

GAHC010203742017



2026:GAU-AS:5974

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RFA/119/2017

MEGHMALLAR ESTATES and SERVICES PVT. LTD. and ANR.
A CO. INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT
1956 AND HAVING ITS REGISTERED OFFICE SITUATED AT F.C. ROAD,
UZAN BAAR, GUWAHATI 781028 IN THE DIST. OF KAMRUP, ASSAM.

2: ANUP SAIKIA
MANAGING DIRECTOR
MEGHMALLAR ESTATES and SERVICES PVT.LTD.
R/O SURVEY BELTOLA
GUWAHATI 78102

VERSUS

DR. MADHUMITA DAS MAZUMDAR and ANR.
W/O SRI KISHORE KUMAR DAS, R/O HOUSE NO. 7, TRINAYAN PATH, NEAR
CID OFFICE, BELTOLA, GUWAHATI 781028 IN THE DIST. OF KAMRUP,
ASSAM.

2:UTPAL DAS

MANAGING DIRECTOR
SWAGATAM ESTATES and SERVICES PVT. LTD.
EX DIRECTOR
MEGHMALLAR ESTATES and SERVICES PVT. LTD.
R/O BELTOLA
SURVEY
GUWAHATI 78102

Advocate for the Petitioner : MS.A LAHKAR, MR. N BARUAH,MS. P DUTTA,MR.S K
SINGH,MR.J CHOPRA,MR.V K CHOPRA,MR.O P BHATI

Advocate for the Respondent : MR.B BARMAN(R-1), MR A DEKA,N CHAUDHURY,MR. M
DAS,MR.D BARUAH(R-1),MR.N B P SINGHA(R-1)

Linked Case : CO/13/2018

MADHUMITA DAS MAZUMDAR
W/O SHRI KISHORE KUMAR DAS

R/O HOUSE NO. 7
TRINAYAN PATH
NEAR CID OFFICE
BELTOLA
GUWAHATI-781028
IN THE DISTRICT OF KAMRUP
ASSAM.

VERSUS

MEGHMALLAR ESTATE AND SERVICES PVT LTD
A COMPANY INCORPORATED UNDER THE PROVISION OF THE COMPANIES
ACT
1956 AND HAVING ITS REGISTERED OFFICE SITUATED AT F C ROAD
UZAN BAZAR
GUWAHATI 781028 IN THE DISTRICT OF KAMRUP M ASSAM

2:SRI ANUP SAIKIA
MANAGING DIRECTOR
MEGHMALLAR ESTATES AND SERVICES PVT. LTD.
RESIDENT OF SURVEY
BELTOLA
GUWAHATI 781025

3:SRI UTPAL DAS
MANAGING DIRECTOR
SWAGATAM ESTATES AND SERVICES PVT. LTD.
EX DIRECTOR
MEGHMALLAR ESTATES AND SERVICES PVT. LTD.
RESIDENT OF BELTOLA
SURVEY
GUWAHATI 781028

Advocate for : MR. D BARUAH
Advocate for : MR. S K SINGH appearing for MEGHMALLAR ESTATE AND
SERVICES PVT LTD

:::BEFORE:::

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Advocate for the appellants : Mr. B. N. Baruah
Advocate for the respondents : Mr. A. Deka
Date on which judgment is reserved : **26.03.2026**
Date of pronouncement of judgment : **30.04.2026**
Whether the pronouncement is of the : N/A
operative part of the judgment ?
Whether the full judgment has been : Yes
pronounced?

JUDGMENT & ORDER (CAV)

(Sanjeev Kumar Sharma,J)

- 1.** Heard Mr. N. Baruah, learned counsel for the appellant, and Mr. A. Deka, learned counsel for the respondent/cross objector.
- 2.** This appeal is directed against the impugned Judgment and Decree dated 22.08.2017 passed by the Civil Judge No. 3 Kamrup (M), Guwahati in Title Suit No. 185/2010.
- 3.** The respondent as the plaintiff had instituted a suit for specific performance of contract, permanent injunction, and compensation. The present appellants were the defendant Nos. 1 and 2 therein.

