreement to Sell dated 22.12.1970; (iii) in view of the fact that the letter dated 27.12.1991 was sent by the plaintiff No.1 by Regd. Post at the correct address of the defendant the stand of the defendant, of not having received the same is not acceptable as it is in teeth of the provisions of Section 27 of the General Clauses Act and illustration (f) to Section 114 of the Evidence Act which provide that a letter which is properly addressed and sent by the registered post, a presumption arises that the letter has reached the addressee in the ordinary course of post; (iv) the oral statement of the defendant that he had applied to the income tax authorities for sale permission did not inspire confidence for reasons; namely:-(a) no particulars of the stated application filed before the income tax officer has been furnished by the defendant in the written statement; (b) the defendant did not produce any receipt pertaining to the said application being filed with the income tax officer; and (c) it was contrary to Government working that the income tax officer would pass oral orders (as claimed by the defendant) requiring the defendant to furnish bank guarantee for permission to be granted; (v) no material has been brought on record by the defendant to show that he ever required the plaintiff No.1 to pay Rs. 1,00,000/-to him or deposit the same with his Banker to enable him to obtain a bank guarantee; (vi) stand of the defendant that he personally delivered the letter dated 09.09.1971 to the plaintiff

No.1 cannot be believed as the said letter appears to be a manipulated letter for it could not be appreciated that the defendant himself delivered the said letter to the plaintiff No.1 instead of sending the same by post; (vii) even if it is assumed that the defendant was asked by the income tax officer to furnish bank guarantee for permission to be granted, the plaintiff No.1 cannot be faulted for not paying Rs. 1,00,000/-to the defendant or deposit the same in the account of the defendant to enable the defendant to obtain a bank guarantee, inasmuch as clause 7 of the Agreement to Sell obliged plaintiff No.1 to directly pay money to the income tax authorities if any income tax due was determined qua the defendant; (viii) it is the defendant who has breached the Agreement to Sell dated 22.12.1970 by not taking any steps for obtaining the necessary Certificate from the income tax authorities; (ix) delay in filing the present suit is of no consequence because firstly, the delay was caused due to absence of the defendant from India and secondly, it has been settled by the Courts in India unlike the legal position in England the delay in filing a suit for specific performance is no ground to refuse the relief for specific performance if the suit was filed within the prescribed period of limitation; and (x) in computing limitation, the plaintiffs are entitled to the benefit of Section 15(5) of the Limitation Act 1963.

19. Issues Nos.4, 5 and 6 were the ones which were hotly contested before the learned Single Judge and in the appeal the debate centered around the said issues. A perusal of the issues would show that the factual matrix to be considered for deciding the three issues was the same.

20. That the parties had entered into an agreement to sell on 22.12.1970 was not in dispute. We need to note the relevant terms of the Agreement to Sell dated 22.12.1970. Clause 4, 5, 7 and 9 thereof are relevant. They read as under:

4. That the Vendor shall obtain at his own cost a Wealth Tax clearance Certificate as required under the Wealth Tax Act, 1957 and other relevant papers for the purpose of transfer of the above property as soon as possible & will intimate to the Purchaser by Registered Post or his having obtained necessary certificate delivering a certified copy of the same to the Purchaser not later than 12 (twelve) months from this date.

5. That the Vendor agrees to execute the Sale Deed within a period of 15 (fifteen) months from this day and the Purchaser has agreed to pay to the Vendor the balance of the sale price at the time of registration of the Sale Deed after deducting the earnest money of Rs. 50,000/-within 3 months after receipt of the intimation as mentioned in para 4 above with copies of the Wealth Tax Certificate.

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7. That the Purchaser agrees to pay to the income tax authorities such money as may be desired by the Vendor (not exceeding the balance sale price of the property) against Tax dues from the Vendor to facilitate the Vendor to get the required Wealth

Tax certificate. Such money as paid to the income tax Authorities on the request of the Vendor will be paid in the Vendor''s account and will be deducted by the purchaser from the balance of the sale price at the time of the execution of the Sale Deed.

8. If the purchaser does not pay the balance sale price within 3 months as mentioned hereinabove, the Vendor shall be entitled either to get the sale completed by specific performance through a Court of law at the cost of the Purchaser or to forfeit Rs. 25,000/-out of the earnest money of Rs. 50,000/-and shall return Rs. 25,000/-(Rupees twenty five thousand only) the balance earnest money to the Purchaser..

X X X

9. If the Vendor does not execute the Sale Deed for any reason and makes a default the Purchaser will be entitled to get back from the Vendor a sum of Rs. 50,000/-paid by the Purchaser as earnest money together with a sum of Rs. 25,000/-as special damages in all Rs. 75,000/-or get the sale completed by a specific performance through a Court of law at the cost of the Vendor or if the Purchaser does not get the sale completed by a specific performance in that event the Vendor will have no right to ask for the vacant possession of the portion possessed by the Purchaser as tenant, but if the Vendor pays a sum of Rs. 50,000/-to the Purchaser for inconvenience and for the improvement made by the Purchaser then the Purchaser will vacate his portion and will hand it over to the Vendor, other than the payment about the portion in occupation with Shri Nanak Chand, as mentioned above.

