

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA No.2311 of 2015 (O&M)
Date of Decision:11.01.2016**

Bal Vir Sehgal

.....Appellant

vs

Sanjay Bansal and others

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Ashok Aggarwal, Senior Advocate with
Mr. Mukul Aggarwal, Advocate
for the appellant.

Mr. Puneet Bali, Senior Advocate with
Mr. Arun Gupta, Advocate
for the respondents.

- 1. *Whether Reporters of local papers may be allowed to see the judgment ? yes***
- 2. *To be referred to the Reporters or not ? yes***
- 3. *Whether the judgment should be reported in the Digest? yessss***

RAJ MOHAN SINGH, J.

[1]. Defendant-Appellant has filed this Regular Second Appeal against the judgment and decree dated 11.11.2014 passed by Additional District Judge, Chandigarh, whereby the judgment and decree dated 12.08.2013 passed by Additional Civil Judge (Sr. Divn.) Chandigarh was upheld.

[2]. Plaintiffs/respondents filed suit for specific performance of the agreement to sell dated 03.03.2005 seeking enforcement of agreement by directing the defendant to execute

and get registered the sale deed in respect of House No.70, Sector 2, Chandigarh in the office of Sub-Registrar, U.T., Chandigarh and for possession of the said house.

[3]. Plaintiffs alleged that the defendant is the owner of House No.70 Sector 2, Chandigarh. He entered into an agreement to sell with the plaintiff No.1 in respect of sale of aforesaid house for a total sale consideration of Rs.5 crores. An amount of Rs.50 lacs was paid as earnest amount to the defendant.

[4]. According to the terms and conditions of the agreement, defendant was required to obtain 'No Due Certificate' and to get released the original title deeds from HSBC Bank, Sector 9, Chandigarh and to get permission to sell the aforesaid house from the Estate Office, U.T., Chandigarh for the execution of sale deed. The date for execution of sale deed was fixed on or before 30.06.2005. The sale deed was to be executed in the office of Sub-Registrar, U.T., Chandigarh on the target date upon receiving the full and final sale consideration. The expenses towards stamp papers and registration charges were to be borne by the plaintiffs.

[5]. Plaintiffs further alleged that the plaintiff No.1 has a right to get the sale deed registered either in his favour or in favour of his nominee or any other person. The defendant was

to hand over the vacant physical possession of the house along with original title deeds. Defendant was further bound to get the tenant evicted from the aforesaid house and also to clear the dues towards water and electricity charges at the time of handing over the possession of the house in question.

[6]. Plaintiffs further alleged that the plaintiff No.1 informed the defendant that he wanted to get the sale deed executed in the name of all the plaintiffs and they were ready to pay the house loan amount which was raised by the defendant from HSBC Bank, Sector 9, Chandigarh. Plaintiff No.1 contacted the defendant several times to accompany him to the aforesaid Bank and also to get the portion vacated from the tenant. On 11.06.2005, the plaintiff No.1 directly approached the Bank along with the due amount for the clearance of the outstanding loan amount raised by the defendant. Since the defendant did not accompany plaintiff No.1 for clearing the dues of the loan, therefore, 'No Due Certificate' could not be obtained from the Bank. Plaintiff No.1 even wrote a letter to the Bank, but the Bank refused to entertain the plaintiff No.1 in the absence of the defendant. Even the Bank did not respond to the letter issued by the plaintiff No.1 (Annexure P-2).

[7]. Faced with the aforesaid situation, the plaintiffs wrote a letter to the defendant and also submitted a liability affidavit

with the Estate Office which was required for granting permission to sell. The said letter was issued on 13.06.2005 and was sent through registered A.D., and UPC. The letter was received by the defendant. As per certificate of the Bank issued on 13.06.2005, an amount of Rs.75,27,295.07 existed as balance in the account of plaintiff No.1 in his saving bank account No.7179 of Punjab & Sind Bank, Sector 11, Chandigarh.

[8]. Plaintiff further pleaded that after waiting for several days, a meeting was arranged on 24.06.2005 with the defendant in which he agreed to apply for 'No Objection Certificate' (for short 'NOC') on 27.06.2005 and also promised to accompany the plaintiffs to the HSBC Bank along with cheque No.931581 dated 27.06.2005 drawn in the name of HSBC Bank, Chandigarh.

[9]. However, the defendant did not accompany the plaintiffs and also did not approach the Bank on 27.06.2005. In the absence of the defendant the Bank refused to accept the aforesaid cheque. Plaintiffs wrote a letter (Annexure P-11) to the Bank and a letter (Annexure P-12) was also written to the defendant on the same day. Both the letters were sent under registered A.D./UPC (Annexures P-13 to P-17).

[10]. Plaintiffs received reply dated 24.06.2005

(Annexure P-19) to the communication dated 13.06.2005. The said reply was received on 28.06.2005 and was immediately replied back vide Annexure P-21 and telegram message (Annexure P-22) dated 28.06.2005.

[11]. Defendant was not ready to co-operate with the plaintiffs despite the fact that target date for execution of sale deed was 30.06.2005. Ultimately plaintiffs informed the defendant to remain present in the office of Sub-Registrar, U.T., Chandigarh on 30.06.2005 for the execution and registration of the sale deed. No response was given by the defendant and after waiting upto 29.06.2005, plaintiffs attended the office of Sub-Registrar on 30.06.2005.

[12]. Plaintiffs were/are always ready and willing to perform their part of obligation and were ready with the balance sale consideration in terms of agreement and on the target date they were ready with the expenses required to be borne by them towards stamp duty and registration charges. Plaintiffs had already approached their Banker for raising loan, to pay the amount of sale consideration to the defendant. Punjab National Bank, Sector 33, Chandigarh had even sanctioned the loan, amounting to Rs.2.14 crore for the purchase of the house in terms of the letter dated 24.06.2005 (Annexure P-27). Plaintiffs kept the required amount for payment of the house loan to

HSBC Bank and balance sale consideration along with charges towards stamp papers and registration. Plaintiffs went to the office of Sub-Registrar on 30.06.2005 at 3.00 p.m. and remained there upto 5.00 p.m. Plaintiffs got an affidavit attested from the Sub-Registrar as token of their presence in the office vide Annexure P-28.

[13]. Plaintiffs received letter dated 21.06.2005 (Annexure P-29) from the Estate Office in response to the submission of liability affidavit by them. The defendant had never approached the Estate Office for seeking permission to sell the house. Plaintiffs were surprised to receive a letter dated 06.07.2005 written by the defendant on concocted premise. A false story has been concocted just to make out a false ground to back out from the bargain.

Thereafter the present suit came to be filed for the decree of specific performance of the agreement to sell dated 03.03.2005.

[14]. The defendant contested the suit on all counts.

[15]. Defendant took the plea that plaintiffs No.2 and 6 had no privity of contract, therefore, they were not competent to seek enforcement of the agreement to sell by means of specific performance. The suit filed by them was claimed to be not maintainable. Plaintiff No.1 never intimated about nominee, nor

exercised any such right to appoint nominee till the filing of the suit. Suit on behalf of plaintiffs No.2 to 6 was claimed to be misconceived. Besides taking ground of maintainability, defendant alleged that plaintiff No.1 was not ready and willing to perform his part of contract, nor he was having requisite consideration required for registration of the sale deed.

[16]. Defendant admitted that house in question was mortgaged with the HSBC Bank, Sector 9, Chandigarh and the outstanding house loan was approximately Rs.59 lacs. Plaintiff No.1 undertook to pay the said amount to the Bank in order to obtain No Due Certificate from the Bank. The said amount was not paid by the plaintiff No.1 and consequently the Bank did not issue No Due Certificate to the defendant. This certificate was the essential and pre-requisite for applying for the NOC for the sale of the property to plaintiff No.1.

[17]. Defendant alleged that the plaintiff No.1 failed to perform his part of obligation inspite of notice dated 24.06.2005 sent under registered A.D. as well as UPC in the context that time was the essence of the contract. Defendant was to make further investment in the real estate, but he could not do so and immediately after 30.06.2005, the prices of the real estate in and around Chandigarh arose enormously and put the defendant into disadvantageous position. Defendant also

alleged that plaintiff No.1 was indulged in uncalled correspondence with the defendant on incorrect premises.

[18]. Defendant also alleged that in order to get the vacant possession of the first floor from his tenant, he served a notice dated 27.05.2005 which was received by the tenant and who had offered to vacate the same in compliance with the notice. Since the plaintiff No.1 failed to perform his part of obligation, therefore, defendant orally instructed the tenant to continue with the premises in order to avoid loss of rent.

[19]. Defendant denied the allegations made in the plaint on merit as well. Defendant alleged that failure on the part of the plaintiff No.1 to perform reciprocal prescribed obligation, prompted the defendant to rescind the contract through notice dated 06.07.2005. The claim of the plaintiffs was denied on broad parameters and the suit was claimed to be false and vexatious and was sought to be dismissed with cost.

[20]. Both the parties went to trial on the following issues:-

- “1. *Whether the plaintiff is entitled for specific performance of agreement to sell dated 03.03.2005, as alleged? OPP*
2. *Whether the suit is not maintainable? OPD*
3. *Relief.”*

[21]. Plaintiffs led their evidence and got examined

Ms. Sunita Minhas, Manager, Punjab National Bank, Sector 33, Chandigarh as PW-1, Dharminder, Jr. Assistant from the Estate Office, U.T., Chandigarh as PW-2 and Sh. I.C. Bansal plaintiff No.5 as PW-3. After tendering the documentary evidence, plaintiffs closed their evidence.

[22]. Defendant examined Ms. Harpreet Kaur Dhillon, Officer, Punjab & Sind Bank, Sector 11, Chandigarh as DW-1, Rahul Sondhi, Associate Vice President, HSBC Bank, Sector 9, Chandigarh as DW-2. Raman Aggarwal, Chartered Accountant as DW-2/A, defendant Bal Vir Sehgal himself stepped into the witness box as DW-3, Vimal Kumar, Jr. Assistant, Estate Office, U.T., Chandigarh as DW-4 and Kuldeep Verma, Clerk, Office of Sub-Registrar, U.T., Chandigarh as DW4/A. After tendering documentary evidence, defendant also closed his evidence.

[23]. Trial Court decreed the suit vide judgment and decree dated 12.08.2013. The defendant remained unsuccessful in appeal before the lower Appellate Court which was dismissed by the Additional District Judge vide judgment and decree dated 11.11.2014.

[24]. Appellant has formulated the following substantial questions of law in para No.44 of the grounds of appeal:-

“(i). *Whether in the absence of any privity of contract between plaintiff nos.2 to 6 and*

appellant, the present suit is maintainable at the instance of plaintiff nos.2 to 6?

