

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.716 of 1993

=====

Against the judgment and decree dated 31.07.1993 passed by Shri Jagdish Kumar Sinha, 4th Subordinate Judge, Bhagalpur in Title Suit No. 106 of 1989

=====

Umesh Prasad Yadav son of Late Govind Prasad Yadav, R/o village- Fatehpur, P.S.- Sabaur, District- Bhagalpur..... Appellant

Versus

1. Smt. Puspa Sinha, Wife of Dr. Pradeep Kumar
2. Kumari Anamika D/o Dr. Pradeep Kumar
3. Smt. Madhuri Sinha, wife of Sri Nagendra Narayan Sinha
4. Dr. (Smt) Aruna Sinha wife of Sri Gangadhar Prasad Sinha
All R/o Mohalla- Tilka Manjhi of Central Jail Road, in the town of Bhagalpur, P.S.- Kotwali, District- Bhagalpur Respondents

=====

Appearance :

For the Appellant/s : Mr. T. N. Matin, Sr. Advocate
Dr. Mrityunjaye Kr. Gautam, Advocate
Mr. Yogendra Kumar, Advocate
For the Respondent/s : Mr. Ajay Kumar Singh, Advocate
Mr. Ranjit Sahay, Advocate
Mr. Rajnish Kumar, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA
C.A.V. JUDGMENT
Date: 22-07-2015

This appeal has been preferred against the judgment and decree dated 31.07.1993, decree sealed and signed on 21.08.1993, passed in Title Suit No. 166 of 1989 by the learned 4th Subordinate Judge, Bhagalpur in the matter of Smt. Puspa Sinha and Ors. Plaintiffs vs. Umesh Prasad Yadav Defendant. The defendant is the appellant and the plaintiffs are the respondents in this appeal.

2. The aforesaid title suit was filed for specific performance of contract directing the defendant to execute and register sale deed in their favour with respect to 16 Katthas and 7 Dhurs of land with measurement of 1102 Sq. Feet per Kattha out of 1 Acre 22 Decimals of land of Thana No. 22, Khata No. (old) 121 Khata No. (new) 94, Khesra No. (old) 332, Khesra No. (new) 416 fully described in Schedule B of the plaint (hereinafter referred to as the suit land) within time fixed by the court on receipt of the balance consideration amount of Rs. 1,45,644/-



and in case of failure, sale deed be executed and registered by the court after deposit of the said amount in the court and also for a decree for delivery of possession and for permanent injunction restraining the defendants from transferring the suit land or causing any interference with the possession of the plaintiffs over the suit land and further for compensation of Rs. 15,000/-. Alternatively, it has also been sought that if the plaintiffs are not found entitled to a decree of specific performance of contract, then a decree for refund of Rs. 10,000/- with interest at the rate of 16 % per annum be passed in favour of plaintiffs and against the defendant as well as for the cost of the suit.

3. Briefly stated, the case of the plaintiffs is that the defendant and others purchased 4 Acres and 56 Decimals of land jointly and the 4 vendees came in joint passion and accordingly, their names have been recorded in the recent survey records of rights and thereafter, the four purchasers partitioned the entire land in equal share and the defendant was allotted the land which is shown in Schedule A of the plaint. Jamabandi No. 578 was opened in favour of defendant. The defendant being Karta and manager consisting of himself, his associates and other members of the family expressed his willingness to sale the suit land for meeting legal necessity and expenses of his family. Dr. Pradeep Kumar (PW 11) negotiated and finalized the matter with the defendant and for a consideration of Rs. 1,55,644/-, the defendant agreed to sale 16 Katthas and 7 Dhurs of land. Accordingly, the said land was got measured by the defendant and a map was prepared through his Amin Laxman Mandal (PW 9) in presence of Dr. Pradeep Kumar and his brother Nagendra Narain Sinha (husband of plaintiff no. 3) and others. Accordingly, a deed of agreement for sale was executed on 03.05.1989 by the defendant on receipt of part consideration money of Rs. 10,000/- in favour of plaintiffs with respect to the suit land with recitals that the sale deed will be



executed and registered on receipt of the balance consideration amount of Rs. 1,45,644/- within a month from the date of execution, failing which the plaintiffs shall be entitled to seek relief from the court and if the plaintiffs failed to pay the balance consideration money, the earnest money, so paid, shall stand forfeited. It was also agreed that the defendant will deliver possession to the plaintiffs with a right to construct brick built boundary wall around the suit land and to utilize usufruct thereof in pursuance of the same. The plaintiffs constructed a well in the portion of suit land and stacked huge quantity of bricks and raw materials. It was also stipulated in the agreement for sale that road measuring 15 feet width to be left out jointly by the plaintiffs and defendant in the extreme eastern side of the suit land i.e. 7 feet and 6 inch was to be left by the plaintiffs and 7 feet and 6 inch was to be left out by the defendant from the western extremity and that common *rasta* was to be used by the plaintiffs and defendant. The plaintiffs have been all along ready and willing to perform their part of contract but the defendant with ulterior motive and for wrongful gain started evading to perform his part of contract giving rise to the suit. The plaintiffs managed the money on high rate of interest and in spite of the request made by the plaintiffs, the defendant evaded the matter resulting the plaintiffs sent legal notice through their Advocate Sri Janardan Prasad Tiwary (PW 4) on 01.06.1989 which was duly served upon defendant and the defendant gave reply to the said notice on 06.06.1989 through his Advocate Md. Jakki which does not contain true fact but admitted the payment of part consideration money and execution of the deed for sale dated 03.05.1989. The plaintiffs have taken demand loan of Rs. 1,05,700/- on 19.04.1989 itself against the security of NSC pledged in favour of bank for Rs. 1,48,000/- at the rate of 16 % per annum as the negotiation has already been finalized prior to execution of agreement of sale dated 03.05.1989 and the rest consideration money in cash was



available with the plaintiffs. Branch Manager of Punjab National Bank, Bhagalpur has granted original certificate in this regard also. The plaintiffs again sent legal notice on 08.06.1989 (Ext. 4A) to Shri Md. Jakki requesting him to suggest the defendant to receive balance consideration money and to register the sale deed but evasive reply was given by the defendant. After notice, dated 08.06.1989, the defendant came before Dr. Pradeep Kumar (PW 11) and agreed to execute the sale deed as per the agreement to sale and map and promised to come on 12.06.1989 for purchasing the stamp through the process Challan as cost of stamp was to be born out by the defendant but the defendant did not turn up and again legal notice was sent on 13.06.1989 (Ext. 4B) through the same Advocate, reply of which was received on 21.06.1989. At the behest of the defendant and after filing of the suit, measurement of suit land was again done and it was found that the actual area of land agreed and contracted to be sold comes to 18 Katthas and odd Dhurs in place of 16 Katthas and 7 Dhurs and for that the defendant requested the plaintiffs through Dr. Pradeep Kumar to get the sale deed executed and registered for the excess land on payment of consideration amount of Rs. 20,000/- and accordingly, sale deed was executed and registered by the defendant in favour of plaintiff no. 1 and she was put in possession and in that sale deed which was registered during the pendency of the suit, the deed of agreement for sale dated 03.05.1989 has been admitted by the defendant admitting that excess land cannot be sold to other persons than the plaintiffs. Even after execution of the said sale deed of 2 Katthas land, Dr. Pradeep Kumar persuaded and requested the defendant to execute and register the sale deed for the remaining area as per agreement to sale, dated 03.05.1989, but the defendant evaded the matter and did not execute and register the sale deed though the plaintiffs are still willing and ready to perform their part of contract and were/are always ready to pay the balance consideration money. The

defendant is on the look out for the intending purchaser to sale the suit land on higher price and, as such, the defendant is liable to be restrained by an order of injunction from transferring the suit land and from removing the bricks and other materials stacked over the suit land.

