Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Collister

1933
August, 17

SOHAN LAL AND OTHERS (DEFENDANTS) *v*. ATAL NATH (PLAINTIFF)*

Registration Act (XVI of 1908), sections 17, 49—Contract for sale of immovable property—Whether compulsorily registrable—Specific performance where a minor is concerned—Equitable considerations—Repudiation of contract and retention of benefit thereof—Specific performance defeasible by reason of indefiniteness of time—Minor—Power of natural guardians—Contract by guardians borrowing money for purchase of property and agreeing to repay or to sell the property to the creditor—Joint Hindu family—Contract by elder members whether binding on minor—Practice and pleading—Point of law raised for the first time at hearing of appeal—Interpretation of statutes—Amending Act laying down rule of procedure—Applicability to pending actions.

In consideration of *A's* allowing *B* to use *A's* money, along with *B's* money out of a common fund, for the purpose of purchasing certain immovable property, *B* agreed in writing that *A* should have the option of either having his money repaid with interest or of purchasing in lieu thereof a proportionate share of the property from *B*. This contract was not registered. *A* sued *B* for specific performance of the contract for sale by *B* to *A*.

Held that under the Registration Act, as it stood before the amendment of section 49 made by Act XXI of 1929, a contract for sale of immovable property, which did not purport to be a sale deed or to create an interest in immovable property, was not compulsorily registrable, and, though unregistered, was admissible in evidence in a suit for specific performance.

The Privy Council case of *James Skinner* v. *R. H. Skinner* (1) was distinguishable, as the document in question in that case clearly purported to be a sale deed and to create an interest in immovable property.

The question of the inadmissibility in evidence of the agreement for want of registration was allowed to be raised for the first time in course of argument of the appeal, as it raised a question of law which had become of some significance in view of the pronouncement of the Privy Council, made subsequent to the filing of the appeal.

*First Appeal No. 420 of 1928, from a decree of J. N. Kaul, Additional Subordinate Judge of Benares, dated the 28th of July, 1928.

(1) (1929) I.L.R., 51 All., 771.

Further, by the proviso to section 49 of the Registration Act, added by the amending Act XXI of 1929, it has been made clear that a document like the one in question is admissible in evidence. So, even if it had been inadmissible on the date when it was admitted by the lower court, which was before the coming into force of the amending Act, it had now become admissible, according to the well recognized principle that when an amending Act lays down a rule of procedure it ordinarily affects pending actions. The question of admissibility was being raised now, for the first time, and now the document had become unquestionably admissible; the appellate court could not now exclude the document on the ground of its previous inadmissibility, supposing that it had been inadmissible prior to the passing of the amending Act.

The agreement in question was executed not by *B* alone but also by the other members of the joint family to which *B* belonged, among whom was a minor who was represented by the adults. On the question whether the contract was not specifically enforceable inasmuch as the interest of a minor was involved,—

Held that as the contract was not one for the sale of joint family property, and the adult members and natural guardians of the minor were in no sense jeopardising the interest of the minor in the family property or imposing any personal liability on the minor, but they were acquiring new property by raising a loan and by entering into a contract for the discharge of that loan either by repayment by themselves or by transfer of a share of the newly acquired property, it was within the competence of the natural guardians to enter into such a contract, which would be binding on the minor. Further, as the minor had in no way been prejudiced, on the other hand he had benefited by enjoyment of the usufruct of the property for several years, he was bound by the act of the adult members and his natural guardians and he could not in equity retain the benefit of the property and at the same time repudiate their authority to enter into the contract. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1), distinguished.

The option given to *A* by the agreement was expressed to be exerciseable by him "at any time". On the question whether specific performance should not be refused on the ground that the contract was vague on account of indefiniteness of time,—

Held that although indefiniteness of time may be a ground for refusing specific performance, in the present case there was

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no such indefiniteness. As the remedy of recovering the amount with interest could not be exercised after the lapse of three years, there was necessarily a limit of time put on the exercise of the option. When the plaintiff allowed his remedy to recover the money to become barred by time, he necessarily exercised his option to confine his relief to the taking of the property.