21. That under the agreement to sell the defendant was to obtain the necessary certificate permitting sale by the income tax authorities was also not in dispute. That the parties had agreed for sale to be completed within 3 months of the income tax clearance certificate being obtained and that the income tax clearance certificate was to be obtained within 12 months of the agreement to sell was also not disputed by the parties. In other words, the defendant was to obtain the income tax clearance by 23.12.1971 and the sale deed had to be executed within 3 months thereafter. That clause 7 of the agreement enjoined upon the plaintiff No.1 to pay to the income tax authorities such money as may be desired by the vendor i.e. the defendant against tax dues was also not in dispute between the parties.

22. Thus, the breach of reciprocal obligations alleged by the parties against each other was rightly considered by deciding the three issues under a common caption.

23. From the pleadings and evidence of the parties it clearly emerges that the stand taken by the plaintiffs was that the defendant neither applied for an income tax clearance certificate nor ever informed the plaintiff No.1 that the income tax officer had desired a bank guarantee to be furnished in the name of the Commissioner Income Tax to secure a tax demand if any determined and alternatively that the only obligation of plaintiff No.1 was to pay, on behalf of the defendant and to his credit,

such sum as may be found payable to the income tax authorities, but within the limits of the balance sale consideration. The stand taken by the defendant was that he did so and for which he relied upon the letter dated 09.09.1971 and admissions made by Lajjya Ram Kapur PW-3. It was in this context that letter dated 9.9.1971 with reference to it being delivered to plaintiff No.1 assumes importance. The letter dated 27.12.1971 written by the plaintiff No.1 to the defendant, qua it being received by the defendant became relevant in the context of the defendant not having responded thereto.

24. Since plaintiff No.1 not only deposed, but made good his deposition with reference to the letter dated 27.12.1991 by proving postal receipt Ex.P-12, evidencing his having sent a registered letter dated 27.12.1971 to the defendant at the correct address of the defendant at London, the learned Single Judge has taken recourse to the provisions of Section 27 of the General Clauses Act and illustration (f) u/s 114 of the Evidence Act to draw a presumption that the defendant received the letter in question and therefrom held that the contents of the letter established the readiness and willingness of the plaintiff No.1 to perform his obligations under the Agreement to Sell.

25. Though not so expressly stated, the signature tune of the reasoning of the learned Single Judge rests upon an inference based on the conduct of the defendant to not respond to the said letter; the conduct being no assertion in response by the defendant that plaintiff No.1, by not paying him Rs. 1,00,000/-to enable him to obtain the necessary income tax clearance certificate, was in breach of the Agreement to Sell.

26. The learned Single Judge may be technically correct in drawing the inference drawn regarding proof of service of the letter dated 27.12.1971 in view of postal receipt Ex.P-12, since the letter was posted at the correct address of the defendant at London and that the stand of the defendant that the address at which the letter was posted was not his, was rightly negated, for the reason an earlier dated 06.01.1971, admitted to have been received by the defendant from Lajjya Ram Kapur, was posted at the same address. But the learned Single Judge lost sight of the fact that Indo-Pak war was fought in December 1971 and due to hostilities, flights from India to United Kingdom, which fly over territory of Pakistan were disrupted and there may have been a possibility of the letter in question not having reached the destination i.e. the letter not being delivered at the address to which it was posted.

27. The learned Single Judge has held that there is no evidence of the defendant having ever applied for an income tax clearance certificate and further that there is no evidence that the defendant ever asked the plaintiff No.1 to pay him further sum of Rs. 1,00,000/-from out of the balance sale consideration to facilitate the sale permission being granted and for which conclusion, as noted hereinabove, learned Single Judge disbelieved the defendant''s version of having written and delivered

letter dated 09.09.1971 to the plaintiff No.1.

28. We clarify once again that the signature tune of the judgment, with reference to the letter dated 27.12.1971, is the assertion of the plaintiff No.1 in the letter that he had not received any communication from the defendant and the same being in consonance with the plea of the plaintiff No.1 that he had not heard anything on the subject from the defendant. The relevant assertion in the letter dated 27.12.1971, is as under:

I am referring to the agreement made on 22.12.1970 between you and myself for the sale by you of your bunglow at civil lines, Delhi to me, subject to your obtaining a Wealth-Tax clearance certificate from the income tax authorities required for the registration of the sale deed. You were to obtain this certificate not later than 21.12.1971 within 12 months from the date of the above agreement and with three months for your obtaining the certificate and intimates to me, I was to get the sale completed by paying you the balance money, before the sub-Registrar Delhi. You had desired me to pay to the income Tax authorities such money as may be due from you against taxes which they were likely to claim before issuing certificate and you were to inform me about the same after a demand has been created by the income tax authorities, no intimation about which has been received by me so far nor do I know about the progress in your efforts to obtain the certificate.

