IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 11th OF MARCH, 2024

FIRST APPEAL No. 197 of 2000

BETWEEN:-

1. **RADHESHYAM RAMLAL S/O RAMLAL PORWAL (SINCE DECEASED) THROUGH LEGAL REPRESENTATIVES: -**

   A. **DILIP S/O RADHESHYAM, AGE: 37 YEARS, OCCUPATION: BUSINESS, R/O: 3/3, MAHATMA GANDHI MARG, NAGDA, DISTRICT UJJAIN (M.P.)**

   B. **PRADIP S/O RADHESHYAM, AGE: 29 YEARS, OCCUPATION: BUSINESS, R/O: 3/3, MAHATMA GANDHI MARG, NAGDA, DISTRICT UJJAIN (M.P.)**

   C. **PRAMOD S/O RADHESHYAM, AGE: 27 YEARS, OCCUPATION: BUSINESS, R/O: 3/3, MAHATMA GANDHI MARG, NAGDA, DISTRICT UJJAIN (M.P.)**

   D. **TARABAI WD/O RADHESHYAM, AGE: 59 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: 3/3, MAHATMA GANDHI MARG, NAGDA, DISTRICT UJJAIN (M.P.)**

   E. **PREMLATA W/O NARENDRA KUMAR, AGE: 46 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: CHANDANI CHOWK, RATMAL, DISTRICT RATLAM (M.P.)**

   F. **NIRMALA W/O BABULAL, AGE: 39 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: SHEETAL VASTRALAYA, SANTHA BAZAR, INDORE DISTRICT INDORE (M.P.)**

   G. **NISHA W/O MANISH, AGE: 27 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: ANNAPURNA NAGAR, INDORE, DISTRICT INDORE (M.P.)**

.....APPELLANTS

(BY MR. RAVINDRA SINGH CHHABRA – LEARNED SENIOR ADVOCATE APPEARED ALONG WITH MS. PRANEESHA NAYYAR – ADVOCATE AND MR. RAGHAV RAJ SINGH – ADVOCATE FOR APPELLANTS – PLAINTIFFS.)

AND

1. BHERU SINGH S/O RATANSINGH (DECEASED) THROUGH LEGAL REPRESENTATIVES: -

A. VIDHYA WD/O SHRI BHERU SINGH, AGE: 65 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: TILAK MARG, NAGDA, DISTRICT UJJAIN (M.P.)

B. SUNIL S/O SHIR BHERU SINGH RAGHUVANSHI, AGE: 50 YEARS, OCCUPATION: RETIRED, R/O: JAME JAYA APARTMENT, MAHIDPUR ROAD, NAGDA, DISTRICT UJJAIN (M.P.)

C. RAJKUMARI W/O NANDRAM RAGHUVANSHI, AGE: 48 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: GANDHIGRAM COLONY, NAGDA (JUNCTION), DISTRICT UJJAIN (M.P.)

D. SANDEEP S/O SHRI BHERU SINGH RAGHUVANSHI, AGE: 40 YEARS, OCCUPATION: NOT KNOWN, R/O: TILAK MARG, NAGDA, DISTRICT UJJAIN (M.P.)

E. VINITA D/O SHRI BHERU SINGH RAGHUVANSHI, AGE: 42 YEARS, OCCUPATION: HOUSEHOLD WORK, R/O: TILAK MARG, NAGDA, DISTRICT UJJAIN (M.P.)

2. OMPRAKASH S/O BASANTI LAL JAISWAL, AGE: 51 YEARS, OCCUPATION: BUSINESS, R/O: MAHATMA GANDHI MARG, NAGDA, DISTRICT UJJAIN (MADHYA PRADESH)

.....RESPONDENTS

(MR. SUNIL JAIN – LEARNED SENIOR ADVOCATE APPEARED ALONG WITH MR. PRASANNA R. BHATNAGAR – ADVOCATE FOR RESPONDENT NO.2 – DEFENDANT NO.2.).

MR. MAQBOOL AHMED MANSOORI, MR. SAPNESH JAIN AND MR. RAKESH YADAV – ADVOCATES FOR RESPONDENT NO.1 – DEFENDANT NO.1.

HEARD AND RESERVED ON: 30.01.2024
JUDGMENT PASSED ON: 11.03.2024

This appeal coming on for judgment this day, the court passed the following:

JUDGMENT

The plaintiffs–appellants (legal heirs of Plaintiff Late Radheshyam S/o Ramlal Porwal) filed this appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) against judgment and decree dated 05.02.2000 passed in Civil Suit No.12-A of 1996 by the learned Additional District Judge, Khachrod, District Ujjain (M.P.) whereby the suit for specific performance of the contract has been dismissed.