Sir *Tej Bahadur Sapru* and Dr. *K. N. Malaviya* and Messrs. *K. Verma* and *A. M. Gupta,* for the appellants.

Mr. *B. E. O'Conor,* Dr. *K. N. Katju* and Messrs. *P. L. Banerji* and *N. Upadhiya,* for the respondent.

SULAIMAN, C.J., and COLLISTER, J.:—This is a defendants' appeal arising out of a suit for specific performance of a written contract. Originally seven defendants filed this appeal jointly. With the exception of Bansidhar all the others applied to withdraw the appeal. So far as the adult appellants were concerned, their appeal has been withdrawn and they have submitted to the decree of the court below. An application was made on behalf of the minor appellant Har Mohan by his guardian and also by his mother to withdraw the appeal, but no order was passed, inasmuch as it was not clear whether there had been any compromise with the minor's guardian and whether such a compromise was for the benefit of the minor.

The parties belong to the same family with distinct branches. It appears that at one time all the members had a common fund, though the family was not joint in status. The leading members proposed to purchase three villages in Benares from Raja Madho Lal for a sum of Rs.90,200. The plaintiff Atal Nath represented one branch, Jagmohan and others represented the second branch and Bansidhar and others represented the third branch. These were the descendants of three sons of the common ancestor, the fourth son having died issueless. Each branch was entitled to a one-third share in the common fund. Admittedly the plaintiff Atal Nath was not a member of the joint Hindu family at

the time, and although the fund was undivided he was entitled to a distinct one-third share in it.

Apparently Bansidhar and others, and Jagmohan and others, had not sufficient funds to pay the entire sale consideration. It therefore seems to us to have been agreed that the whole of Rs.90,200 should be taken out of the common fund and the three villages should be purchased; and that Atal Nath should have the option of either getting back his Rs.30,000 with interest at 6 per cent. per annum or getting a one-third share in the entire property purchased. It is obvious that if Rs.30,000 provided by Atal Nath had not been forthcoming the villages might not have been acquired at all, as the vendor might not be disposed to transfer only a two-thirds share in the three villages. It is an admitted fact that Rs.30,000 belonging to Atal Nath was taken out of the common fund along with the Rs.60,200 belonging to the two branches, and the whole sum of Rs.90,200 in that way was paid to the vendor and the three villages were acquired by the family. As evidence of the transaction *inter se,* a letter dated the 10th of August, 1921 was written and signed by Sohan Lal, Bansidhar and Rajnath, who belong to Bansidhar's branch. The defendants put forward the case in the court below that this letter had been obtained under undue influence or coercion, but the finding being against them the point has not been re-agitated in appeal. We shall have to refer to its contents in detail when we come to examine the plea that specific performance should not be granted.

Apart from oral evidence we have no documentary evidence showing what passed between the parties during the interval between August, 1921, and June, 1927. We shall refer to the later correspondence when we come to deal with the conduct of the defendants.

No point was taken in the court below that this letter was inadmissible in evidence for want of registration. But the learned counsel for the appellants before us has argued that in view of the pronouncement of their

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Lordships of the Privy Council in the case of *James Skinner* v. *R. H. Skinner* (1) the letter is inadmissible in evidence for want of registration, inasmuch as it either created an interest in immovable property or is evidence of a transaction affecting such property. As pointed out above, this plea was not taken in the court below, nor was any issue framed as to it, nor was it taken in the grounds of appeal filed in the High Court. But as it raises a question of law, and the question has become of some significance in view of the pronouncement of their Lordships of the Privy Council referred to above, made subsequent to the filing of the appeal, we have allowed counsel to raise this point for the first time in appeal. Had counsel for the plaintiff asked for any more time we would have allowed him further opportunity inasmuch as this point was not mentioned in the précis filed on behalf of the appellants. We may note that in the Privy Council case mentioned above their Lordships themselves permitted such a plea to be raised for the first time before their Lordships.

The first contention seems to be that under the Indian Registration Act, as it stood unamended by Act XXI of 1929, a contract for sale of immovable property must, in view of their Lordships' pronouncement, be deemed to be compulsorily registrable. We do not think that this proposition follows from the judgment of their Lordships.