4. On the other hand the case of the defendant, shortly stated, is that the deed of agreement for sale stand cancelled by notice dated 16.06.1989. The suit land is jointly held by the defendant and his brothers and, as such, the suit is bad for non-joinder of the necessary parties. The defendant, in urgent need of money for purchase of land and house and for meeting other expenses such as marriage of his daughter, has agreed to sale the land and the plaintiffs agreed to purchase the same at the said price and for that the land was got measured in presence of the plaintiffs and their karpardaz. The map of the suit land was prepared at the direction of the plaintiffs and of the defendant. The payment of Rs. 10,000/- was made by way of security for the due performance of contract and it was agreed that in case of default in payment of rest consideration money and non-performance of the contract by the plaintiffs within the stipulated time the earnest money shall stand forfeited as penalty. The time was the essence of the contract and, as such, the agreement for sale dated 03.05.1989 stands cancelled after expiry of one month time. The plaintiffs played fraud by wrongly incorporating delivery of possession in the agreement whereas the delivery of possession of the suit land by the defendant to plaintiffs was conditional on payment of entire consideration money, no delivery of possession was given to the plaintiffs and the defendant being in possession is growing crops thereon. The agreement to sale is unregistered and is not admissible in evidence. The plaintiffs have assured to pay the entire consideration money immediately and to get the sale deed executed and hence, they pleaded to defendant that in order to avoid further dispute construction of



boundary wall may be permitted over the suit land. The plaintiffs have not collected materials like bricks and others over the suit land and the plaintiffs have also not dug pucca well on any portion of the suit land. As a matter of fact a kachha well with bricks surface has been built by the defendant for irrigation of the suit land three years ago. Regarding *rasta* left by the plaintiffs and defendant in equal share and the defendant is also always ready and willing to act according to the map after the execution of the sale deed and payment of balance consideration money. The defendant approached the plaintiffs for payment of the balance consideration money on several occasions but they failed to pay the balance consideration money. The plaintiffs after the agreement started imposing new conditions by asking the defendant to bear the cost of pucca boundary wall on the boundary of the suit land before payment of the rest consideration money and further for laying of common road towards east before execution of the sale deed. As a matter of fact the plaintiffs have no sufficient money to pay the balance consideration amount and hence, they evaded the matter on frivolous grounds. The defendant after execution of the agreement to sale negotiated for purchase of 1 and $\frac{1}{2}$ Bigha of land at village Bagadar for Rs. 45,000/- with Anup Yadav on 10.05.1989 and paid Rs. 2,000/- to him and balance amount was to be paid by 28.05.1989 but due to non-payment, the earnest money of Rs. 2000/- has been forfeited and defendant failed to purchase the same and further the defendant did not purchase the house at village Sabour which has been sold to Ram Bilash Mandal. The defendant approached the plaintiffs several times for payment of balance consideration money and for getting the sale deed executed but the plaintiffs failed to perform their part of contract within time agreed. Further the marriage of the daughter of the defendant could not be solemnized for want of money and thereafter, his daughter was married in October, 1989 and he had to



sale 2 Katthas extra land on 03.10.1989 and, in this way, the purpose was frustrated. It is wrong to say that the plaintiffs were all along ready and are still willing and ready to perform their part of contract. It is wrong to say that the plaintiffs managed money on higher rate of interest and approached the defendant through Dr. Pradeep Kumar. The plaintiffs started sending legal notices to save themselves from penalty clause. The defendant extended one week time by his reply notice dated 06.06.1989 but the plaintiffs in stead of performing their part of contract, unnecessarily sent notices after notices. In reply notice, dated 16.06.1989, again the defendant gave one week time to the plaintiffs to hand over approved draft copy of sale deed but the plaintiffs failed to comply the same and balance consideration money was also not paid. The plaintiffs threatened by notice dated 13.06.1989 to institute a suit and against that reply was sent on 19.06.1989 by which the agreement stands cancelled. The defendant has to sale the adjacent property and, as such, the plaintiffs have got no right to enforce the contract and to seek relief as claimed. In the additional written statement it has been stated that negotiation for the purchase of the suit land was started on 01.05.1989 and on the date of agreement for sale the plaintiffs had only Rs. 10,000/- and, as such it is wrong to say that the plaintiffs had taken a demand loan of Rs. 1,05,700/- on 19.04.1989 through Dr. Pradeep Kumar and if it was so, then, the plaintiff would have paid the entire consideration money and had got the sale deed executed. The plaintiffs had to purchase the stamp for sale deed as per prevailing custom. Certificate dated 02.07.1990 has been manufactured after filing of the suit. The sale deed dated 03.10.1989 executed by the defendant in favour of plaintiff no. 1 is outside the land covered under the agreement to sale dated 03.05.1989 and it is an independent transaction. The defendant never got the suit land measured and he did not get the map prepared by Amin. The plaintiffs never tendered the balance

consideration money and they were/are not willing to perform their part of the contract at any point of time. The plaintiffs always demanded possession of the suit land before payment of the consideration money contrary to the terms of agreement and, as such, the suit of the plaintiffs is fit to be dismissed.

5. On the basis of pleadings of the parties, the following issues have been framed by the learned court below:

“(i) Is the suit as framed maintainable ?

(ii) Has the plaintiffs got valid cause of action for the suit ?

(iii) Is the suit bad for non-joinder of necessary and proper parties?

(iv) Is the suit barred under Section 55 of Indian Contract Act ?

(v) Had the defendant entered into an agreement for sale of the suit property with the plaintiffs on 03.05.1989 and on receipt of part consideration money of Rs. 10,000/- executed a written agreement in favour of the plaintiffs ?

(vi) Have the plaintiffs commit breach of terms of the agreement dated 03.05.1989 by not paying the entire consideration money to the defendant and by not getting the kewala executed within the stipulated time ?

(vii) Have the plaintiffs committed fraud, misrepresentation and deceit on the defendant in incorporating the term of delivery of possession and construction of bricks wall in the agreement dated 03.05.1989 ?

(viii) Had the defendant delivered possession of the suit property to the plaintiffs in pursuance of agreement dated 03.05.1989 ?

(ix) Is the agreement dated 03.05.1989 enforceable in law against the defendant ?

(x) Had the defendant suffered damage by non-performance of the contract dated 03.05.1989 ?