- (ii) Whether in view of the fact that none of the plaintiff nos.2 to 6 stepped into the witness box, an adverse inference was liable to be drawn against them?*
- (iii) Whether in view of the fact that none of the plaintiff nos.2 to 6 stepped into the witness box and in the absence of any other evidence, the Ld. Courts below were justified in law to hold their privity of contract with the appellant?*
- (iv) Whether in the absence of challenge to the notice dated 06.07.2005 (Ex.P-32 = Ex.D-3/4) cancelling the agreement to sell (Ex.P-9), the simpliciter suit for specific performance is maintainable?*
- (v) Whether in the absence of challenge to the notice dated 6.07.2005 (Ex.P-32 = Ex.D-3/4) vide which the agreement in question was rescinded, the courts below were justified in decreeing suit for specific performance?*
- (vi) Whether on account of the non-appearance of plaintiff No.1, who is the sole signatory to the agreement to sell dated 03.03.2005 (Ex.P-9), an adverse inference has to be drawn against the*

plaintiffs?

- (vii) *Whether the statement of PW-3 with respect to readiness and willingness on the part of the plaintiff no.1, who is special attorney of plaintiff no.1, is liable to be ignored in view of the settled principle of law as laid down by the Hon'ble Supreme Court of India in Man Kaur's case?*
- (viii) *Whether in the absence of any other evidence (except of statement of PW-3) proving the readiness and willingness on the part of the plaintiffs, the Ld. Courts below were still justify in law to grant the relief of specific performance?*
- (ix) *Whether the plaintiffs, more particularly plaintiff no.1, have proved the readiness and willingness to perform their part of contract?*
- (x) *Whether the Id. courts below were justified to hold that in the instant time was not the essence of the contract?*
- (xi) *Whether in view of the fact that there had been a considerable increase in the market value of the suit property, the courts below were justified in law to grant the discretionary relief of specific performance?*
- (xii) *Whether evidence on the record has been*

misread and mis-interpreted?

(xiii) Whether proper issues have been framed by the Id. Courts below?"

[25]. I have heard the arguments of both sides and have also perused the material on record.

[26]. First of all, it is necessary to peruse the terms of agreement to sell dated 03.03.2005. As per para no.2 of the agreement to sell (Ex.P-9), Sanjay Bansal son of Sh. I.C. Bansal is shown to be the purchaser, though in the recital, he has been referred as "the purchasers", which shall admit and include his heirs, assignees, executors, successors, legal representatives and administrators. Thereafter it has been shown that the house is fully paid up and free from all incumbrances of sale, gift, Will, mortgage, claims, demands, charges and litigation etc., except the mortgage with HSBC Bank, Sector 9, Chandigarh against outstanding house loan of Rs.59 lacs and the said loan shall be paid by buyer directly to the HSBC Bank, who in return would obtain the 'No Due Certificate' from the Bank. A sum of Rs.50 lacs is shown to have been paid to the seller. An amount of Rs.25 lacs has been paid vide cheques No.334316, 358945, 357913 and 923081 dated 28.02.2005 of Punjab & Sind Bank, Sector 11, Chandigarh in a sum of Rs.6,25,000/- each. Remaining Rs.25 lacs is shown to have been paid in cash. The

House bearing No.70, Sector 2, Chandigarh is measuring 4 *Kanals* and earnest money has been paid by the purchaser Sanjay Bansal.

[27]. As per condition No.3, the balance amount after deducting the earnest money and amount paid to the HSBC Bank on account of clearing outstanding loan from the total sale price, shall be paid by the said purchasers to the seller at the time of execution and registration of sale deed of the said house. The word 'purchasers' has been used time and again despite the fact that only Sanjay Bansal was the person who entered into agreement to sell with the defendant.

[28]. Again in condition No.5, the word 'purchasers' has been used to the fact that purchasers has right to get the sale effected in his own name or in the name of his nominee or any other person or persons whomsoever and the seller shall have no objection for the same at any later stage in future.

[29]. Condition No.8 prescribes that the seller shall obtain NOC from the Estate Officer, U.T., Chandigarh for the sale of the said house and shall hand over the same to the purchasers at the time of registration of the sale deed of the said house. The seller shall hand over photostat copy of NOC to the said purchasers five days before the last day for registration of the sale deed. The target date for registration and execution of sale

deed was fixed on or before 30.06.2005.

[30]. As per condition No.10, the seller shall get the rented premises vacated within four months from the date of signing the agreement to sell.

If this condition is read in terms of date of signing of agreement to sell, the resultant date would come beyond the target date for registration of the sale deed.

[31]. As per condition No.11, in the event of backing out from the bargain by the seller and, if, he fails to execute the sale deed within the time specified, then he shall be liable to refund double of the earnest money along with other actual payments received by him from the purchasers and in case purchasers do not accept such liquidated damages, then the purchasers shall have a right to get the sale affected by process of the Court under Specific Relief Act. In case the purchasers back out from this bargain, then the earnest money shall stand forfeited in favour of the the seller.

[32]. PW-1 Sunita Minhas, Manager, Punjab National Bank, Sector 33, Chandigarh has deposed on record that the plaintiffs had applied for loan to purchase the house in question. The Bank sanctioned the loan in their favour for a sum of Rs.2.25 crores on 24.06.2005 (Ex.P-1). The letter of sanction has not been cancelled till date and the Bank is still ready to pay

the amount, if sale deed is executed by the seller in favour of the purchasers. In cross-examination the witness has admitted necessary procedural compliances that a bank used to make in case of advancing loan.

[33]. Dharminder, Junior Assistant from the office of Estate Office, U.T., Chandigarh while appearing as PW-2 stated that an application was submitted in the office on 13.06.2005 along with certain documents i.e. letter addressed to the defendant, Manager HSBC Bank, liability affidavit signed by the purchaser and attested photograph of the purchaser. The aforesaid documents were acknowledged vide Ex.P-7. Reply was given by the office vide Ex.P-8. In cross-examination, he also endorsed the fact that defendant never applied for grant of NOC for the sale of the house in question. The witness also admitted that the Office does not issue NOC, if it is disclosed by the owner that there is loan on the house by the Bank. The witness also admitted that the Office does not issue NOC, if it is applied once in favour of second person unless first intending buyer gives his consent or withdraws the same.

[34]. I.C. Bansal, plaintiff No.5 appeared as PW-3 and reiterated the stand taken in the the plaint. In cross-examination PW-3 has admitted that plaintiff No.1 is his son and agreement to sell was not signed by him. Receipt of letter dated 06.07.2005

(Ex.P-32) and letter dated 24.06.2005 (Ex.P-22) are admitted to have been received by son of the witness i.e. plaintiff No.1. He admitted that the plaintiff No.1 Sanjay Bansal did not write any letter to the defendant that he will get the sale deed executed in favour of all the plaintiffs. The witness volunteered that it was mutually agreed and was a family decision to get the sale deed executed in favour of all the plaintiffs. This was the reason why the cheques for payments were issued from accounts of the plaintiffs to the defendant. Out of four cheques, shown in the agreement to sell, two cheques were from the account of Sanjay Bansal and other two cheques were from the accounts of two ladies plaintiffs. No cheque from the account of witness PW-3 was issued towards payment of earnest money.

[35]. The witness also admitted that agreement was executed in favour of plaintiff No.1 only and plaintiff No.1 did not appoint nominee before filing the suit in writing, though it is mentioned in the agreement to sell (Ex.P-9) that he can appoint nominee. The witness also admitted that sum of Rs.59 lacs approximately was due and payable to HSBC Bank, Sector 9, Chandigarh and the property in dispute was mortgaged with the said Bank. None of the plaintiffs ever sent any draft of Rs.59 lacs either to the defendant or to the Bank till filing of the suit. The witness further volunteered that he offered a blank cheque

(Ex.P-21) to the Bank after the refusal of the defendant to accept the same in the name of the Bank through the letter in writing and when the Bank refused to accept the same in the absence of the defendant, then he wrote another letter to the defendant.

[36]. PW-3 further admitted that without No Due Certificate of the Bank, the Estate Office does not issue NOC/permission letter for sale of the house. The witness admitted that in the absence of No Due Certificate by the Bank, NOC was not applied for by the defendant. The witness also submitted that liability affidavit was directly submitted to the Estate Office which was required for NOC, but defendant was never informed in writing about the submission of the liability affidavit in the Estate Office directly, rather he was informed orally. Witness further admitted that after 03.03.2005, the prices went high. The witness pleaded ignorance as to the approximate value of the house i.e. whether it was between Rs.18 to 20 crores? The witness also admitted that plaintiffs No.2 to 5 had not signed the agreement to sell (Ex.P-9) and also admitted that stamp papers required for drawing the sale deed were not purchased because defendant failed to show NOC and the purchasers did not get issued Bank drafts in the name of the defendant in respect of balance sale consideration on the day when they appeared

before the Sub-Registrar.

[37]. At the time of tendering affidavit of PW-3 in examination-in-chief documents Ex.P-9 to Ex.P-51 were objected to on the ground of mode of proof. Only two documents were admitted by the defendant i.e. Ex.P-9 and Ex.P-15.

[38]. On the other hand, defendant got examined Ms. Harpreet Kaur Dhillon, Officer of Punjab & Sind Bank, Sector 11, Chandigarh as DW-1 in respect of saving account No.7179 of plaintiff No.1, account No.10295 in respect of Anita Bansal, account No.7180 of Ajay Bansal, account No.10316 of Sushma Bansal, account No.9393 of Ram Murti, account No.9391 of Ishwar Chand Bansal and also saving account No.12202 of Ishwar Chand Bansal for the period 01.03.2005 to 30.06.2005. The statement of accounts Exs.D-1/1 to D-1/7 were stated to be true as per Bank records.

[39]. Rahul Sondhi, Associate Vice President, HSBC Bank, Sector 9, Chandigarh has been examined as DW-2, who deposed with reference to the statement of house loan amount of the defendant for the period 01.03.2005 to 31.11.2011. The witness stated that Ex.P-4 did bear the seal of the Bank. Normally all the letters received by the Bank are initialled or signed by the receiving authority, besides affixing the stamp.

Letter Ex.P-4 does not bear the signature of the recipient or any official of the Bank. The letter appears to be dated 11.06.2005, whereas stamp of the Bank is of dated 10.6.2005. The witness admitted in his cross-examination that Ex.P-4 was located in the Bank, but the same could not be traced. The witness could only answer about Ex.P-14 and Ex.P-15 after verifying from the record. The witness also admitted that the Bank cannot deal with the loan account in the absence of the defendant and that is why the Bank did not receive cheque offered by the plaintiffs to clear the loan account. Ex.P-49 has been admitted to be the original of Ex.P-4 and the witness can produce original of Ex.P-4/P-49, Ex.P-14 and Ex.P-15 after verifying from the record. The witness admitted on recalling that Ex.P-49 bears the stamp of acknowledgment.

[40]. Raman Aggarwal Chartered Accountant, has been examined as DW-2/A. There is some ambiguity in describing serial number DW-3.

