K. Narendra vs Riviera Apartments (P) Ltd on 24 May, 1999

Equivalent citations: AIR 1999 SUPREME COURT 2309, 1999 AIR SCW 2378, 1999 (5) ADSC 256, 1999 (5) SCC 77, 1999 (5) KANT LD 690, 1999 (3) LRI 945, 1999 (4) SCALE 22, 2001 (1) ALL CJ 828, (1999) 4 JT 428 (SC), 1999 (4) JT 428, 1999 (2) UJ (SC) 1161, 1999 (7) SRJ 367, 2001 ALL CJ 1 828, (1999) 3 PUN LR 32, (1999) 3 LANDLR 653, (1999) 5 ANDHLD 14, (1999) 6 SUPREME 8, (1999) 3 RECCIVR 292, (1999) 3 ICC 623, (1999) 4 SCALE 22, (1999) 2 ANDHWR 144, (2000) 2 CIVLJ 290, (1999) 3 CURCC 97, (1999) 80 DLT 435

Author: R.C. Lahoti

Bench: Sujata V.Manohar, R.C.Lahoti

PETITIONER:
K. NARENDRA

Vs.

RESPONDENT:
RIVIERA APARTMENTS (P) LTD.

DATE OF JUDGMENT: 24/05/1999

BENCH:
Sujata V.Manohar, R.C.Lahoti

JUDGMENT:

R.C. LAHOTI, J This common judgment shall govern the disposal of Civil Appeals Nos. 1928 and 1929 of 1993 between the same parties and touching the same property.

The property in suit consists of a plot of Nazul Land known as 6, Tolstoy Marg, New Delhi wherein lease hold rights were vested by the President of India in favour of M/s. Shiv Ram, Mahashaya Krishna and K. Narendra (the appellant herein) in terms of a perpetual lease commencing from 29th May, 1956. The relevant and material terms of the lease are extracted and re-produced hereunder:-

> " II (5) The Lessee will not without the previous consent in writing of the Lessor or of such officer or body as the Lessor may authorise in this behalf make any alterations in or additions to the buildings erected on the said demised premises so as to effect any of the architectural or structural features thereof or erect or suffer to be erected

on any part of the said demised premises any buildings other than and except the buildings erected thereon at the date of these presents.

(6) The Lessee shall not without the written consent of the Lessor or such officer or body as he may authorise in this behalf construct any well of any description, or instal any private system of supplying water whether for irrigation or for drinking.

(7) The Lessee will not without such consent as aforesaid carry on or permit to be carried on the said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a single storey residential building for a private dwelling house for one or two families in all or do or suffer to be done thereon any act or thing whatsoever which in the opinion of the Lessor or such officer as he may authorise in this behalf may be an annoyance or disturbance to the President of India or his tenants in the New Capital of Delhi".

xxx xxx xxx (13) The Lessee shall before any assignment or transfer of the said premises hereby demised or any part thereof obtain from the Lessor or such Officer or body as the Lessor may authorise in this behalf approval in writing of the said assignment or transfer and all such assignees and transferees and the heirs of the Lessee shall be bound by all covenants and conditions herein contained and be answerable in all respects therefor.

xxx xxx xxx (IV) If there shall at any time have been in the option of the Lessor or such officer as may be authorised by him in this behalf whose decision shall be final, any breach by the Lessee or by any person claiming through or under him of any of the covenants or conditions contained in sub-clauses (5), (9) and (10) of Clause III and if the said Lessee shall neglect or fail to remedy any such breach to the satisfaction of the Lessor or such officer as may be authorised by him in this behalf within seven days from the receipt of a notice signed by the Lessor or such officer as may be authorised by him in this behalf requiring him to remedy such breach it shall be lawful for the officers and workmen acting under the authority and direction of the Lessor to enter upon the premises hereby demised, and (a) to remove or demolish any alterations in or additions to the buildings erected on the said premises, (b) to remove or demolish any buildings erected on the said premises without the previous consent in writing of the Lessor or duly authorised officer(c) to fill any excavation or carry out any repairs that may be necessary and all such moneys and expenses as may be laid out and incurred by the Lessor or by his order shall be paid by the said Lessee; and it is hereby expressly declared that the liberty herein before given is not to prejudice in any way the power given to the President of India by Clauses V and VI hereof."