I am anxious to have to sale deed completed and am ready for the same. I am writing you this letter, therefore, to please let know what is the position in this regard and whether you have applied for or obtained the certificate so that after receipt of your letter, such action as may be necessary is taken by me. I am sorry to write that I have not received any communication from you during the entire period of 12 months in regard to the said agreement and I hope that I shall now be with your reply per return.

(Emphasis Supplied)

29. The controversial letter dated 09.09.1971 claimed to have been written and delivered by the defendant to the plaintiff No.1, reads as under:

I was requested to come to Delhi by your Agent Shri Lajya Ram Kapur of M/s Devi Ditta Mal Lajya Ram Kapur, New Delhi to complete the sale of the property agreed to be sold to you namely No.4, Flag staff Road, Civil Lines, Delhi.

As agreed between us, you were to pay on demand all dues of income tax for payment to the income tax officer in order to obtain the necessary clearance certificate. I inform you that it will be necessary for me to deposit in the Bank a sum of Rs. 1,00,000/-in order to secure a Bank Guarantee in favour of the Commissioner of income tax as the I.T.O. had agreed to issue the clearance Certificate upon production of this Bank guarantee.

I request you to make this sum of money available for the purpose of obtaining the Bank guarantee. Please note that as agreed the sale can be completed only upon the production of the clearance certificate which you wanted to be ready before the end of December, 1971. Please take notice that the amount of Rs. 1,00,000/-(Rupees One Lac only) is to be paid to me or to my Bank against my receipt by you immediately for me to deposit the same in a Bank to with instructions to the Bank guarantee in favor of Commissioner of income tax. This will be in part payment of sale proceeds.

(Emphasis Supplied)

30. Parties were not at variance that through his lawyer Mr.Iqbal Krishna, the defendant had caused to be served upon the plaintiff No.1 a legal notice dated 06.11.1972, which was replied to by the plaintiff No.1 vide his letter dated 14.11.1972. In the notice dated 06.11.1972, it is, inter alia written as under:

2. That in accordance with para No.7 of the said agreement you were to provide my client or to pay to the income tax authorities on his behalf such amount as may be required by for payment of tax dues from securing a clearance certificate to enable him to execute the Sale Deed. He was required to deposit a sum of Rupees One Lac on account subject to adjustment later before the certificate could be granted and he came herein September 1971 for the purpose. By letter dated 9th September 1971 he asked you to pay the said amount to him or to deposit the same in his Bank account against his receipt so as to enable the Bank to give the necessary guarantee but you gave no reply and when personally contacted, you asked for more time. Thereafter he asked you several times through your agent Shri Lajya Ram Kapur to carry out your commitment but you neither paid the amount nor gave any reply.

3. My client being anxious to finalize the matter came here again all the way from London and contacted you personally on 31st Oct. 1972 when he found your attitude evasive. After a couple days he again rang you but with no better results.

....

31. Plaintiff No.1''s response dated 14.11.1972 to the legal notice dated 06.11.1972, is as under:

I am in receipt of your notice dated 6th November, 1972 given by you on behalf of Shri A.A. Rushdie S/o Mohd. Din in connection with the agreement dated 22nd December, 1970, between him and me about the sale of his Bungalow No.4 at Flagstaff Road, Civil Lines, Delhi.

.....

According to the agreement Mr.Rushdie was to obtain at his own cost a Wealth Tax Clearance Certificate and all other relevant papers for the purpose of the transfer of the above mentioned property and was to intimate to me by registered post of his

having obtained the necessary certificates, delivering a certified copy of the same to me within 12 months of the date of the agreement. He was then to execute the sale deed within three months thereafter, clearing all the outstandings, against the said property in regard to property taxes etc. After the agreement which was executed on the 22nd December, 1970 I received no intimation from your client to the effect that he has applied to the income tax authorities for the clearance certificate and to further enquire about the amount that would be required to be paid to the income tax authority in order to obtain the clearance certificate, necessary for the sale of the property.

Unfortunately, your notice does not throw any light on the subject and I fear again that your client is not giving a proper or full information to you as per the agreement. I am, in fact, to pay to the Income Tax authorities and not to your client any amount, to the extent of the balance of the sale price, to facilitate him to get the required certificate. I, therefore, need an assurance from the income tax department that the clearance certificate would be issued for the sale of the property concerned, if the amount was paid by me in account of your client. No such request was ever made by your client to me nor have I ever been informed about such demand raised by the income tax authorities. It looks that your client never applied for the certificate.

....

(Emphasis Supplied)

32. It assumes importance that in the legal notice dated 06.11.1972, the defendant has made a reference of having delivered letter dated 09.09.1971 to the plaintiff No.1, containing a request to be paid Rs. 1,00,000/-to enable him to furnish a bank guarantee to the income tax authorities. The learned Single Judge has not adverted to the contents of this legal notice dated 06.11.1972 and has therefore not discussed the relevance of said legal notice. We do so. The suit in question was filed in the year 1977 and surely the letter dated 09.09.1971 could not have been conceived of for the first time when defence by way of written statement was filed. There being a reference to the letter dated 09.09.1971 contemporaneous to the point of time when the parties were communicating on the subject 5 years prior to the suit being filed, leans against the letter being fabricated after the suit was filed.