[41]. Defendant appeared as DW-3 and in his cross-examination admitted the factum of receiving Rs.50 lacs as earnest amount in which amount of Rs.25 lacs were in cash and remaining amount was paid by way of four cheques each in the sum of Rs.6,25,000/-. The witness admitted that at the time of execution of agreement to sell (Ex.P-9), he along with plaintiff

No.1, I.C. Bansal, Raman Aggarwal and Shaleen Kapoor were present and agreement to sell was signed in the presence of these persons. The witness also admitted that four cheques were issued from the accounts of plaintiffs namely Ajay Bansal, Anita Bansal, Sushma Bansal and Sanjay Bansal. The witness also admitted that he did not intimate the plaintiffs before 30.06.2005 that how much amount was payable to the Bank for clearing the housing loan. The witness volunteered that he was not required to do so as it was mentioned in the agreement to sell itself. The witness also admitted that it might be correct that Sanjay Bansal was having amount available with him which was more than the amount due to the Bank. He also admitted that as per Ex.P-13 more than Rs.75 lacs were available in the Bank Account of Sanjay Bansal. He pleaded ignorance about Sanjay Bansal having started correspondence with the Bank to whom the loan was payable from 10.06.2005 onwards.

[42]. The witness also pleaded ignorance about the plaintiffs having submitted the liability affidavit required for NOC with the Estate Office on 13.06.2005. The witness volunteered that he had handed over the documents on 14.03.2005 for obtaining NOC and for the signature of the purchasers, but they did not sign and returned the documents to him. The witness admitted that he did not issue any notice to the plaintiffs asking

them to furnish the documents for obtaining NOC as they were meaningless until loan was cleared by the plaintiffs. Receiving of Ex.P-15 was admitted. He pleaded ignorance that his Bankers had refused to accept the payment through cheque Ex.P-21, rather he did not ask his Banker, even after coming to know about the correspondence done by the plaintiffs with the Bank about the offer of the payment through Ex.P-21 dated 27.06.2005. Letter dated 24.06.2005 (Ex.P-22) having posted on 27.06.2005 was admitted. Reply of Ex.P-22 from the plaintiffs was admittedly received on 28.06.2005 (Ex.P-24). The witness also admitted that he did not remain present on 30.06.2005 before the Sub-Registrar as there was no purpose to remain present in the office of Sub-Registrar because NOC from the Bank as well as permission from the Estate Office were not taken.

[43]. The witness also admitted that he was to get the original title deeds released from the Bank, subject to payment of loan by the plaintiffs and thereafter he was to obtain permission to sell from the Estate Office. The witness also admitted that at the time of registration of sale deed, he was required to give vacant possession of the house to the purchasers and there was a tenant on the first floor of the house on the day of execution of agreement to sell. It was also

admitted that as per condition of agreement to sell, plaintiff No.1 was at liberty to get the sale deed executed in his own name along with his family members or nominee. The witness did not produce any document (notice dated 27.05.2005) in respect of eviction proceedings against the tenant. The witness also asserted that ejectment petition was filed in 2005 after the agreement with the plaintiff No.1. The witness also admitted that he did not write any letter to the plaintiffs to deposit the loan amount with the HSBC Bank on or before 30.06.2005. Again he stated that he wrote a letter dated 24.06.2005 which was posted on 27.06.2005 as 26.06.2005 was holiday being Sunday. Even this was handed over to plaintiff No.1 on 24.06.2005 by hand, but he did not get acknowledgment from plaintiff No.1.

[44]. The witness pleaded ignorance about the fact whether Sanjay Bansal offered the payment to the Bank through cheque, however the Bank refused to accept the same in his absence. He also pleaded no instructions, if plaintiff No.1 approached the Bank through letter dated 11.06.2005. The witness did not know about the liability affidavit with the Estate Office submitted by the plaintiffs for obtaining permission to sell. The witness admitted that he had received Ex.P-5 i.e. letter written by plaintiff No.1 containing photocopy of blank cheque dated 27.06.2005. He volunteered that it was received on

30.06.2005. The witness had seen the letter dated 24.06.2005 Ex.P-22. He also admitted that he did not submit any application for grant of NOC with the Estate Office till 30.06.2005, but volunteered that because of non-clearance from HSBC Bank, the same could not be granted. He admitted that he might have received Ex.P-24, but denied to have received any telegram message Ex.P-25. The payment lying in the plaintiff's Bank account was admitted. The witness also admitted that the tenant in the house did not vacate the premises till 30.06.2005, but volunteered that it was on his asking that he continued to occupy the premises.

[45]. DW-4 Vimal Kumar, Junior Assistant, Estate Office Chandigarh and DW-4/A Kuldeep Verma Clerk, Office of Sub-Registrar, U.T., Chandigarh were formal in nature.

[46]. Learned Senior counsel for the appellant in place of substantial questions of law, has formulated the following composite substantial questions of law:-

“(a). *Whether in the absence of challenge to the notice dated 06.07.2005 (Ex.P-32), cancellation of agreement to sell (Ex.P-9), simpliciter suit for specific performance is maintainable in law, since no declaratory relief has been sought qua notice dated 06.07.2005?*

- (b) *Whether in the absence of any privity of contract between plaintiffs No.2 to 6 and appellant, the Courts below are justified in law in decreeing the suit?*
- (c) *Whether the statement of PW-3 with respect of readiness and willingness on the part of the plaintiff No.1 being special power of attorney of plaintiff No.1 is liable to be ignored in view of law laid down by the Hon'ble Apex Court in Man Kaur (dead) by LRs vs. Hartar Singh Sangha, 2010(10) SCC 512?*
- (d) *Whether on account of non-appearance of plaintiff No.1, the sole signatory of the agreement to sell dated 03.03.2005 (Ex. P-9), an adverse inference has to be drawn against the plaintiffs?*
- (e) *Whether the documents Exhibits P-3, P-4, P-14, P-15 and P-24 have been proved by the plaintiffs in accordance with Sections 61 and 64 of the Indian Evidence Act?*
- (f) *Whether plaintiff No..1 has proved readiness and willingness to perform his part of contract?*
- (g) *Whether letter dated 11.06.2005 (Ex.P-4) is a fabricated document and whether it can be held that plaintiffs were ready and willing to perform their part of contract?*

- (h) *Whether time is the essence of the contract?*
- (i) *Whether in view of the admitted fact, there had been considerable increase in the market value of the suit property?*
- (j) *Whether it is equitable to grant relief of specific performance on the basis of agreement to sell?*

[47]. As regards composite question No.(a), learned Senior Counsel for the appellant has submitted that since the plaintiffs have not sought the declaratory relief declaring notice of rescinding of agreement to sell as bad in law, therefore, in the absence of such prayer, the suit for specific performance on the basis of agreement to sell is not maintainable. Learned Senior counsel relied upon *I.S. Sikandar (Dead) by LRs. vs. K. Subramani and Ors., 2014(1) CCC 439, (2013)15 SCC Page 27.*

[48]. On the strength of aforesaid judgment, learned Senior counsel for the appellant has submitted that in the absence of such a prayer by the plaintiffs, the suit for specific performance, is not maintainable in law and the relief sought on the basis of non-existing agreement of sale is wholly unsustainable in law. Learned counsel relied upon para No.16 of the aforecited judgment to submit that following points were

framed for determination by the Hon'ble Apex Court:-

- “(1) *Whether the original suit filed by the plaintiff seeking a decree for specific performance against the defendant Nos. 1-4 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the Agreement of Sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law?*
- (2) *Whether the reversal of the findings of the trial court on the issue Nos. 3, 4 and 5 by the High Court and answering the same in favour of the plaintiff in the impugned judgment and granting the decree for specific performance in favour of the plaintiff in respect of the schedule property is legal and valid?*
- (3) *Whether the grant of decree of specific performance in favour of the plaintiff despite Clause 12 of the Agreement of Sale dated 25.12.1983 is legal and valid?*
- (4) *Whether the grant of the decree is in conformity with sub- sections (1) and (2) of Section 20 of the Specific Relief Act and whether the learned Judge of the High Court has exercised his discretionary power reasonably in granting the same in favour of the plaintiff?*

(5) *What decree or order to be passed?"*

[49]. The aforesaid point No.1 as framed in **I.S. Sikandar (Dead) by LRs'** case (supra) has been answered by the Hon'ble Apex Court in the following manner:-

"It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos. 1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale

deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.03.1985.”

[50]. The facts involved in **I.S. Sikandar (Dead) by LRs'** case (supra) were that agreement to sell was executed by defendants No.1 to 4 on 25.12.1983 in favour of plaintiff of that suit agreeing to sell the scheduled property for consideration. Advance amount was also received and the date was fixed for remaining sale consideration to be paid at the time of execution of sale deed. Period of five months was agreed between the parties within which sale deed was to be executed in favour of plaintiff by the defendants No.1 to 4 after obtaining necessary permission from the competent authorities such as Urban Land Ceiling Authority and Income Tax Department. If there was any delay in obtaining necessary permission from the Authorities, the target date for performance of agreement was liable to be extended for a period of two months from the date of grant of such permission. The permission from the Authorities was not obtained and the period of five months stipulated in the

agreement expired despite that defendants No.1 to 4 got issued legal notice dated 06.03.1985 to the plaintiff, pointing out that he has failed to perform his part of contract in terms of agreement to sell by not paying the balance sale consideration to them and getting the sale deed executed in his favour and called upon him to get the sale deed executed on or before 18.03.1985. Plaintiff replied through his Advocate on 16.03.1985 admitting his default and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the defendants to the plaintiff extending time to the plaintiff and getting the sale deed executed on or before 10.04.1985. On failure to comply with the same, the agreement to sell dated 25.12.1983 would be terminated. Since the plaintiff did not avail the time extended to him by defendants No.1 to 4 and he did not perform his part of contract within extended time, the agreement to sell was terminated by notice dated 18.03.1985. The Apex Court held that relief sought by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of suit land on the basis of non-existing agreement to sell is wholly unsustainable.

[51]. As regards point No.2 framed in **I.S. Sikandar (Dead) by LRs'** case (supra) the Hon'ble Apex Court held in the following manner:-

“The time fixed for execution and completion of the sale transaction is five months from the date of the agreement of sale. The first parties have agreed to get the necessary permission for registration from the competent authorities such as the Urban Land Ceiling authorities and Income Tax Authority within the said period of five months at the cost and expenses of the Second Party. The Second Party has agreed to pay the necessary layout and conversion charges of the suit property to the concerned authorities. The first party have further agreed with the second party that if in case the necessary permission from the aforesaid authorities is delayed and as a consequence thereof the payment of layout charges is delayed, the time for due performance of the agreement shall stand extended for a further period of 2 months from the date of grant of such permission.” This position of law is well settled by this Court in the Constitution Bench judgment in Smt.Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.[10]; wherein this Court has held that it is well settled principle of law, that in a case of sale of immovable property, time is not the essence of the contract. However, If the parties agreed to a specified time in the agreement to perform their part of the contract, then time is the essence of the contract and parties shall adhere to the same.”