xxx xxx xxx On 25th July, 1972 , the appellant entered into an agreement to sell, transfer and assign all his rights, title and interest in the said property along with all structures out houses plants etc. in favour of the respondents in consideration of a sum of Rs. 8,97,740/- for the purpose of constructing a multi-storeyed building by the respondents on the said property. In terms of the agreement a sum of Rs. 50,000/- was to be paid at the execution of the agreement vide demand draft dated 25th July, 1972 which was done. Another sum of Rs.2,75,000/-was to be paid by a post-dated cheque dated 25th January, 1973 which was to be encashed by the appellant after the

plans of multi-storeyed building as submitted by the respondents were passed and cleared for construction by N.D.M.C. and L.& D.O. or earlier by mutual agreement and the balance amount of Rs. 5,72,740/- was to be paid after the completion of the said multi-storeyed building. There are a few relevant clauses of the agreement, material for the purpose of these appeals which are extracted and re-produced hereunder:-

> " (3) That the purchaser shall get the permission for such a conveyance from the Land Development Officer and shall pay all the charges and expenses whatsoever, for execution and registration of the sale-deed, its stamping and the charges to the Land & Development Office on account of unearned increase payable by the Seller for getting the necessary permission as provided in the perpetual lease dated 11th September, 1961.
>
> (4) That the purchaser shall have the building planned in their absolute discretion and after having the plans duly sanctioned construct and sell flats in the said building as per their terms and conditions without any let or hindrances from the seller any sort whatsoever. xxx xxx xxx (6) That only after the payment of the consideration in full to the seller the purchasers shall be entitled to convey, sell or transfer the flats and the plot of land bearing No. 6, Tolstoy Marg, New Delhi.
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> (7) That the vacant physical possession of the premises is hereby given to the purchaser who will nowforth be in actual possession of the premises.
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> (8) That the purchaser shall be at liberty to store their construction materials, make storage, sheds, keep chowkidars and make room for them in the rear of the Bungalow No. 6, Tolstoy Marg, New Delhi at their own cost without any let or hindrance from the seller or anyone claiming through or under him provided as specifically agreed that in case the post dated cheque for Rs.

2,75,000/- stated above, is not honoured by the bankers, the possession shall immediately be returned to the seller.

(9) That the seller shall execute an irrevocable Power of Attorney in favour of the purchasers authorising them to do all the every act for constructing the said building on this land. xxx xxx xxx (13) That in the event the Government of India acquires or requisitions whole or part of the property or prohibits the transfer of the said property under any Urban Property Ceiling Law enforced the said property before the date of the sanction of the plans for the construction of the proposed multi-storeyed building, then in such event the, sellers shall refund the amount paid by the purchasers and the purchasers shall simultaneously hand over vacant and peaceful possession of the premises to the sellers. xxx xxx xxx (16) The purchaser undertakes to complete the construction of the said building within a period of two to three years from the date the plans for the said buildings are sanctioned and released by the appropriate authorities subject to strike, war, natural calamity and force major and Civil Commotion.

(17) That on possession of the said plot and the building thereon being given to the purchaser by the seller, the former shall be entitled to dismantle the buildings now standing on the said plot of land and utilise the debris thereof for such purpose as the purchaser may decide and the seller shall not claim any compensation for the same.

xxx xxx xxx On 26th July 1972, the parties entered into an agreement supplementary to the agreement dated 25.7.72 and to some extent modified the terms and conditions of the original agreement. According to the supplementary agreement, the parties agreed that instead of the balance consideration of Rs. 5,72,740/- being paid in cash, the respondent would give to the appellant flats on 2nd, 3rd and 4th floors measuring 8,182 sq. ft. at the rate of Rs. 70/- per sq.ft. valued at Rs.5,72,740/-. The area of 8,182 sq. ft. could be reduced or increased by 5 to 6 percent at the discretion of the respondents.

An amount of Rs. 50,000/- was paid by the respondents to the appellant on 25.7.72 simultaneously with the execution of the agreement. A post-dated cheque for a sum of Rs. 2,75,000/- was also delivered by the respondents to the appellant. Though this cheque was to be encashed by the appellant in terms of the agreement only after sanction of the building plans of the proposed multi-storeyed building by the local authority i.e. N.D.M.C. and the Land and Development Office, however, the cheque for the said amount of Rs. 2,75,000/- was encashed by the appellant though the building plans had not been sanctioned by the NDMC and L & DO.