(xi) Are the plaintiffs entitled to get a decree for specific performance

of contract ?

(xii) To what relief or reliefs the plaintiffs are entitled for?"

6. Learned Sub-Judge decided issues no. (i), (iii) and (iv) in favour of plaintiffs and against the defendant and held that the suit as framed is maintainable, is not bad for non-joinder of necessary parties, and is not barred under Section 55 of the Indian Contract Act. Issues No. (vi) to (x) have been taken together and decided the same in favour of plaintiffs and against the defendants. Accordingly, issue no. (xi) has also been decided in favour of plaintiffs and against the defendants and further issue no. (ii) was also decided in favour of plaintiffs and against the defendant holding that the plaintiffs have got valid cause of action for the suit. In deciding issue no. (xii) the learned court below held that the plaintiffs are entitled for the relief of specific performance of contract against the defendant only and the plaintiffs are not entitled to other reliefs and accordingly, the suit was decreed in part on contest without cost.

7. The learned counsel for the appellant arguing in this appeal has submitted that none of the plaintiff has been examined in the suit. Dr. Pradeep Kumar has been examined as PW 11 who is the husband of plaintiff no. 1 but he has got no power of attorney on behalf of plaintiffs. None of the plaintiffs has come to support their case as made out in the plaint. No one has come forward to say that they were/or ready to perform their part of contract. None-examination of the plaintiffs is fatal for them. Learned counsel for the appellant placing reliance upon the judgment reported in **AIR 2005 Supreme Court Page 439** in the case of **Janki Vashdeo Bhojwani and another, Appellants v. Indusind Bank Ltd. and others. Respondents**, has submitted that even power of attorney holder cannot depose in place and in stead of principal as only the principal can have a personal knowledge and instead of which the principal is entitled to be cross-examined.



Learned counsel for the appellant has placed reliance upon paragraphs 12, 13, 14 and 22 of the said judgment. Further reliance has been placed upon **AIR 1998 Rajasthan page 185** in the case of **Ram Prasad, Petitioner v. Hari Narain and others, Respondents**, paragraphs 8 and 9 wherein it has been held that “ A general power-of-attorney holder can appear, plead and act on behalf of party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself. To appear in a witness-box is altogether a different act. The general power-of-attorney holder cannot be allowed to appear as a witness on behalf of plaintiff in the capacity of the plaintiff”. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the C.P.C. and if the plaintiff is suffering from disease of deafness, in the event also he may be examined with the help of the provisions contained in Section 119 of the Indian Evidence Act, 1972 which are applicable for the purpose of recording the evidence of a dumb witness. A deaf witness may also be examined in the same manner.

8. Further it has been argued that time was the essence of the contract and plaintiffs were not ready to perform their part of contract and, as such, they are not entitled for equitable relief. Within the stipulated time the plaintiffs failed to discharge their part of contract and, as such, they are not entitled for any relief. The evidences adduced on behalf of plaintiffs are not reliable whereas the evidences adduced on behalf of defendant/appellant are reliable and competent. Learned counsel for the appellant placed reliance upon a judgment reported in **2015 (2) PLJR (SC) Page 420 paragraph 12 in the case of Nanjappan... Appellant vs. Ramasamy & Anr... Respondents**, and it has been submitted that under Section 20 of the Specific Relief Act grant of specific performance is



discretionary. Though the decree for specific performance is discretionary, yet the court is not bound to grant such a relief merely because it is lawful to do so. But the discretion of the court should not be arbitrary, but sound and reasonable, guided by judicial principles of law and capable of correction by a court of appeal and should be properly exercised keeping in view the settled principle of law as envisaged in Section 20 of the Act. The jurisdiction of decree of specific performance is a discretion of the court and it depends upon facts and circumstances of each case. The court would take into consideration circumstances of each case, conduct of the parties, recitals in the sale agreement and the circumstances outside the contract have to be seen. Learned counsel further submits that Hon'ble Apex Court considering the totality and the facts and circumstances refused to grant discretionary relief of specific performance to the respondents plaintiffs. Further reliance has been placed upon a judgment reported in **2015 (1) PLJR Supreme Court Page 7** in the case of **Zarina Siddiqui vs. A. Ramalingam @ R. Amarnathan**, paragraphs 25 and 37. Paragraph 25 of the judgment is quoted herein below:-

“25. It is well settled that remedy for specific performance is an equitable remedy. The Court while granting decree of specific performance exercises its discretionary jurisdiction. Section 20 of the Specific Relief Act specifically provides that Court's discretion to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with sound and reasonable judicial principles.”

Paragraph 37 is also quoted herein below:

“37. As held by this Court time and again, efflux of time and escalation of price of the property by itself cannot be a valid ground to deny the relief of specific performance. But the Court in its discretion may impose reasonable

conditions including payment of additional amount to the vendor. It is equally well settled that the plaintiff is not to be denied specific performance only on account of phenomenal increase of price during the pendency of litigation.”

9. Further reliance has been placed upon a judgment reported in **AIR 2011 Supreme Court page 3351** in the case of **M/s. Citadel Fine Pharmaceuticals v. M/s. Ramaniyam Real Estates P. Ltd. & Anr. WITH M/s. Ramaniyam Real Estates P. Ltd. & Anr. V. M/s. Citadel Fine Pharmaceuticals & Anr.** paragraph 50 and 51 which are quoted herein below:

50. “ Section 55 of the Indian Contract Act which deals with a contract, in which time is of essence is as follows:

“Section 55. Effect of failure to perform at a fixed time, in contract in which time is essential.- When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.”

51. “On a combined reading of Section 9 of the Specific Relief Act and Section 55 of the Indian Contracts Act it is clear that in this case the vendor as a promisee, was within its right to terminate the contract by sending the letter dated 4th September, 1996 in terms of Clause (9) of the Contract while returning the advance money of Rs. 10,00,000/-. It is clear that the plaintiff has not discharged its burden within the time specified and is not entitled to a specific performance of the contract.”

10. Further reliance has been placed on the judgment reported in **AIR 1996 Supreme Court Page 2150** paragraph 5 in the case of **Kanshi Ram,**



Appellant v. Om Prakash Jawal and others, Respondents. It has been submitted that Hon'ble Apex Court has been pleased to hold that as the respondent himself had claimed alternative relief for damages, the court should have been well justified in granting alternative decree for damages instead of ordering specific performance which would be realistic and fair and accordingly, held that the decree for specific performance is inequitable and unjust to the appellant. The learned counsel for the appellant has submitted that in the present case the time was the essence of the contract and due to non-payment of balance consideration money of Rs. 1,45,644/- by the plaintiffs to the defendant appellant, the agreement to sale (Ext. 6) stood cancelled and cannot be enforced through the process of the law. The plaintiffs have not deposited the said amount in the court and the same was never tendered to the defendant. Further after passing of the decree they deposited the amount during execution but in this appeal they withdrew the said amount vide order dated 24.08.1995 whereby and whereunder further proceeding in execution case was stayed and the respondents shall be entitled to the refund of Rs. 1,45,644/- deposited in the court treasury, Bhagalpur on 08.10.1993 to the credit of the appellant without prejudice to the rights of the respondents and, as such, the respondents withdrew that amount and utilized the same whereas the appellant was always ready to perform his part of contract within stipulated time. The appellant was in urgent need of money and due to non-payment of the rest amount, the appellant failed to purchase another land and also did not perform the marriage of his daughter at the relevant time. The witnesses examined on behalf of defendant have proved the case of the defendant but in spite of that the learned court below has decreed the suit which is bad in law and is fit to be set aside.