The facts of the case in short are, as under: -

2. Plaintiff Late Radheshyam S/o Ramlal Porwal filed a suit for specific performance of the contract against defendant No.1 – Bheru Singh S/o Ratan Singh Raghuwanshi and defendant No.2 Omprakash S/o Banshilal Jaiswal. Defendant No.1 is the owner of a house constructed on land (measuring 65 sq. ft. x 10 sq. ft.) bearing House No.97, Mahatma Gandhi Road, Nagda, District Ujjain (M.P.) (hereinafter referred to as **the suit house**). The plaintiff (Late Radheshyam S/o Ramlal Porwal) and defendant No.1 (Bheru Singh S/o Ratan Singh Raghuwanshi) entered into an agreement to sell dated 27.07.1988 (hereinafter referred to as **'the agreement**) in respect of the sale of the suit house for a total consideration of Rs.3,25,000/- (rupees three lakhs twenty-five thousand only). The aforesaid agreement was signed in the presence of the witnesses and the plaintiff paid an amount of Rs.31,000/- (rupees thirty-one thousand only) as an advance, and did agree to pay the remaining amount of Rs.2,94,000/- (rupees two lakhs ninety-four

thousand only) within 4 months on or before 26.11.1988. When within 4 sale deed could not be executed parties again agreed that in the month of January 1989, after discussion, they would fix the date to get the sale deed executed. Thereafter, on 30.01.1989, it was agreed between them to execute the sale deed in the month of March 1989.

3. According to the plaintiff, after March 1989, he requested several times to defendant No.1 to get the sale deed executed, but he only gave assurance and passed the time. Three months from the date of execution of the agreement, the prices of the property have gone high therefore a doubt came to the mind of the plaintiff, that defendant No.1 because of this hike in the prices is avoiding the registration of the sale deed. Accordingly, the plaintiff sent a registered notice on 19.06.1991 to defendant No.1, which he received on 26.06.1991; and thereafter, when the sale deed was not executed, the plaintiff filed the suit on 12.08.1991. The plaintiff also filed an application under Order 39 Rules 1 and 2 of CPC.

4. On 11.02.1992, the first time, defendant No.1 appeared and sought time to file a written statement. Defendant No.1 filed a written statement, denying the averments made in the plaint. The defendant submitted that the plaintiff was required to pay the remaining amount within a period of four months and get the sale deed executed within four months. The aforesaid time was extended up to January 1989 for execution of the sale deed, but the plaintiff could not arrange the money for payment of the remaining amount of sale consideration.

5. It is further pleaded in a written statement by defendant No.1 that on 03.03.1989 his mother expired, therefore, he was in need of money. Thereafter, on 25.03.1989, his aunt also expired. He again requested the plaintiff to get the sale

deed executed, but since he (the plaintiff) was short of funds, therefore, he did not execute the sale deed till 31.03.1989, hence violated the terms and conditions of the agreement. Hence, the agreement was cancelled and defendant No.1 had a right to sell the suit house. Defendant No.1 sold the suit house to defendant No.2 vide registered sale deed dated 14.08.1992 for a total sale consideration of Rs.5,05,000/- (rupees five lakhs five thousand only). Accordingly, defendant No.2 was also impleaded as a defendant in the suit and he filed a reply / written statement on 09.03.1994.

6. Vide order dated 10.08.1992, learned 5th Additional District Judge to the Court of District Judge, Ujjain, District Ujjain (M.P.) dismissed an application filed by the plaintiff under Order 39 Rules 1 and 2 of CPC by observing that even if the sole defendant No.1 sells the suit house, the provisions of Section 52 of the Transfer of Property Act, 1882 would apply.

7. On the basis of the pleadings, on 05.07.1994 learned Civil Court framed four issues for adjudication, which are reproduced, as under: -

"**<u>वाद विषय</u>**

1. क्या वादी अनुबंध अनुसार शेष विक्रय मूल्य देकर विक्रयपत्र का पंजीयन कराने के लिये तैयार था, यदि हॉ तो प्रभाव?
2. क्या प्रतिवादी क्रमांक-2 ने वादी के साथ हुए अनुबंध की जानकारी होते हुए, प्रतिवादी क्रमांक-1 से वादग्रस्त मकान का विक्रयपत्र अपने नाम करा लिया है, यदि हॉ तो प्रभाव?
3. क्या वादी चाही गई सहायता प्राप्त करने का अधिकारी है?
4. सहायता एवं व्यय?"