33. The learned Single Judge is also in error in not correctly discussing the requisite inference which was possible to be drawn with reference to the admitted legal notice dated 06.11.1972 being sent by the defendant to plaintiff No.1 and his response thereto on 14.11.1972. We have noted hereinabove the relevant contents of the 2 documents and suffice would it be for us to highlight that the defendant''s positive assertion in his lawyer''s notice dated 06.11.1972 that he had demanded Rs. 1,00,000/-to be paid to him from out of the balance sale consideration to facilitate his obtaining income tax clearance certificate has not even been given a muted

response by the plaintiff No.1. Normal human conduct would be that if plaintiff No.1 had not received the letter dated 09.09.1971, to have immediately retorted, that it was a lie to assert in the legal notice dated 06.11.1972 that the defendant had given any letter dated 09.09.1971 to the plaintiff No.1 or had ever asked plaintiff No.1 to pay a sum of Rs. 1,00,000/-, as claimed by the defendant in the legal notice dated 06.11.1972.

34. From the response dated 14.11.1972, the contemporaneous conduct of the plaintiff No.1 emerges i.e. his conduct of not denying having received letter dated 09.09.1971. The bald response that he had not received any communication from the defendant cannot be read as a denial of having received the letter dated 09.09.1971, for the reason normal human response of a person who is being falsely accused of being told to do something and charged for not having done that something, would be to strongly deny the accusations leveled against him. If a person falsely alleges having delivered a letter, the response expected of a reasonable person, who claims not to have received the letter in question, is to deny the receipt thereof in unequivocal terms and perhaps call the other person a liar and a fabricator of documents. It assumes importance that the subject matter of the legal notice dated 06.11.1972 was a very hot subject i.e. the subject of the breach of a very important obligation under the Agreement to Sell. The response could not be cold, if indeed the accusation was hot.

35. Any doubt to resolve the controversy had to factor all relevant evidence on the issue. We have noted hereinabove the testimony of Lajjya Ram Kapur PW-3. The learned Single Judge has completely eschewed the same. Lajjya Ram Kapur, was the witness of the plaintiffs. He was the broker through whom the agreement in question was arrived at. As the witness of the plaintiffs, he admitted in no uncertain words that the defendant was in India in September 1971 and that the defendant had requested him i.e. Lajjya Ram Kapur to impress upon the plaintiff No.1 to pay to the defendant a sum of Rs. 1,00,000/-from out of the balance sale consideration, to enable the defendant to obtain the necessary income tax clearance certificate and that he conveyed the same to the plaintiff No.1 and that plaintiff No.1 told him i.e. Lajjya Ram Kapur that he was not willing to pay any further sum to the defendant, but was willing to make a payment directly to the income tax authorities.

36. Factoring in the discussion, the testimony of Lajjya Ram Kapur, we have enough reasons to sustain the finding of fact that there is sufficient evidence to establish defendant being in communication with the plaintiff No.1 on the subject of the defendant needing, from plaintiff No.1 Rs. 1,00,000/-, to enable the defendant to obtain the necessary income tax clearance certificate by obtaining and furnishing a bank guarantee in the name of the Commissioner Income Tax.

37. It may be true that the defendant could have led better evidence, in the form of filing and proving the sale permission sought by him from the income tax authorities, towards which a belated attempt was made after parties had led

evidence, but that would not mean that other relevant evidence on the subject cannot or should not have been looked into.

38. Parties are guided by legal advice on how should a fact in issue be proved and in the instant case it appears to be casual legal advice which has led to defendant not leading documentary evidence on the subject of obtaining sale permission from income tax authorities. But, we highlight once again that Lajjya Ram Kapur''s testimony and the response of the plaintiff No.1 vide letter dated 14.11.1972 to the defendant''s legal notice dated 06.11.1972, leads one, as a prudent person would be so led to believe the existence of the fact that the defendant demanded Rs. 1,00,000/-from the plaintiff No.1 as asserted by him. We highlight that under the Indian Evidence Act 1872, a fact is said to be proved, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable, that a prudent man under the circumstances of the particular case, to act upon the supposition that it exists.