Plaintiff/Respondents case:

1. Case of the plaintiff in substance is that she and her husband are doctors

by profession. In search of space to open up a doctor's chamber cum clinic they met defendant No.3 who introduced them to defendant No.2, the MD of defendant No.1 company. A discussion took place amongst them and the defendant No.2 verbally agreed to provide ground floor space measuring 1000 sq. ft plus frontage area of about 400sq. ft as well as first floor area of 1375 sq. ft. in the under construction Meghmallar Hill View apartment of defendant No.1 to the plaintiff and his wife at Rs.33,00,000/- which included registration cost etc.

2. Plaintiff and her husband were, however, told that permission for ground floor space has been applied for and there was 99% chance of getting the same from GMDA. They were further told that in case permission was not granted, they would be provided contiguous two bed room apartment on the first floor alongside three bed room apartments at the stipulated price.

3. The plaintiff and her husband readily agreed to the said proposal and also agreed to pay Rs.33,00,000/-for the entire area.

4. On 22.06.07 vide two allotment letters plaintiff's husband as well as the plaintiff were allotted apart./flat bearing No.-01/Gr. and apart./flat bearing No. 101/AI measuring 1000 sq. ft and 1350 sq. ft. at Rs.9,30,000/- and Rs.13,50,000/- respectively excluding cost of extra work under construction

project 'Meghmallar Hill View', by defendant Guwahati No. 1. The apartment/flat bearing serial No. 101/A1 was allotted to the plaintiff for a total cost of Rs. 13, 50,000/-. Rest Rs.10, 20,000/- was, thus, charged for registration and frontage area etc.

5. On 06.07.2007 registered deeds of agreement bearing No.8705/07 & 8706/07 were executed by defendant No.1 through defendant No.2 in favor of the husband of the plaintiff and the plaintiff respectively for apart./flat bearing No.- 01/Gr. and apart./flat bearing No. 101/A1 measuring 1000 sq. ft and 1350 sq. ft. respectively for consideration price of Rs.9,30,000/- and Rs.13,50,000/- respectively.

6. The defendants failed to obtain NOC in respect of 1000sq. ft. open space on the ground floor. They kept on assuring the plaintiff of getting the permission or NOC stating that requisite steps were taken by them in this regard. The plaintiff and her husband, on Bonafide belief, continued to make payment and since 23.06.06 till 05.09.08 (on different dates) she and her husband together paid Rs.30,00,000/- to the defendants. The plaintiff paid Rs. 18,00,000/- and her husband paid Rs. 12,00,000/-.

7. Further case of the plaintiff is that on 23.06.08 defendant No.2 informed her husband that frontage in front of 1000 sq. ft. area was not possible to be

conveyed. The husband of the plaintiff then asked for providing alternative option of two bed room flat contiguous to three bed room flat but defendant No.2 turned down the said offer saying that contiguous two bed room flat has been sold.

8. The husband of the plaintiff, on 09-08-08, was again informed that frontage, as agreed, would be provided subject to NOC from GMDA. The husband of the plaintiff agreed to the same too.

9. On 03.10.2008 a revised plan was provided to the husband of the plaintiff subject to payment of additional amount of Rs.6,29,000/-. The husband of the plaintiff, under compelling circumstances, agreed to pay Rs.5,50,000/- to which the defendant No.2 also agreed.

10. The defendants, on 26.11.2008 informed the husband of the plaintiff that permission for ground floor space could not be procured. He, then, requested the defendants to allow him to avail alternative option as initially agreed to by them, but defendant No.2 informed that in spite of best effort NOC could not be obtained from GMDA and he (husband of the plaintiff) was further informed that he could either retain the ground floor area in "as is where is" basis or cancel the agreement and take refund of the money paid in respect to the ground floor space. It was also informed that alternative option of two bed room flats

contiguous to three bed room flats could be made available to him on revised pricing.