8. During the pendency of the suit, plaintiff Radheshyam S/o Ramlal Porwal

expired on 15.11.1995 and his seven legal heirs were brought on record. Out of seven legal heirs, the second son of the original plaintiff, Pradeep Mehta examined himself as PW-1 in support of the plaint and also examined Ramesh Chandra Mehta, uncle of Radheshyam Porwal as PW-2, Ranchhod Porwal as PW-3, Banshilal as PW-4. The plaintiffs exhibited 10 documentary evidence as Ex.P/1 to Ex.P/10 in which the agreement is exhibited as Ex.P/1.

9. In defence, defendant No.1 Bheru Singh examined himself as DW-1, Gokul Singh as DW-2 and Omprakash defendant No.3 examined himself as DW-3.

10. While answering to **Issue No.2**, learned Additional District Judge, Nagda, District Ujjain (M.P.) held that from March, 1989 to 19.06.1991 for a period of two years and four months, the plaintiff remained silent, therefore, the contract between the parties came to an end; hence defendant No.1 (Bheru Singh S/o Ratan Singh Raghuvanshi, now dead) was free to sell the suit house to defendant No.2 (Om Prakash S/o Basantilal Jaiswal), and the sale deed which would not be affected by the suit.

11. After appreciating the evidence that came on record, vide **judgment & decree dated 05.02.2000**, learned Additional District Judge, Nagda, District Ujjain (M.P.) dismissed the suit by recording the findings that the plaintiff was not ready to get the sale deed executed by paying the remaining amount of sale consideration.

Now this first appeal before this Court.

12. The legal heirs of the plaintiff have filed this appeal against defendants Bheru Singh S/o Ratan Singh Raghuwanshi and Omprakash S/o Banshilal Jaiswal. During the pendency of this appeal, defendant No.1 Bheru Singh expired and his

legal heirs were placed on record.

Submissions of the appellants

13. Shri Ravindra Singh Chhabra, learned Senior Counsel appearing for the appellants submitted that the learned Additional District Judge has wrongly dismissed the suit solely on the ground that the plaintiff was not ready and willing to get the sale deed executed. The aforesaid findings are perverse and contrary to the evidence on record. The agreement was executed on 27.07.1988, at that time out of the total sale consideration of Rs.3,25,000/- (rupees three lakhs twenty five thousand only), an advance amount of Rs.31,000/- (rupees thirty one thousand only) was paid by the plaintiff to defendant No.1 and remaining amount of sale consideration was agreed to be paid on or before 26.11.1988 is not in dispute but said time was relaxed later on by the consent of the parties, hence the time was no longer essence of the agreement.

14. To elaborate above submissions Shri Chhabra learned senior counsel argued that on 26.11.1988, the parties extended the above period of 4 months and decided to sit in the month of January of the next year to decide a date for execution of sale deed. In the month of January, 1989, again they decided to sit in the month of March, 1989 for fixing the date for execution of the sale deed. It is further submitted by the learned senior counsel that in the month of March, 1989, the parties were required to sit again to decide a date for execution of the sale deed. Therefore, the time was not the essence of the contract/agreement.

15. It is further submitted that thereafter two deaths took place in the family of defendant No.1 was not ready to execute the sale deed with the plaintiff and got extended the time. Therefore, the plaintiff cannot be blamed for the non-execution

of the sale deed, when he was always ready and willing to get the sale deed executed. Defendant No.1 has not disputed in a written statement about two deaths in the family and due to the said reason, the sale deed was not executed by him and thereafter, he sold the suit house to defendant No.2 illegally and blamed the plaintiff for non-execution of the sale deed.

16. It is further submitted that in para 29 of the impugned judgment, the learned Civil Court has wrongly held that the registered sale deed was to be executed within four months from the date of the agreement and it was extended up to March, 1989, but the Civil Court has misconstrued that the parties have extended time twice and agreed to sit again for deciding a date for execution of sale deed. In Ex.P/1, there is no reason, that the date is being extended due to the non-availability of the fund. Therefore, the Civil Court has wrongly held that the plaintiff did not have sufficient funds to get the sale deed executed. The mother of defendant No.1 expired on 03.03.1989 and thereafter his aunt expired on 25.03.1989, therefore, he did not execute the sale deed. Without any evidence and pleadings, the Civil Court has held that the sale deed could not be executed because of the non-availability of the fund with the plaintiff.

17. Shri Ravindra Singh Chhabra, learned Senior Counsel submits that after death on 25.03.1989, defendant No.1 was required to call the plaintiff to fix a date for execution of the sale deed, but instead of doing so, in order to fetch the higher amount, he executed sale deed of suit house in favour of defendant No.2, without informing the plaintiff.