39. The reasoning of the learned Single Judge that orders are passed by the government officials in writing and not verbally, to hold against the defendant that his stand of being verbally told by the income tax officer that pending finalization of calculation of tax dues, necessary sale permission could be given if bank guarantee in sum of Rs. 1,00,000/-was furnished in the name of the Commissioner Income Tax, is too technical a reasoning and in our opinion is a pedantic approach to an appreciation of a commercial dealing between parties. It does happen, that when an application is processed, at a meeting with the government official, in the process of discussion something is verbally communicated by the government servant to enable the individual concerned to overcome an issue which needs to be sorted out before a formal order is issued by the government servant. The sale permission had obviously to be in writing, under the signatures of the concerned income tax officer. Some tax dues were pending but up to date assessments had yet to be finalized. Under the circumstances the concerned income tax officer finding a via media and orally suggesting the same to the defendant, as a course of action to be adopted, was certainly within the realm of a possibility and certainly needed a discussion on the subject by the learned Single Judge. We fault the impugned judgment in not having explored the same. Venturing into this area, which needs to be ventured into, keeping in view the testimony of Lajjya Ram Kapur PW-3, who is the witness of the plaintiffs, there emerges good evidence that the concerned income tax officer did verbally tell the defendant that for a crystallized demand which may come into existence in the future, to secure payment thereof and at the same time a contemporaneous sale permission being granted, both situations could be harmonized by a bank guarantee being furnished. Such kind of verbal communications, to facilitate formal orders being issued is not an uncommon event in India where even official things are done in a most un-officious manner. The learned Single Judge led himself into error by equating the income tax officer telling the defendant that he could furnish a bank guarantee to obtain the necessary

income tax clearance certificate, as equivalent to an order, inasmuch as said communication was a step in aid to a formal order being passed, which would have been in writing. We highlight that a step in aid is different than a final step which leads to the destination and it is the final destination which has to be expressed, if it concerns the government, in a formal written order under the authority of the government servant concerned, for only then would the government be bound.

40. We thus conclude by deciding the said issue in favour of the defendant and against plaintiff No.1 by holding that the defendant did ask plaintiff No.1 to give him Rs. 1,00,000/-from out of the balance sale consideration to enable him to furnish a bank guarantee in the name of the Commissioner Income Tax so that the necessary sale permission could be obtained.

41. We now deal with the reasoning of the learned Single Judge that plaintiff No.1 was not obliged to pay any further money from out of the balance sale consideration to the defendant and upon the supposition by the learned Single Judge that if the defendant had so requested, plaintiff No.1 was not in breach of the agreement to sell. The reasoning of the learned Single Judge is that under clause 7 of the Agreement to Sell, the obligation of the plaintiff No.1 was to pay to the income tax authorities such money (not exceeding the balance sale price of the property) as may be desired by the defendant against tax dues, to facilitate the requisite certificate to be issued and not to pay any money to the defendant, much less money to enable the defendant to obtain a bank guarantee in favour of the Commissioner Income Tax.

42. We have noted hereinabove clause 7 of the Agreement to Sell in para 20 above. It is no doubt true that the language is that the purchaser agrees to pay to the income tax authorities, and literally read, would be in harmony with the view taken by the learned Single Judge.

43. But, the problem with the reasoning of the learned Single Judge is that it has read the clause as if a statute was being read. The clause in question finds place in a commercial document i.e. in an agreement to sell and thus needed to be interpreted, not literally, but with business efficacy. It is settled legal principle that when a court is required to construe a commercial document the effort must be to give business efficacy to the commercial understanding between the parties and not be pedantic. See J.R. Enterprises and Others Vs. State Trading Corporation of India Limited, . The underlying idea beneath clause 7 of the Agreement to Sell is the recognition of the fact that the defendant had no money in India and that if any due towards income tax was demanded by the income tax authorities, within the limits of the balance sale consideration, the plaintiff No.1 would make the necessary tender at the request of the defendant, to the defendant''s account, so that the sale permission as per certificate would be given. The business efficacy of the term had to be considered in the then prevailing economic policy of the government of India i.e. the stringent Foreign Exchange Remission Legislation i.e. FERA. The era of early

1970''s was an era where it was difficult to bring in and take out foreign exchange, to and fro, from India. Clause 7 recognizes, that notwithstanding the defendant having a valuable property in India, he had no liquid cash to clear a tax demand and thus the need for the plaintiff No.1 to clear the same, to the account of the defendant. The parties had set out a time limit within which the transaction had to be closed i.e. sale deed executed. They were aware that there was a possibility of a tax demand being raised. The process to determine whether tax was due or not, required time and was a process in which a third party i.e. the income tax officer had a say, and over whom neither party had a control. If, within the time frame set by the parties, in harmony with the ethos of clause 7, an alternative emerged, within the limits of the obligation of the plaintiff No.1, we see no reason why, on the principle of business efficacy the plaintiff No.1 would not be bound to discharge said obligation. The underlying object of the obligation upon plaintiff No.1, as per clause 7, is to facilitate income tax clearance certificate; the obligation is to pay money within the limit of the balance sale consideration to the account of the defendant with the income tax authorities, and thus within the underlying idea the slight deviation of defendant requiring the money to be credited in his account to enable his Banker to furnish a bank guarantee in favour of the Commissioner Income Tax was certainly within the confines of the obligation of the plaintiff No.1 under clause 7 of the Agreement to Sell.