[52]. The Hon'ble Apex Court while deciding the aforesaid point No.2 pointed out that in view of proposition of law settled

in **Smt. Chand Rani (Dead) through LRs vs. Smt. Kamal Rani (Dead) by LRs, 1993(2) RRR 46, 1993 (1) SCC 519** time is not the essence of the contract in case of sale of immovable property, however, if the parties agreed to specify a time in the agreement to sell, then, time is the essence of the contract and parties shall adhere to the same. The Hon'ble Apex Court applied the aforesaid principle in **I.S. Sikandar (Dead) by LRs'** case (supra) and held that time was the essence of the contract as the plaintiff had not complied with the condition of original stipulated period of five months and extended period of two months.

[53]. Point No.3 of the aforesaid judgment of **I.S. Sikandar (Dead) by LRs'** case (supra) was decided on facts and it was concluded that since the agreement to sell in favour of plaintiff was terminated and he had not sought declaratory relief to declare that the termination of agreement in the original suit is bad in law and, therefore, suit for specific performance is not maintainable.

[54]. Perusal of **I.S. Sikandar (Dead) by LRs'** case (supra) reveals that after expiry of the contract date for registration of the sale deed, the seller waited quietly and even extended time for execution of the instrument and for that plaintiff was called upon to get the sale deed executed and

registered by paying the balance sale consideration, but the plaintiff avoided the execution of the sale deed on one reason or the other, leading to the conclusion that he was not ready and willing to perform his part of obligation. In view of that defendants rescinded the contract and executed the sale deed in favour of subsequent vendee by alleging that time was the essence of the contract as the vendors were in dire need of money due to death of husband of the defendant No.1, who was the only breadwinner, therefore, in view of that it was pleaded that time was the essence of the contract and plaintiff failed to perform his part of obligation, despite extension in time granted by the defendants.

[55]. Learned Senior counsel for the appellant also relied upon Surjit Singh Bhatia & Ors. vs. Tej Raj Singh Goel, (HUF), CS(OS) 1447 of 2010 decided on 01.07.2014 (Delhi), V. Raveendran & Ors. vs. Capt. S.K. Joshua & Ors, CMP No.724 of 2013 decided on 25.04.2014 (Madras) wherein it was held that agreement of sale was unilaterally cancelled by the defendant No.1 by his notice and there was no prayer for declaration that termination of agreement of sale by defendant No.1 was illegal in view of judgment rendered in I.S. Sikandar (Dead) by LRs' case (supra), a suit for specific performance was not maintainable and was held liable to be dismissed.

Similar view was taken in **RSA No.1790 of 2014** titled as **Ram Kishan and Ors. vs. Chuni Lal & Ors.** wherein contract date for execution of sale deed was 30.04.2006 and agreement to sell was cancelled on 03.05.2006 by the defendant by giving notice of termination of agreement to sell. Plaintiffs did not seek any declaratory relief to declare the notice of termination as null and void. Since the agreement to sell stood terminated by defendant No.1 and termination had not been declared illegal, therefore, no agreement existed in favour of the plaintiff on the date of the filing of the suit, therefore, suit for specific performance in respect of non-existing agreement was held to be not maintainable in view of **I.S. Sikandar (Dead) by LRs'** case (supra). In the judgment rendered by Madras High Court in **S.A. Nos.1275 and 1276 of 2007** similar view was taken.

[56]. On the other hand learned Senior counsel for the respondents argued that when time is not the essence of the contract there is no need for seeking declaratory relief *qua* termination of contract and suit for specific performance is maintainable. Since time was not the essence of contract in the present case, therefore, suit is maintainable. He relied upon **G. Sekar vs. K. Masilamani (Madras), S.A. No.1224 of 2004 & CMP No.324 of 2015 decided on 09.06.2005, Abdul Sami vs. Smt. Neelu Dhandiya (Rajasthan), 2014 SCC Online Raj**

5888, and Mandhir Singh & Ors. vs. Gurjant Singh & Anr., 2014(3) RCR (Civil) 728 (P&H) (Punjab).

[57]. In rebuttal to the argument on the aforesaid question, learned Senior counsel for the appellant submitted that the aforesaid precedents of Madras and Rajasthan are distinguishable as in the cited judgments, the Courts have held that there was no termination of contract and, therefore, the aforesaid judgments in no way distinguished the law laid down by the Hon'ble Apex Court in I.S. Sikandar (Dead) by LRs' case (supra). The judgment rendered by this Court in Mandhir Singh & Ors' case (supra) is also distinguishable as it does not deal with the reasoning given by the Hon'ble Apex Court in I.S. Sikandar (Dead) by LRs' case (supra). In Arjan Singh vs. Dr. S.R. Pahwa, C.S No.27 of 2008 decided on 09.09.2015 by the Himachal Pradesh High Court the law laid down by the Hon'ble Apex Court has been followed and suit was dismissed by holding that the same is not maintainable.

[58]. Learned Senior counsel further stated that there is no need to challenge the letter dated 06.07.2005 rescinding the contract. In I.S. Sikandar (Dead) by LRs' case (supra) as per the facts and circumstances of the case, time was held to be the essence of the contract, therefore, necessity arose to seek challenge to the letter of cancellation. Since the third party

interest came in the cited case, therefore, *qua* his cause of action in the form of cancellation was held to be liable to be challenged. The time was extended twice and no sale deed was executed and the property was sold to defendant No.5. The right of defendant No.5 came into being and, therefore, in the facts and circumstances of that case, the Hon'ble Apex Court held that time was the essence of the contract. In the instant case, there is no third party interest involved, no extension has been granted. Notice of cancellation was issued after the target date i.e. 30.06.2005. Therefore, no such proposition is attracted in the present case. Learned Senior counsel relied upon **G. Sekar's** case (supra) wherein Madras High Court while interpreting **I.S. Sikandar (Dead) by LRs'** case(supra) held the suit to be maintainable. The facts of the **I.S. Sikandar (Dead) by LRs'** case (supra) have been treated to be different.

[59]. Learned counsel also cited **Abdul Sami's** case (supra) wherein **I.S. Sikandar (Dead) by LRs'** case (supra) has been discussed to hold that the circumstances of the cited case are different and there cannot be any universal obligation of that judgment. The Court held in the following manner:-

“5. The first contention of the appellant is that vide notice dated 1.2.2008, the agreement has been terminated and without asking declaratory relief with respect to termination of agreement, the suit is not

maintainable and reliance has been placed on I.S. Sikander (D) by LRs Vs. K. Subramani & ors., Civil Appeal No. 7306/2013 decided by the Apex Court on 29.8.2013 where on the facts of the case it has been held that the plaintiff has not sought for declaratory relief to declare the termination of sale as bad in law and suit for specific performance has not been allowed. The facts are quite pertinent to note that agreement to sale has been executed between the parties on 25.12.1983, a legal notice dated 6.3.85 was served pointing out that the party has failed to perform his part of the contract and it has been agreed that the sale deed be executed on or before 18.3.85. Thereafter reply has been filed and it has been admitted that default has been committed in performing the contract and extension of time has been sought. Thereafter, time has been extended till 10th April, 1985 in spite of this in the extended period, the plaintiff did not perform his part of the contract and agreement has been terminated. In the above facts, it has been held that when plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law, the suit is not maintainable but here in the present case, there exists no such circumstances. It is true that a notice dated 1.2.2008 has been served but the condition in the agreement was that in case of breach 50% amount of advance would be confiscated and rest of 50% amount would be re-paid, but admittedly here 50% amount has not been re-paid, hence the agreement could not be said to be

terminated and contention of the appellant is ill-founded.”

[60]. Learned Senior counsel for the respondents also cited **Gurmail Singh and another vs. Suman Sharma & Ors., 2014 SCC Online P&H 15600.** The judgment has been distinguished on facts and also on the aspect of the time being the essence of the agreement held in the facts of that case, whereas in the instant case time is not proved to be an essence of the contract. Learned Senior counsel relied upon **Mandhir Singh & Ors'** case (supra) wherein the aforesaid proposition has been held and the judgment has been upheld by the Hon'ble Apex Court in SLP.

[61]. In the context of composite question No.(b), learned Senior counsel for the appellant referred to Section 2(c) and 2(d) of the Contract Act (for short 'the Act') to submit that the person making the proposal is called as promisor and the person accepting the proposal is called as the promisee. When at the desire of the proposal of the promisee or any other person has done or abstain from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promises is called as consideration for promise. In the present case, the promisee is the only plaintiff No.1 and plaintiffs No.2 to 6 were not privy to the contract.

[62]. Learned Senior counsel by referring to the Section 37 of the Act submitted that the parties to the contract must either perform or offer to perform their respective promise unless such performance is dispensed with or excused under the provisions of the Act or any other law. Promisor binds the representative of the promisors in case of death of such promisors before performance, unless the contrary intention appears from contract.

[63]. Learned Senior counsel further highlighted that in view of Section 15 of the Specific Relief Act a specific performance of the agreement may be obtained by any party thereto, representative-in-interest or the member of any of the party thereto. Plaintiff No.5 cannot be treated to be representative of plaintiff No.1, nor other plaintiffs can step into shoes of legal representatives of plaintiff No.1. None of the plaintiffs claimed power of attorney on behalf of the other. Section 19 of the Specific Relief Act deals with the relief against the parties and persons claiming under them by subsequent title. No such proposition arises in favour of plaintiff No.5 in the present case. It is an admitted case of the plaintiff No.1 that agreement to sell was executed with him only and earnest money was paid by him, even though from different resources, therefore, in the absence of any privity of contract, suit on behalf

of plaintiffs No.2 to 6 is not maintainable.

[64]. Learned Senior counsel further argued that a person who is not party to the contract cannot ask for enforcement of the terms of the contract. Recognised exceptions are that beneficiaries under the term of the Contract or whether the contract is a part of the family agreement may enforce the covenant.

[65]. PW-3 I.C. Bansal in his cross-examination has admitted that Sanjay Bansal never wrote any letter to the appellant informing him that the sale deed has to be executed in favour of all the plaintiffs. Witness has also admitted that Sanjay Bansal has not appointed nominee before filing of the suit. Plaintiffs No.2 to 6 are not party to the agreement, nor fall in the said exceptions, therefore, suit is not maintainable. In view of Section 2(c) of the Act, they cannot be termed as promisor or promisee in any eventuality. Learned Senior counsel relied upon **M.C. Chacko vs. State Bank of Travancore, AIR 1970 SC 504**, **Babu Ram and Ors. vs. Dhan Singh and Ors., AIR 1957, Punjab 169 (DB)** and **Mool Chand vs. Ram Phool and Anr., AIR 1979 (Allahabad)189** in the aforesaid context.

[66]. Learned Senior counsel by supplementing his arguments further submitted that admittedly no amount of earnest money has been paid by I.C. Bansal plaintiff No.5 and

his wife plaintiff No.6, therefore, even if it is to be presumed that all the plaintiffs have paid the earnest money, then also suit at the behest of plaintiffs No.5 and 6 is not maintainable.