In *Skinner's* case (1) the document sued upon was in the form of a sale deed and purported to transfer immovable property, though it contained a recital stating that it would be followed by a registered document. The learned Subordinate Judge held that this document was a sale deed and purported to affect immovable property within the meaning of section 17 of the Registration Act and accordingly it was compulsorily registrable and was not admissible in evidence for want of registration. On appeal the High Court took the view that the document,

(1) (1929) I.L.R., 51 All., 771.

inasmuch as another registered document was in contemplation, was merely a contract for the sale of immovable property, which did not affect the immovable property, but was in the nature of a document creating a right to obtain another document and was therefore not compulsorily registrable. The learned Judges held that the document therefore was admissible as evidence of the contract for sale of the property.

When the matter went up to their Lordships of the Privy Council their Lordships agreed with the learned Subordinate Judge in holding that, although the language employed was perhaps not that of a trained draftsman, it clearly purported to transfer interest in the immovable properties (pages 777—8) and it accordingly came within the terms of section 17. Their Lordships then proceeded to consider the second question raised for the first time in appeal that the document, though wholly ineffective as a sale deed, should be treated as embodying a contract for sale and should be received in evidence. Their Lordships quoted the language of section 49 which forbids a compulsorily registrable document from affecting any immovable property or being received as evidence of any transaction affecting such property. Their Lordships then pointed out that "If an instrument which comes within section 17 as purporting to create by transfer an interest in immovable property is not registered, it cannot be used in any legal proceeding to bring about indirectly the effect which it would have had if registered. It is not to 'affect' the property, and it is not to be received as evidence of any transaction 'affecting' the property."

As the document before their Lordships purported to be a sale deed and it was held to purport to create an interest in the immovable property, their Lordships held that it fell under section 17, and accordingly under section 49 it could not be used in evidence either for the purpose of affecting the property or for the purpose of showing a transaction affecting such property. Their

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Lordships accordingly remarked that "In the face of this provision, to allow a document, which does itself create such an interest, to be used as the foundation of a suit for specific performance appears to their Lordships to be little more than an evasion of the Act."

It seems to us that what their Lordships have laid down is that if an unregistered document on the face of it purports to create an interest in immovable property then it cannot be used in evidence for the purpose of showing that it affected such interest, nor even for the purpose of showing any transaction affecting such interest. We do not think that their Lordships meant to lay down that even where a document does not purport to create an interest in immovable property it falls under section 17 and is therefore altogether inadmissible under section 49 for either purpose. Nor do we think that their Lordships have laid down in their judgment that a mere contract for sale of immovable property purports to create interest in such property and falls within section 17 of the Indian Registration Act, so as to be compulsorily registrable. We think that the view of this Court that a mere contract for the sale of an immovable property does not require registration has not been overruled by this pronouncement of their Lordships.

The learned advocate for the respondent has argued before us that the effect of the proviso added to section 49 of the Indian Registration Act by Act XXI of 1929 is to overrule the view expressed by their Lordships of the Privy Council in *Skinner's* case (1). We do not think that this contention has any force whatsoever. Their Lordships interpreted the sections of the old Act as they stood unamended and clearly laid down their legal effect. The legislature does not appear to have thought that such provisions of law were in the public interest and promptly intervened and got a proviso added to section 49 of the Registration Act. It is for

(1) (1929) I.L.R., 51 All., 771.

the legislature to make enactments and for the courts to enforce such enactments. We are not concerned with its policy. There is nothing in Act XXI of 1929 which would suggest that the Act was of the nature of a Declaratory Act or Explanatory Act which might mean that the view taken by their Lordships of the unamended sections was in any way wrong. The addition of the proviso is a fresh enactment and that enactment came into force on the 4th of October, 1929, when the amending Act received the assent of the Governor-General. This was during the pendency of the present appeal.

But there is a well recognized principle that where an amending Act lays down a rule of procedure it ordinarily affects pending actions. That is the view which has prevailed in England, and this view was pointed out by a Bench of this Court, of which one of us was a member, in *Sheopujan Rai* v. *Bishnath Rai* (1). The court below has admitted this document. Even if it had been inadmissible on the date when it was admitted, there can be no doubt that it is admissible at the present moment. It is the defendants who are asking the appellate court to exclude this document from consideration and hold it to be inadmissible. Our jurisdiction is being invoked at a time when under the law the document has become admissible. We do not think that in such circumstances an appellate court should hold that the document is inadmissible and should not be considered at all. An appellate court has power of admitting even fresh evidence for good cause, and so we do not think that the document can be excluded on the ground of its previous inadmissibility.