44. We have already held hereinabove that there is sufficient evidence to establish that the defendant in person and additionally or at least alternatively, through Lajjya Ram Kapur had required the plaintiff No.1 to deposit money in the account of the defendant to enable his Banker to furnish a bank guarantee to the Commissioner Income Tax and thus we conclude by holding that by refusing to do so, the plaintiff No.1 was in breach of his obligation under clause 7 of the Agreement to Sell and the said breach of the obligation led to income tax sale permission not being granted and thus on issues No. 4 to 6 framed in the suit, the finding has to be that although the plaintiff No.1 had the requisite means i.e. was in a state of readiness to perform and discharge his obligations under the agreement, but was not willing to do so and thus it was plaintiff No.1 who was in breach of the agreement and not the defendant. We clarify that readiness and willingness are different concepts. One may have the money to purchase something and thus it could be said that one is ready for a purchase, but there may be lack of willingness to part with the money and complete the purchase.

45. The suit claiming decree for specific performance must fail on aforesaid reasoning qua said relief.

46. Notwithstanding our view as above, since before the learned Single Judge and even before us the issue of limitation was hotly contested, and as we would be prepared to lay a bet at a stake of 1:10,00,000 that whatever view we take the party which loses is bound to challenge our opinion before the Supreme Court; and our

reason to stake a bet on 1:10,00,000, is the heavy financial stake involved in the present litigation which would compel the parties to spend a couple of lakhs more on lawyers fee; at stake is land ad-measuring 5373 square yards in Civil Lines Delhi, we would be failing in our duty if our present decision lacks the muse on the subject of the suit being within limitation by granting benefit of sub-Section 5 of Section 15 of the Limitation Act to the plaintiffs.

47. The Agreement to Sell is admittedly dated 22.12.1970. Parties were not at variance that the sale has to be completed within 15 months i.e. within 12 months of the Agreement to Sell, the defendant to obtain the necessary sale permission and within 3 months thereafter the plaintiff No.1 to tender the balance sale consideration to the defendant, with defendant''s reciprocal obligation to execute the sale deed being discharged. The cause of action would thus accrue on 22nd March 1972. Period of limitation to seek enforcement of an agreement to sell being 3 years, limitation would expire on 21st March 1975. The suit was admittedly filed on 03.11.1977. The only aid which plaintiffs could take was u/s 15(5) of the Limitation Act which reads as under:

(5) In computing the period for limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of Central Government shall be excluded.

48. With reference to the decisions reported as Turner Morrison and Co. Ltd. Vs. Hungerford Investment Trust Ltd., ,Atul Kristo Bose v. Lyam and Co Ltd 14 Cal 457, AIR 1933 741 (Lahore) , Periya Akkandi Chetty Vs. Rethinagiri Chetty and Others, , P.C.K. Muthia Chettiar and Others Vs. V.E.S. Shanmugham Chettiar (dead) and Another, the learned Single Judge has held that since when cause of action accrued to the plaintiffs, the defendant was in a foreign country, the plaintiffs would be entitled to the benefit of sub-Section 5 of Section 15 of the Limitation Act 1963. The reasoning of the learned Single Judge would reveal that the parties litigated and probably argued on the expression ''absent from India'' which finds a mention in sub-Section 5 of Section 15. The plaintiffs had contended that irrespective of the nature of suit, the entire period during which defendant was absent from India had to be excluded while computing limitation and the defendant''s plea was that said Sub-section had no role in a suit for specific performance where decree could be enforced without defendant requiring to execute the sale deed in person and alternatively the said sub-Section had no play when the defendant was not in India when the suit was filed. It is relevant to note following portion of the impugned judgment:-

6. ISSUE NO.1

Whether the suit is within time.

Under Article 54 of the Limitation Act, 1968 the period for limitation for filing a suit for specific performance of contract is three years from the date fixed for the

performance, and if no such date is fixed, then the period of limitation commences from the date when the performance is refused. The agreement is dated 22nd December, 1970. The defendant was to execute the sale deed within a period of fifteen months after obtaining tax clearance certificate and other papers. The period of limitation would thus commence from 22nd March, 1972. The suit was filed on 3rd November, 1977. Part III of the Limitation Act provides for computation of period of limitation. Section 15 of the Act provides for exclusion of time while computing the period of limitation. Sub-section (5) of section 15 of the Limitation Act, 1963 is as under:

.....

7. The defendant was residing in London both before and after entering into the agreement. He had acquired British Nationality in 1963 and since then he has been a resident of United Kingdom. After referring to his entries in his passport the defendant as D.W.1 has deposed that he was in India from 24th September, 1970 to 15th October, 1970, 17th December, 1970 to 28th December, 1970, 16th August, 1971 to 11th September, 1971, 20th October, 1972 to 10th November, 1972 and 2nd September 1977 to 1st October, 1977. In other words, he was in London and absent from India during the periods from 20th December, 1971 to 15th August, 1971, from 12th September 1971 to 28th October, 1972, from 11th November 1972 to 1st September 1977 and from 2nd October, 1977 till the filing of the suit on 3rd November, 1977. The Learned Counsel for the plaintiff submits that the defendant was absent from India for a period of six years seven months and twenty eight days between the date of execution of the agreement and the date of institution of the suit and the period of his absence from India is to be excluded u/s 15(5) of the Limitation Act for computing the period of limitation. After excluding the period of his absence from India the suit has been filed within a period of four months and twelve days from the date of the agreement, although the plaintiff was entitled to institute the suit within a period of three years from the date of its performance. The learned counsel for the plaintiff therefore submits that the suit is within time.