[67]. To refute the arguments of the learned Senior counsel of the appellant, learned Senior counsel appearing for the respondents/plaintiffs submitted with reference to the plea raised in the plaint which has not been denied in the written statement that sale deed was to be executed in favour of all the plaintiffs. Even in the agreement, specific recital was made that plaintiff can get the sale deed in favour of plaintiffs and in favour of assignees. Payments were made from the accounts of plaintiffs except PW-3 and his wife.

[68]. With regard to composite question Nos.(c), (d), (f) and (g), learned Senior counsel for the appellant submitted that the entire proceedings more particularly letters dated 11.06.2005 (Ex.P-4) and 27.06.2005 (Ex.P-14) to prove readiness and willingness on the part of the plaintiff No.1 have been carried out by the plaintiff No.1 Sanjay Bansal and not by I.C. Bansal PW-3. In view of **Man Kaur (dead) by LRs'** case (supra), the attorney holder cannot depose in place of his Principal for the act done by the Principal or the dealings of the Principal of which Principal alone has personal knowledge. There are three ingredients to be proved, (a) that a valid

agreement of sale was entered into by the defendant in favour of plaintiff and the terms thereof; (b) that the defendant committed breach of the contract and; (c) that he was always ready and willing to perform his part of obligation in terms of the contract. Even plaintiff No.1 has to prove that he was always ready and willing to perform his part of contract, then necessarily he should step into witnessbox and give evidence that he all alone been ready and willing to perform his part of obligation and subject himself to the cross-examination on that issue. He cannot obviously examine in his place his attorney holder, who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser as also his capacity and preparedness, one without the other is not sufficient. Therefore, a third party, who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned. The Hon'ble Apex Court in the aforesaid context in **Man Kaur (dead) by LRs'** case (supra) summarised the issues as to who should give evidence in regard to matters involving personal knowledge in the following manner:-

“(a). *An attorney holder, who has signed the
plaint and filed the suit, but has no*

personal knowledge of transaction can only give formal evidence about the validity of the power of attorney and filing of the suit.

- (b) *If the attorney-holder has done one any act in pursuance of the power of attorney granted by Principal, he may be examined as witness to prove those acts. If attorney-holder has personal knowledge of such acts and transactions and not the Principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.*
- (c) *Attorney cannot depose in place of his Principal for the acts done by Principal, of which Principal alone has the personal knowledge.*
- (d) *Where the Principal at no point of time had personally dealt with the transaction and has no personal knowledge of the same and where entire transaction has been dealt by the attorney, then it is only the attorney alone, who can give evidence.*
- (e) *Where the entire transaction has been conducted through an attorney and the Principal has to examine that attorney to prove the transaction.*

- (f) *Where different attorneys had dealt with the matter at different stages of the transaction, then all those attorneys will have to be examined.*
- (g) *Where law requires the plaintiff to establish with reference to his “state of mind” or “conduct”, normally the person concerned alone has to give evidence and not attorney. The bona fide of the person has to be proved by himself. Similarly readiness and willingness fall under this category. There is no recognised exception to this requirement.”*

[69]. There are two distinct issues, first issue is the breach by the defendant vendor which gives a cause of action to the plaintiff to file suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance of persons shown in Section 16 of the Specific Relief Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms and conditions which are to be performed by him is barred from claiming specific performance. Even if defendant has committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms and conditions of the contract, there is a bar to specific performance in his favour. In a way the

primary duty is casted upon the plaintiff to prove readiness and willingness. The assumption that readiness and willingness on the part of the plaintiff is something which needs to be proved. If the plaintiff is able to establish that the defendant refused to execute the sale deed thereby committed breach, is not correct. Sanjay Bansal has not appeared in witnessbox to prove alleged correspondence or readiness and willingness on his part, therefore, the statement of PW-3 is liable to be ignored. PW-3 in his entire statement has not stated that he is deposing in the capacity of attorney of plaintiff No.1.

[70]. On the other hand, learned Senior counsel for the respondents has contended that I.C. Bansal PW-3 did not depose in the capacity of attorney of plaintiff No.1, therefore, the principle highlighted in **Man Kaur (dead) by LRs'** case (supra) are not attracted to the facts of the present case. He further contended that DW-3 while appearing as witness admitted that PW-3 was present at the time of execution of agreement to sell, therefore, statement of PW-3 is relevant and cannot be ignored. He further contended that, even if, a witness deposes in terms of his authority, the said statement is to be accepted. Learned Senior counsel relied upon **Satnam Channan vs. Darshan Singh, (2006) SCC Online P&H 330, Balbir Singh vs. Anil Kumar, 2003(3), RCR (Civil) 116** and **Meena Rani vs. Sham**

Lal, 2008(2) RCR (Civil) 254.

[71]. While replying upon the contentions of the respondents, learned Senior counsel for the appellant rejoined his arguments by saying that the admitted case of plaintiff No.1 is that the agreement to sell was entered with him only and no amount of earnest money has been paid by plaintiff No.5 i.e. PW-3, who has not deposed in the capacity of attorney of plaintiff No.1, therefore, his statement *qua* readiness and willingness cannot be accepted. At the most statement of PW-3 would have been relevant to prove the execution of agreement to sell. Since the appellant has admitted the execution of agreement to sell, therefore, his statement cannot go beyond that.

[72]. In the context of Ex.P-4 and Ex.P-14, learned Senior counsel for the appellant relied upon Section 61 of the Indian Evidence Act to contend that the documents may be proved either by preliminary or by secondary evidence. In view of Section 64 of said Act, the documents must be proved by preliminary evidence except in the cases mentioned therein. In view of Section 106 of the said Act, when the fact is especially within the knowledge of any person, the burden of proving that fact is always upon him. By relying upon the aforesaid provision, learned Senior counsel contended that the appearance of the

PW-3 is not sufficient to prove readiness and willingness on the part of plaintiff No.1.

[73]. Learned Senior counsel for the respondents has vehemently argued that as per Ex.P-9, the outstanding house loan was shown approximately Rs.59 lacs. Balance payment was to be paid by the buyer directly to the HSBC Bank and No Due Certificate was to be obtained. It is nowhere mentioned that the No Due Certificate was to be obtained by the buyer alone or the payment was in order to facilitate the defendant to obtain NOC. Even otherwise the defendant was to obtain NOC because the Bank does not recognise any other person in the absence of the defendant and that is what has actually happened in the present case.

[74]. As per para No.5 of the agreement to sell it has been recited that the purchasers has a right to get the sale deed effected in this own name or in the name of his nominee or any other person and the seller shall have no objection for the same at any later stage in future. The seller shall hand over vacant physical possession of the said house to the purchasers along with document of title in original at the time of making the final payment. The seller was to get the rented premises vacated within four months from the date of signing the agreement. Cumulative effect of all these three paragraphs of the

agreement to sell shows that the plaintiff No.1 was well within his competence to associate plaintiff No.2 to 5 along with him in execution of sale deed in terms of para No.5 of the agreement to sell and as per para No.6 to 8 the obligation was on the seller to obtain the document of title and to give it to the purchaser at the time of making final payment along with vacant physical possession of the house in question. Therefore, the defendant has failed to perform his part of obligation. He could not get the premises vacated from the tenant, nor could obtain the clearance certificate from the Bank and consequent by NOC from the Estate Office, rather he did not even attend the office of Sub-Registrar on the date fixed for execution of sale deed on 30.06.2005.

[75]. The plaintiffs had sufficient amount in the Bank which they have demonstrated vide Ex.P-1. The plaintiffs submitted letter dated 13.06.2005 to the Estate Officer, UT, Chandigarh along with liability affidavit and letter written to HSBC Bank, Sector 9, Chandigarh for the purposes of issuing NOC in favour of the plaintiffs vide Ex.P-3, letter issued to the defendant by plaintiff No.1. The endorsement on Ex.P-4 as per the seal is dated 10.06.2005, but the date mentioned at the top cannot be read as 11.06.2005, conclusively. However, if the statement of the Bank Officer from the HSBC Bank is perused, it gives no

room for any ambiguity. The liability affidavit (Ex.P-5) has been executed by all the plaintiffs and the same was duly submitted to the Bank along with application written to the defendant. The letter dated 27.06.2005 issued to the HSBC Bank by the plaintiff No.1 and photocopy of cheque attached thereto cannot be doubted inasmuch as that the plaintiffs had the resources to pay the requisite amount which was lying in their account No.7179 of Punjab & Sind Bank and this fact has been proved on record by oral testimony of the witness. Similarly the conduct of the parties even after this letter and further correspondence proved the factum of receipt of letter dated 27.06.2005 by the defendant.

[76]. Apparently, a meeting dated 24.06.2005 is proved between the parties in which NOC was agreed to be obtained positively by 27.06.2005. Ex.P-14 is in the context of offer made on 27.06.2005 along with cheque No.931581 dated 27.06.2005 drawn on Punjab & Sind Bank, Sector 11, Chandigarh. Learned Senior counsel states that letter dated 27.06.2005 was in the reference of letter dated 11.06.2005. Letter dated 13.06.2005 was duly received by the defendant, but was not replied. Defendant did not come to the Bank and was not ready and willing to get the needful done in terms of bank clearance. Meeting dated 24.06.2005 is proved. Letter was dispatched on

27.06.2005 and it was received on 28.06.2005 and telegram message was issued by the respondents and that was also received by the defendant/appellant, the same is proved from the record. According to learned Senior counsel there are overwhelming and voluminous record over and above the Ex.P-4 and Ex.P-14 showing the readiness and willingness on the part of the plaintiffs.

[77]. The cross-examination of the defendant/appellant clinches the issue inasmuch as that he has admitted his inaction in the context of readiness and willingness. He had not intimated the plaintiffs before 30.06.2005 the exact amount due and payable to the Bank for clearing the housing loan. He has admitted that the exact amount due and payable on that day was Rs.58,30,555.74 and Sanjay Bansal was having more than Rs.75 lacs in his account as per Ex.P-13. He pleaded ignorance as to whether plaintiff No.1 started correspondence with his Bankers and also pleaded ignorance about the liability affidavit submitted by the plaintiffs to the Estate Office for the purposes of obtaining NOC. The witness did not issue notice to the plaintiffs to furnish the documents for obtaining NOC from the Bank. He has also admitted the postal receipt Ex.P-11 containing his name and address correctly. Even he admitted receipt of Ex.P-15 containing photocopy of cheque No.931581

dated 27.05.2005. The witness has also admitted that a meeting was held on 24.06.2005 with plaintiff No.1 and the plaintiff was supposed to bring Bank draft of Rs.59 lacs. The letter dated 24.06.2005 Ex.P-22 was posted on 27.06.2005 vide envelope Ex.P-23. This letter was received on 28.06.2005 by the plaintiffs. The defendant received the reply of notice dated 24.06.2005 on 28.06.2005 Ex.P-24 and he had full knowledge of the proceedings of the case till date.