11. On the other hand on behalf of the respondents it has been submitted that non-examination of the plaintiffs is not fatal in the present case as



Dr. Pradeep Kumar is non-else but he is the husband of plaintiff no. 1, father of plaintiff no. 2 and devar of plaintiffs no. 3 and 4. Not only that he on behalf of plaintiffs has negotiated the matter and finalized the deal with the defendant. He is a competent witness to depose under Section 120 of the Indian Evidence Act. From the cause title of the plaint it is manifest that plaintiffs no. 1 and 3 are house wives whereas plaintiff no. 2 was student and plaintiff no. 4 was medical practitioner and from paragraph 6 of the plaint it is manifest that the plaintiffs negotiated and finalized the deal through Dr. Pradeep Kumar. Further from paragraph 7 of the plaint it is manifest that at the time of measurement Dr. Pradeep Kumar being Karpardaz of the plaintiffs was present. From paragraph 13, 13A, 14A and 14 C of the plaint also it is manifest that the plaintiffs having managed the money approached the defendant through Dr. Pradeep Kumar time without number and requested to receive the balance consideration money and further the plaintiffs through Dr. Pradeep Kumar had taken a demand loan of Rs. 1,05,700/- on 19.04.1989 against the security of NSC pledged in the bank for Rs. 1,48,000/- at the rate of 16.5 % per annum. Further after second measurement, 2 Katthas of land was sold by the defendant to plaintiff no. 1 through Dr. Pradeep Kumar on consideration money of Rs. 20,000/- and Dr. Pradeep Kumar after execution and registration of the aforesaid sale deed, persuaded and requested the defendant to execute and register the sale deed for the remaining area as per agreement to sale dated 03.05.1989 and, as such, Dr. Pradeep Kumar was quite well versed in all the transactions going on between the plaintiffs and defendant. The defendant being DW 9 in paragraph 1 itself has said that he has talked with Dr. Pradeep Kumar to sale the land and for that agreement was prepared. Here, Dr. Pradeep Kumar acting on behalf of plaintiffs and further being competent witness under Section 120 of the Indian Evidence Act has deposed as PW 11 and has fully supported the case of

the plaintiffs showing willingness and readiness to perform their part of contract but the defendant evaded the matter on one pretext or the other.

12. The evidences adduced on behalf of the plaintiffs are competent, reliable and most of them are the witnesses of the agreement to sale (Ext. 6). The documents exhibited on behalf of the plaintiffs are also relevant and go to prove that the plaintiffs were/are willing to perform their part of contract. Further from Ext. 9 which is sale deed dated 03.10.1989 executed by the defendant in favour of plaintiff no. 1 also goes to prove that time was not the essence of the contract and at the time of executing the sale deed i.e. on 03.10.1989 also the defendant has admitted regarding the existence of agreement to sale (Ext. 6). The boundary given in the sale deed is very important as in the west the land involved in Ext. 6 is mentioned by further admitting part payment of Rs. 10,000/-. In the recitals also in the middle the existence of Ext. 6 has been admitted. Thus, the argument advanced by the learned counsel for the appellant has got no leg to stand. The evidence oral and documentary adduced on behalf of the defendant/appellant are not trust worthy and as such the learned Sub-Judge has rightly decreed the suit. Learned counsel has placed reliance upon the judgment reported in **AIR 2013 (SC) Civil page 471 paragraphs 25 and 28 equivalent (2013) 8 SCC 131 paragraphs 36 and 40** in the case of **Satya Jain (Dead) through Lrs. and Ors. Versus Anis Ahmed Rushdie (dead) through Lrs. And Ors.** The Hon'ble Apex Court has held that no straitjacket formula can be laid down and the test of readiness and willingness of the plaintiff would depend on his overall conduct i.e. prior and subsequent to the filing of the suit which has also to be viewed in the light of the conduct of the defendant. Further it has been held that the discretion to direct specific performance of an agreement and that too after elapse of a long period of time, undoubtedly, has to be exercised on sound,



reasonable, rational and acceptable principles, efflux of time and escalation of price of property, by itself, cannot be a valid ground to deny the relief of specific performance. Further reliance has been placed upon a judgment reported in **AIR 2005 SC Page 3503 paragraph 7 and 13** in the case of **Aniglase Yohannan, Appellant v. Ramlatha and others, Respondents**. wherein Section 16 © of the Specific Relief Act, 1963 has been interpreted. Explanation of Section 16 (c) reads as follows:-

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

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

13. Learned counsel for the respondents submitted that in the present case also the plaintiffs have averted and have successfully proved that they have always been ready and willing to perform the essential terms of the contract which are to be performed by them and as soon as the court directed, the balance consideration money was deposited in the court. Learned counsel for the respondents has placed reliance upon paragraph 37 of the judgment of **Zarina Siddiqui** (supra), the same judgment has also been relied upon by the learned counsel for the appellant. Paragraph 37 thereof has already been quoted above. Further reliance has been placed on the judgment reported in **(2015) 1 SCC 597** paragraph 13 to 18 in the case of **K. Prakash Versus B. R. Sampath Kumar**. The Hon’ble Apex Court has held that subsequent rise in the price will not be treated as hardship entailing refusal of the decree for specific performance. Rise in price is a normal change of circumstances and therefore, on that ground a decree



for specific performance cannot be reversed. Further reliance has been placed upon the judgment reported in **2008 (2) PLJR SC 67**, paragraphs 10, 12 and 13 in the case of **Balasaheb Dayandeo Naik (Dead) through Lrs. & Ors. vs. Appasaheb Dattatraya Pawar**. The Hon'ble Apex Court has been pleased to hold that when a contract relates to sale of immovable property, it will normally be presumed that time is not the essence of the contract even where the parties have expressly provided that time is the essence of the contract, such a stipulation will have to be read along with other provisions of the contract. Paragraph 13 of the judgment is quoted herein below:

“13. It is true that the defendant in his written statement, has made a bald claim that the time was the essence of contract. Even if we accept the recital in the agreement of sale (Ext. 18) that the sale deed has to be executed within a period of six months, there is an express provision in the agreement itself that failure to adhere the time, the earnest money will be forfeited. In such circumstances and in view of recital pertaining to forfeiture of the earnest money makes it clear that time was never intended by the parties to be of essence. The Constitution Bench decision in Chand Rani vs. Kamal Rani (*supra*) also makes it clear that mere fixation of time within which contract is to be performed does not make the stipulation as to the time as the essence of contract. Further, we have already pointed out that the defendant has not bothered to prove his claim on oath before the Court to the effect that it was the plaintiffs who avoided performing their part of contract. All the above mentioned material aspects were correctly appreciated by the trial Court and unfortunately the High Court failed to adhere to the well known principles and the conduct of the defendant. When the third plaintiff deposed before the Court explaining their case with reference to the recitals in the agreement of sale including the reference to the



legal notice to the defendant, in the absence of *contra* evidence on the side of the defendant, we are unable to agree with the conclusion arrived at by the High Court in non-suiting the plaintiff. The High Court commented the conduct of the plaintiffs in praying for refund of the earnest money, namely, Rs. 20,000/- paid as advance. As rightly pointed out, the claim for refund of earnest money is only their alternative claim. It is not in dispute that in all suits for specific performance, the plaintiff is entitled to seek alternative relief in the event the decree for specific performance cannot be granted for any reason, hence there is no infirmity in the alternative plea of refund.”