18. Shri Chhabra has drawn the attention of this Court to paragraph 32 of the impugned judgment in which, the Civil Court has held that the plaintiff did not

have money, as he could not arrange the requisite funds in the month of March, 1989 and thereafter, no time was extended for execution of sale deed. Whereas the plaintiff examined PW-2, PW-3 and PW-4, who has categorically stated that the plaintiff has sufficient money to pay defendant No.1 the balance sale consideration for the execution of the sale deed. The plaintiff was not required to prove his financial condition by producing an account statement.

19. Shri Chhabra, learned Senior Counsel further submits that defendant No.2 stated on oath that suit property was purchased by him on 14.08.1992 for a total sale consideration of Rs.5,05,000/- (rupees five lakhs five thousand only). Defendant No.1 informed him that he was the owner of the suit property, but he had no knowledge about the pendency of any dispute in respect of the suit property. Learned Civil Court has wrongly treated that the agreement had expired in the month of March, 1989 and defendant No.1 was not required to give any notice to the plaintiff before executing the sale deed of the suit house in favour of defendant No.2.

20. Shri Chhabra learned senior counsel submitted that the agreement was never cancelled by defendant No.1 by invoking Section 31 of the Specific Relief Act, 1963. The silence of the plaintiff cannot be treated as cancellation of the agreement. Defendant No.2 has wrongly been held as a *bona fide* purchaser, therefore, the learned Civil Court has wrongly dismissed the suit, which ought to have been decreed in favour of the plaintiff.

21. Shri Ravindra Singh Chhabra, learned Senior Counsel appearing for the plaintiff/appellant placed reliance on the judgment passed by the Apex Court in case of **Panchanan Dhara** v. **Mohamatha Nath Maity** reported as **(2006) 5 SCC**

340 (para 20 and 21) in which the Apex Court has held that a bare perusal of Article 54 of the Limitation Act, 1963 would show that the period of limitation begins to run from the date on which the contract was specifically performed. When, however, no time is fixed for the performance of a contract, the Court may determine the date on which the plaintiff had notice of refusal on the part of the defendant to perform the contract and in that event, the suit is required to be filed within a period of three years therefrom; and if it is proved, that the time fixed for performance of the contract has been extended by the parties, then instead of first part of Article 54, the second part would become applicable.

22. Learned Senior Counsel has also placed reliance on a judgment of the Supreme Court in the case of **Smt. Indira Kaur & others** v. **Shri Sheo Lal Kapoor** reported as **AIR 1988 SC 1074** (para 6), in which the Apex Court has held that the law is well settled that in the transaction of sale of immovable property, time is not the essence of the contract. He has also placed reliance on the case of **Govind Prasad Chaturvedi** v. **Hari Dutt Shastri & another** reported as **IR 1977 SC 1005** (para 5-7, 10 and 12).

23. Learned Senior Counsel has placed reliance on a judgment of the Supreme Court in the case of **K. Prakash** v. **B. R. Sampath Kumar** reported as **(2015) 1 SCC 597** (para 18) in which the Apex Court has held that subsequent rise in the price of the property would not be treated as hardship entailing refusal of decree for specific performance of the contract. In this aspect, he also placed reliance on para 17 and 18 of the judgment of the Supreme Court in the case of **Laxman Tatyaba Kankate & another** v. **Staramati Harishchandra Dhatrak** reported as **2011 (1) MPLJ 317**.

24. On the issue of readiness and willingness, Shri Chhabra learned senior counsel relied on judgments of the Supreme Court in the case of **Aniglase Yohannan** v. **Ramlatha & others** reported as **(2005) 7 SCC 534** (para 9-13) and in the case of **P. D'Souza** v. **Shondriolo Naidu** reported as **AIR 2004 SC 4472** (para 19-21). The requirements to be fulfilled for bringing compliance with Section 16 (c) of the Specific Performance Act, 1963 have been delineated by the Court in several judgments. Any person seeking the benefit of specific performance of the contract must manifest that his conduct has been blemish-less throughout entitling him to the specific relief.

25. Lastly, Shri Chhabra learned senior counsel placed reliance on a judgment passed by the Apex Court in the case of **Prakash Chandra** v. **B Angad Lal & others** reported as **(AIR 1979 SC 1241** (para 9), in which the Apex Court has held that the ordinary rule is that specific performance should be granted. It ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief.