11. It is alleged that this conduct of the defendants exhibits that they played fraud upon the plaintiff and her husband and frustrated the plan of opening doctor's chamber cum clinic by not honoring the promise made by them initially at the time of booking of the flats and they illegally denied to even provide alternative option of two bed room flat contiguous to three bed room flat as agreed to by them. It is further alleged that by the said conduct the defendants had made the plaintiff and his wife to alter their position and to part with huge amount of their hard-earned money and even more than the actual consideration amount for no gain.

12. The plaintiff contended that as per registered agreement dt. 06.07.2007 she has a valuable right to seek specific performance of said agreement (contract) and she has all along been ready and willing to purchase the suit schedule-A premises and has already paid an amount of Rs. 18,00,000/- to the defendants which is more than the agreed amount of the agreement. Further as the plaintiff has not been delivered possession of the schedule flat within the time stipulated in the said agreement and she and her husband suffered loss of business being not able to open up chamber cum doctor's clinic she has claimed compensation,

etc.

13. It reveals from the record that the suit proceeded ex parte against defendant Nos. 1&2 in as much as they remained absent without step and failed to file their written statement. It, however, appears that vide order dt.12.12.2013 they were allowed to cross-examine the plaintiff side with the restriction that they could not travel beyond the legitimate scope of pointing out the falsity or weakness of the plaintiff's case.

14. The defendant No.3, however, contested the suit by filing his written statement contending inter alia that the suit is not maintainable as the allegation of fraud is unfounded. It was contended that it is the Bye-Law of GMDA which specifically stipulates that parking spaces are not allowed to be converted for any other purposes and as such the instant suit for specific performance cannot be enforced for performing illegal acts. It was contended that the contract of the plaintiff does not support the facts pleaded as the same are afterthought.

15. It was contended that the suit is bad for mis-joinder of defendant No.3 as it is an admitted fact that defendant No.3 was not acting as director of the defendant No. 1 at the relevant time. It was contended that as per averments made in the plaint Dr. Kishore Kumar Das, the husband of the plaintiff was a

necessary party but for failure of the plaintiff to array him, the suit is not maintainable and liable to be dismissed.

16.It is stated that the defendant No.3 resigned as director from the Board of Directors of defendant No.1 on 25.02.09 and his cessation was confirmed by Registrar of companies with effect from 25.02.09. It is stated further that after he introduced the plaintiff and her spouse to defendant No.2 he was ousted from the defendant No. 1 company by acts and deeds of defendant No.2 and his wife and as such he was not interested in maintaining his part in the company and he never played any role with respect to the dealing involving purchase of flat in question.

4. The learned Trial Court framed seven issues and, inter alia, held that the suit was maintainable and not bad for non-joinder of necessary parties. It also found that the registered deed of agreement in question was binding upon the defendants and that the plaintiff was entitled to specific performance of contract and decreed accordingly. However, the learned trial court did not frame any issues, nor gave any findings with regard to the claim of the plaintiff for compensation. The instant cross-objection has been filed in the present appeal, seeking compensation and damages on account of the alleged illegal actions on the part of the appellant.

5. Both the appeal and the cross-objection have been heard together.

6. Submissions of the learned counsel for the appellant.

At the outset, the learned counsel has referred to the findings of the learned trial court on issue number five, which is as follows:-

“23. Since this is the issue relating to specific performance of registered agreement for sale bearing No. 8706/07 dated 06.07.07, I have gone through the contents of the said document with due care. On page No.2 of the said document it is written that on the application of the second party (plaintiff) for allotment of one three bed room flat measuring 1375 sq.ft. on the first floor, bearing allotment/flat No.101/AI in the complex known as Meghmallar Hill View, situated at Ganeshguri, Jatia, Guwahati and on being agreed by the second party (plaintiff) to purchase one three bed room flat as described in schedule-C of the agreement (Ext-10) measuring 1375 sq. ft. on the first floor at a consideration of Rs.13,50,000/- against cost of floor/roof, proportionate share of the land and consideration charges including raw materials, which is to be fully paid as per schedule-D, the agreement in question was entered into between the defendant No.1 represented by defendant No.2 (1 party) and plaintiff (2nd party) on the terms and conditions as set forth in said agreement. It is pertinent to mention here that though the defendants No.1&2 failed to contest the suit by filing their written statement yet they cross-examined Dr. Kishore Kumar Das,