....

9. In the instant case the defendant was present in India when the agreement was executed on 22nd December, 1970. He stayed in India for the periods detailed above, and he had not been residing in India on other dates....

I am, therefore, of the opinion that to exclude time u/s 15(5) of the Limitation Act, 1963 it is immaterial whether the defendant is an Indian or a foreigner; whether the suit is instituted in a court having jurisdiction u/s 16 or 20 of the CPC and also whether the suit relates to immovable property or for recovery of money. The section provides that the period during which the defendant has been absent from India is to be excluded in computing the period of limitation for instituting any type of suit and in any court. After excluding the period during which the defendant was

absent from India the present suit is held to be within time.

(Emphasis Supplied)

49. The origin of sub-Section 5 of Section 15 of the Limitation Act 1963 can be traced to the rule of private international law as discussed in Dicey''s Conflict of Laws, 5th Edition (Page 398) and Halsbury''s Laws of England 2nd Edition (Vol. VI Page 256) that Courts of any country would have jurisdiction to entertain actions in personam in respect of any cause of action or relating to contract wherever the cause might have arisen or wherever the contract was made, provided that at the commencement of the action the defendant was resident or present in that country and the provisions of the Statute of Limitation in force in the country where the action is instituted i.e. ''Lex Fori'' would apply to such actions and for which the period during which the defendant was not present in the country where action was initiated would be excluded while computing limitation. Those were the days when means of communication were poor and it was difficult to serve a party. We highlight that when aforesaid jurisprudence was developed, there was no internet, there was hardly any postal facility, transportation to foreign shores was by ships which would sail on the oceans and the seas with painfully slow speed. It was in that era that aforesaid jurisprudence relating to exclusion of time while computing limitation was conceived of.

50. We shall be reflecting more on the relevance, in today''s context where the globalized world has shrunk to a village in the era of telecommunication, to sub-Section 5 of Section 15 of the Limitation Act 1963, but we proceed with our discussion, whether in the instant case, the plaintiffs would be entitled to the benefit thereof.

51. Sub-Section 5 of Section 15 of the Limitation Act 1963 was examined in detail by the Madras High Court in the decision reported as Rajamani Vs. Meenakshisundaram, . The facts of the said case were that the appellant/defendant borrowed 2000 Singapore dollars from one R.S.Sundaram at Singapore, on 09.11.1975, promising to repay the same on demand to him with interest @ 18% per annum and executed a promissory note Ex.A-5 in said regards. On 03.07.1979, the promissory note Ex.A-5 was assigned in favour of the plaintiff, and on 11.07.1979 the plaintiff issued a notice to the defendant intimating to him the factum of the said assignment and demanding the payment of entire dues to him. When the defendant did not pay the amount the plaintiff filed a suit for recovery of money. All this while, the defendant was residing in Singapore and did not visit India even once and was not present in India when the suit was instituted. On behalf of the defendant it was contended that the suit is barred by limitation. Per contra, it was submitted on behalf of the plaintiff that since the defendant was absent from India, the period of absence in its entirety had to be excluded while computing limitation as per Sub-Section 5 of Section 15 of the Limitation Act 1963. Holding that the presence of the defendant in India on the date when the suit was filed is a sine qua non for the

application of Sub-Section 5 of Section 15 of the Limitation Act 1963, the suit was held to be barred by limitation and the reasoning is as under:

15. So, it has to decided whether the plaintiff can sustain the suit, though the defendant had not returned to India on the date of filing of the suit. In the present case, admittedly, the cause of action had arisen in foreign country when the defendant was in Singapore. Even according to the plaintiff, the defendant was in Singapore on the date of the filing of the suit. The plaintiff himself has given the Singapore address of the defendant in the plaint. The Full Bench of this Court in Muthukanni Mudaliar Vs. Andappa Pillai and Another, has found in this regard that "the Courts in a country have jurisdiction to entertain action in personam in respect of any cause of action or wherever the contract has been made provided that at the commencement of the action the defendant was resident or present in that country." Again in the conclusion, the same has been insisted by the Full Bench of this Court. Moreover, the words used in Section 15(5) of the Limitation Act themselves suggest that the defendant should be present in India on the date of filing of the suit. Otherwise, the question of computing the period of limitation taking into consideration of the defendant''s absence would not arise. If the defendant continues to be absent such a calculation is impossible for the purpose of limitation....
16. In view of the above, the respondent/plaintiff cannot take advantage of the provisions of Section 15(5) of the Limitation Act, 1963 for the purpose of computing the period of limitation, and to say that the suit is not barred by limitation.