14. Learned counsel has further argued that when both sides have adduced evidence, burden of prove looses its importance and it becomes insignificant and for that reliance has been placed upon the judgment reported in **AIR 1999 Supreme Court 2216** paragraph 16 in the case of **Arumugham (dead) by L. Rs. And others, Appellants v. Sundarambal and another, Respondents.**

15. On the basis of rival contentions of the parties, points for consideration in this appeal before this Court are as follows:

- (i) Whether non-examination of plaintiffs is fatal in the present case ?
- (ii) Whether time was the essence of the contract?
- (iii) Whether the plaintiffs were/are ready and willing to perform their part of contract as per the terms of Ext. 6 ?

16. Point No. (i) :- In the present case, PW 1 Dr. Pradeep Kumar is the husband of plaintiff no. 1, father of plaintiff no. 2 and dewar of plaintiffs no. 3 and 4. He on behalf of plaintiffs has negotiated the matter and finalized the deal with the defendant which has been admitted by the defendant (DW 9) in paragraph 1 of his deposition itself. From the averments made in the plaints vide paragraphs 6, 7, 13, 13A, 14A and 14 C it is manifest that it was PW 11 who has negotiated and



finalized the deal. Measurement of the land was done in his presence and further he managed the money and approached the defendant time without number and requested to receive the balance consideration money. Dr. Pradeep Kumar even during pendency of the suit and after execution and registration of the sale deed (Ext. 9), persuaded and requested the defendant to execute and register the sale deed for remaining area as per agreement to sale dated 03.05.1989. Section 120 of the Evidence Act, 1872 reads as follows:-

“120. parties to civil suit, and their wives or husbands.

Husband or wife of person under criminal trial.-In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.”

17. From plain reading of Section 120 of the Evidence Act itself it is manifest that in civil proceeding, the husband shall be competent witness. During the pendency of the suit also PW 11 and his brother Sri Nagendra Narain Sinha came in the court with cheque for payment of balance consideration money as agreed between the defendant and PW 11 to hand over the same to the learned Advocate Mr. Jakki and to this extent petition has been filed which is Ext. 1 and in that Ext. 1 also which is dated 05.05.1993 in paragraph 3, the role of Dr. Pradeep Kumar is described. The rulings relied upon by the learned counsel for the appellant reported in **AIR 2005 Supreme Court Page 439 and AIR 1998 Rajasthan Page 185** are not applicable in the present case. In the case of **Janki Vashdeo Bhojwani and another, Appellants v. Indusind Bank Ltd. and others. Respondents** (supra) the facts are on different footing. In that case the question was whether one of the appellants have own independent source of



income and had contracted towards the purchase of the property from their own independent income and then, it was held that such question can only be answered by the appellants themselves and not by a mere holder of power of attorney from them. Further in the case of **Janki Vashdeo Bhojwani and another, Appellants v. Indusind Bank Ltd. and others. Respondents** (supra) the suit was instituted for injunction and possession of the property against the defendant and in that suit petition was filed and moved that the plaintiff's son being general power of attorney holder may be allowed to appear as a witness on his behalf which was contested by the defendant and the trial court dismissed the said application which was upheld in the revision also.

18. Here the defendant has not raised any objection at the time of examination of PW 11 rather the defendant (DW 9) in his deposition at paragraph 1 has admitted himself that negotiation for sale was done with Dr. Pradeep Kumar. Thus, it can safely be held in the present case that non-examination of plaintiffs is not fatal for plaintiffs.

19. Point No. (ii):- Ext. 6 is agreement to sale dated 03.05.1989 which is an admitted document. In paragraph 4 of the recitals, it is mentioned that within one month after paying consideration money the vendee will get the sale deed executed and if the vendees evaded the matter, then the consideration money which has been paid will be forfeited and if the vendor started evading the matter, then the vendee have got right to get the sale deed executed after bringing the suit for specific performance of contract in the Court and also to realize the cost. Paragraph 6 of Ext. 6 is important wherein the vendor (defendant) has admitted that the vendees are entitled to erect brick built boundary wall over the land involved in the agreement to sale so that at the time of taking possession after execution of sale deed there would be no obstruction or hindrance. But from the



evidence adduced, it is manifest that the defendant did not allow to get the boundary wall constructed after execution of Ext. 6 though for the same bricks and other materials were stacked on the plot. From Ext. 9 which is sale deed executed by Umesh Yadav in favour of Puspa Sinha which is dated 03.10.1989, in the boundary towards west, the land covered under Ext. 6 has been mentioned and the defendant has further admitted regarding payment of part consideration amount of Rs. 10,000/- and till then the defendant has not stated regarding forfeiture of part consideration amount of Rs. 10,000/- and cancellation of Ext. 6. In the recitals also, the defendant has admitted regarding the existence and continuity of Ext. 6. Thus, time was not the essence of the contract. The Hon'ble Apex Court in the case of **Balasaheb Dayandeo Naik (Dead) through Lrs. & Ors. vs. Appasaheb Dattatraya Pawar** (supra) has been pleased to hold that when a contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. Paragraph 10 of the said judgment is quoted herein below:-

“10. 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 where the parties have expressly provided that time is the essence of the contract, such a stipulation will have to be read along with other provisions of the contract. For instance, if the contract was to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would, be construed as rendering ineffective the express provision relating to the time being the essence of contract. In the case on hand, though the parties agreed that the sale deed is to be executed within six months, in the last paragraph they made it clear that in the event of failure to execute the sale deed, the earnest money will be forfeited.

In such circumstances, the above-mentioned clauses in the last three paragraphs of the agreement of sale would render ineffective the specific provision relating to the time being the essence of contract.”

20. In the present case, the defendant has admitted himself by executing the sale deed dated 03.10.1989 (Ext. 9) in favour of plaintiff no. 1 that the time was not the essence of the contract and on 03.10.1989 the defendant has admitted regarding existence and continuity of Ext. 6. Thus, this point is decided in favour of the respondents and against the appellant.