The learned advocate for the appellants has contended before us that when the document was not admissible to start with, it did not create any rights in the plaintiff and could not be made the foundation of any cause of action in his favour and therefore the suit itself was not maintainable.

(1) (1930) I.L.R., 52 All., 886 (892).

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We have already pointed out that in our opinion a contract for sale does not purport to create an interest in the immovable property; and therefore by producing a document embodying such a contract a plaintiff is not trying to prove a document affecting immovable property. It is at best evidence of a transaction affecting such property; and therefore the question is one of admissibility of evidence and not of any interest in immovable property. As pointed out above we are of opinion that the document did not require registration even under the unamended law.

The letter in question was signed by the three adult members of Bansidhar's group, and their nephew Har Mohan, being a minor at the time, was alleged to be represented by his adult uncles. The learned advocate for the appellants has strongly contended before us that the contract is not specifically enforceable because the interest of a minor was involved. He has strongly relied on the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) in which their Lordships of the Privy Council clearly laid down that before specific performance can be enforced there ought to be mutuality and that inasmuch as the manager of the minor's estate or the guardian of the minor is not competent to bind the minor or the minor's estate by a contract for the purchase of immovable property, the minor was not bound by such an agreement and therefore the minor could not obtain specific performance of the contract.

We think that that case is not in point. There the contract was purely one-sided, as the agreement by the guardian of the minor or the manager of his estate could not be enforced against the minor or his estate at all. It was on this ground that their Lordships held that there was no mutuality and accordingly it could not be enforced even on behalf of the minor.

We also concede in favour of the appellants that a manager of a joint Hindu family has no power to bind

(1) (1911) I.L.R., 39 Cal., 232.

the minor members by a contract for the sale of joint family property and that a claim for specific performance of such a contract would not ordinarily be allowed.

But the position before us is somewhat different. The property which is in dispute in this suit was a one-third share in three villages which had never belonged to the family at all and in which the minor had no interest. The leading members were going to acquire the shares for the first time and were in need of raising money for the purpose. They were in no sense jeopardising the interest of the minor in the family property or imposing any personal liability on the minor for the payment of this amount. What happened was that they wanted to raise money for the acquisition of fresh property and agreed that if they were unable to pay the amount borrowed to the creditor he should have that property instead. We do not think that a minor member of the family can take a share in the property so acquired and at the same time repudiate the authority of the other members to enter into such a contract. If he wishes to repudiate such a contract he must repudiate the whole of it and not take a benefit under it. The one-third share in these three villages having been acquired out of funds borrowed from Atal Nath and not taken out of the joint family fund, must be treated as a separate property acquired by the other members, with the obligation to repay the loan or to hand over the property instead to the creditor. No authority has been cited before us which would make the leading members of the family incompetent to acquire fresh property in this way and to enter into a contract of this character. It is not suggested that the minor has suffered in any way. On the other hand he has undoubtedly gained. The money has come out of the plaintiff's pocket and for all these years the minor's family had had the usufruct for their own enjoyment. The plaintiff is claiming this property without the mesne profits for these years and is not getting any interest on his money for that period. It

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is not suggested that the value of the zamindari property in these provinces has increased considerably; as a matter of fact, if we were to take judicial notice of existing conditions, the value has considerably fallen. So there can be no suggestion that the minor has suffered by this transaction and the enforcement of it against him would be inequitable.

The learned counsel for the respondent has raised the point that the granting of specific performance is a matter of discretion for the court and, inasmuch as the learned Subordinate Judge has exercised his discretion in favour of the plaintiff, the appellate court should not interfere with that exercise of discretion.

The answer to this is to be found in section 22 of the Specific Relief Act, where, although the jurisdiction to decree specific performance is said to be discretionary, such discretion is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. We have therefore to satisfy ourselves whether the contract was of such a nature as to justify its specific performance.