(Emphasis Supplied)

52. In the instant case, the suit was admittedly filed on 03.11.1997, on which day the defendant was not present in India. (See the testimony of plaintiff No.1 Bhikhu Ram Jain noted in para 13 above). In view of the fact that the defendant was not present in India on the date when the suit was filed, it has to be held that the plaintiff was not entitled to the benefit of Sub-Section 5 of Section 15 of the Limitation Act 1963.

53. Before bringing down the curtain on the subject, we need to note that the learned Single Judge has ignored that after the cause of action accrued, which we have noted hereinabove, accrued on 22.3.1972, the defendant was in India on 29.10.1972 till 10.11.1972. The cause of action having accrued, limitation had to continuously run as per the mandate of Section 9 of the Limitation Act 1963, which provision reads as under:

9. Continuous running of time.-Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stop it :

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.

54. Though not relevant for the present decision, but may be for the benefit of the executive, we think that we should reflect upon the continued relevance of sub-Section 5 of Section 15 of the Limitation Act 1963. In today''s era of globalization and means of communication and serving parties, what is the relevance of the jurisprudence underlining sub-Section 5 of Section 15 of the Limitation Act 1963?

55. The Superior Court of Los Angeles County, in the decision reported as O'' Laskey v. Sortino (1990) 224 Cal. App. 3d 241, 273 Cal. Rptr. 674, while dealing with Section 351 of CPC of California, which Section is pari-materia with sub-Section 5 of Section 15 of the Limitation Act 1963 observed as under:

For the record, we also note that but for the anachronism of section 351 of the Code of Civil Procedure, O'' Laskey''s complaint would have been untimely as a matter of law. We agree with the concurring opinion of Justice King in Mounts v Uyeda (1990) 223 Cal. App. 3d 474 [272 Cal. Rptr. 876]: "I....write separately to suggest that the Legislature repeal CPC section 351. This section, adopted in 1872, may have made sense when there was no long-arm statute and no ability to serve an absent defendant by substituted service or by publication. It makes no sense today and should be repealed.

(Emphasis Supplied)

56. Likewise, in its report dated 02.11.1995, California Law Revision Commission also recommended the repeal of Section 351 of CPC of California. The relevant portion of the recommendation of California Law Revision Commission reads as under:

This recommendation proposes the repeal of CPC Section 351, which tolls statutes of limitations when the defendant is out of the state. Section 351 is based on outdated notions of personal jurisdiction and service of process, and it is unconstitutional as applied to cases involving interstate commerce. Repeal of Section 351 would further the policies underlying statutes of limitation, protect courts from having to adjudicate stale claims lacking any meaningful connection to the state, and eliminates inequities that may arise when tolling is applied to brief periods of absence.

57. We dwell no more on the subject. It is for the Legislature to take appropriate action in said regard.

58. To complete our decision on all the issues and upon the supposition that the suit was within limitation and that the plaintiffs were not in breach of the agreement to sell and that it was the defendant who was in breach of his obligation, merely because the suit was filed within limitation would not entitle the plaintiffs to a decree for specific performance as the remedy is discretionary. The agreement to sell was executed on 22.12.1970 and the suit was filed after 7 years thereof on 3.11.1977. The value of property had risen considerably and it would be iniquitous to decree specific performance. This is the view taken by the Supreme Court in the

judgment reported as K.S. Vidyanadam and Others Vs. Vairavan, wherein it was observed:

10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in Chand Rani v. Kamal Rani: (SCC p. 528, para 25)
"... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident): (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

(Emphasis Supplied)

59. Referring to the principle that mere rise in prices is no ground for denying the specific performance, the Supreme Court emphasized the need of being alive to the realities of life and inflationary tendencies judicially noticeable and observed:

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

60. The view aforesaid was reiterated by the Supreme Court in the decisions reported as M. Meenakshi and Others Vs. Metadin Agarwal (D) by LRs. and Others, and K. Narendra Vs. Riviera Apartments (P) Ltd., .

61. The net result of the above discussion is that the suit of the plaintiffs must fail. Not only would the plaintiff be not entitled to specific performance of the agreement to sell, but in the view taken by us of the suit being barred by limitation, would not be entitled to the alternative relief of refund of the earnest money paid with interest thereon. But since during arguments learned senior counsel appearing for the defendant/appellant made a concession that by way of good will and to keep pure the conscience of the legal heirs of the deceased appellant they would have no objection to refund Rs. 50,000/-to the plaintiffs with interest @ 12% per annum from 22.12.1970 when deceased appellant received said sum from the plaintiff No.1, we dispose of the appeal setting aside the impugned judgment and decree dated 5.10.1983 and dispose of the suit by passing a decree in sum of Rs. 50,000/-against the defendant and in favour of the plaintiffs together with interest @ 12% per annum from 22.12.1970 till payment is made and we leave the parties to bear their own costs all throughout.