[78]. According to learned Senior counsel for the respondents, if one of the aforesaid communication is admitted by the defendant, then nothing remains to be highlighted in the context of readiness and willingness on the part of the plaintiffs.

[79]. The witness has also admitted that he had checked the bank statements and certificates of the plaintiffs which are Ex.P-1, Ex.P-40 to Ex.P-47, Ex.DW-1 and Ex.DW-7. By referring to the cross-examination of the defendant i.e. DW-3, learned Senior counsel for the respondents stated that the case has been proved even by the statement of DW-3 when he said in his cross-examination that he has not produced any document relating to eviction of the tenant, nor brought on record any notice served upon the tenant as the vacant possession was to be given to the plaintiffs at the time of execution of sale deed. DW-3 did not write any letter to the

plaintiff No.1 to deposit the loan amount with HSBC Bank on or before 30.06.2005 except the communication dated 24.06.2005 that he posted on 27.06.2005 as 26.06.2005 was holiday. Receipt of Ex.P-15 has been admitted. He has also admitted that he did not go to the office of Sub-Registrar on 30.06.2005, nor submitted any application for the grant of NOC with the Estate Officer till 30.06.2005. He has also checked the bank statements of plaintiffs placed on record proving that before 30.06.2005, the entire sale consideration was lying in the Bank account of the plaintiff.

[80]. Learned Senior counsel also submitted that the defendant has himself not denied Ex.P-4 and Ex.P-14. He has accepted Ex.P-24 and Ex.P-28, the letters disclosing that the sale deed to be executed in the name of family members of plaintiffs, their readiness with the sale consideration, the refusal to come with them to HSBC Bank, convening of meeting dated 24.06.2005, availability of entire sale consideration with the plaintiffs, asking the defendant to come on 30.06.2005 i.e. date fixed for execution of sale deed and ultimately his presence before the Sub-Registrar, if all these things have been admitted then nothing remains to be proved.

[81]. Further the letter of rescinding the contract dated 06.07.2005 gives different reading in the context of pretext

made by the defendant. The recital shows that the plaintiffs were allegedly trying to offer him the cash amount, but not cheque and were pursuing the defendant time and again to receive part of consideration in black money which he refused. Despite admitting the availability of balance sale consideration with the plaintiffs, defendant issued letter dated 24.06.2005 desiring the plaintiffs to furnish the proof of possession of balance sale consideration as he was allegedly told on earlier occasion that the plaintiffs did not have the requisite amount of white money. The alleged reason recorded in the letter dated 06.07.2005 is also that since the plaintiffs were not in possession of requisite amount, therefore, they were to obtain loan from the Bank and this was allegedly stated for the first time in an undated letter which was allegedly received on 29.06.2005. Learned Senior counsel further stated that the recital of the letter dated 06.07.2005, is wholly presumptory in nature and concoction has been made just to create excuse to back out from the promise. Once the factum of availability of requisite funds with the plaintiffs has been admitted by the defendant, the contents of letter dated 06.07.2005 are proved to be farce.

[82]. Learned Senior counsel also submitted that in his statement the Bank Officer DW-2 has admitted the seal on

Ex.P-4 acknowledging the receipt of the letter. The witness has also admitted that the seal was put on the copy of the letter after receiving its original. Learned Senior counsel contended that when the witness has admitted that he can answer about Ex.P-14 and Ex.P-15 after verifying from the record and as per Rule they cannot deal with the loan account of the defendant in his absence and that is why they did not receive the cheque offered by the plaintiff to clear the loan account. Further the ignorance was pleaded by the witness to say that he cannot say, if the cheque Ex.P-21 was offered by the plaintiff in the Bank on 27.06.2005. The witness has admitted that Ex.P-49 is the original of Ex.P-4 and he can produce the original of Ex.P-4/ Ex.P-49, Ex.P-14 and Ex.P-15. In the light of this statement, defendant cannot deny the execution of Ex.P-4 and Ex.P-15 by any stretch of imagination. Ex.P-9 and Ex.P-15 are the admitted documents by the defendant.

[83]. Learned Senior counsel for the appellant contended that since the defendant/appellant has admitted only Ex.P-9, Ex.P-15 and Ex.P-4 and Ex.P-14 have not been admitted, therefore, the entire correspondence more particularly letters dated 11.06.2005 (Ex.P-4) and 27.06.2005 (Ex.P-14) have been carried out by plaintiff No.1 and not by plaintiff No.5 I.C. Bansal. Since plaintiff No.1 has not appeared in the witnessbox to prove

the aforesaid letters, therefore, adverse inference has to be drawn against him. Once the statement of PW-3 is ignored, then no evidence remains on record to prove the case of the plaintiffs. A party in possession of best evidence, if withholds the same, then adverse inference has to be drawn against him. Even as per Section 106 of the Indian Evidence Act the fact which is specifically within the knowledge of the person has to be proved by him alone. Onus to prove the relevant fact is always on the person, who affirms it. Learned Senior counsel relies upon **Gopal Krishnaji Ketkar vs. Mohamed Haji Latif and ors., AIR 1968 (SC) 1413, A.S. Rathinam vs. A.S. Ponnammal & Ors., (Madras), 2003(3) RCR (Civil) 399, Krishan Kumar vs. G.C. Jain, Assistant Commissioner (Slums), 1997(1) RCR (Rent) 440, and Man Kaur (dead) by LRs' case (supra).**

[84]. On the other hand learned Senior counsel for the respondents contended that the adverse inference can only be drawn, if there is no other evidence available on record. It has been contended that there are various letters on record to show that respondents had performed their part of contract. Receipt of letter dated 27.06.2005 (Ex.P-15) has been admitted by the appellant in his cross-examination. Therefore, non-appearance on the part of the plaintiff No.1 is of no consequence. Learned

counsel referred to **Pandurang Jivaji Apte vs. Ramchandra Gangadhar Ashtekar, (1981)4 SCC 569.**

[85]. Learned Senior counsel for the respondents while relying upon **Pandurang Jivaji Apte's** case (supra) stated that adverse inference cannot be drawn against the plaintiffs because voluminous evidence is available on record to show that the plaintiffs have performed their part of obligation. Ex.P-15 receipt of letter dated 27.06.2005 has been admitted by the defendant, therefore, nothing more is required in the context of proving readiness and willingness on the part of the respondents. In the cross-examination of the defendant No.3, it has been admitted that I.C. Bansal was present at the time of execution of the agreement to sell. Terms were settled in his presence. Availability of funds with the plaintiffs has been proved on record and the correspondence made by Sanjay Bansal with the Bank and with the defendant are proved on record. Even if, I.C. Bansal did not appear in his personal capacity, but the material on record proves the fact of readiness and willingness on the part of the plaintiffs.

[86]. Learned Senior counsel also submitted that since the defence has not been raised in the written statement in the context of cancellation of agreement to sell. Learned Senior counsel by relying upon **Pandurang Jivaji Apte's** case (supra)

submitted that admission of correspondence between the parties has to be taken to be a material evidence on behalf of the plaintiffs to prove the case and non-appearance on behalf of Sanjay Bansal cannot be a ground to disbelieve the case of the plaintiffs. The question of drawing adverse inference against a party for his failure to appear in the Court would arise only when there is no evidence on record. In **Satnam Channan's** case (supra), this Court held that a party may be ill, infirm, old or incapable of attending the Court personally. Does it mean that inspite of all the disabilities party to the *lis* have to appear before the Court? Obviously not. The appointment of attorney contemplated under the Contract Act, as well as under the Power of Attorney Act cannot be set at naught by such interpretation. Similarly in the **Balbir Singh's** case (supra) non-appearance of the plaintiff in witnessbox has not been taken to be an instance to infer any such inference when other material on record is sufficient to prove the case of the plaintiff.

[87]. This Court in **Meena Rani's** case (supra) while relying upon **Janki Vasdeo Bhojwani vs. Indusind Bank Limited and Ors., 2005(1) RCR (Civil) 240** held that if, the witness is examined and the witness deposes in terms of authority granted, such witness is competent witness and his statement is admissible in evidence.

[88]. As regards composite question No.(e), learned Senior counsel for the appellant contended that mandatory requirement of Section 64 of the Evidence Act is that a document has to be proved by means of its preliminary evidence. Mere exhibition of documents does not dispense with the prove of its execution. The alleged correspondence in the context of readiness and willingness on the part of the plaintiffs has been carried out by the plaintiff No.1 and not by plaintiff No.5. Since plaintiff No.1 has not appeared in the witnessbox to prove his case and has not offered himself for cross-examination by the defendant, therefore, the documents have not been proved in accordance with law. An objection was taken with regard to the mode of proof by the defendant on 19.07.2010 that PW-3 has produced evidence Ex.P-9 to Ex.P-15. Only Ex.P-9 and Ex.P-15 have been admitted and other documents have not been admitted by the defendant. Therefore, mere production of the documents and marking of the documents as exhibits cannot be held to be due proof of their contents. Learned Senior counsel relied upon **Sait Tarajee Khimchand and ors. vs. Yalamarti Satyam & Ors., AIR 1971 (SC) 1865, LIC of India and Anr. vs. Ram Pal Singh Bisen, AIR 2010, (Suppl) SC 753, Karnail Singh vs. M/s Kalra Brothers, Sirsa, 2009(2) RCR (Civil) 380, Punjab.**

[89]. Learned Senior counsel for the appellant contended that the entire proceedings in terms of Ex.P-4 and Ex.P-14 to prove readiness and willingness on the part of the plaintiff No.1 has been carried out by plaintiff No.1 himself. Since plaintiff No.1 has not appeared in the witnessbox to prove the alleged correspondence in respect of readiness and willingness, therefore, readiness and willingness on the part of the plaintiff No.1 remains unproved. The principles highlighted in **Man Kaur (dead) by LRs'** case (supra) have been pressed into service to assert the aforesaid ground. Plaintiff No.1 is the sole party to the contract. No nomination has been made, nor any assignee has been named in the agreement. Plaintiff No.1 has not appeared in the witnessbox and has not stood the test of cross-examination, therefore, Ex.P-4 i.e. letter dated 11.06.2005 and Ex.P-14 letter dated 27.06.2005 are proved to be forged and fabricated. Though the letter dated 11.06.2005 bears the seal of the Bank, but the same is dated 10.06.2005 which on the face of it proves that the same is fabricated. The reference has been made to the statement of DW-2 Bank Officer, who submitted that though the letter bears the seal of the Bank, which is one day prior to its execution, the witness has clearly stated that the seal did not bear the initials of the official and was not found in the Bank. Learned Senior counsel also relied upon cross-

examination of PW-3, wherein he has admitted that he went to the office of Sub-Registrar without the Bank draft of remaining sale consideration and without the amount required for purchasing stamp papers.