The main argument on behalf of the appellants before us is that the contract was of such a nature that its specific performance should not be granted. It is therefore necessary to quote extracts from the document. After admitting that Rs.30,000 had been borrowed from Atal Nath and received by the family in order to make up the sum of Rs.90,200 required for the purchase of the three villages, the writers of the letter assured Atal Nath, the addressee, that "You (Atal Nath) are at liberty either to demand and receive back from us (executants) your said sum of Rs.30,000 with interest at 6 per cent. per annum or to purchase from me and my brothers one-third share in the said above mentioned landed property at cost price and, when so purchased, you can get the mutation effected in your name of the said one-third share in the zamindari any time at your option; and I, my brothers, and our heirs, etc., shall have no objection

whatsoever. Further, if you do not approve of the latter procedure you will have a lien on the above property till as long a time as your money is not paid up in full by us." Undoubtedly an option was given to Atal Nath either to demand back the money with interest or to purchase one-third share in the property. But merely because there was an option given to Atal Nath, it cannot be said that there was no mutuality in this contract. Atal Nath having paid Rs.30,000 performed his part of the contract in full, and from that moment it became a unilateral contract which had to be performed by the executants only. There was mutuality inasmuch as there was reciprocal consideration.

But the learned counsel for the appellants argues that the plaintiff having allowed the period of limitation to lapse is now seeking to force the hands of the court and compel the court to grant him specific performance because the other alternative relief is not capable of being granted. We agree that if the contract for the transfer of immovable property was not such as could be specifically granted, the plaintiff would not be entitled to get that relief merely because he has allowed his alternative relief to be barred by time. At the same time we must hold that if the contract for specific performance is of such a nature as to admit of being specifically performed, then the mere fact that the other remedy has become barred by time should not deprive the plaintiff from getting the relief to which he is entitled. We have accordingly to examine whether there was anything in the contract which makes it inappropriate to grant its specific performance. The only point which has been pressed before us is that the option given to Atal Nath was to be exercised "at any time" by him and was accordingly indefinite in its nature.

We may point out that this aspect of the case was not pressed before the court below and no objection was taken on behalf of the defendants that the contract was vague on account of indefiniteness of time. Nor such a

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plea seems to have been raised in the grounds of appeal filed in this High Court. Apparently the defendants themselves did not think that there was any indefiniteness or vagueness about it until the appeal came to be argued before us.

The learned advocate for the appellants relies on a passage in Pomeroy's Equity Jurisprudence (paragraph 2196, page 4935, 2nd edition). The concluding portion of the paragraph is as follows: "Where the option is so worded that the exercise of the privilege may be delayed indefinitely, specific performance is refused, and the refusal is sometimes based on the ground of lack of mutuality." Although we do not see how the lack of mutuality can be regarded as the basis, we are prepared to state that indefiniteness of time may be a ground for refusing specific performance. But in this case we are not satisfied that there was such an indefiniteness. The language of the document was somewhat loose. But when it is remembered that the remedy to recover the amount with interest could not be exercised after the lapse of three years, there was necessarily a limitation of time put on the exercise of the option. The indefiniteness of time was not as regards the right to recover the money, which was of course governed by the ordinary law of limitation, but it was with regard to the option, if any, to select one or the other remedy. As the document was unregistered, it was inherent in its very nature that the option must be exercised before three years expired, and could not have been exercised after the expiry of that period. We therefore do not think that the parties contemplated that Atal Nath would be able to wait for an indefinite period of time long after the expiry of the period of limitation and yet insist on the payment of the money with interest. When he allowed his remedy to recover the money to become barred by lapse of time, he necessarily exercised his option to confine his relief to the taking of the property in lieu of the money. We do not think that the parties intended that the option to

choose the remedy for recovery of the money itself would be exercised after an indefinitely long period of time, as in point of fact it could not have been so exercised when the law of limitation placed a bar against such a claim.

It further seems to us that the parties soon after made up their minds that money was not to be paid and that property only would have to be transferred. It is true that apart from oral evidence led on behalf of the plaintiff we have no documentary evidence to show that during the period 1921—26 there was any such understanding. But the later correspondence makes it clear that there must have been such an understanding.