Submissions of respondents / the defendants

26. *Per contra*, Shri Sunil Jain, learned Senior Counsel appearing for defendant No.2 contended that the learned Civil Court has rightly dismissed the suit after due consideration of the evidence that came on record. The time was the essence of the contract as initially, the plaintiff was required to pay the remaining amount of sale consideration within a period of four months. The time was extended only once. On 26.11.1988, the parties decided to execute the sale deed in the month of January, 1989, thereafter both parties decided to execution of the sale deed in the month of March, 1989, but the plaintiff did not turn up with the remaining amount

of sale consideration to get the sale deed executed. Therefore, after 31.03.1989, the agreement stood cancelled and defendant No.1 was free to sell the suit house. The Civil Court has rightly held that the plaintiff was not ready and willing to get the sale deed executed well within time, hence the plaintiff is not entitled to decree of specific performance of a contract.

27. It is submitted that due to the death of the mother and aunt of defendant No.1, he never denied the execution of the sale deed, rather he was in genuinely in need of money, but the plaintiff did not come forward with the balance sale consideration for execution of sale deed. Defendant No.1 always wanted to sell his property / suit house, therefore, when the plaintiff did not turn up, defendant No.1 waited for more than a year and sold the suit house to Defendant No.2 vide registered sale deed. Hence, no interference is called for in the first appeal and the same is liable to be dismissed.

28. Shri Sunil Jain, learned Senior Counsel appearing for defendant No.2 has placed reliance on the judgment passed in the case of **N.P. Thirungnanam (Dead) by Legal Representatives** v. **Dr. R. Ragan Mohan & others** reported as **(1995) 5 SCC 115**, in which the Apex Court held that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right from the date of execution till the date of decree, he must prove that he is ready and has always been willing to perform his part of the contract.

29. The Apex Court summarized the principle for grant of discretionary relief for specific performance of the contract under Sections 16 (c) and 20 of the Specific Relief Act, 1963 in the case of **Surinder Kaur (Dead) through Legal**

Representatives v. **S Bhahadur Singh (Dead) through Legal Representatives** reported as **(2019) 8 SCC 575**. In the case of **Ritu Saxena** v. **D J.S. Grover & another** reported as **(2019) 9 SCC 132**, dismissal of the suit has been upheld by the Apex Court on the ground that the plaintiff / appellant had not produced any income tax record or bank statement in support of the plea of financial capacity so as to be ready and willing to perform the contract.

30. In the recent judgment passed by the Apex Court in case **T.D. Vivek Kumar** v. **Ranbir Chaudhary** reported as **2023 SCC OnLine SC 526**, the Apex Court has held that if the second party fails to pay the balance amount within the stipulated time, the advance will be forfeited; and if the seller fails or refuses to execute the sale deed and other necessary documents in favour of the purchaser, the seller will be responsible to pay double the amount given as an advance. In view of the above, learned Senior Counsel appearing for defendant No.2 prays for dismissal of the first appeal. Shri Mansoori, learned counsel appearing on behalf of respondent No. 1 / the defendant No.1 supported defendant No.2 and adopted the arguments of Shri Sunil Jain senior advocate.

Appreciations & Conclusion

31. Admittedly, the plaintiff entered into a sale agreement to purchase the suit house owned by defendant No.1. At the time of execution of the agreement, the plaintiff paid an amount of Rs.31,000/- (rupees thirty one thousand only) and agreed to pay the remaining amount of sale consideration of Rs.2,94,000/- (rupees two lakhs ninety four thousand only) at the time of registration of sale deed. The house was free from all encumbrances, as there was no loan, mortgage, tax liability etc. Therefore, there were no such obligations for defendant No.1 to be fulfilled before the execution of the sale deed. For the purchaser (plaintiff), there was only

one obligation that he was required to pay the remaining sale consideration at the time of execution of the sale deed for which four months time was given by way of Condition No.2 of the agreement. The consequence of not performing of the obligation by either of the parties was also provided in the agreement. If defendant No.1 (seller) refuses to execute the sale deed, then he will return double the amount taken as an advance to the plaintiff. As per Condition No.3, if the plaintiff (purchaser) fails/refuses to purchase, then he would have no right to the advance amount paid to the owner and the agreement would be cancelled. Therefore, in both situations, the consequences have been provided in the agreement itself and both the parties were bound by such conditions. At the most, the plaintiff/appellant would be entitled to get Rs.62,000/- from the defendant No.1 or that amount would be forfeited by defendant No.1 and the agreement would be treated as cancelled.

