

(2005) 08 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Regular First Appeal No. 133 of 1998

Smt. Lal Devi and Others

APPELLANT

Vs

Smt. Vaneeta Jain and Others

RESPONDENT

Date of Decision : 29-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 1(2), Order 41 Rule 16, Order 43 Rule 1, Order 8 Rule 10, Order 9 Rule 13
Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 118
Himachal Pradesh Tenancy and Land Reforms Rules, 1975 — Rule 38A(1)
Limitation Act, 1963 — Article 1, 53, 54
Specific Relief Act, 1963 — Section 10, 16

Citation : (2006) 3 ShimLC 477

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

**Advocate : Vijay Pandit, Naresh Gupta and Yogitta Dutta, for the Appellant;
Anand Sharma and Tarlok Chauhan, for the Respondent**

Final Decision : Dismissed

Judgement

Arun Kumar Goel, J.—Civil Suit No. 29 of 1985 was initially filed in this Court by Shri Jawahar Lal Jain against Shri P.S. Multani. With the enhancement of pecuniary jurisdiction of the District Courts, it was assigned to the Court of District Judge, Shimla, for disposal in accordance with law.

2. At this stage it may be appropriate to notice that most of the Plaintiff's evidence was recorded in this Court. Only cross-examination of PW-8 Shri S.C. Dave was deferred, which was to be continued after summoned record was received. Trial Court recorded the statement of PW-10 Shri Rajinder Sethi on 7.1.1998. Matter came up for consideration before the trial Court on this date. As none appeared on behalf of the Defendant, so after proceeding ex parte against him, ex parte statement of PW-10 was recorded. This was followed by hearing of arguments. Case was adjourned for pronouncement of judgment in the post lunch session on the same day. And finally ex parte decree was passed.

3. It is against this judgment and decree dated 7.1.1998, passed by the learned District Judge, Shimla, in Civil Suit No. 9-S/I of 1997/1985, present appeal is filed.

4. Appellants are the legal representatives of deceased Shri P.S. Multani Defendant, in the suit. Likewise Respondents are the legal representatives of deceased Shri JawaharLal Jain, who had filed the suit as Plaintiff. Parties are being referred to hereinafter as Plaintiff and Defendant.

5. This suit was filed by the Plaintiff seeking a decree for possession of specific performance of the property in the following terms:

It is, therefore, respectfully prayed that a decree for specific performance with regard to the property covered by agreement to sale dated 26th March, 1982 be passed in favour of the Plaintiff and against the Defendant, with a direction to Defendant to apply and sign the necessary documents for obtaining permission of the Himachal Pradesh Government for sale of land under the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act and to execute the deed of sale in favour of the Plaintiff regarding land and estate known as Brombley Estate near Bharari, Shimla consisting of one main house, (5 bed rooms), drawing and dining room, one kitchen, pantry, one store, five bath rooms, two stores, 3 varandahs (1 glazed, one closed and one verandah), one annexe consisting of four rooms, two bath rooms and a kitchen, one cattle shed, one garage, 12 servant quarters, two cemented stores and the land attached to the estate measuring about 20 bighas along with orchard as shown in the plan attached and more particular described as bearing Khewat No. 68, Khatauni No. 89, Khasra Nos. 149 (0-3), 150 (0.19), 151 (0.7), 152 (0.16), 154 (0.1), 151 (0.2), 156 (15 bighas 13 biswas), measuring 18 bighas 10 biswas as per the copy of the Jamabandi for the year 1974-76 situate in Mauza Paloh, Pargana Deochu, Tehsil and District Shimla. And also after getting the requisite clearance from the Income Tax Authorities and to hand over the possession of the properties to the Plaintiff.

(b) On failure of the Defendant to obtain the requisite permission, to order the obtaining of the permission and to execute the sale deed, the same may be got obtained by this Hon'ble Court after getting all other formalities completed at the expense of Defendant after payment of the balance of the sale consideration;

Costs of the suit may also be ordered to be awarded to the Plaintiff.

Any other relief which this Hon'ble Court may deem fit in the circumstances of the case be also granted in favour of the Plaintiff.

6. Admitted facts of this case are that agreement to sell Ext.PW-5/A was entered into between the Plaintiff and Defendant. This is dated 26.3.1982. Sale transaction thereunder was to be completed by 30.5.1982. A sum of Rs. 40,000/- by means of bank drafts was paid by the Plaintiff to the Defendant at the time of its execution out of total agreed sale consideration of Rs. 4,20,000/-,

as earnest money. Balance amount was payable at the time of execution of the sale deed.

7. Plaintiff asked the Defendant to execute the sale deed, to seek permission for the sale of the property, but he dilly-dallied. With a view to overcome the agreement in question and get out of it, Defendant started looking for excuses. On 19.5.1982, vide Ext. PW-5/D Plaintiff asked the Defendant, that letter should obtain necessary permission from the authority so that needful can be done by the date fixed. He, (the Plaintiff) was ready with money and prepared to do all the acts required from him in furtherance of the agreement of sale. In respect to this communication from the Plaintiff, Defendant replied vide Ext. PW-5/E in the following word:

I received your Registered letter dated 19th May, 1982, last evening. I am glad that you are ready to execute the Sale Deed by 30th May, 1982. On my part, I am ready with the Income Tax clearance Certificate. And I presume that you have obtained the Himachal Government's sanction, as required by law to purchase the property, you being a Non-Agriculturist, by which law we are bound. So please have the Sale Deed ready for execution by the 30th May, and fix any date convenient to you before the said date.

8. Attorney of the Plaintiff sent telegram Ext. PW-5/F to the Defendant to make himself available at 10.00 a.m. on 28th May at Shimla for registration.

9. Thereafter Defendant extended time upto 7th June as a gesture of grace vide Ext. PW-5/G. Plaintiff pleaded that he was ready and willing to perform his part of agreement.

10. Further case set out in the plaint was, that the Defendant returned Rs. 40,000/- received by him to the Plaintiff. After having accepted the same, Plaintiff got the drafts encashed because validity was for six months. But by encashing the drafts Plaintiff did not absolve the defendant of his liability from the contract. Plaintiff also pleaded that Defendant be directed to co-operate with him in obtaining permission u/s 118 of the H.P. Tenancy and Land Reforms Act, 1972 for the purchase of the land. However, Defendant did not co-operate in the matter and it remained pending for decision. Plaintiff claimed that he had purchased the stamp paper of the value of Rs. 26,400/- for drawing of the sale deed. In terms of the agreement amount of the sale consideration was sent by him through his representative PW-8 Shri S.C. Dave and PW-10 Shri Rajinder Sethi. Sale deed was also drawn up by PW-7 Shri B.N. Aggarwal, Advocate, at Shimla, but it had not been signed by the Defendant and therefore, it was got cancelled and its refund was claimed by him. (This original sale deed is Ext. PW-10/A).

11. Defendant had claimed refund of the amount of the stamp i.e. Rs. 26,400/- and had submitted application accompanied with his affidavit Ext. PW-5/Q. However, vide application Ext. PW-10/B Jawahar Lal Jain had also claimed refund of this amount. This application was supported with the affidavit of PW-10

Rajinder Sethi Ext. PW10/C. After having examined the matter while declining the claim of the Defendant, refund was allowed vide order dated 17.12.1983, Ext. PW-5/P by the Collector, Shimla Sub-Division This resulted in loss to him (the Plaintiff). He had also got served legal notice-vide Ext. PW-5/J upon the Defendant before filing of the suit, but without any consequence.

12. When put to notice, Defendant while admitting the execution of the agreement Ext. PW-5/A, stated that it was obtained by undue influence and pressure, when he was under the influence of liquor, which he had at the dinner time with the Plaintiff and other persons present at the time of execution of this document. He was then not in a position to resist the pressure exerted on him by all these persons. Sale consideration was inadequate according to him, as value of the suit property was not less than Rs. 20 lacs at the relevant point of time, it is the further case of the Defendant that the contract in question was rescinded and he had returned the earnest money of Rs. 40,000/-. Plaintiff was not ready and willing to perform his part of the agreement, as per the Defendant.