21. Point No. (iii):- The plaintiffs in order to prove their case have examined altogether 11 witnesses. PW 1 is Sri Narayan Sharma, a typist, who has typed the agreement to sale dated 03.05.1989, PW 2 is Parmanand Singh, a typist, who has proved the petition dated 05.05.1993 as Ext. 1, PW 3 is Mansoor Alam, a deed writer, who has proved payment receipt of consideration amount dated 03.10.1989 as Ext. 2, further he has proved draft of the sale deed as Ext. 3. PW 4 is Shyam Sundar Jha who has proved legal notice, dated 01.06.1989, 08.06.1989, 13.06.1989 and 22.06.1989 as Ext. 4 to 4C and under certificate of posting as Ext. 5 and 5A. PW 5 is Nagendra Kumar Singh, an Advocate, who has stated that on 03.05.1989 Umesh Prasad Yadav (defendant) called him to read the agreement to sale and he read over the contents of the agreement to sale to him and then Umesh Prasad Yadav signed the same. This witness has signed as a witness over the same. He has stated that the parties and other witnesses have also signed over the same in his presence and accordingly, he has proved the agreement to sale as Ext. 6. This witness has further stated that Dr. Pradeep Kumar has stated to him that he went to Umesh Prasad Yadav to pay the consideration amount but he was not receiving the same and was also not ready to execute the sale deed and further he is not allowing



to erect the boundary wall over the land involved in agreement to sale. Dr. Pradeep Kumar requested him to convince the defendant in this regard and then, he called Umesh Prasad Yadav at his residence. Dr. Pradeep Kumar and his brother Nagendra Narayan Sinha came with cash and cheque. Umesh Prasad Yadav also came but he did not receive the same and he took time but thereafter, he did not come. This witness has been cross-examined at length wherein he has become more competent. PW 6 is Sumit Prasad Yadav, an Advocate, who has stated that Umesh Prasad Yadav showed his willingness to sale the land, then he asked to other persons but nobody was ready and then, he asked to Dr. Pradeep Kumar and Dr. Nagendra Singh and then they became ready, thereafter, deal was finalized in his presence. He has also signed as a witness on the deed of agreement (Ext. 6). He has stated that along with Ext. 6 there was map also. He has further stated that Laxman Mandal has measured the land in presence of defendant and Dr. Pradeep Kumar and others. He has stated that Laxman Mandal prepared the map in his presence and has signed over the same also. He has proved the map as Ext. 7. He has further stated that after execution of Ext. 6, Dr. Saheb came and told him that Umesh Prasad Yadav did not object in constructing the well but he was not allowing in giving boundary wall and further he was not receiving the rest consideration amount. He requested to intervene into the matter and then, he called Umesh Prasad Yadav and Dr. Saheb. Dr. Saheb told Umesh Prasad Yadav to receive the cash or cheque or draft and to execute the sale deed but Umesh Prasad Yadav did not agree and took time. This witness has further stated that after filing of the case Umesh Prasad Yadav came and told that on the spot the land is more than covered under the agreement to sale and thereafter, Dr. Saheb told that he will pay the consideration amount if the land will be more and again second measurement was done and 2 Katthas land was found excess. Umesh Prasad



Yadav became ready to sale that land also and executed the sale deed and Dr. Saheb paid the consideration amount but did not execute the sale deed with respect to the land covered under Ext. 6 whereas the plaintiffs were always ready to pay the balance consideration amount and to get the sale deed executed. This witness has also been cross-examined at length but nothing has come to disbelieve his testimony. PW 7 is Raj Kumar Mishra. He has also stated that on 03.10.1989 Umesh Prasad Yadav executed sale deed in favour of Puspa Sinha and Dr. Saheb paid consideration amount of Rs. 20,000/- to Umesh Prasad Yadav and over that sale deed he has signed as a witness, on that date also Dr. Saheb told Umesh Prasad Yadav to execute the sale deed for the land covered under Ext. 6 but Umesh Prasad Yadav evaded the matter. This witness states that Dr. Saheb and his brother were always ready to pay the balance consideration amount and to get the sale deed executed but the defendant refused. This witness has also been cross-examined at length but nothing has come to disbelieve his testimony. PW 8 is Nitya Nand Chaudhary. He is also a witness to Ext. 6. He has stated that Dr. Saheb told him after execution of agreement to sale that Umesh Prasad Yadav is neither executing the sale deed after receiving the consideration amount nor is ready to allow him to construct the boundary wall over the land and thereafter, he called Umesh Prasad Yadav and Dr. Saheb both in the court. Dr. Saheb was ready to pay the balance consideration amount on that date also and to get the sale deed executed but Umesh Prasad Yadav took time and evaded the matter. He has been cross-examined at length but nothing has come to disbelieve his testimony. PW 9 is Laxman Mandal, Amin, who has stated that Umesh Prasad Yadav told him to measure the land and after measuring the land he prepared the map. He has identified the map which was prepared by him and the same has been marked as Ext. 7. He has stated that at the time of measurement Umesh Prasad Yadav, his nephew, Dr. Pradeep Kumar (PW



11) and his brother were present. Again after 3-4 months Umesh Prasad Yadav called him for measuring the land and after second measurement the land was found 2 Katthas more as earlier towards south there was ditch which was not measured. PW 10 Umakanth Mishra is a Professor who has signed as a witness on Ext. 6. In October, 1989, Dr. Saheb told him that he was ready to pay the balance consideration amount but Umesh Prasad Yadav on that date did not agree to take the balance consideration amount and told that after 8-10 days he will execute the sale deed with respect to the land of agreement to sale and on that date sale deed was executed only with respect to the more land which was found after second measurement. He has also been cross-examined at length but nothing has come to disbelieve his testimony. PW 11 is Dr. Pradeep Kumar. He has stated that plaintiff no. 1 is his wife, plaintiff no. 2 is his daughter who is minor, plaintiff no. 3 is own bhabhi who is a house wife and plaintiff no. 4 is also his own bhabhi and is the Head of the Department in Anatomy Department, Jawaharlal Nehru Medical College, Bhagalpur. In paragraph 3 he has stated that all the plaintiffs are the members of joint Hindu Family and he and his brother used to manage the family affairs. He has stated that on behalf of the plaintiffs he is deposing which will be binding on all the plaintiffs. No objection was raised on behalf of the defendant to this statement of this witness. He has fully supported the case as made out in the plaint by saying that he was and is always ready to perform the plaintiffs part of contract, he was and is willing to pay the balance consideration amount to the defendant but the defendant evaded the matter and finally refused. This witness has further stated that loan of Rs. 1,05,700/- at the rate of 16.5% per annum was taken from Punjab National Bank, Bhagalpur on the basis of pledging National Saving Certificate to pay the balance consideration amount and that loan was taken on 19.04.1989 as the negotiation was finalized till then. He has proved Ext. 8 which is



a certificate granted by the Manager, Punjab National Bank, Bhagalpur Branch. This witness has stated that they never tried to take more land than the covered under the agreement to sale and never violated the terms of the agreement to sale. After filing of the suit, the defendant agreed to compromise the suit and got the land measured again and then, 2 Katthas more land was found and for that the defendant became ready to execute the sale deed after receiving Rs. 20,000/- and accordingly, sale deed was executed on 03.10.1989 and the defendant received the total consideration amount of Rs. 20,000/- of that sale deed. The defendant has signed the sale deed after understanding the contents. On that day also the defendant stated that he will execute the sale deed for the land covered under the agreement to sale later on. He has denied the allegation of defendant. This witness has stated regarding sending the legal notice, receiving the reply notice and further that the defendant at first agreed to receive the balance consideration amount to execute the sale deed but he did not come for purchasing the stamp and executing the sale deed. This witness has been cross-examined at length but his testimony has not been shaken.