[90]. On the other hand learned Senior counsel for the respondents has submitted that on account of clerical error the discrepancy viz-a-viz. the date has come. There are other evidence available on the record which proves that the plaintiffs were ready and willing to perform their part of contract.

[91]. As regards composite question No.(h), learned Senior counsel for the appellant by referring to the clauses of the agreement contended that the time is the essence of the contract. As per clauses No.8, five days prior to agreed date of registration, vendor was to hand over the copy of NOC to the vendee. As per clause No.9, the agreed date of registration of sale deed was on or before 30.06.2005. As per clause No.10, the vendor was to get the rented premises vacated from the tenant and as per clause No.11, if the purchasers back out from the bargain within the stipulated time, then earnest money would stand forfeited.

[92]. Further by referring to letter dated 24.06.2005 (Ex.P-22) which was admittedly received by plaintiff No.1, learned Senior Counsel for the appellant reiterated that time is

the essence of the contract. He submitted that time is not the essence of the contract in case of the immovable property, has to be revisited in the light of observations made in **K.S. Vidyanadam & Ors. vs. Vairavan, (1997) 3 SCC 1, Saradamani Kandappan vs. S. Rajalakshmi & Ors., (2011)12 SCC 18** and **M/s Citadel Fine Pharmaceuticals vs. Ramaniyan Real Estate Pvt. Ltd. and anr., (2011)9 SCC 147.**

Learned Senior counsel further submitted that the fact that the time period fixed for getting the premises vacated was beyond the date fixed for registration does not give any inference that time was not the essence of the contract, rather reading of the aforesaid clauses clearly shows that for each act, time has been prescribed which gives an irresistible conclusion that time is the essence of the contract. A reference has also been made to **I.S. Sikandar (Dead) by LRs'** case (supra).

[93]. On the other hand, learned Senior counsel for the respondents has contended that as per clause No.10 the appellant was to get the rented premises vacated within four months, which period was beyond the date fixed for registration, therefore, it shows that time was not the essence of the contract.

[94]. The statement of DW-3 proves that the time is not the essence of the contract as at the time of registration of the sale

deed he was to give vacant possession to the plaintiffs. There was a tenant on the first floor of the house in question on the date of execution of agreement to sell and the defendant was to get the original title deeds released from the Bank and to hand over the same to the plaintiffs at the time of registration of sale deed and balance payment of sale consideration was to be received. The ejectment of the tenant was only done in the year 2006 that too with the process of the Court. In such a situation time cannot be presumed to be an essence of the contract.

[95]. The learned Senior counsel for the respondents has highlighted that the defendant has admitted the execution of agreement to sell and payment made by family members of the plaintiff No.1 have also been admitted. The recital of the agreement shows that the sale deed can be executed in favour of family members of the plaintiff No.1 as per clause No.5 of the agreement to sell. The sale deed was to be executed when vacant possession was ready to be delivered. There was no vacant possession available with the defendant because the eviction was not done by that time. As per para No.10 of the agreement to sell, the defendant undertook to get the premises vacated within four months of the agreement to sell, that date comes out to be beyond the target date for execution of the agreement to sell. In any case since four months superseded

the target date, the impact of such recital is that the time cannot be treated to be an essence of the contract. The eviction was ultimately done only in the year 2006. Plea of defendant is proved to be false that he made the tenant to continue as he was not interested in losing the rent in the absence of clearance from the Bank and Estate Office. If this was the position, then why he got the tenant evicted with the process of the Court at a later stage.

[96]. In the context of composite question Nos.(i) and (j), learned Senior counsel for the appellant by referring to the statement of PW-3 stated that at the time of statement in the year 2010, witness has admitted that after execution of agreement to sell, market price of the suit property increased from Rs.22 to 25 crores, therefore, as per law laid down by the Hon'ble Apex Court coupled with the fact that the suit property is the sole residential house of the appellant, it is not equitable to granting relief of specific performance. Learned Senior counsel relied upon **Satya Jain (Dead) through LRs and ors. vs. Anis Ahmed Rushdie (Dead) through LRs and ors, (2013)8 SCC 131, Vimleshwar Nagappa Shet vs. Noor Ahmed Sheriff and others, 2011(6) RCR (Civil) 206, Nanjappan vs. Ramasamy, Civil Appeal No.2373 of 2015** wherein it has been held that it is inequitable to grant specific relief in view of escalation of price of

the property.

[97]. Learned Senior counsel for the respondents on the other hand contended that escalation of the price is not a ground to refuse grant of specific relief. The defendant can be compensated by paying an additional amount. Learned Senior counsel relied upon **Zarina Siddiqui vs. A. Ramalingam @ R. Amarnathan, (2015) 1 SCC 705, P. D'souja vs. Shondrilo Naidu (2004) 6 SCC 649, P.S. Ranakrishna Reddy vs. M.K. Bhagyalakshmi and another, (2007)10 SCC 231, K. Prakash vs. B.R. Sampath Kumar (2015) 1 SCC 597, Gobind Ram vs. Gian Chand, (2000) 7 SCC 548, Narinderjit Singh vs. North Star Estate Promoters Promoters, 2012(5) SCC 1712.**

[98]. Learned Senior Counsel for the respondents submitted that in view of **Zarina Siddiqui's** case (supra) efflux of time and escalation of price of the property by itself cannot be a valid ground to deny relief of specific performance, but the Court in its discretion may impose reasonable conditions including payment of additional amount to the vendor. Plaintiff is not to be denied specific performance only on account of phenomenal increase of price during the pendency of litigation. According to learned Senior counsel, it is not a case where defendant did not foresee the hardship. It is also not a case that non-performance of agreement would not cause any hardship to the plaintiffs, it is

too late for the defendant to suggest that having regard to escalation in prices, respondents should be denied the benefit of specific performance. There cannot be any binding precedent to the effect that in all the cases where there had been an escalation of prices, the Court should either refuse to pass a decree for specific performance or direct the plaintiff to pay higher consideration. No law in absolute terms to that effect has been laid down by any Court, nor is discernible from any of the precedents cited above.

[99]. While relying upon P. D'souja's case (supra), learned Senior counsel for the respondents sought to argue that rise in price of immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale. In K. Prakash's case (supra) the Hon'ble Apex Court opined in the context of subsequent rise in price and it was held that subsequent rise in the prices will not be treated as a hardship entailing refusal of the decree for specific performance. Rise in prices is normal change of circumstances and, therefore, on that ground decree for specific performance cannot be reversed. However the Court may take notice of the fact that there has been an increase in the price of the property and considering the other facts and circumstances, the Court while granting decree for specific performance can impose such condition which may to some

extent compensate the defendant.

[100]. During course of arguments, learned Senior counsel for the respondents submitted that there was an offer on behalf of the plaintiffs, keeping in view the escalation in prices also.

[101]. In rebuttal of the arguments of the learned Senior counsel for the respondents, learned Senior counsel for the appellant reiterated his arguments by saying that except **Zarina Siddiqui's** case (supra) and **K. Prakash's** case (supra) all the aforesaid cited judgments are prior to **Satya Jain (Dead) through LRs and ors'** case (supra), therefore, these judgments do not hold the field in view of observations made in **Satya Jain (Dead) through LRs and ors'** case (supra). Moreover judgments rendered in **Zarina Siddiqui's** case (supra) is not to apply in view of para Nos.33 and 34 in which judgment delivered in **Satya Jain (Dead) through LRs and ors'** case (supra) has been noticed, but not considered, however proceeded in different context. Learned Senior counsel contended that in the said case suppression in terms of para Nos.36 to 38 has been made and he further contended that the controversy is covered by the decision rendered in **Satya Jain (Dead) through LRs and ors'** case (supra). Similarly **K. Prakash's** case (supra) does not deal with the law, nor laid down any principle of law, rather the judgment is based on factual matrix and does not notice the

earlier precedents and, therefore, it is liable to be ignored. In this way learned Senior counsel contended that the proposition held in **Satya Jain (Dead) through LRs and ors'** case (supra) holds the field as on date. The conduct of plaintiffs does not warrant the grant of discretionary relief of specific performance as they have fabricated the letter dated 11.06.2005 (Ex.P-4) and also contended that in view of order dated 29.05.2015 passed by this Court, the conduct of the plaintiffs is proved to be deplorable and, therefore, discretionary relief should not be granted to him.

[102]. Having considered the rival submissions, it is found that in the agreement to sell though the agreement has been executed by one of the plaintiffs i.e. plaintiff No.1, but the words 'purchasers' has appeared repeatedly. Para No.2 of the agreement to sell further highlights that the 'purchasers' includes the assignees, executors, successors, heirs, legal representatives and administrators. The payments were made from the accounts of Sanjay Bansal, Ajay Bansal, Anita Bansal and Sushma Bansal. The balance amount after deducting the earnest money was required to be paid by the said 'purchasers' as per condition No.3 of the agreement to sell. As per condition No.5, plaintiff No.1 has the right to get the sale deed effected in his own name or in the name of his nominee or any other

person or persons whomsoever. The seller shall have no objection for the same at any later stage in future. The eviction of the tenant was to be done within four months from the date of signing the agreement as per condition No.10 and the said date ultimately came out to be beyond the target date for execution of the sale deed. In view of aforesaid, it can be found that time was not the essence of the contract. Even the tenant was got evicted with the process of the Court in the year 2006.

[103]. The pleadings in terms of plaint also show that in para No.4, the plaintiffs have pleaded that the plaintiff No.1 informed the defendant that he wants to get the sale deed executed in the names of all the plaintiffs. The plaintiffs were ready to pay the house loan amount which was raised by the defendant from HSBC Bank. The written statement to that extent is proved to be evasive. There is no denial to the fact that the plaintiff No.1 had informed the defendant that he wants to get the sale deed executed in the names of all the plaintiffs. The averment made in the plaint has not been denied in the written statement and the same amounts to admission of fact.

[104]. In the bilateral contract where terms have been settled and option has been given to the plaintiff to purchase the property either in his own name or in the name of his assignee or any other person whomsoever, then in all probabilities the

defendant has no right to oppose such a plea of the plaintiffs and filing of suit in association with such persons cannot be a ground to deny the joinder of parties in the suit. Plaintiff No.5 even though has not made any payment from his account was appointed as attorney at a subsequent stage and that by itself is no ground to question joining of plaintiffs No.2 to 6 in the suit. Therefore, filing of suit by the plaintiffs in considered opinion of this Court is maintainable.

[105]. The notice dated 06.07.2005 rescinding the contract has to be appreciated in the light of the facts and circumstances more particularly whether time is the essence of the contract or not? Though learned Senior counsel for the appellant has submitted that the ratio held in **I.S. Sikandar (Dead) by LRs'** case (supra) is applicable irrespective of the fact whether time is or not the essence of the contract and that by itself makes no difference once notice of cancellation of contract is not challenged in the suit.