13. Reliance is placed by the Defendant on his letter dated 23.1.1982 sent to the Plaintiff, i.e. Ext. PW-5/C, so far the agreement Ext. PW-SA having been rescinded was concerned. For ready reference this letter of Defendant to the Plaintiff is extracted hereinbelow:

Let me talk to my younger brother frankly. You have hitherto looked at things from just one angle - yours. I would want you to see the other side of the picture also mine.

In the first place, when I give up my Simla house, I would naturally go over to my Chandigarh house which is the only other house that I have got. Now the tenant against whom I had filed ejectment proceedings has got a Court order permitting him to stay on for another year till March 1983 to enable him to look for another house. In these circumstances, I am sure you would not like me to be on the road, I appreciate your offer of the Annexe at Shimla, but this two roomed accommodation would be most insufficient and unsuitable for any long stay, will not taken even a quarter of my household effects, and cannot accommodate any member of my family coming to see me. So, while I thank you for your gesture, you will agree that this arrangement will not work. Having lived all my life in fair sized commodious houses, you will not like to push me in my old age into a strait-jacket.

Then, you will appreciate that my family has a right of say in the matter of living in Shimla or shifting to another place like Chandigarh. It is not a decision that I can force upon them all on my own. All along I had been requesting you to wait till my wife returns from abroad, so that I can talk things over with her and my only son. Even on the day the "agreement" was signed, I implored you to give me time to consult my family. But all the four of you browbeat me into signing the said agreement in course of the drinks we were having. Your conscience will bear witness to the way in which I was literally forced to sign. When the next day

I rang up my wife and got her violent reaction, as also of my son from Poona, I realized the position I have been put into under compulsion from you, And I promptly returned the Bank Drafts that you had given me uncashed, together with my own copy of the said agreement, to you through Prem. The absolute gentleman that I have always considered you to be, in you will tell you that you should not insist on your pound of flesh. And I am sure that you would not want to sow seeds of discord in my family.

Since I am talking to you frankly as a brother, let me explain the financial side. You very well know that I am a person with limited and fixed means. I do not possess factories or business or lands. On the one hand I shall be foregoing the rent of the Chandigarh house, which forms a substantial slice of my income; and on the other, I shall not be able to touch the sale proceeds of the Shimla house, as these I shall have to deposit in Rural Bonds or some such thing from which I the return will be negligible. So, in the net result I shall be a big loser. Whatever extra you may give me will hardly cover the cost of doing up the Chandigarh house and a car.

For you it is only a matter of pleasure; for me it is a question of life and death.

One thing, however, I can assure that give you my word of honour which I have never in all my life broken that whenever I sell this, and it is quite on the cards, I shall sell it only to you, knowing how sentimentally attached you are at Shimla. But like a good brother, please do not insist just yet. As proof of this, let me tell you that a party from Delhi last year came and made a bigger offer, but I put them off because I was pledged to you. That pledge still holds good, agreement or no agreement.

In view of my explanation above, I am confident that as a gentleman and in view of my appeal to you sense of honour and justice, you will not insist on your pound of flesh. This is my request to you with folded hands.

I have had a couple of sittings with Jawahar Oswal, in the company of my dear friend Rajinder Whig at Delhi in the Oberoi intercontinental. But that was a long time back. Whig died a couple of years ago. If he was alive today, he would have spoken on my behalf to him also.

With affectionate regards.

14. What is its effect and whether the contract stood rescinded in terms of this letter will be examined and dealt with hereinafter keeping in view the submissions urged on behalf of the parties. Subsequent conduct of the Defendant, as well as effect of claim made by him for the refund of Rs. 26,400/- to the Collector, Shimla Sub Division, will be examined hereinafter in this judgment.

15. Plaint having not been verified by the Plaintiff in law merits rejection, Plaintiff was estopped from his act, conduct, acquiesce and silence, besides its being bad for mis-joinder of parties are the pleas raised for dismissal of suit. Plaintiff being

ready and willing to perform his part of the agreement was denied. Delay was set up as a ground for dismissal of the suit. Defendant further pleaded, that he was present in the registration office, but representative of Plaintiff evaded the execution of the sale deed. Other material facts were also denied by the Defendant. He thus prayed for dismissal of the suit.

16. In replication filed to the amended written statement Plaintiff reiterated his claim as set out in the plaint and the averments to the contrary made in the written statement were denied.

Court framed following issues on different dates.

10.3.1986.

1. Whether the parties entered into an agreement of sale with respect to the suit property according to the terms and conditions given in para 3 of the amended plaint? OPP.

2. Whether fraud and pressure was exercised on the Defendant and there is no valid agreement between the parties? OPD

3. Whether the Plaintiff has been and is willing to perform his part of the contract? OPP.

4. Whether the time was the essence of the contract? OPD.

5. Whether the Defendant is bound to obtain the permission of the competent authority under the provisions of Himachal Pradesh Tenancy and Land Reforms Act for transfer of the suit property as also no objection certificate from the Income Tax authorities? OPP.

6. Whether the Plaintiff is estopped from filing the present suit due to his acts, conduct and acquiescence? OPD.

7. Whether the Plaintiff is entitled to a decree for specific performance? If so, in which form? OPP.

8. Relief.

18.1.1991.

7-A. Whether the suit is bad for mis-joinder of parties i.e. Plaintiff No. 2 who has been joined with mala fide intention? OPD.

6.1.1992.

1(a) Whether the value of the property in question was Rs. 20 lac at the time parties entered into agreement for its sale. If so, what is its effect on the enforcement of the said agreement? OPD.

17. Before proceeding further in the matter it is also necessary to notice that suit was initially filed by the Plaintiff alongwith another Plaintiff, namely M/s. Punjab

Con-Cast Steels Limited, of which the Plaintiff i.e. late Shri Jawahar Lal Jain was the Managing Director. Defendant objected to impleadment of said Company as co-Plaintiff, as according to him the alleged agreement was not entered with this Company. As such, an application was filed for amendment of plaint. The same was allowed by this Court. Record of the case further shows that written statement was also amended in terms of the order dated 4.11.1991 in OMP No. 459 of 1991.

18. Another application i.e. OMP No. 170 of 1994 was filed again for amendment of the written statement. Order on this application was in the following terms, passed on 31.5.1994:

Heard. During the course of arguments on this application, it has been found from the record that one of these issues framed is:

6. Whether the Plaintiff is estopped from filing the present suit due to his acts, conduct and acquiescence? OPD.

By this application Defendant No. 1 wants to set up a plea that Plaintiff No. 1 being not possessed of sufficient funds to purchase the property, misused the financial position as Managing Director of Punjab Concast Steel Limited and thus, set up a sham transaction by pretending to be in possession of sufficient funds for the purchase of property. However, he does not concede that an agreement of sale having been entered into in between the Plaintiff No. 1 and himself. This fact he wants to plead for the purpose of cross-examining the witnesses on the basis of the documents relied upon by the Plaintiff which, according to him, tend to show that the money belong to the company and it was not refunded in the name of the company.

In view of issue No. 6 referred to above, the Defendant is at liberty to confront the witnesses of the Plaintiff with the documents to this effect, particularly relied upon by him in the instant suit. In that view of the matter, no amendment appears to be necessary in the written statement. Shri R.L. Sood, Advocate, in view of this issue liberty having been given also does not press the application which is dismissed as such. The application stands disposed of.

19. Further regarding reference to the Company in plaint after its deletion as Plaintiff No. 2, this Court on 6.5.1992 ordered as under:

The parties are present in person.

The witnesses S/Shri Abinash Jain, Prem Chand Jain and Suresh Chand Dhawe are also present but Shri Chhabil Dass learned Counsel for the Plaintiff states that he is unable to get statements of Plaintiff and his witnesses recorded, as agreement dated 26.3.1982 in original is not traceable with his client. He prays for an adjournment on this account which is not opposed by Counsel for the Defendant. Last opportunity granted to produce the witnesses are no present today at the responsibility of the Plaintiff himself.