22. On behalf of plaintiffs Ext. 1 is petition dated 05.05.1993 filed on behalf of plaintiffs in the suit. From this petition it reveals that the plaintiffs were/are always ready and showing their willingness to pay the balance consideration amount and to get the sale deed executed from defendant and even during pendency of the suit also the defendant agreed to allow the plaintiffs to get the boundary wall constructed after payment of consideration amount to his Advocate Md. Jakki and accordingly, Dr. Pradeep Kumar and his brother went before Md. Jakki, Advocate to pay the balance consideration amount but the defendant again refused. Ext. 2 is receipt of consideration amount dated 03.10.1989. Ext. 3 is draft of agreement to sale dated 03.05.1989. Ext. 4 is



Advocate's Notice dated 01.06.1989. Ext. 4A is Advocate's Notice Dated 08.06.1989. Ext. 4 B is Advocate's Notice dated 13.06.1989 and Ext. 4C is Advocate's Notice dated 22.06.1989 and from all these notices, it is manifest that the plaintiffs were/are always ready to pay the balance consideration amount to the defendant and to get the sale deed executed. Ext. 4 D is reply notice sent by the defendant dated 06.06.1989. Ext. 4E is the reply notice dated 16.06.1989. Ext. 4 F is reply notice dated 21.06.1989 and in reply notice earlier the defendant after extending the time demanded the balance consideration amount and it goes to show that time was not the essence of the contract. Ext. 5 and 5A are under certificate of postings, Ext. 6 is agreement to sale dated 03.05.1989 wherein the defendant has agreed to allow the plaintiffs to get the boundary wall constructed surrounding the land in question. Ext. 7 is the map attached with the agreement to sale. Ext. 8 is the certificate granted by Branch Manager, Punjab National Bank by which it is manifest that the plaintiffs have arranged the amount for purchasing the land in question. Ext. 9 is certified copy of sale deed dated 03.10.1989 executed by Umesh Prasad Yadav in favour of plaintiff no. 1 and in this sale deed the defendant has admitted regarding the existence and continuance of Ext. 6. Ext. 10 to 10C are the registered postal receipts and Ext. 11 is money receipt dated 14.05.1989.

23. On behalf of defendant DW 1 is Shashi Bhushan Jha a formal witness who has proved Ext. A and A/1 the reply notices. DW 2 is Chottu Prasad Yadav. He has stated that in between Dr. Saheb and Umesh Prasad Yadav the deal was finalized on 03.05.1989. Umesh Prasad Yadav has to sale the land and further Dr. Saheb became ready to purchase the same. He has stated that for marrying daughter and to purchase the land Umesh Prasad Yadav has agreed to sale the land. This witness has further stated that Dr. Saheb did not pay the balance consideration amount in time, resulting, the marriage of the daughter of the defendant was



deferred. In paragraph 7 he has stated that over the land in suit there is a well which was constructed by Umesh Prasad Yadav but the existence of said well is not mentioned in Ext. 6. In Ext. 6 it is also not mentioned that the defendant was to marry his daughter and for that he was selling the land. During cross-examination, in paragraph 10, he has stated that Umesh Prasad Yadav is sitting in court. In paragraph 14 he has admitted regarding selling of 2 Katthas of land by Umesh Prasad Yadav to Dr. Saheb. In paragraph 23 he has admitted that Umesh Prasad Yadav is his uncle and he has come with him. In paragraph 24 he has stated that Umesh Prasad Yadav has proposed to sale the land before Dr. Saheb. In paragraph 29 he has stated that well standing over the suit land is not constructed of bricks and there is no water at present. In paragraph 30 he has stated otherwise that Umesh Prasad Yadav executed the sale deed for 2 Katthas as Dr. Saheb was pressurizing to refund the part consideration amount which is not the case of the defendant. DW 3 is Anup Lal Yadav. He has come to say that Umesh Prasad Yadav agreed to purchase the land from him for Rs. 45,000/- and he has given advance of Rs. 2,000/-. He has proved Ext. B the agreement to sale and has further stated that Umesh Prasad Yadav did not pay the balance consideration amount and as such, advance amount was forfeited. In paragraph 9 this witness states that over the agreement to sale of Umesh Prasad Yadav whether he has signed or not he cannot say. Thus, evidence of this witness is not reliable. DW 4 is Prakash Yadav. He has also stated that between Dr. Pradeep Kumar and Umesh Prasad Yadav deal was finalized and Umesh Prasad Yadav agreed to sale the land with condition to pay the amount within one month and then, Dr. Saheb told that he will pay the same within 2-4-10 days but Umesh Prasad Yadav told him after 2-3 months that the balance consideration amount has not been paid. In paragraph 7 he cannot say as to whether any crops is being grown on the suit land or not. He cannot say the



description of the suit land. Thus, this witness appears not competent. DW 5 is Biendeshwari Prasad Yadav. He has also come to say that Dr. Pradeep Kumar did not pay the amount to Umesh Prasad Yadav and he never saw bricks, sand etc. stacked on the suit land. On 03.06.1989 Umesh Prasad Yadav demanded the money from Dr. Saheb but he told Umesh that money has not been arranged. This witness, during cross-examination, has become incompetent by saying that he cannot say as to whether Umesh Prasad Yadav has sold 2 Katthas of land to plaintiff no. 1 whereon he is witness. DW 6 is Jaidev Yadav. He has also come to say that the defendant has paid Rs. 2,000/- to Anup Lal Yadav to purchase the land for Rs. 45,000/- but due to non-payment the advance money was forfeited. During cross-examination he cannot say as to whether the amount of Rs. 2000/- was paid in cash or through cheque. DW 7 is Md. Tawarak. He has come to say that he is co-sharer of the land involved in the suit and he has stated that he sold his land in the year 1991 at the rate of Rs. 25,000/- per Kattha and in the locality the land is being sold at the measurement of 720 Sq. Feet per Kattha. In paragraph 4 he has stated that Umesh Prasad Yadav talked with Dr. Pradeep Kumar to sale his land for marrying his daughter and to purchase the land at other place but Dr. Pradeep Kumar did not pay the entire consideration amount. This witness is also stating otherwise than the recitals made in Ext. 6. So, it appears that he is not a reliable witness. DW 8 is Vivekanand Kumar. He is the son of Umesh Prasad Yadav. He has also stated that his father has agreed to sale the land with Dr. Pradeep Kumar for marrying his sister as the negotiation of marriage of his sister was finalized. He further states that deed of agreement to sale was prepared at 6:00 pm on 03.05.1989 which is not the fact as on 03.05.1989 the amount of Rs. 10,000/- was paid by cheque and that cheque was encashed on 03.05.1989 itself. This witness being interested witness is deposing falsely and as such, is not reliable. DW 9 is the