On the 17th of June, 1927, a letter was written by Sohan Lal, Rajnath and Bansidhar in which there was a note that Atal Nath held one-third share in the Benares *ilaqa* and was also entitled to one-third share of the money which had been realised previously. There is no suggestion before us that the family owned any other villages in Benares. The plaintiff has distinctly stated that they had no other *ilaqa* anywhere except the one in suit. There is therefore no doubt that the reference in this letter is to the three villages purchased from Raja Madho Lal.

Leaving aside an undated letter, which seems to have preceded it, we have a letter dated the 15th of October, 1927, written by the appellant Bansidhar and with a postscript in the handwriting of his brother Sohan Lal. In this Bansidhar said: "We, that is, the brother and myself, have no concern in the least with your share. We have said not only once but a thousand times and we say even now that one-third share belongs to you. We were trying to have your name mutated and were seeking an opportunity for it and to have the names of all other co-sharers entered against their respective shares." Sohan Lal wrote in the postscript that Atal Nath should note the contents of that letter. It appears that Rajnath, the other member of Bansidhar's group,

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was at the time contemplating to file an application for rectification of khewat, and so Bansidhar and Sohan Lal assured Atal Nath that he should not worry, for they had always been admitting that his one-third share was safe. We may mention that even Rajnath himself wrote to the plaintiff on the 8th of October, 1927, shortly before filing his application for rectification of khewat, assuring him that "You should not entertain any bad idea in your mind against me in the least. If I take any new proceeding or it is unintentionally taken by me, you should not take it seriously. You will know everything when we meet together." As a result Atal Nath arrived at Benares, and the learned Subordinate Judge has found that stamps for the execution of the sale deed were purchased and the document was actually faired out by a scribe, but at the last moment the vendors backed out and refused to execute the deed or get it registered. This happened in November, 1927. The plaintiff then promptly filed the present suit in February, 1928.

In view of this conduct of the defendants, and particularly the written assurance given by Bansidhar himself to Atal Nath, we do not think that there is any ground for refusing specific performance.

We have already pointed out that the transaction was perfectly fair and straightforward. But for the agreement of Atal Nath to lend Rs.30,000, the villages might not have been acquired at all. Atal Nath parted with the money and has had no interest on the capital so far. The defendants acquired the share and have been appropriating its profits all this time. They had been assuring the plaintiff that he would have his one-third share. It seems to us that the delay has been due mainly to the fact that there was litigation going on between the members of the family among themselves. There have been suits by Jagmohan's branch for the separation of their one-third share, in which Atal Nath was impleaded as a *pro forma* defendant. That resulted in a compromise between the other members. Atal Nath did not

sign it and said he had no objection to the compromise, but as he was wrongly impleaded he should be given his costs. As up to that time Atal Nath had not acquired any interest in the eye of the law in the one-third share of this property, he could not put forward the defence that he was the owner of it and that the property should not be partitioned. But, as a matter of fact, there was no necessity for him to do so when Jagmohan and others only got one-third and the remainder of the property remained with Bansidhar's branch, which had made itself liable for giving one-third out of it to Atal Nath. So far as the appellant Bansidhar is concerned he is an adult and entered into this agreement with open eyes and he cannot complain of his own agreement being enforced specifically against him when he has had the benefit of the money and the income of the property.

As regards the minor we would not have enforced the contract against him if his interest in the family property were in any way adversely affected. But we have already pointed out that this was new property acquired by the adult members by raising a loan and by entering into a contract for the discharge of that loan either by payment by themselves or by transfer of the newly acquired property. The minor also has benefited so far as the enjoyment of the profits for the last 12 years is concerned. We therefore think that he was bound by the act of the adult members of the family and of his natural guardians and he cannot retain the benefit of the property and repudiate the authority of his uncles to restore this property to Atal Nath if the money borrowed from him was not paid.

Having given the case our best consideration, we think that the equities are all in favour of the plaintiff, that there is no fatal defect in the written contract and that there are no good grounds for refusing specific performance. We accordingly dismiss the appeal with costs, which will be borne by all the appellants including those who have withdrawn the appeal.