As agreed, the appellant also executed an irrevocable Power of Attorney which was duly registered with the Sub- Registrar Delhi on 26th July, 1972 in favour of Shri Inder P. Choudhary, Managing Director and Ms. Minakshi Choudhary, Director of the respondent company authorising them to represent the appellant before the NDMC and L & D.O , the office of the local Government and any other Government Department or authority in connection with the affairs connected with and pertaining to the construction of multi- storeyed building to be constructed on the said property.

On 7/11-9-72 the respondent submitted to the N.D.M.C. building plans for bringing up a Group Housing Project by the name of "Girnar" on the said property. The plans were for the construction of a Housing Project consisting of an 8 storeyed building and 2 blocks of 5-storeyed building comprising of 18 flats of three bed rooms and 23 flats of two bed rooms each apart from incidental/ancillary constructions such as power sub-station, pump house, lifts etc. On 6.11.1972 the plans were rejected mainly on the ground that plot in question formed a part of the zone marked as re-development area as per the zonal plan D-3. This was in exercise of the power conferred by section 193 (2) of the Punjab Municipalities Act.

On 9.11.72 the respondent requested the NDMC to keep the building plans pending and put them up for sanction after certain clarification awaited from Delhi Development Authority was received.

On 31.10.72 the Government of India served a notice on the appellant calling upon him to show cause as to why the lease be not cancelled followed by re-entry upon the premises by the lessor in view of the appellant having sold the property to the respondents without obtaining prior approval of the lessor and thereby having committed a breach of clause II (13) of the lease deed.

On 9.11.72 the respondents gave a reply to the L & D.O. to the letter dated 31.10.72 sent to the appellant which apparently was passed on by the appellant to the respondents for the needful further action. The respondents submitted that there was no breach of clause II (13) of the lease deed inasmuch as there was only an agreement to sell entered into by the appellant authorising the respondents to build on that property but there was no sale as such. It appears, that the respondents had raised certain structures on the property which were objectionable. The respondents stated that the objectionable structures as pointed out by the L & D.O. had been removed. On 22.11.73 the N.D.M.C. once again informed the respondents that the case for sanction of the building plans was considered by the NDMC on 21.9.1973 and the plans were rejected for the reasons annexed with the letter. The principal of the reasons was that the area was earmarked as re-development area in the master/zonal plan and further because the size of the plot was less than one acre whereas minimum size of the plot of group housing was required to be one acre. The master/zonal plan referred to by the NDMC was one approved by the Central Government under Section 9 (2) of the Delhi Development Act and hence having a statutory effect. Efforts were repeated for the sanction of the building plans but as is borne out from the communications dated 12.8.85 and 19.11.90 by the NDMC, building plans were not sanctioned and were only rejected.

Sanction has however been granted on 4.6.1991 valid upto 29.4.1993 which is subject to about 13 conditions and provides that the sanction will be void ab initio if any of the auxiliary conditions mentioned therein were not complied with. The correspondence with the NDMC indicates that the NDMC was persuaded to grant such permission on account of the suit having been decreed on 15.12.1990 by the Trial Court and the decree containing a direction to the appellant to obtain all necessary permission from all authorities including Revenue, local or central authorities so as to effectuate the agreement.

Before we may proceed to notice the facts relevant to initiation of litigation between parties, we may also notice certain facts relevant to the Urban Land Ceiling & Regulation Act, 1976 (hereinafter ULCRA, for short).

It is not disputed that the land forming subject matter of the agreement to sell between the parties includes an excess land to the extent of 368.23 sq.mtrs. as per the provisions of ULCRA. Time and again permission sought for sale of the land was denied by the competent authority. The application dated 14.9.1976 under Section 20 of the ULCRA filed by the respondents projecting a plea that though a group housing scheme did not come within the ambit of the Act, an application for exemption from the provisions of the Act was being filed by way of precaution, was turned down by Delhi Administration on 2.5.1979. On 9.8.1976, the appellant had moved an application for the requisite exemption whereon vide letter dated 1.1.1978 the appellant was informed that as per the existing guidelines the application for exemption proposing to construct a multi- storeyed building was likely to be rejected by the competent authority. On 16.8.1978 the appellant reiterated his prayer for exemption banking upon a plea that as sanction of sale was not possible under the Act, the agreement to sell could be deemed to have become infructuous and therefore the requisite exemption may be granted for the appellant's own scheme of group housing.