defendant himself. He has also stated that he has talked with Dr. Pradeep Kumar to sale the land and then agreement to sale was prepared on 03.05.1989 which was in the name of Puspa Sinha, Anamika, Aruna and Madhuri Sinha. That agreement to sale was for 16 Katthas and 7 Dhurs land. This witness has also stated that to marry the daughter and to purchase the land, he has agreed to sale the land but he did not get the balance consideration amount resulting marriage of his daughter was deferred. He has come to support his case but during cross-examination, in paragraph 61, he has stated that if Dr. Saheb will pay the consideration amount, then also he will not execute the sale deed as the value of the land has increased and after execution of the agreement to sale the value of the land started increasing. This statement in paragraph 61 goes to indicate that the defendant was not willing and ready to perform his part of contract due to increase of the value of the land. In paragraph 65 he has stated that he did not say Dr. Saheb that the advance amount has been forfeited. On behalf of defendant Ext. A is reply notice dated 06.06.1989 from which it reveals that time was not the essence of the contract. Ext. A/1 is reply notice dated 19.06.1989, Ext. B is agreement to sale executed by Anup Lal Yadav in favour of defendant dated 08.05.1989.

24. After careful and cautious scrutiny of the evidences available on the record, it reveals that the plaintiffs were/are always ready and willing to perform their part of contract through Dr. Pradeep Kumar but the defendant was not ready to perform his part of contract due to increase of price of the land. Learned court below has rightly held in this regard.

25. Learned counsel for the appellant has argued that as the plaintiffs has sought alternative relief for refund of his advance amount with interest and for damages and, as such, the learned court below ought to have granted alternative decree for refund of advance money and for damages in stead of ordering specific



performance. The nominal amount of Rs. 10,000/- was only paid whereas balance consideration amount of Rs. 1,45,644/- remained unpaid. In this regard reliance placed on AIR 1996 2150 (supra) by learned counsel for the appellant is not applicable in the present case. Here, the facts of the case are quite on different footing. In the present case the defendant after execution of Ext. 6 has executed Ext. 9 sale deed in favour of plaintiff no. 1 for 2 katthas of land as after second measurement 2 katthas land was found more than in Ext. 6 agreement to sale. Further reliance placed upon AIR 2011 Supreme Court Page 3351 (supra) is also not applicable in the present case. In that case the defendant has returned the advance money of Rs. 10,00,000/- and the plaintiff has not discharged its burden within time specified, then it was held that the plaintiff is not entitled to specific performance of the contract. Here, in the present case, the plaintiffs were/are always ready and willing to perform their part of contract but the defendant evaded the matter and finally refused. During pendency of the suit also the plaintiffs tried their best to pay the balance consideration amount and to get the sale deed executed which is evident from Ext. 1 but the defendant failed to discharge its burden. The rulings relied upon by the learned counsel for the appellant reported in 2015 (1) PLJR Supreme Court page 7 (supra) has also been relied by the learned counsel for the respondents. Learned counsel for the respondents has argued that this judgment is helpful for the respondents which is evident from paragraph 37 of the judgment itself. The respondents are ready to pay the reasonable additional amount to the vendor. The Hon'ble Apex Court has been pleased to hold that it is well settled that the plaintiff is not to be denied specific performance only on ground of phenomenon increase of price during the pendency of the litigation. The defendant cannot be allowed to take advantage of his fault.

26. The rulings relied upon by the learned counsel for the appellant



in the case of **Nanjappan vs. Ramasamy & Anr.** (supra), is also not helpful for the appellant. The Hon'ble Apex Court has been pleased to hold that under Section 20 of the Specific Relief Act grant of specific performance is discretionary and it depends upon facts and circumstances of each case. The court would take into consideration of each case, conduct of the parties, recitals in the sale agreement and the circumstances outside the contract have to be seen. Here, in the present case, the defendant failed to perform his part of contract. He did not obey the recitals of Ext. 6 wherein he has agreed to allow the plaintiffs to construct the boundary wall by surrounding the suit land after execution of Ext. 6 so that after registration no problem arise but against the terms of agreement to sale the defendant did not allow the plaintiffs to construct the boundary wall resulting dispute arose between the parties.

27. It is true that due to efflux of time price of property has increased but as the plaintiffs were/are always ready to perform their part of contract and after second measurement as per the wishes of defendant 2 Katthas of land was purchased by plaintiff no. 1 and, as such, in the facts and circumstances of the case, the rulings relies upon by the learned counsel for the respondents are fully applicable in the present case. The plaintiffs have averted and further have successfully proved that they have always been ready and willing to perform the essential terms of the contract which are to be performed by them. In the case of **K. Prakash Versus B. R. Sampath Kumar** (supra), it has been held by the Hon'ble Apex Court that subsequent rise in the price will not be treated as hardship entailing refusal of the decree for specific performance, rise in price is a normal change of circumstances and therefore, on that ground a decree for specific performance cannot be reversed.

28. Having considered the evidences available on the record and

submissions as advanced by the learned counsels, I am of the considered view that the plaintiffs were/are always ready and willing to perform their part of contract as per terms of the Ext. 6 and, as such, this point is also decided in favour of respondents and against the appellant.

29. Learned court below has elaborately discussed the pleadings and evidences of the parties and this Court is of the firm view that the same cannot be reversed and accordingly, the findings of the learned court below are hereby confirmed.

30. It is an admitted fact that balance consideration money of Rs. 1,45,644/- as per Ext. 6 has not been paid and that amount which was deposited has already been withdrawn by the respondents as per order of this Court, and that amount has been utilized by the respondents and, as such, in the facts and circumstances of the case and considering the increase in price during the period the matter remained pending during trial and during this appeal, I am of the considered opinion that additional amount has to be paid by the respondents to appellant. During the period under litigation five times increase in the price must has gone up and, as such, the respondents have to pay a sum of Rs. 7,20,000/- (seven lac twenty thousand) in addition to the amount already paid i.e. Rs. 10,000/- by the respondents to the appellant. On depositing the said amount in trial court by the respondents for payment to the appellant within three months from today, the appellant shall execute and register the sale deed in favour of the respondents in respect of the suit property. In the event the aforesaid condition of depositing of Rs. 7,20,000/-(seven lac twenty thousand) is fulfilled within the time stipulated, herein above, but the defendant fails to comply with the direction, then the respondents shall be entitled to execute the decree in accordance with the procedure provided in law.

31. In the result, this appeal is hereby dismissed with the aforesaid directions and observations; but, under the facts and circumstances, without cost.

32. The impugned judgment and decree as passed by the learned Sub-Judge-4, Bhagalpur are hereby confirmed with the conditions imposed and narrated hereinabove.

(Jitendra Mohan Sharma, J)

avin/-

U		T	
---	--	---	--