32. Admittedly, initially four months period was provided for payment of the remaining sale consideration and execution of the sale deed and later on same was extended on 26.11.1988 with the consent of both parties till January 1998. However, the reasons were not assigned by both the parties in the plaint, in the agreement as well as in the written statement; and by way of consent, both would fix a date for execution of sale deed. Again a meeting was held between them in the month of January 1989, and the date of execution of the sale-deed was extended up to March, 1989 with the consent of the parties. The contention of Shri Ravindra Singh Chhabra learned senior counsel is that in the month of March, 1989 also, the parties were required to sit again to fix a date for execution of the sale deed, March of 1989 was not fixed for the execution of the sale deed. The aforesaid contention is not acceptable. Only on 26.11.1988, the time was extended and the parties agreed to sit in the month of January, 1989 for the execution of the

sale deed and in the month of January, 1989, they decided to get the sale deed executed in the month of March, 1989. Therefore, the initial agreement of four months which was fixed on 27.07.1988 was extended up to March, 1989. Thereafter, the plaintiff did not make any effort to get the sale deed executed. The plaintiff first time, issued a notice on 19.06.1991 i.e. after one year and four months for which he gave an explanation that defendant No.1 did not agree to the execution of the sale deed, because of two deaths in his family which had been denied by the defendant No.1.

33. According to defendant No.1, his mother expired on 03.03.1989 and his aunt expired on 25.03.1989, but he never refused to execute the sale deed, rather he was in need of money. The sale deed was not executed by the plaintiff because he did not have money for that. In evidence, defendant No.1 specifically stated that because of two deaths in his family, he did not postpone the execution of the sale deed, rather he was in need of money. Therefore, he requested plaintiff Radheshyam to get the sale deed executed. Hence the plaintiff has failed to prove continuous readiness and willingness to perform his obligation. In the recent decision of **Alagammal v. Ganesan**, reported in **2024 SCC OnLine SC 30** the Apex court has held that there was no willingness shown by the purchaser to pay the remaining amount or get the Sale Deed ascribed on necessary stamp paper and give notice to the seller to execute the Sale Deed, it cannot be said that he was willing and ready to get the sale deed executed even if the time was not essence of the contract. the relevant paras are as under: -

> "**29.** The ratio laid down in *K.S. Vidyanadam* (supra) which had a similar factual matrix squarely applies in the facts and circumstances of the present case, on the issue that time was the essence of contract and even if time is not the essence of the agreement, in the event that there is no reference of

any existence of any tenant in the building and it is mentioned that within a period of six months, the plaintiffs should purchase the stamp paper and pay the balance consideration whereupon the defendants will execute the Sale Deed, there is not a single letter or notice from the plaintiffs to the defendants calling upon them to the tenant to vacate and get the Sale Deed executed within time. Further, the Legal Notice was issued after two and a half years from expiry of the time period in *K.S. Vidyanadam* (supra), whereas in the present case, the Legal Notice has been issued after more than six and a half years. The relevant paragraphs from *K.S. Vidyanadam* (supra) read as under:

> *'**10.** It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in* Chand Rani *v.* Kamal Rani, *[(1993) 1 SCC 519] : (SCC p. 528, para 25)*
>
> > *"... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."*
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> *In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and*

determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades — particularly after 1973 [It is a well-known fact that the steep rise in the price of oil following the 1973 Arab-Israeli war set in inflationary trends all over the world. Particularly affected were countries like who import bulk of their requirement of oil.]. In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? The plaintiff says that he has been calling upon Defendants 1 to 3 to get the tenant vacated and execute the sale deed and that the defendants were postponing the same representing that the tenant is not vacating the building. The defendants have denied this story. According to them, the plaintiff never moved in the matter and never called upon them to execute the sale deed. The trial court has accepted the defendants' story whereas the High Court has accepted the plaintiff's story. Let us first consider whose story is more probable and acceptable. For this purpose, we may first turn to the terms of the agreement. In the agreement of sale, there is no reference to the existence of any tenant in the building. What it says is that within the period of six months, the plaintiff should purchase the stamp papers and pay the balance consideration whereupon the defendants will execute the sale deed and that prior to the registration of the sale deed, the defendants shall vacate and deliver possession of the suit house to the plaintiff. There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11-7-1981. It is not the plaintiff's case that within six months', he purchased the stamp papers and offered to pay the balance consideration. The defendants' case is that the tenant is their own relation, that he is ready to vacate at any point of time and that the very fact that the plaintiff has in his suit notice offered to purchase the house

with the tenant itself shows that the story put forward by him is false. The tenant has been examined by the defendant as DW 2. He stated that soon after the agreement, he was searching for a house but could not secure one. Meanwhile (i.e., on the expiry of six months from the date of agreement), he stated, the defendants told him that since the plaintiff has abandoned the agreement, he need not vacate. It is equally an admitted fact that between 15-12-1978 and 11-7-1981, the plaintiff has purchased two other properties. The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2½ years, the prices went up three times and that only because of the said circumstance has the plaintiff (who had earlier abandoned any idea of going forward with the purchase of the suit property) turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, we are inclined to accept the case put forward by Defendants 1 to 3. We reject the story put forward by the plaintiff that during the said period of 2½ years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above finding means that from 15-12-1978 till 11-7-1981, i.e., for a period of more than 2½ years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the defendants to execute the sale deed and deliver possession of the property. We are inclined to accept the defendants' case that the values of the house property in Madurai town were rising fast and this must have induced the plaintiff to wake up after 2½ years and demand specific performance.