During the pendency of this suit, the plaint was ordered to be amended by order dated 20.12.1985 in OMP No. 426/85. Besides additions to para 8 of the plaint, the name of Plaintiff-2 M/s. Punjab Concast Steel Ltd. was also ordered to be deleted from the array of Plaintiffs. Thereafter, though in the amended plaint only the name of Plaintiff Shri Jawahar Lal Jain is mentioned yet in the written statement as well as replication filed by the parties, reference has been made to original Plaintiff No. 2 M/s. Punjab Concast Steel Ltd. at various places. Counsel for parties jointly state that this was done inadvertently and pray that order may be passed that any reference to M/s. Punjab Concast Steel Ltd. - original Plaintiff No. 2 in their pleadings may be ignored. Prayer granted.

(Emphasis supplied)

Registrar (Vigilance) to list the case for Plaintiffs evidence.

20. Record of the case further shows that Plaintiff in all examined as many as 10 witnesses and as already observed when PW-8 S.C. Dave was under cross-examination in this Court it was deferred on 27.8.1993, when Court time was over. This witness again appeared on 23.9.1994 and was further partly cross-examined, but again his cross-examination had to be deferred as the learned Counsel for the Defendant stated that he was not in a position to further cross-examine the witness in the absence of the record for which notice under Order XII Rule 16 of the Code of Civil Procedure, as well as an application under Order XII Rule 8 of the CPC had been moved for production of documents on 28.9.1994. Record of the case also shows that OMP No. 480 of 1994 was filed by the Defendant for issuing direction to Rajinder Sethi to bring the record as detailed in it. Its reply by the Plaintiff shows, that its stand was that Defendant is well aware of Rajinder Sethi having left M/s. Punjab Con-Cast Steels Limited in March, 1989.

21. So far notice under Order XII Rule 8 of the CPC is concerned, some record was ordered to be summoned from PW-8 and some record from PW-10. Its reply sent to the learned Counsel for the Defendant on behalf of the Plaintiff also shows that documents called by the Defendant are neither in possession nor in power of the Plaintiff since he left Punjab Con-Cast Steels Limited. Therefore, question of producing those did not arise. Again another notice was served upon learned Counsel for the Plaintiff on 7.5.1994 under Order XII Rule 8 of the Code of Civil Procedure.

22. After the case had been sent to the Court below for trial in accordance with law, it was listed on different dates. It is very strange that though date for appearance of the parties before the trial Court was fixed as 17.5.1995 by this Court, but the said Court instead of proceeding further in accordance with law when none of the parties appeared, fixed the case for service.

23. Some orders passed by the Court below, which in my opinion have material bearing on the decision of this case, for ready reference are extracted hereinbelow:

26.4.1996. Present: Shri Deepak Gupta, Advocate, for the Plaintiff.

Shri R.L. Sood, Advocate for the Defendant.

PWs S/Shri B.C. Dabe and Rajinder Sethi present. The cross-examination of PW-6 S.C. Dabe stood deferred on 23.9.1994. The Defendant pressed for adjournment of cross-examination with a view to confront the witness with some record of Punjab Concast. The aforesaid record has not been got summoned by the Defendant till date and oral submission has been made for adjourning the cross-examination of PW-8 even today. It is stated that the evidence of Rajinder Sethi also cannot be recorded in the absence of the aforesaid records. The adjournment is granted subject to cost of Rs. 500/-. The above witnesses be now summoned for 8.7.1996. Defendant is directed to take effective steps for production of the record. Summons to above witnesses and for witnesses for production of record be issued Dasti as well as through registered post for the aforesaid date.

8.7.1996 Present: Shri Deepak Gupta, Advocate, for the Plaintiff.

Shri G.C. Gupta, Advocate for the Defendant.

PW Rajinder Sethi is present. The other witness is not present. Summons for production of record sent to Punjab Concast Ltd. Ludhiana not received back. Summons through registered post be now sent for production of record. PW present is discharged. Be put up on 22.8.1996. PWs Rajinder Sethi and S.C. Dave be summoned on PF etc.

13.5.1997 Present : Shri G.S. Rathore, Advocate, for the Plaintiff.

Shri R.L. Sood, Advocate for the Defendants.

Register.

PWs S/Shri S.C. Dave and Rajinder Sethi, are present, but the record by reference to which the Defendants want to cross-examine them could not be procured by the Defendants. The Hon'ble High Court while recording the evidence of Shri S.C. Dave has observed that the Defendants should have a chance to get the record referred to in the notice under Order 41 Rule 16 Code of Civil Procedure. produced so that they may cross-examine the witness Shri Dave by reference to that record. The record is said to be available in the office of Punjab Con-Cast Steels Limited Dhandari Kalan, Ludhiana. Notices have been sent to the said Company repeatedly for the production of the record from the Court of Additional District Judge, but the same have not been received back. Fresh notice be sent to the Managing Director of the said Company requiring him to produce or caused to be produced the requisite record on or before 20.6.1997. Notice be sent through registered post and also through the Process-serving agency of S.S.J., Ludhiana. The notice to be sent to the Senior Sub-Judge for service upon the Managing Director of the Company be forwarded through a D.O. Letter which would be dictated by the undersigned. Process fee and R.A.D. be

filed within two days. Witnesses S/Shri S.C. Dave and Rajinder Sethi who are present, are discharged for today. They need not appear on the next date which is fixed only for the production of the record from the above named company. The matter be put up for further orders on 20.6.1997.

20.6.1997 Present: Shri Guljar Rathore, Advocate, for the Plaintiff.

S/Shri R.L. Sood, and G.C. Gupta Advocates for the Defendant.

Issue fresh notice to the witness for production of record. This time

again the notice be sent through Senior Sub Judge, Ludhiana. A copy of the forwarding letter be sent to the District Judge pointing out in the endorsement that earlier the Senior Sub-Judge has been requested through a D.O. letter to get the notice served but he has not cared to respond to that letter what to speak of effecting the service. Put up on 17.7.1997.

17.7.1997 Present : Shri N.S. Chandel, Advocate, vice Counsel for the Plaintiff.

Shri G.C. Gupta, Advocate for the Defendant.

Notice sent to Punjab Con-Cast Steels Ltd. for production of record has not been received back. Fresh notice be sent, this time through Registrar, High Court of Punjab and Haryana, returnable for 27.8.1997.

27.8.1997 Present : Shri G.S. Rathore, Advocate, for the Plaintiff.

Shri B.N. Shandil, Advocate, vice Shri G.C. Gupta, Advocate for the Defendant.

The Court has tried its best to serve the notice upon M/S. Punjab Con-Cast Steels Limited Dhandari Kalan, Ludhiana through Senior Sub Judge, Ludhiana and District Judge, Ludhiana and even the Punjab and Haryana High Court. Even the notices issued have not been received back. So, it is ordered that Dasti notice for production of record be given to the Defendants for service upon the concerned Company, for 10.11.1997.

10.11.1997 Present : Shri G.S. Rathor, Advocate, for the Plaintiff.

Shri R.L. Sood, Advocate for the Defendant.

The learned Counsel for the Defendant has stated that Defendant did not take dasti notice for the production of record because that would not serve any useful purpose, as according to him when the notices issued by the Court directly for service upon the Company from which the record is to be requisitioned could not be served, how could the Defendant have succeeded in serving the dasti notice. He says that the Company from which the record is to be requisitioned was initially Plaintiff and that now the said company is siding with the Plaintiff Jawahar Lal Jain and, therefore, it is not interested in producing the record. His contention that the company was initially a Plaintiff is borne out from the original

plaint that was filed before the Senior Sub Judge, though now the said company ceases to be the Plaintiff after the amendment of the plaint as ordered by the Hon"ble High Court.