On 26.4.1985 the competent authority passed an order under Section 20(1) (a) read with Section 22 of the ULCRA exempting the excess vacant land to the extent of 368.23 sq.mtrs. from the provisions of Chapter III of the Act to undertake group housing on the said plot subject to certain terms and conditions inter alia :-

> "3. The building plan for group housing will be strictly in conformity with the development controls and restrictions/regulations recommended by the erstwhile N.D.R.A.C. for the Zone. xxx xxx xxx 5. The construction should be completed within two years from the date of the approval of the building plan or the date of issue of this order, whichever is later. 6. The plinth area of each dwelling unit in the building shall not exceed 300 sq.mtrs.
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> 7. A person shall be entitled to own only one dwelling unit in this scheme. It is clarified that for the purpose of this clause a Company shall be deemed to be a person.
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> xxx xxx xxx
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> 9. No transfer/substitution of a dwelling unit shall be effected without obtaining prior approval of the Administrator of Delhi. For this purpose a list of intending buyers along with copies of the agreements executed or intended to be executed with the intending buyers and affidavits individually from them to the effect that he/she does not own any dwelling unit in any group housing scheme or a residential property or a house site or has a share in any joint ancestral property exceeding 80 sq.yds., either in his/her name or in the name of unmarried minor children in the Union Territory of Delhi shall be filed with the Secretary (L & B) Delhi Administration, Delhi."

Here itself, we may state that the agreement to sell entered into between the parties was incapable of being honoured in the light of the stringent terms and conditions subject to which the abovesaid permission was granted. In terms of the supplementary agreement entered into between the parties the appellant was to be allotted flats measuring 8182 sq.ft. on several floors of the proposed building as a part of the consideration for the agreement, but the order dated 26.4.1985 would not permit the appellant to have more than one dwelling unit in the scheme. Secondly, the building plan for group housing unit must be in conformity with other restrictions/regulations applicable for a zone. In this context, we propose to set out the controversy centering around the question whether the suit land forms part of LUTYEN's bungalow zone (LBZ, for short). If the property be the part of LBZ, the construction of multi- storeyed building on the said plot is absolutely out of question. The communication dated 8.2.1988 from the Joint Secretary (Urban Development) made to various local authorities of Delhi describes one of the restrictions as under :-

> "The new construction of dwellings, on a plot must have the same plinth area as the existing bungalow and must have a height not exceeding the height of the bungalow in place or, if the plot is vacant, the height of the bungalow which is the lowest of

> those on the adjoining plots."

It was vehemently disputed by the learned counsel for the respondents if the suit land at all forms part of LBZ. On the material available on record of the case, it is not possible to record a categorical finding in that regard. However, still we may refer to a document or two.

It appears that a piece of the land forming part of the suit property was acquired by notification dated 5.9.1991 for the purpose of road widening. Award no.6/92- 93 made by the Land Acquisition Collector (DS) Delhi specifically refers to plot no.6, Tolstoy Marg apart from other properties acquired. It states inter alia :-

> "Besides this other properties 2,4,6 & 8 Tolstoy Marg, 13, Barakhamba Road and 12 min Kasturba Gandhi Marg fall in residential zone and as per present record available only property No.6 Tolstoy Marg has sanction for group housing construction, which was obtained from DDA & NDMC before the extension of Lutyen's Bungalow zone over Hailey Road and Tolstoy Marg, which means this plot bearing 6, Tolstoy Marg has future potentiality to be used as commercial one."

Fair market value of the property was determined at Rs.33,400/- per sq.mtr. The amount of compensation determined at the abovesaid rate along with the amount of solatium and interest was received by respondents.

During the course of hearing our attention was drawn to a communication dated 17.6.1993 from L & D.O. to the parties whereby the sanction for construction of multi- storeyed group housing building on the suit premises offered to the respondents on 18.9.1992 has been withdrawn and cancelled on the ground of non-compliance with the terms and conditions of the sanction.