[106]. The facts of **I.S. Sikandar (Dead) by LRs'** case (supra) operate in different situation. In the aforesaid judgment, after expiry of the stipulated date the vendors had waited quietly and even extended the time for registration of the sale deed. Plaintiff was called upon to get the sale deed executed by paying the balance money, but the plaintiff avoided the same for

one reason or the other and it was held that plaintiff was not ready and willing to perform his part of obligation. Therefore, they rescinded the contract and executed the sale deed in favour of subsequent vendee, claiming that time was the essence of the contract as vendors were in dire need of the amount. In that context it was held that time was the essence of the contract and the notice of cancellation of contract has to be assailed in the suit for specific performance. If the facts of **I.S. Sikandar (Dead) by LRs'** case (supra) are applied to the present case, no such situation arises. Here in the present case, the plaintiffs have led evidence in the context of their readiness and willingness and there was no such extension in time, facilitating the plaintiffs to honour the agreement to sell, rather converse situation is arising in the present case which makes the case distinct from that of aforecited case. Considering the factual position, I am of the view that **I.S. Sikandar (Dead) by LRs'** case (supra) is not applicable to the facts of the present case and suit is maintainable.

[107]. The correspondence in terms of letter dated 11.06.2005 (Ex.P-4) and letter dated 27.06.2005 if read in the context of evidence on record would show that the documents are proved on record. Statement of Rahul Sondhi, (DW-2) cannot be blown out of proportion. The witness has admitted

that seal bearing on Ex.P-4 is correct and the same is of the Bank of the witness. He has also admitted that seal is put on the copy of the letter after receiving its original. The subsequent statement of witness appears to be directing towards helping the cause of the defendant when he said that the original of Ex.P-4 was located in the Bank, but the same could not be traced. The witness has also admitted in unequivocal terms that he can answer about Ex.P-14 and Ex.P-15 after verifying from the record. Factum of moving application Ex.P-14 along with cheque has been admitted, but the reason for not entertaining the plaintiff No.1 in the context of satisfying the loan amount is stated to be the absence of the defendant and that is why the cheque offered by the plaintiffs to clear loan amount could not be entertained. The subsequent statement to the effect that he cannot say if cheque (Ex.P-21) was offered by the plaintiff or not is nothing, but to help the cause of the defendant. The witness has admitted that he has seen Ex.P-14 which is original of Ex.P-4, therefore, documents Ex.P-4 and Ex.P-14 cannot be treated to be unproved documents and reliance can be placed thereon. Even in his cross-examination the defendant himself, has admitted that letter dated 24.06.2005 (Ex.P-22) was posted by him pursuant to the meeting held between the parties. This letter was received by the plaintiffs on 28.06.2005. The reply of

this letter sent by the plaintiffs vide letter dated 28.06.2005 (Ex.P-24) was also received by the defendant.

[108]. As recorded earlier, the cross-examination of defendant has admitted the correspondence between the defendant and the plaintiff No.1, therefore, the aforesaid documents cannot be termed to be unproved documents and even if, the documents Ex.P-9 and Ex.P-15 were objected to by the defendant, still he has admitted documents Ex.P-9 to Ex.P-15 to be correct. The evidence of the defendant itself proved Ex.P-4 and Ex.P-14 being fully proved, therefore, the denial the defendant is only proved to be for the sake of denial of Ex.P-4 and Ex.P-14 only.

[109]. The principles highlighted in the case of **Man Kaur (dead) by LRs'** case (supra) are fully attracted in the present case. PW-3 did not depose as attorney of Sanjay Bansal, but he himself is party to the suit as has been held in preceding para of the judgment. PW-3 was very much present at the time of execution of the agreement to sell. The terms and conditions of the agreement to sell further make plaintiff No.3 to be competent to depose in the suit. In the light of observations made in the preceding paras, the statement of PW-3 can be be read in the context of readiness and willingness on the part of the plaintiff No.1 because documents viz. Ex.P-4, Ex.P-9,

Ex.P-14 and Ex.P-15 are relevant documents which can be relied in the present case. In a case of specific performance once the agreement to sell is proved, then execution of sale deed is the necessary corollary subject to fulfillment of conditions of readiness and willingness. Therefore, non-appearance of plaintiff No.1 in the suit does not invite any adverse inference in view of the fact that there are materials on record to prove the case of the plaintiffs, therefore, no adverse inference can be drawn against the plaintiffs. Since the documents Ex.P-4, Ex.P-14, Ex.P-15 and Ex.P-24 have been referred in the statements of the defendant and the execution of these documents can be taken notice of with reference to the statements of defendant's witnesses, therefore, these documents can be relied into evidence.

[110]. As discussed above documents Ex.P-4 and Ex.P-14 have their foundation in the statement of DW-2. Document Ex.P-15 is an admitted document and reference of Ex.P-25 has come in the cross-examination of defendant himself, therefore, execution of Ex.P-3 is also proved from the other evidence where the correspondence dated 24.06.2005 was admitted between the parties and these documents have relevant nexus in that context where resultant communication in the form of Ex.P-22 by the plaintiffs and Ex.P-24 by the defendant have

been admitted. The defendant had full knowledge of the proceedings of the case, therefore, the aforesaid documents even if, objected to can be relied in view of statement of defendant which have relevant connectivity in the correspondence between the parties originated from meeting dated 24.06.2005. In the light of admission made by the defendant in the cross-examination, the execution of agreement to sell is proved. Passing of earnest money is also proved. The only thing which is to be considered is the readiness and willingness on the part of the plaintiffs.

[111]. As per terms and conditions of the agreement to sell property in question has been mortgaged with HSBC Bank, Sector 9, Chandigarh and out of balance payment the amount was to be paid by the buyer direct to the HSBC Bank to obtain No Due Certificate. So far as liability of the plaintiff No.1 is concerned, he was to pay the amount directly to the Bank. Effort of the plaintiff No.1 to pay the amount directly to the Bank has been acknowledged in the context of his moving application to the defendant, then moving application to the Bank. Even liability affidavit has been submitted and copy of cheque has also been submitted. Moving of application Ex.P-4 along with cheque, if read in conjunction with the statement of DW-2 would show that the plaintiff No.1 has made sincere effort to pay the

loan amount to the Bank, but the Bank in the absence of the defendant did not entertain the effort of the plaintiff No.1. This condition in the agreement to sell can be read differently also. The payment was to be made by the plaintiff No.1 directly to the Bank and such payment was to be made in order to obtain No Due Certificate by the defendant. In other way, the payment was to facilitate the defendant to obtain No Due Certificate because thereafter the defendant was to obtain certificate from the Estate Office, U.T., Chandigarh in terms of permission.

[112]. The further conditions incorporated in the agreement to sell also point out that at the time of registration of sale deed vacant possession of the property along with original documents were to be submitted by the seller to the purchaser. Since the seller was to obtain NOC from the Estate Office, U.T., Chandigarh, therefore, clearance of the Bank was supposed to be available with the defendant only. The clause seems to be of facilitating nature and the effort shown by the plaintiffs can be taken to be an effort made by them to obtain No Due Certificate from the Bank which would have entailed the defendant in obtaining NOC from the Estate Office, U.T., Chandigarh.

[113]. The cross examination of the defendant i.e. DW-3 has virtually clinched the issue in the context of appreciating readiness and willingness of the parties. Readiness and

willingness are two distinct things. A person may be ready with the amount, but at the same time he may not be willing to execute the agreement. In the instant case readiness and willingness both are proved in favour of the plaintiffs. The sufficient amount was available in the account of the plaintiffs and the same has been proved on record with cogent evidence, therefore, it cannot be argued by the defendant that the plaintiff No.1 is not proved to be ready and willing to perform his part of obligation.

[114]. Now in such type of situation whether readiness and willingness on the part of the plaintiffs can simultaneously be appreciated with the conduct of the defendant. On the one hand, effort of the plaintiff No.1 to pay off the loan amount is writ large on the record, the Bank did not entertain the application of the plaintiff in the absence of the defendant. Admittedly No Due Certificate could not be obtained from the Bank and resultantly NOC could not be issued by the Estate Officer, U.T., Chandigarh. Therefore, defendant did not make himself present before the Sub-Registrar, U.T., Chandigarh with obvious stand that no sale deed could have been executed in the absence of aforesaid two documents.

[115]. On the other hand despite non-availability of No Due Certificate from the Bank and NOC from the Estate Office

plaintiffs presented themselves before the Sub-Registrar, U.T., Chandigarh and got their presence marked. The question arises whether vendor can sell his property and execute the sale deed, even in the absence of prior sanction by the Estate Office or No Due Certificate from the Bank?

[116]. A reference can be made to **Vishwa Nath Sharma vs. Shyam Shankar Goela and another, 2007(2) RCR (Civil) 415** wherein a situation arose in respect of prohibition to execute the sale deed without prior sanction of the Authority. In that case permission from Haryana Urban Development Authority (for short 'the HUDA') was required for execution of the sale deed and transfer could have been made only with the sanction with the Competent Authority.

[117]. In the aforesaid case, it was observed that permission from HUDA was not a condition precedent for grant of decree for specific performance. In the event of refusal by the Competent Authority in respect of permission, the plaintiff may not be able to enforce the decree for specific performance, but that is not a bar to the Court for passing a decree for that relief. If after the grant of decree for specific performance, the Competent Authority refused to grant permission, the decree-holder may not be in a position to enforce the decree, but it could not be said that such a condition is condition precedent

for passing a decree for specific performance.

[118]. Permission is not a *sine qua non* for execution of the sale deed in the light of dictum laid down by the Hon'ble Apex Court. However in the present case even if, obligation has been cast upon the plaintiff No.1 to pay back the remaining amount of loan, still contingent grounds could have been incorporated in the sale deed thereby obligating the plaintiff No.1 to fulfill those obligations or enforcement of the decree can be tested at the threshold of requirement in the light of **Vishwa Nath Sharma's** case (supra).

[119]. If conduct of both the parties is tested in the light of aforesaid observation, it can be culled out that readiness and willingness on the part of the plaintiffs are proved to the hilt, whereas the defendant is found lacking.

[120]. As discussed above, the document Ex.P-4 cannot be held to be a fabricated document.

[121]. In view of observations made in **Zarina Siddiqui's** case (supra) and **K. Prakash's** case (supra) the escalation of price cannot be held to be a ground to deny the specific performance of the agreement.

[122]. Keeping in view the entire controversy between the parties and also the fact that agreement to sell is dated

03.03.2005 and there is enormous rise in the price, it would be just and expedient to ask the plaintiffs to get the sale deed executed on the basis of collector's rate prevailing as on today of the property in dispute.

[123]. In order to ascertain the market value of the property on the basis of collector's rate, trial Court can be obligated to undertake the exercise and determine the market value of the property in question and on such determination, pass necessary order for execution of the sale deed.

[124]. With the aforesaid modification, this appeal is disposed of.

January 11, 2016

Atik

(RAJ MOHAN SINGH)
JUDGE