The learned Counsel for the Defendant says that a dasti bailable warrant in place of dasti notice may be given to the Defendant and that at the same time a bailable warrant through ordinary channel be also issued and that one notice by registered AD post may also be sent to the said company. Prayer granted. Dasti bailable warrant in the sum of Rs. 5,000/- be issued on filing of P.F. etc., within two days. The warrant be issued to the Managing Director of the Company in question. Another warrant be sent for execution through official channel. One notice for production of record be also sent to the Managing Director of the said company by registered A.D. post on filing of a RAD cover bearing the address of the Managing Director of the said company. It should be written in red ink on the bailable warrant that the same have been issued for the production of the record either by the Managing Director himself or by other Officer/official of the company. The particulars of the record be also mentioned in the warrant itself or if the particulars are lengthy, the same be included in a separate paper sheet to be annexed with the warrant. Put up on 28.11.1997.

28.11.1997 Present : Shri G.S. Rathore, Advocate, for the Plaintiff.

Shri G.C. Gupta, Advocate Counsel for the Defendant.

Dasti bailable warrant was given to the Defendant on his Counsel's request. Notice by registered post was also sent for the production of the record, but there is no response. The warrant has been returned unexecuted. So, the case is now posted for the evidence of the Plaintiff to 7.1.1998. The Defendant shall have the right to cross-examine the witnesses with reference to the record, in question, provided they, at their own level cause the production of the record by that date. The Defendant may get issued a fresh notice by registered post for production of record by filing R.A.D. within two days.

24. Emphasis by underlining in the orders of the trial Court has been supplied by this Court with a view to highlight that the Court below did whatever was possible in its power for summoning the record. And in case it was not forthcoming, how the Defendant in fact should have proceeded was to be decided by him. When original record in a given situation/case is not forthcoming (as was the situation in the present case), in law there are ways and means to lead other evidence. Defendant did not take any steps in that direction.

25. When the matter came up before the Court on 7.1.1998, no one appeared for the Defendant and the Court below proceeded against him ex parte, recorded ex parte order and after having heard the arguments posted the case for judgment in the afternoon. But before pronouncement of judgment, an application was filed in the trial Court for setting aside ex parte proceedings u/s 151 of the Code of Civil Procedure. This application was taken up and was also dealt with on 7.1.1998 and finally ex parte decree was passed in favour of the

Plaintiff against the Defendant. For ready reference order passed by the trial Court is extracted below:

7.1.1998: Present: Plaintiff's Counsel Shri Deepak Gupta.

Witness PW-8 S.C. Dave and witness Shri Rajinder Singh Sethi.

None for the Defendant. Hence proceeded ex parte.

There is no one to further cross-examine PW-8 Shri S.C. Dave. Statement of Shri Rajinder Singh Sethi PW-10, has been recorded. Arguments heard. Put up for pronouncement of judgment in the afternoon.

Sd/- District Judge, Shimla.

7.1.1998: (Case called again for the pronouncement of the judgment).

After the evidence had been recorded and the ex parte arguments had been heard and even judgment had been dictated to the P.A., an application was moved by the Defendant's Counsel Shri R.L. Sood making prayer for the re-call of the order for pronouncement of judgment. Since the application has been moved after the hearing stood completed and the case was adjourned to post lunch session for pronouncement of judgment, the same is not maintainable in view of law laid down by the Hon'ble Supreme Court in Arjun Singh Vs. Mohindra Kumar and Others, Moreover, no ground, leave alone a sufficient ground, has been shown in the application for the absence of the Defendant and/or his Counsel when the case was called.

Per separate judgment placed on the file, the suit is decreed. Formal decree sheet be drawn accordingly. Record be completed and consigned to the record room.

26. Suit file also shows that CMA No. 3-S/6 of 1996 was filed on 9.1.1998 under Order IX Rule 13 read with Section 151 of the CPC for setting aside the ex parte decree dated 7.1.1998 passed by the Court below in the suit. When put to notice it was seriously contested and resisted on behalf of the Plaintiff. After calling for reply and rejoinder from the parties, trial Court framed following issues on 24.4.1998:

1. Are there sufficient grounds to set aside the ex parte decree? OPA.

2. Final order.

27. Thereafter case was listed on 6.6.1998 and on 7.7.1998 for evidence of the Defendant on these issues. No evidence present on both these dates. Finally at the request of the Defendant following order was passed by the trial Court:

It is stated by the Counsel for the applicant, namely Shri S.K. Sood that the applicant has filed an appeal in the Hon'ble High Court against the ex parte decree dated 7.1.1998, of this Court and, therefore, he does not pursue the present application under Order 9 Rule 13 Code of Civil Procedure. The

application is dismissed as not pressed and also on account of its becoming infructuous. Record be completed and consigned to the record room.

28. During the pendency of this appeal, P.S. Multani, the original Defendant-Appellant died. Similarly, original Plaintiff-Respondent Jawahar Lal Jain also died when the appeal was pending. Legal representatives of both, i.e. Plaintiff and Defendant were substituted in this appeal.

29. In the context of maintainability of an application and proceedings under Order IX Rule 13 and Section 96 of the Code of Civil Procedure, observations made by the Supreme Court in P. Kiran Kumar Vs. A.S. Khadar and Others, are also relevant and are extracted hereinbelow:

Explanation was added to Order 9 Rule 13 with effect from 1.2.1977 by the CPC (Amendment) Act, 1976. Prior to its enactment, a Defendant burdened by an ex parte decree could apply under Order 9 Rule 13 for setting aside the ex parte decree. He could also file an appeal u/s 96 against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial Court decree merged with the order of the appellate Court by reversal, confirmation or varying it, the trial Court was precluded from setting aside the ex parte decree. Where the trial Court did not merge with the appellate Court order the trial Court was at liberty to proceed with the application for setting aside the ex parte decree. Such instances arose, when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the Appellant to implead the legal representatives of a deceased Respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e. by preferring an application to the trial Court under Order 9 Rule 13 for setting aside the decree and by filing an appeal to the superior Court against it. The legislative attempt incorporating the Explanation to Order 9 Rule 13 is to confine the Defendant to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial to set aside the ex parte decree. With the introduction of the Explanation, no application to set aside the ex parte decree would be maintainable where the Defendant filed an appeal and appeal was disposed of on any ground, other than the ground that the appeal had been withdrawn by the Appellant.

30. In this behalf it may be appropriate to notice that after addition of Explanation to Order IX Rule 13 vide Central Act 104 of 1976, wherein an appeal against the decree passed ex parte under this Rule and the same having been disposed of on any ground other than its having been withdrawn, no application under this Rule for setting aside ex parte decree, would be maintainable. Admittedly, that is not the situation here. To the contrary, after filing of an application under Order IX Rule 13 of the Code of Civil Procedure, present appeal was preferred by the Defendant against the said decree in this Court on

23.5.1998.

31. Learned Counsel for the Plaintiff submitted that proceeding ex parte on 7.1.1998 followed by recording ex parte evidence, as well as passing of ex parte decree on the same date by the learned trial Court is not only illegal, unjust and arbitrary, but in the peculiar fact situation of this case, could not at all have been passed in any circumstances whatsoever. In this behalf great emphasis was laid by the learned Counsel on Ex. PW-5/C (supra). While buttressing this submission, he further submitted that for absence of his Counsel, a litigant like Defendant should not suffer. Therefore, he prayed for allowing this appeal on both these grounds by setting aside the impugned judgment and decree of trial Court and direct it to proceed further in the matter from the stage at which his client was set ex parte on 7.1.1998.

32. Next submission urged by the learned Counsel was, that despite having been well aware that PW-8 could only be cross-examined with reference to the record as directed by the Court and the same having not been received, still the trial Court proceeded in the matter in post haste without waiting for the receipt of the record. On this ground also the judgment and decree is liable to be set aside.

33. Another plea raised on behalf of the Defendant was, that relief of specific performance being equitable and discretionary in its nature and character, and in this suit no case having been made out in favour of the Plaintiff for grant thereof, so the impugned judgment and decree is liable to be set aside. In this behalf it was also submitted that equities have not been properly balanced. This has resulted in miscarriage as well as failure of justice.