Some controversy between the parties also centres around the fact whether possession over the suit property was handed over by the appellant to the respondents or not. The agreement to sell recites delivery of possession by the appellant to the respondents. The learned Trial Judge has recorded a finding that the recital in the agreement as to delivery of possession was not true and that the appellant had delivered possession of an area of 45 sq.yards merely to the respondents for the purpose of storing the material, on which area the respondents did raise some temporary structures; the physical possession was to be handed over after the necessary permissions/sanctions were granted. The Division Bench in appeal has however referred to the contents of the agreement and formed an opinion that the vacant possession of the suit premises was handed over by the appellant to the respondents on 25.7.1972 which possession was a `legal possession' of the respondents and as the appellant had got encashed the cheque for Rs.2,75,000/-, therefore, the appellant was obliged now to handover physical possession of the portion of the suit premises which was in his occupation to the respondents. The finding recorded by the Division Bench, to say the least, is laconic and oscillating.

From the evidence and the contents of correspondence exchanged between the parties it is also writ large that the parties were well known to each other from much before. The appellant had

confidence in the respondents as a builder. The appellant was not in a position to develop the property. He did not have the requisite finance. He also lacked confidence if he would be able to manage for the several sanctions and permissions pre-requisite to materialising any building plan on the suit property such as the permission of the lessor (L & D.O.), the exemption under the ULCRA, the sanction of the building plan from the NDMC. That is why, he entered into an agreement to sell the property to the respondents. The appellant executed an irrevocable power of attorney in favour of the respondents giving wide and sweeping powers. The underlying object behind execution of such power of attorney was manifestation of appellant's expectations from and confidence in the respondents that they would be in a position to secure the several permissions and sanctions. However, the expectations did not materialise. The intention of the parties as evidenced by the terms and conditions of the agreement and subsequent correspondence between the parties was that the respondents should have been in a position to secure performance of the terms and conditions of the agreement within a reasonable time which has been belied. In the meantime, the value of the land has sky-rocketed. In the year 1972, the appellant had entered into an agreement to sell the property for a sum of Rs. 8,97,740/-. The total area of the land is approximately 4000 sq.mtrs. meaning thereby the property was agreed to be sold roughly at the rate of Rs.225 per sq.mtr. In the year 1991, consequent upon a part of the property having been acquired for the purpose of road widening, the Land Acquisition Officer has estimated the value of the acquired property at Rs.33,400/- per sq.mtr. Going by the standard adopted by the Land Acquisition Collector, which is always on the lower side, the value of the property had risen astronomically.

If such circumstances taken together should the Court exercise its jurisdiction in favour of decreeing the specific performance?

It is true that the agreement to sell dated 25th July, 1972 does not specifically provide for a time limit within which the agreement was to be performed or its performance secured. The Constitution Bench has held in the case of Smt. Chand Rani (dead) by LRs. vs. Smt. Kamal Rani (dead) by LRs. AIR 1993 SC 1742:-.lm15 .rm55 "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."

Intrinsic evidence is available in the agreement itself spelling out the intention of the parties to perform the contract within a reasonable time. Vide clause 1 (b), a cheque for Rs.2,72,000/-, which was post-dated 25.1.1973, was given by the respondents to the appellant with the stipulation that the same was to be encashed by the seller after the plans of multi-storeyed buildings as submitted by the purchaser were passed and cleared for construction by the NDMC and L&DO or earlier by a mutual agreement. The cheque was neither a blank nor an undated cheque. It was dated 25.1.1973. The validity of the cheque would have expired on 24.7.1973 on expiry of six months. Meaning thereby the sanction of the plans from NDMC and clearance from the L&DO, the obligation to secure which was on the purchaser, were expected by the parties to be secured within the period of six months. So also clause 16 provided for completion of the construction of the building within a period of two to three years from the date of the plans being sanctioned and released by the appropriate authority.

Thus, the intention was to have the agreement performed within a period of about 2-1/2 to 3-1/2 years calculated from 25.1.1973.

In the background of the abortive efforts made by the parties at securing the sanction and the clearances, on 16.8.1975 the appellant wrote a letter to the respondents. A reading of the letter shows it to have been written with innocence and simplicity without any legal advise. The appellant made an humble appeal to the respondents for fulfilling their obligations under the contract and to take the appellant in the right spirit while reading the letter. The appellant indicated the high hopes which he had from the respondents while entering into the agreement, which hopes were belied. The appellant then states in no uncertain terms:-

> "In view of all this, I would request you, therefore, to place yourself in a position to get the transaction completed by obtaining necessary sanctions, permissions,completions and other formalities within three months from the date of receipt of this letter. You would also appreciate that in the absence of your efforts to get the transaction completed within this period, it will not be taken amiss if I also desire to exercise my legal rights and enforce them."