11. *Shri Sivasubramaniam cited the decision of the Madras High Court in* S.V. Sankaralinga Nadar *v.* P.T.S. Ratnaswami Nadar, *[AIR 1952 Mad 389 : (1952) 1 Mad LJ 44] holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We*

cannot be oblivious to the reality — and the reality is constant and continuous rise in the values of urban properties — fuelled by large-scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs. 5000 and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs. 5000 (as against the total consideration of Rs. 60,000) the plaintiff did nothing until he issued the suit notice 2½ years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties — evolved in times when prices and values were stable and inflation was unknown — requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).

xxxxx

> ***13.*** *In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices — according to the defendants, three times — between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff*.'
>
> Emphasis supplied)
>
> **30.** The decisions relied upon by the respondents, relating to the conduct of parties are of no avail to them in the circumstances, as even if the case of later payments by the respondents to the appellants is accepted, the same being at great intervals and there being no willingness shown by them to pay the remaining amount or getting the Sale Deed ascribed on necessary stamp paper and giving notice to the appellants to execute the Sale Deed, it cannot be said that in the present case, judged on the anvil of the conduct of parties, especially the appellants, time would not remain the essence of the contract."

34. The agreement was executed by plaintiff Radheshyam and he filed the suit, but before he could be examined, in the court he expired. His second son Pradeep Mehta entered into witness box as PW-1. He gave the evidence only on the basis of the contents of the agreement to sell. According to him, he was not present at the time of signing of the agreement or extension of the time. Therefore, his depositions in respect of the agreement to sell or extension of time or so-called refusal by defendant No.1 for execution of the sale deed, are not based on his personal knowledge. Therefore, he cannot give evidence to establish the readiness and willingness of the purchaser i.e. original the plaintiff. He admitted in para 9 of the cross-examination that Bheru Singh was in need of money, therefore, he agreed to sell the house to the plaintiff and the time was fixed for payment of the remaining amount of sale consideration and the sale deed was not executed within

that agreed time and the time was extended because of death in the family of Bheru Singh. There are certain fact which are in the knowledge of the party which can be proved by him only by entering into witness box especially in facts related to readiness and willingness. A party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath, no one can appear as a witness on behalf of the party in the capacity of that party. In the case of ***Janki Vashdeo Bhojwani v. Indusind Bank Ltd.*****, reported in (2005) 2 SCC 217:-**

> "**14.** Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr Bhojwani to represent them and the Tribunal erred in allowing the power-of-attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.
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> **15.** Apart from what has been stated, this Court in the case of *Vidhyadhar* v. *Manikrao* [(1999) 3 SCC 573] observed at SCC pp. 583-84, para 17 that:
>
> > "*17.* Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct…."
>
> **16.** In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of decree.
>
> **17.** On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri* v. *State of Rajasthan* [(1986) 2 WLN 713 (Raj)] it was held that a general power-of-attorney holder can ap-

pear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of *Ram Prasad* v. *Hari Narain* [AIR 1998 Raj 185 : (1998) 3 Cur CC 183]. It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of *Pradeep Mohanbay (Dr.)* v. *Minguel Carlos Dias* [(2000) 1 Bom LR 908] the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

20. However, in the case of *Humberto Luis* v. *Floriano Armando Luis* [(2002) 2 Bom CR 754] on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order 3 Rule 2 CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in *Floriano Armando* [(2002) 2 Bom CR 754].

21. We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* [(1986) 2 WLN 713 (Raj)] followed and reiterated in the case of *Ram Prasad* [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] is the correct view. The view taken in the case of *Floriano Armando Luis* [(2002) 2 Bom CR 754] cannot be said to have laid down a correct law and is accordingly overruled."

35. According to him, his father arranged the money and on 25.03.1989, he went

to the house of Bheru Singh with an amount of Rs.3,00,000/- (rupees three lakhs only) and his brother Ramesh Chandra Mehta was also with him, but this fact has neither been pleaded in the plaint nor even in the notice sent to defendant No.1 before filing the civil suit. He has also admitted that when the sale deed was not executed in the month of March, 1989, no action was taken by his father. Therefore, the plaintiff's legal heirs have failed to prove his readiness and willingness to get the sale deed executed by their father.