34. Learned Counsel also urged for setting aside the impugned decree, because on the basis of evidence on record it stood clearly proved that the alleged agreement to sell dated 26.3.1982 Ex. PW-5/A, stood rescinded and cancelled vide Ex PW-5/C. As such in no circumstances the suit could be decreed. Statement of PWs.5 to 10 were criticized in this behalf as not inspiring confidence besides all of them being interested. And the typist who typed out the agreement as well as the person who purchased the stamp paper for drawing up Ex. PW-5/A, having not been examined and also the rough draft of this agreement having not been produced on record, the impugned decree for specific performance in no circumstances could not have been passed. Therefore, it was liable to be set aside QX\\ this ground as well.

35. The suit on the face it was time barred. This aspect of the case has been completely ignored by the Court below. Therefore, on this ground also while allowing this appeal, decree was liable to be reversed.

36. All these pleas on behalf of the Defendant have been controverted by the opposing Counsel. As according to them, this is a case of un rebutted evidence both oral and documentary produced by the Plaintiff. Further according to them none of the grounds are made out from the materials on record. Therefore, the decree has been rightly passed and they prayed for dismissal of the appeal with

costs throughout.

37. Pleadings of the parties, evidence oral and documentary, as well as other relevant material on record was examined to which detailed reference was made on behalf of the parties at the time of hearing.

38. Now coming to the plea of the Defendant that the ex parte proceedings could and in fact should not have been ordered against on 7.1.1998 because their learned Counsel was busy in some other Court. As such they should not suffer on this count.

39. Suffice it to say in this behalf that so far scope and amplitude to Order IX Rule 13 and Section 96 of the CPC is concerned, it is totally different, distinct and independent of each other. No doubt, both these remedies are concurrent. However, fact remains that in law in an application under Order IX Rule 13 CPC question of merits of the case as has been argued while assailing the ex parte judgment and decree, are not the grounds available to a litigant, like Defendant in this case. I may hasten to add that an appeal is maintainable against an ex parte decree u/s 96 Code of Civil Procedure. But this appeal has to be determined on the basis of the merits of the case of the parties depending upon nature of evidence on record. In such appeal judgment and decree can be challenged on all the grounds including the evidence being not enough/sufficient or any other legal ground which affects the decision of the case on its merits. But not on the any of the grounds whereunder application under Order IX Rule 13 CPC can be maintained.

40. At the risk of repetition it may be appropriate to observe here that the grounds under Order IX Rule 13 Code of Civil Procedure. are limited in their scope as well as applicability. Under this provision a litigant, like Defendant, has to satisfy the Court that summons were not duly served upon him or that he was prevented for sufficient cause from appearing in Court when the suit was called on for hearing. And on being satisfied, the Court shall then pass an order setting aside the decree against him upon such terms as it may deem proper.

41. It may also be appropriate to notice in the context of Order IX Rule 13 CPC that an order refusing to set aside the ex parte decree is appealable as per provisions of Order XLIII Rule 1 (d) Code of Civil Procedure. Thus for getting the ex parte decree set aside specific provision is there in law available to a litigant. This Defendant admittedly availed. But without taking this application to its logical conclusion, for reasons best known to him and at his instance order dated 7.7.1998 (supra) was passed by the trial Court. He, by leading legally acceptable evidence, could have satisfied the trial Court for setting aside ex parte decree. However, he chose to suffer the order dated 7.7.1998 on this application.

42. Parties could have gone to trial on the said application even after filing of the appeal. In my considered opinion law does not prohibit continuing with such application despite filing appeal as in the present case. And as already observed that the trial Court would have had an opportunity to have determined whether

there was sufficient cause for setting aside the ex parte decree or not. Thus filing of the appeal would not have come in the way of the Defendant to have satisfied the trial Court that there was sufficient ground for setting aside of the ex parte decree. And in such a situation trial Court was duty bound in law to have set aside the ex parte decree. Suffice it to say that both remedies i.e. Under Order IX Rule 13 and u/s 96 CPC are concurrent. Effect of the application being allowed, would have been that the appeal would have become Infructuous.

43. I am further of the view that the Defendant is well within his rights to contest the decree on its merits, in this appeal. However, he

cannot be allowed to convert the present appeal being one for setting aside the ex parte judgment and decree under Order IX Rule 13. For taking this view, reliance is being placed on Smt. Maya Devi and others v. Mehria Gram Dall Mill, Balsamand Road Hissar and Ors. 1987 (1) P.L.R. 647 and Ram Narain v. Gobind Singh and Ors. 1992 (1) R.L.R. 522 . In this behalf observations in A.K.P. Haridas Vs. V.A. Madhavi Amma and Others, , are being relied, these are as under:

4. The first contention was that the decree is an appealable one and hence an application under Order 9 Rule 13 will not lie. That is not a sound proposition of law. These are not remedies which are inconsistent or mutually exclusive. The mere fact that there is right of appeal against the ex parte decree is no reason to hold that an application under Order 9 Rule 13 is not maintainable. Order 8 Rule 10 as it stood before the amendment of 1976 did not contain a provision that on pronouncement of the judgment a decree shall be drawn up. The adjudication was therefore taken out of the definition of decree in Section 2(2) of the Code and it was made appealable as an order under Order 43 Rule 1(b). After the amendment of 1976 when the provision for drawing up a decree was inserted in Order 8, Rule 10 Order 43 Rule 1(b) was deleted and the decree under Order 8 Rule 10 became no longer appealable as an order under Order 43 Rule 1(b). It became an appealable decree as held in C.D. Itoop v. Trichur Municipality 1984 KLJ 280. The contention is that for this reason it ceased to be one against which an application under Order 9 Rule 13 is maintainable. That contention is on the basis of a misapprehension that remedy under Order 9 Rule 13 and that by way of appeal are mutually exclusive. In fact they are not. There is no bar in resorting to both the remedies simultaneously or any of them alone. Only thing is that when both remedies are attempted and one succeeds the other becomes infructuous since the object and effect of both is the same. Availability of the remedy by way of appeal is no bar to an application under Order 9 Rule 13 if such a remedy is also available to the party. For example when the Defendant is set ex parte under Order 9 Rule 6 and an ex parte decree passed, though that decree is a appealable, an application under Order 9 Rule 13 also will lie. The real question for consideration is only whether an application under Order 9 Rule 13 will lie.

44. Another plea based on grounds No. 8 and 9 of the grounds of appeal in this case was also urged for setting aside the impugned decree. Suffice it to say that

what transpires in the Court is reflected in the file. For that matter what is stated in the Court record is to be accepted. It is by now well settled that the judges do not come forth to controvert what is stated by a party in its affidavit and/or in its pleadings. Judges speak through record only, and presumption is to such Court record.

For ready reference what is set out in paras 8 and 9 of the grounds of appeal as well as (c) to (g) thereof is extracted hereinbelow:

8. That on the 7th January, 1998, the Counsel for the Appellant-Defendant was busy in another Court, that is, in so far as the Counsel Mr. R.L. Sood is concerned, he was busy in the High Court in the early part of the morning. However, when the case was called out at 11.30 a.m. he was informed by his Trainee Advocate who was attached with him that the same had been called out and accordingly the Counsel rushed from the High Court to attend to the case. But by that time he reached the Court at 12.05 p.m. (Afternoon) he learnt that the learned trial Court, that is, the District Judge had already proceeded ex parte against the Defendant at 11.30 a.m. After having proceeded ex parte, he had completed and recorded evidence of PWs 8 and 10 and had also heard arguments and hence, the entire process had been finished between 1.30 a.m. and much before 12.05 p.m., that is, the time when the Counsel had reached the Court.

9. That the judgment had still to be dictated and announced and accordingly the Counsel immediately moved an application u/s 151 CPC praying that the earlier order passed in the day may kindly be recalled and permission may kindly be granted to cross-examine the witnesses. Special mention of the application was made to the learned District Judge itself at about 12.05 p.m. and he was orally also requested in the above terms, and it was also humbly submitted and pointed out to him that in the normal course of things, and as per the High Court Rules and Orders, the learned trial Court ought not to have proceeded ex parte against the Appellant in the early part of the day, that is, in the morning and ought to wait to call out the case in the afternoon session and furthermore, the arguments in the matter ought not to have been heard on the same day after recording of the ex parte evidence. It was submitted that such action on the part of the District Judge was drastic and has resulted in sealing the fate of the Appellant in a highly prejudicial manner.