This letter is then followed by a legal notice dated 25.1.1979. Having emphasized the failure on the part of the respondents in securing sanctions/clearances and the insurmountable difficulty created in the way of the transfer by ULCRA, the appellant declared that the agreement had become void and unenforceable and hence respondents may vacate about 405 sq.ft. of the property in their possession within a period of two weeks failing which the appellant would be constrained to initiate legal proceedings. On 3.5.1979, the appellant filed a suit seeking a decree for a declaration that the agreement dated 25.7.1972 had become null and void and impossible of performance and a decree for delivery of possession of a portion of the land measuring about 45 sq.yards shown in the plan attached with the plaint.

On 14.3.1980, the respondents filed a suit against the appellant seeking specific performance of the contract for sale, a mandatory injunction directing the appellant to handover vacant possession of the premises/part of the old building in possession of the appellant as described in the map and in the alternative to grant a decree for the refund of Rs.3,25,000/- with interest calculated @ 18% p.a. and a decree for compensation.

Section 20 of the Specific Relief Act, 1963 provides that 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; 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. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature , shall not constitute an unfair advantage to the plaintiff over the defendant or unforseeable hardship on the

defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David and others vs. Louis Chinnaya Arogiaswamy and others. AIR 1996 SC 2814 by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.

Chitty on Contracts (27th Edn.,1994, Vol.1, at p. 1296) states :-

> "Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the defendant rather than the subject-matter of the contract, and for which the plaintiff is in no way responsible." Very recently in K.S. Vidyanadam & others vs. Vairavan 1997 (3) SCC 1, this court has held :
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> 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 vs. 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 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." (Para 10) Referring to the principle that mere rise in prices is no ground for denying the specific performance the Court has emphasized the need for 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." (Para 11) The Court has further proceeded to hold:-

"All this only means that while exercising its discretion , the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)" (Para 11) Having noticed the Constitution Bench decision in Chand Rani (supra), the Court has further held:-

" Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property." (Para 14) In our opinion, there has been a default on the part of the respondents in performing their obligations under the contract. The period lost between 25.7.1972 (the date of the agreement) and the years 1979 and 1980 when the litigation commenced, cannot be termed a reasonable period for which the appellant could have waited awaiting performance by the respondents though there was not a defined time limit for performance laid down by the agreement. The agreement contemplated several sanctions and clearances which were certainly not within the power of the parties and both the parties knew it well that they were the respondents who were being depended on for securing such sanctions/clearances. Part of the land forming subject matter of the agreement was an excess land within the meaning of ULCRA and hence could not have been sold. Part of the land has been acquired by the State and to that extent the agreement has been rendered incapable of performance. The feasibility of a multi-storeyed complex as is proposed and planned by the respondents appears to be an impracticality. If the respondents would not be able to construct and deliver to the appellant some of the flats as contemplated by the novated agreement how and in what manner the remaining part of consideration shall be offered/paid by the respondents to the appellant is a question that defies answer on the material available on record. Added to all this is the factum of astronomical rise in the value of the land which none of the parties would have forecontemplated at the time of entering into the agreement. We are not in the least holding that the consideration agreed upon between the parties was inadequate on the date of the agreement. We are only noticing the subsequent event. Possession over a meagre part of the property was delivered by the appellant to the respondents, not simultaneously with the agreement but subsequently at some point of time. To that extent, the recital in the agreement and the averments made in the plaint filed by the respondents are false. On a major part of the property, the appellant has continued to remain in possession. As opposed to this, the respondents have neither pleaded nor brought material on record to hold that they have acted in

such a way as to render inequitable the denial of specific performance and to hold that theirs would be a case of greater hardship over the hardship of the appellant. Upon an evaluation of the totality of the circumstances, we are of the opinion that the performance of the contract would involve such hardship on the appellant as he did not foresee while the non performance would not involve such hardship on the respondents. The contract though valid at the time when it was entered, is engrossed into such circumstances that the performance thereof cannot be secured with precision. The present one is a case where the discretionary jurisdiction to decree the specific performance ought not to be exercised in favour of the respondents. During the course of hearing the learned senior counsel for the respondents time and again emphasized and appealed to the court that respondents were builders of repute and in the event of the specific performance being denied, they run a grave risk of loosing their reputation as their proposed building plan "Girnar" would not materialise and they will not be able to show their face to their prospective flat buyers. This is hardly a consideration which can weigh against the several circumstances which we have set out herein above. If a multi-storeyed complex cannot come up on the suit property, the respondents' plans are going to fail in any case.