36. As discussed above there was nothing in the agreement to be performed by defendant No.1, which he failed to do so. Therefore, the entire obligation was on the plaintiff to get the sale deed executed by paying the remaining amount of sale consideration within the agreed time for which the plaintiff could not give evidence, as he expired before his examination. The time was finally extended up to March, 1989 and till then no payment was made by the plaintiff. In order to prove his readiness and willingness, it is first incumbent upon the plaintiff to purchase the stamp paper and give a notice to defendant No.1 to remain present in the Office of Registrar for execution of the sale deed on a particular day. Therefore, the strict proof of readiness and willingness, as required under the law, has not been given by the plaintiff.

37. As per Conditions No.2 and 3 of the agreement, if the seller fails to honour the agreement, then he would return the double amount; and if the purchaser fails to make balance amount of sale the advance would be forfeited and the agreement would be cancelled. No right has been given to the plaintiff/purchaser to get the sale deed executed through the Court. However, by way of suit, he did not claim this alternative relief.

38. In similar facts and circumstances, the Apex Court in the case of **T.D. Vivek Kumar (supra)** set aside the decree of specific performance and upheld the order of the Civil Court and first Appellate Court dismissing the suit relying on Condition No.2 of the agreement, that if a second party fails to pay the balance amount within the stipulated time, the advance will be forfeited and if the party fails to refuse to execute the sale deed and other necessary documents, the seller will be responsible to pay the double of the amount. Relevant paragraphs No.17 to 20 of the judgment in the case of T.D. Vivek Kumar (supra) are reproduced, as under: -

> "**17.** Even otherwise on merits also looking to the terms and conditions stipulated in the sale agreement the High Court has erred in passing the decree for specific performance which was refused by the learned Trial Court as well as the First Appellate Court. The relevant clause in the sale agreement reads as under:—
>
> > "2. That if the 2nd party fails to pay the balance amount within stipulated time, the advance will be forfeited and if the first party fail or refuse to execute the sale deed and other necessary document in favour of the purchaser or in the name of his nominees within the stipulated time, the seller will be responsible to pay the double of the amount given as advance."
>
> **18.** Thus, as per clause 2 of the sale agreement, if the second party fails to pay the balance amount within stipulated time, the advance will be forfeited and if the seller fail or refuse to execute the sale deed and other necessary document in favour of the purchaser/buyer or in the name of his nominees within the stipulated time, the seller will be responsible to pay double the amount given as an advance. Therefore, on failure on the part of the seller to execute the sale deed within the stipulated time, the purchaser/buyer shall be entitled to the double of the amount given as an advance. It cannot be disputed that the plaintiff being a party to the agreement to sell is bound by the terms and conditions stipulated in the sale agreement. Therefore, on true interpretation of clause 2 of the sale agreement, the learned Trial Court as well as the First Appellate Court as such rightly refused to pass the decree for specific performance of the sale agreement and rightly passed the decree for recovery of Rs. 4 lakhs being double the amount given as an advance which as such was in consonance with the clause 2 of the sale agreement.

> **19.** An identical question came to be considered by this Court in the case of *P. D'souza* (supra) and after considering the earlier decision of this Court in the case of *M.L. Devender Singh* v. *Syed Khaja* (1973) 2 SCC 515, this Court observed and held that where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done, the Court may refuse to pass the decree for specific performance. In the present case, the condition specifically stipulates that in case of failure on the part of the seller to execute the sale deed within the stipulated time the buyer shall be entitled to double the amount given as an advance. Therefore, the sum is specifically named i.e., double the amount of advance paid. Though, the High Court has relied upon the decision in the case of *P. D'souza* (supra), the aforesaid aspect has not been considered by the High Court, more particularly, the observations made in paragraph 31 in its true perspective.
>
> **20.** In view of the above, the High Court has materially erred in setting aside the concurrent judgment(s) of the learned Trial Court as well as the First Appellate Court refusing to pass the decree for specific performance and passing the decree for recovery of Rs. 4 lakhs being double the amount of advance paid. Under the circumstances, the impugned judgment and order passed by the High Court is unsustainable."

30. Therefore, as per these two conditions of the agreement to sell, the plaintiff is not entitled to a decree of the execution of the sale deed. Learned Additional District Judge did not commit any error of law as well on facts while dismissing the suit. Therefore, no case for interference with the impugned Judgment & Decree is made out. The present first appeal is accordingly dismissed.

The original record of the Civil Court be sent back.

(VIVEK RUSIA)
JUDGE

rcp