(c) That the learned trial Court, i.e., the District Judge erred in law in proceeding ex parte against the Appellant in the early part of the day, i.e. in the morning and further erred in law by immediately recording the ex parte evidence and also by hearing ex parte arguments within a matter of 20 minutes from 11.30 a.m. onwards. It is humbly submitted that in accordance with the High Court Rules and Orders, the learned District Judge ought to have called out the case in the afternoon session and thereafter alone the ex parte order could have been passed. Hence, the impugned judgment and decree is against law and deserves to be set aside.

(d) That the impugned judgment and decree deserves to be set aside as the District Judge erred in law inasmuch as, that he did not pass any orders on the application u/s 151 CPC before noon and he illegally dismissed the same in the later part of the day.

(e) That the impugned judgment and decree deserves to be set aside as it has been passed in a hurry apparently as the case was old and targeted and thus, the principles of law and natural justice were sacrificed at the altar of hurry.

(f) That the impugned judgment and decree deserves to be set aside as the learned Court did not act in accordance with the orders and directions of the Hon'ble High Court dated 23rd September, 1994, which were issued when the cross examination of PW-8 was deferred. It was the bounded duty of the learned District Judge to have ensured that the record of M/s. Punjab Steels Ltd. was made available either by the Plaintiff or the Company for purposes of cross-examination. The learned District Judge could not act against the specific orders and directions of the High Court and he ought to have taken coercive method for the production of the record after his attempts to secure the record by issuance of bailable warrants also failed.

(g) That the learned District Judge apparently did not apply his mind to the record of the case, as he has failed to notice that additional issue framed after amendment of the written statement as has been detailed in para 5 supra. Thus, since no reference has been made to the additional issue nor any findings have been returned thereupon, as such the impugned judgment and decree deserves to be set aside.

45. It is felt that for the view that has been taken on the provisions under Order 9 Rule 13 Code of Civil Procedure, the Defendant is not entitled to take any advantage from any of these pleadings. Reliance in this behalf is being placed on the decision of this Court in Tek Ram v. Tot Ram Latest HLJ 2004 (HP) 516 ; State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, ; Didar Singh Vs. State of Himachal Pradesh and Others, ; Girish Kumar Mehra v. Sh. K.K. Sharma Branch Manager, Bank of India 1990 (1) SLC 27 ; Central Bank of India Vs. Vrajlal Kapurchand Gandhi and Another, ; Shankar K. Mandal and Others Vs. State of Bihar and Others,

46. In the face of above, the Plaintiff cannot be permitted to convert the present appeal into proceedings under Order IX Rule 13 Code of Civil Procedure. Accordingly the plea urged in this behalf is hereby rejected.

Now coming to the next contention on behalf of the Defendant that because of fault of his Counsel he should not suffer because he was busy in other Court. Suffice it to say in this behalf that after the addition of Clauses (a) to (e) under sub-rule (2) of Rule 1 of Order XVII Code of Civil Procedure. vide Central Act No. 104 of 1976 w.e.f 1.2.1977, learned Counsel for the Defendant being busy in other Court is not a ground available for adjourning the case. Accordingly this plea is rejected.

47. Now other pleas urged on the merits of the case impugning the judgment and decree under appeal will now be dealt with.

48. So far order dated 7.1.1998 passed proceeding ex parte against the Defendant and then recording ex parte evidence as well as the plea that the Court below proceeded in post haste in the absence of the record that had been summoned from Punjab Concast Steel Limited and also recording ex-parte evidence of PW-10 is concerned, again for the reasons to be recorded hereinafter it is without substance.

49. The matter was getting delayed because of non receipt of record. Orders above extracted clearly suggest that Defendant was not seriously pursuing so far summoning of record was concerned. In case he had so desired, he ought to have ensured that notice to the concerned person from whose custody the record was to come was duly served. Dasti notices sent were also without any consequence. Orders (supra) passed by the trial Court from time to time are self explanatory.

50. Even otherwise as would be seen from the discussion hereinafter non production of the record in my considered view is of least significance in the peculiar facts and circumstances of the case.

51. So far the plea urged on behalf of the Defendants that there was no legal evidence before the trial Court for having held that the Plaintiff was ready and willing to perform his part of agreement Ex.PW-5/A which according to the former stood already rescinded is concerned, on the basis of the material on record, the same cannot be accepted. In this behalf emphasis laid on Ex. PW-5/C (supra) is also meaningless.

52. Sustainability of this submission is being taken up first. In case agreement Ex. PW-5/A had been rescinded, that was the end of the matter so far Defendant was concerned. Man may lie, but documents will not. In this behalf there is overwhelming evidence in addition to the statements of Plaintiff, PW-5 Jawahar Lal Jain, his brother PW-6 Prem Jain, PW-7 B.N. Aggarwal, Advocate, PW-8 S.C. Dave and PW-10 Rajinder Sethi. Besides these statements there is enough documentary evidence to negate this contention of the Defendant. It consists of Ex.PW-5/D from the Plaintiff to the Defendant, Ex.PW-5/E from the Defendant to the Plaintiff; PW-5/F telegram from Plaintiff's attorney to the Defendant and Ex. PW-5/G from Defendant to the Plaintiff. Claim of refund of price of stamp papers by the Defendant on which Ex. PW-10/A the sale deed was drawn, and his affidavit vide Ex. PW-5/Q with this application are the other documents which completely belie Defendant's plea.

53. In case agreement in question had been actually rescinded by the Defendant vide Ex. PW-5/C, then in response to letter from Plaintiff Ex. PW-5/D in the ordinary course of things his reply simply would have been that so far he was concerned, the matter stands closed.

54. What he has said in Ex. PW-5/E has been extracted above. This nails the Defendant's stand that the agreement stood rescinded. In addition to this, receipt of telegram vide Ex. PW-5/F is admitted by the parties. The matter did not rest here only, because vide Ex. PW-5/G, the telegram from the Defendant to the Plaintiff, the former himself extended the period for execution of the sale deed. This telegram reads as under:

YOUR REPRESENTATIVE DELIBERATELY AVOIDED EXECUTION AND REGISTRATION OF SALE DEED WITHIN PERIOD. THOUGH AGREEMENT ENDS, YET PREPARED TO EXECUTE UPTO 7TH JUNE AS A GESTURE OF GRACE ONLY.....MULTANI.

55. Plea regarding rescinding of agreement Ex. PW-5/A also stands negatived from the acts of the Defendant. Reason being that in case the agreement stood rescinded so far Defendant was concerned, there is no question of anything further being done by him muchless having deposited the sum of Rs. 26,400/- for the purchase of stamp papers for drawing up the sale deed Ex. PW-10/A. Sale deed was in fact drawn up. Refund was applied by the Defendant as he having deposited of the same. It is a different matter that after recording evidence his claim was declined, when order on 7.12.1983 was passed by the Collector Sub-Division, Shimla vide order Ex. PW-5/P. In case the agreement had been rescinded, where was the question for the Defendant to have in the first place deposited the amount of the stamp, which as per endorsement made on Ex. PW-10/A was purchased on 27.5.1982. Admittedly the Defendant accepted this order Ex. PW-5/P, and it has attained finality. And further counter claim for this amount is also not set up in his written statement by the Defendant.

56. Further as per cross examination on behalf of the Defendant directed to the PWs, he (the Defendant) was present before Registration Authority. If this is his case, it is not understood as to why after rescinding the contract Ex. PW-5/A, he would present himself before the said authority or to issued the above extracted telegram to the Plaintiff. Therefore, plea of the Defendant that agreement stood rescinded has no merit and is accordingly rejected.

57. Now coming to the question whether the Plaintiff was ready and willing to perform his part of the agreement Ex. PW-5/A and was thus entitled for the grant of relief of specific performance or should have been granted any other relief in this case.