We have already held that until the repeal of the ULCRA in the year 1999 the property agreed to be transferred was incapable of being transferred for failure of the requisite permission under the ULCRA which situation continued to prevail for a period of about 16 years from the date of agreement until the repeal of ULCRA. In the facts and circumstances of the case we do not think it appropriate to extend the benefit of the subsequent event of repeal of ULCRA in favour of the respondent-plaintiffs after a lapse of 16 years from the date of the contract. Permission for constructing a multi-storeyed complex on the premises was refused time and again by the NDMC until the suit for specific performance came to be decreed by the Trial Court. On none of the two events either of the parties had any control. We are clearly of the opinion that at one point of time the contract had stood frustrated by reference to Section 56 of the Contract Act. We do not think that the subsequent events can be pressed into service for so reviving the contract as to decree its specific performance.

The learned counsel for the respondents submitted that in spite of a part area of the property agreed to be transferred having been rendered inalienable by the owner on account of its having been acquired by the State and part of the property having been found to be inalienable on account of being in excess of the ceiling limit provided by ULCRA, the respondents were prepared to have a sale deed executed of such remaining part of the property as is available to be transferred without insisting on a corresponding reduction in the price agreed to be paid. The learned counsel for the respondents also submitted that the ULCRA having been repealed by the Urban Land Ceiling and Regulation (Repeal) Act, 1999, the hurdle of the land being in excess of the ceiling has been removed and this aspect of the matter has lost its relevance. We are not impressed by the submission. Though the respondents may on their part, in

the changed circumstances, be agreeable to have even lesser property being transferred to them, but in our opinion that is not permissible. The case of non-enforcement except with variation is statutorily covered by Section 18 of the Specific Relief Act, 1963. When the defendant sets up a variation then the plaintiff may have the contract specifically performed subject to the variation so set up only in cases of fraud, mistake of fact or misrepresentation or where the contract has failed to produce a certain legal result which the contract was intended to do or where the parties have subsequent to the execution of the contract varied its terms. Obviously, the case at hand is not covered by any of the situations contemplated by Section 18 abovesaid.

However, in our opinion the present one is a fit case where the respondents should be awarded some compensation in spite of its specific performance being refused. Section 21 of the Specific Relief Act provides for award of compensation either in addition to or in substitution of such performance. The explanation appended to the Section expressly enacts that the Court is not precluded from exercising jurisdiction to award compensation even in a case where the contract has been rendered incapable of specific performance. Compensation to some extent is a matter of guess work. An amount of Rs.3,25,000/-, equivalent to the amount which was paid by the respondents to the appellant would be a reasonable amount of compensation in the facts and circumstances of the case which in our opinion deserves to be paid by the appellant to the respondents in substitution of the decree for specific performance. The respondents have also in their plaint claimed the relief of compensation in addition to other reliefs.

For the foregoing reasons, the appeals are allowed. The judgment and decrees passed by the trial court and confirmed in appeal are set aside. Instead the following consolidated decree is passed in both the suits: 1) the suit for specific performance of agreement to sell dated 25.7.1972 filed by the respondents is directed to be dismissed; 2) the appellant shall return the amount of consideration paid by the respondents to the appellant with interest calculated @ 12% p.a. from the date of payment to the appellant till the date of return by the appellant to the respondents;

3) the appellant shall also pay an amount of Rs.3,25,000/- by way of compensation in lieu of specific performance to the respondents which amount shall carry interest at the rate of 12 per cent per annum from the date of decree (that is, today) till realisation;

4) possession over the part of the property admeasuring 45 sq.yards (approximately) shown in red in the plan attached with the plaint filed by the appellant shall be delivered by the respondents to the appellant by removing structures, if any, raised by the respondents;

5) the costs shall be borne by the parties as incurred throughout.