58. In this behalf reference to Sections 10, 16(a) and 16(c) being relevant are extracted hereinbelow:

10. Cases in which specific performance of contract enforceable.--Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced--

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.--Unless and until the contrary is proved, the Court shall presume--

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases--

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the Plaintiff or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the Defendant as the agent or trustee of the Plaintiff.

16. Personal bars to relief.--Specific performance of a contract cannot be enforced in favour of a person--

(a) who would not be entitled to recover compensation for its breach;

(b) xxxxxxxxxxxxxxxx

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the Defendant.

Explanation.--For the purpose of Clause (c),--

(i) where a contract involves the payment of money it is not essential for the Plaintiff to actually tender to the Defendant or to deposit it Court any money except when so directed by the Court;

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

59. In the facts and circumstances of the case as is evident on the basis of the documents, in my view time was not intended to be made essence of the agreement Ex. PW-5/A. Ordinarily time is not the essence of the contract of an agreement for the sale of Immovable property, unless it is specifically so intended by the parties. Even if initially it was not so intended, it can be subsequently so done.

60. In the instant case this was never the intention of the parties. Reliance is placed on behalf of the Defendant on a decision of the Supreme Court in K. Narendra Vs. Riviera Apartments (P) Ltd., In this case performance of the agreement became impossible. Ratio of this case has no applicability to the facts of the present case. Performance of contract having become impossible as part of

the property having been rendered inalienable because of its having been acquired by the State and part of it became inalienable under the Urban Land Ceiling Regulation Act; therefore, in those peculiar facts, discretion of decreeing specific performance was not exercised. So far statement of PW-5, Jawahar Lal Jain is concerned, he has categorically stated that he was and is ready for performing his part of the agreement, Ex. PW-5/A. In his cross-examination on this vital aspect he has not been dislodged. There is also positive evidence of PWs 7, 8 and 10 to the effect that Plaintiff had sufficient money for getting the sale deed registered. Not only this, but he had deputed PWs 7, 8 and 10 to get needful done who came to Shimla. Necessary stamp papers were purchased. Sale deed Ex. PW-10/A was drafted on the stamp paper. However, Defendant did not come forth to do the need full.

61. In this context another plea urged on behalf of the Defendant needs to be noted. Sale deed could not have been executed unless the Plaintiff had obtained permission of the State Government u/s 118 of the H.P. Tenancy and Land Reforms Act, 1972. It was also pointed out on behalf of the Defendant by referring to the cross-examination of PW-5 that he had obtained income tax clearance certificate before 28th May, 1982. PW-5 was not confronted with any such document not any such document is there on the record. In the list of reliance filed by the Defendant this is also not relied upon by him. In such a situation there was no occasion muchless requirement for the Defendant to have obtained the same.

62. Last but not the least if the agreement, Ex. PW-5/A stood rescinded vide Ex. PW-5/C (supra), why should the Defendant obtain income tax clearance certificate before 28.5.1982.

63. On the other hand, Plaintiff having applied to the Collector for grant of necessary permission u/s 118 of the H.P. Tenancy and Land Reforms Act is concerned, it is established from the contemporaneous official record of the revenue department from the office of D.C. Office, Shimla in file No. 9-S/I of 1997/85, that vide Ex. PW-5/K the application was submitted by the Plaintiff for the grant of permission required under sub-rule (1) of Rule 38-A of the H.P. Tenancy and Land Reform Rules, 1975 with the forwarding letter, Ex. PW-5/K-1. Plaintiff also submitted documents requisitioned from him from time to time by the authorities vide Ex. PW-5/L and "PW-5/L-I to PW-5/L-3.

64. Plaintiff did not have enough money at any point of time right from the stage of entering into agreement till the filing of the suit or at any point of time thereafter was another plea urged on behalf of the Defendant. Again the question that needs consideration in this behalf is, as to whether a litigant like Plaintiff has to demonstrate by showing that he had ready cash available with him. This is not the requirement of law. Similarly, it is not essential for the Plaintiff to actually tender to the Defendant or to deposit in Court any money, except when so directed by the Court. The Plaintiff had expressly not only averred, but also proved from his unrequited evidence as well as from other

circumstances in having deputed PWs 7, 8 and 10 with money party in cash and partly by bank draft for getting the sale deed executed as well as registered on payment of the sale consideration. Great emphasis was laid on behalf of the Defendant that there was no resolution of the company granting loan etc. in favour of the Plaintiff as such this is enough for holding that he did not have sufficient money. What is the source and from where a litigant like Plaintiff arranges the money is no concern of the Defendant. After having established his readiness and willingness the question of payment would arise subsequently. Once it is established that a party was ready and willing to perform his part of agreement, question of payment of the sale of consideration would arise subsequently. Reference is being made to a decision of the Supreme Court in Sukhbir Singh and Ors. v. Brij Pal Singh and Ors. JT 1996 (6) 389. In this case the property was purchased by Sukhbir Singh from Brij Pal Singh. There was a contemporaneous agreement of re-conveyance to the seller within a period of two years from the date of sale. A suit was laid by the Respondent for specific performance wherein he pleaded that despite his readiness and willingness Sukhbir Singh had avoided to sell back the property. Despite sufficient requests to do the needful on receipt of money, needful was not done despite assurances and when such efforts failed, suit was laid for specific performance of agreement. While admitting the agreement of reconveyance the same was cancelled according to Sukhbir Singh and others subsequently on 4th June, 1975 vide Ex,A-I (like Ex.PW-5/C in the present appeal). And also that Brij Pal Singh etc. did not have sufficient means to pay sale consideration and the suit has been filed, for as a measure of blackmailing. Trial Court dismissed this suit, but in appeal the decree was reversed and second appeal of Sukhbir Singh etc. was dismissed. In this background while dismissing the appeal of Sukhbir Singh and others, it was held as under by the Supreme Court:

4. In paragraphs 5, 9 and 10 of the plaint the Respondents have in substance pleaded that they had been and were still willing to perform their part of the agreement and the Defendants did have notice in that behalf. It is seen that averments made in the above paragraphs are in substance as per Forms 47 and 48 prescribed in Appendix AA of the Code as amended by the High Court. What requires to be considered is whether the essential facts constituting the ingredients in Section 16(c) of the Act were pleaded and that found mentioned in the said Forms do in substance point to those facts. The procedure is the handmaid to the substantive rights of the parties. It would, therefore, be clear from a perusal of the pleadings and the forms that the averments are consistent with the Forms. When the Respondents had pleaded and proved by the Sub-Registrar's endorsement as per paper No. 41/C that the Respondents were present in the office of the Sub Registrar for having the sale deed executed and registered by the Petitioners, it would be explicit that the Respondents were ready and willing to perform their part of the agreement. The facts that the Petitioners did not attend the office would prove positively that the Petitioners had avoided execution of the sale deed.

5. Law is not in doubt and it is not a condition that the Respondents should have ready cash with them. The fact that they attended the Sub-Registrars office to have the sale deed executed and waited for the Petitioners to attend the office of the Sub Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the Respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree. It would, therefore, be clear that the Courts below have appropriately exercised their discretion for granting the relief of specific performance to the Respondents on sound principles of law.

65. As such the plea of the Defendant that either Plaintiff was not ready to perform his part of the agreement or he was not possessed of sufficient means to have got the sale deed executed in his favour or that Punjab Concast Steels Ltd. had not authorized by any resolution the grant of loan etc. to the Plaintiff is meaningless. That being the position, non cross-examination of PW-8 with reference to the record of Punjab Concast Steel Ltd. including the resolution regarding grant of loan etc. by this company is of least consequence and in my considered view would not have improved the case of the Defendant even if record was produced and the witness was confronted therewith. For that matter deceased-Plaintiff as PW-5, as well as PW-8 and PW-10 may have been responsible for (if established) having violated the provisions of the Companies Act, 1956 or any other law. But this cannot be allowed to be made a ground for dismissal of this suit on account of non passing of the resolution for the grant of loan in favour of the Plaintiff by the said Company. It may be appropriate to mention here that the Punjab Concast Steel Ltd. was a joint venture Company, but its 100% share holding was purchased by Oswal Groups of Companies in the year 1982 most probabry before 30th May, 1982 and no resolution of the company was required for granting such a loan, as per PW-5 he was authorized to do so. This is what this witness states in his cross examination.

66. Thus plea urged on behalf of the Defendant that compensation would provide adequate relief instead of ordering specific performance of the agreement Ex.PW-5/A in the present case is concerned, also cannot be accepted. PW-5 clearly stated that Defendant had also to co-operate and assist in the obtaining of permission u/s 118 of the H.P. Tenancy and Land Reforms Act from the authorities concerned. Again this part of his statement remains unrebutted. Record of the revenue authorities was summoned. PW-5 was not confronted with any laxity on his part. Permission was to be accorded by the State Government. That being the position the decision in the case of Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others, relied on behalf of Defendant has no applicability in the facts and circumstances of this case.

67. Similarly the plea to the effect that equities have not been adjusted in this case while ordering the specific performance of agreement Ex. PW-5/A again has

no merit. As already observed, there is no rebuttal to the evidence of the Plaintiff. Evidence examined on behalf of the Plaintiff clearly establishes not only the facts stated by them, but also meets all the requirements necessary for ordering specific performance within the meaning of Section 10 read with Section 16 of the Specific Relief Act, 1963 (supra). Therefore, submissions to the contrary are without any merit and are accordingly rejected.

68. Withholding of evidence of the person who had typed out the agreement Ex.PW-5/A and the other who purchased the stamp paper and criticism of PWs 5 to 10 being interested also cannot be accepted. PW-7 is an Advocate who has categorically stated that the Plaintiff was his friend and a day prior to the execution of Ex.PW-5/A a draft was prepared. On the date when it was executed it was seen by the Defendant who carried out one or two corrections in it. Thereafter it was typed out, though this witness has stated that no instructions were given to him by Defendant Multani, but he has also stated that it was signed by the Defendant after needful had been done by PW-7. At the risk of repetition the availability of money is clearly established from the statements of PWs 5, 7, 8 and 10. In these circumstances non examination of either the typist who typed out Ex. PW-5/A or of the person who purchased the stamp paper does not in any manner affect the agreement in question, the execution whereof is admitted though was allegedly forced upon the Defendant by the persons present that too at the dinner time when he, (the Defendant) was under the influence of liquor. In this behalf it may also be observed that there is positive evidence of PWs 5 to 7 that the agreement was executed between the parties at the residence of PW-6 at his House No. 58, Sector 18-A, Chandigarh at tea time. The plea to the contrary was specifically denied by PWs 5, 6 and 7 that it was executed at dinner time or was extracted by compelling the Defendant who was under the influence of liquor.

69. Now coming to the plea of the Defendant that the suit was barred by time, Under Article 54 of the Limitation Act period of limitation for claiming specific performance is three years. For ready reference this Article is extracted hereinbelow:

Description of suit Period of limitation Time from which period begins to run Articles 1 to 53 xxxxxx xxxxxxxx 54. For Specific Performance The date fixed for the per- of a contract Three years formance, or if not such date is fixed, when the Plaintiff has noticed that perform- ance is refused. 55 to 137 xxxxxx xxxxxxxx 70. In the instant case record of the suit clearly shows that through Ex. PW-5/C Defendant clearly demonstrated his disinclination for finalization of the sale transaction. This is dated 28.4.1982.Suit is filed on 26.3.1985.

(Emphasis supplied)

71. Further the Plaintiff informed on 19th May, 1982 vide Ex. PW-5/D his intention to get the sale deed done whereby he also asked the Defendant to obtain necessary permission from the authority so that needful could be done by

the date fixed. This was followed by the letter dated 23.5.1982 from the Defendant to the Plaintiff vide Ex. PW-5/E. This letter reads as under:

My dear Jawahar,

I received your Registered letter dated 19th May, 1982, last evening. I am glad that you are ready to execute the Sale Deed by 30th May, 1982. On my part, I am ready with the Income Tax Clearance Certificate. And I presume that you have obtained the Himachal Government's sanction, as required by law, to purchase the property, you being a Non-Agriculturist, by which law we are bound. So, please have the Sale Deed ready for execution by 30th May, and fix any date convenient to you before the said date.

With regards.

Yours sincerely Sd/- P.S.Multani

72. This is self explanatory. The matter again did not rest here. Attorney of the Plaintiff vide telegram PW-5/F had asked the Defendant to be present on 28th May for registration. This document is admitted on behalf of the Defendant.

73. Finally, vide his telegram Ex. PW-5/G time was extended by the Defendant himself till 7th June as a gesture of a grace. Therefore, question of refusal if any, will be only after 7th June, 2002. Suit as already noted, was filed on 26th March, 1985 in this Court. Therefore, the plea of the Defendant that the suit was barred by time has been raised simply to be rejected. During the course of hearing when specifically confronted with these facts based on documents, learned Counsel for the Defendant could not advance the plea that the suit was barred by time.

74. Admittedly the Defendant did not appear in the witness box to establish his plea as well as to rebut the evidence of the Plaintiff both oral and documentary. This goes to show that the case of the other side has not been rebutted. In *Canara Bank v. Sai Box Factory and Ors.* 2001 (1) S.L.J. 463 , after placing reliance on the Supreme Court decision in *Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and Another* , it was held that where the Defendant does not enter into the witness box to make a statement on oath in support of his pleadings set out in the written statement, an adverse inference would also arise that what he had stated in the written statement was not correct. An attempt was also made to persuade the Court that transaction was unconscionable and the consideration was inadequate, therefore, the appeal deserves to be allowed. This is contrary to documents i.e. Exts. PW-5/D, PW-5/E, PW-5/F and PW-5/G. All these documents suggest that the plea of transaction was unconscionable is nothing but purely after thought.

75. Another fact that needs to be noted here is that where parties had bargained on equal terms on equal bargaining power, a contract cannot be rendered nugatory on the ground of inadequacy of consideration. For taking this view reliance can be placed on *Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb*, To

similar effect is the recent decision of the Supreme Court in P. D'Souza Vs. Shondriilo Naidu, . Thus plea to the contrary urged on behalf of the Defendant is hereby rejected. And above all Defendant was a retired IAS Officer. At no point of time he ever raised such plea till filing of the written statement why, could not be explained on behalf of the Defendant.

76. It was also urged that the stamp paper was of lesser value for drawing up the sale-deed, so this is enough to dismiss the suit while allowing the appeal. This plea has no merit because this question would have arisen when the sale-deed was presented for registration. And in any case deficiency if any could at that time be also made good.

77. No other point was urged.

78. In view of the above discussion there is no merit in this appeal which is accordingly dismissed with costs throughout. Judgment and decree passed by the Court below is upheld, subject of course to the grant of permission by the authorities as required under law in case any such permission is necessary. The Plaintiff is directed to file certified copies of the exhibited documents from the different files which have been tagged with the suit file. On certified copies being filed, such files will be sent back to the concerned department(s)/office(s) and Registry will ensure that those are delivered against proper receipt(s). So far as files containing unexhibited document(s) are concerned, those will be sent back also against receipt(s) after retaining their photostat copies on the suit file. The Plaintiff shall deposit the sale consideration in the Registry of this Court within 4 weeks from today for being paid to the Defendant after the execution and registration of the sale deed. Necessary income tax clearance and other formalities, if any, required for completion of the sale transaction between the parties will also be obtained/completed by the Defendant.

22.9.2005 Present: Ms. Yogitta Dutta, Advocate, for the Appellants.

S/Shri Anand Sharma and Tarlok Chauhan, Advocates, for the Respondents.

In the judgment of this case dated 29.8.2005 RFA is shown as "133 of 1999" whereas in fact its correct number is "133 of 1998". This appears to be a typographical error. Accordingly, in the judgment its number has been corrected today under my signatures.