the husband of the plaintiff. Here it is also pertinent to mention that Dr. Kishore Kumar Das, empowered by special power of attorney (Ext-1) executed in his favour by his wife, the plaintiff, he filed his evidence-on-affidavit deposing about the facts and circumstances which were within his personal knowledge since he was involved in different stages of dealings of the flat in question which her wife, the plaintiff had purchased by entering into the agreement for sale bearing No.8706/07 dt.06-07-07 (Ext-10). It is also evident from the various documents exhibited by the plaintiff that Dr. Kishore Kumar Das, her husband, on her behalf, made necessary correspondences in respect of the suit flat with the defendants and he even himself entered into an agreement with the defendants on the same date (agreement for sale bearing No.8705/07 dt.06-07-07, Ext- 9)

Further, this fact is also not at all in dispute that the plaintiff and her husband being doctors by profession wanted to set up a doctor's clinic cum chamber and for that purpose on the same they entered into two separate agreements (Ext-9&10) with the defendants and also jointly made payments to said defendants in respect of the suit flat as well as the suit property involved in T.S. No. 186/10 filed by her husband against the defendants. Under the aforesaid circumstances the argument of the Ld. Counsel for the defendants No.1 &2 that the evidence of Dr. Kishore Kr. Das cannot be taken into account since he is not the plaintiff and the party to the agreement (Ext-10) with the defendants is not sustainable.

The decision rendered in Man Kaur (Dead) By LRS vs. Hartar Singh Sangha, (2010) 10 SCC 512 further fortifies the fact that the attorney holder can depose in respect of the matters which are within his personal knowledge and which he has handled or the acts or business etc. which he has transacted on behalf of the principal. In para 18 of the said decision the Hon'ble Supreme Court while summarizing the position as to who should give evidence in regards to matters involving attorney holder who has done any act or handled any transactions, then in pursuance of power of attorney granted by the principal, he may be examined as witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those transactions have to be proved. The aforesaid underlined law laid down by the Hon'ble Supreme Court assumes great significance so far the present suit is concerned in as much as in the instant suit also though the plaintiff entered into the agreement (Ext-10) with the defendants but fact is that her husband, Dr. Kishore Kr. Das, the only Pw, who was mainly instrumental in dealing with the defendants in respect of every aspect of the matter involved (Ext-10) in the present suit. Therefore, there is no reason to discard and disbelieve the evidence of Dr. Kishore Kumar Das with regard to Ext-10 and all transactions relating to the same. Otherwise also it appears that nothing could be elicited by the defendants by substantially

cross-examining said Dr. Kishore Kumar Das with respect to his evidence to the effect that the defendants entered into agreement for sale (Ext-10) with the plaintiff and that they have received more than the entire consideration money from the plaintiff but have not yet executed the registered sale deed in favour of the plaintiff and thus has not yet performed their part of said agreement (contract). Besides it also appears that it is an admitted position that the defendants received Rs.30,00,000/- from the plaintiff and his wife. Ext-13 is the acknowledgment of receipt of said amount of Rs.30,00,000/- from the plaintiff and her husband by the defendants on account of purchase of flats in the project Meghmallar Hill View at Jatia, Kahilipara Road, Guwahati, of the defendants and the said exhibited document of the plaintiff has not at all been disputed by the defendants. From Exts-4, 6, 14, 15,17,19, 20, 21, 23 (the papers and money receipts showing payment made to defendant No.2 on behalf of defendant No. 1 of various amount on different dates) it is duly proved that the plaintiff had paid more than the consideration amount of Rs. 13,75,000/- to the defendants and has thus performed her part under the contract (agreement). This clearly shows her readiness and willingness with regard to performance of her part of contract and she has also specifically averred in her plaint that she has been willing and ready to perform her part of contract. Thus, she has fully complied with the provisions of Section 16 (c) of

the Indian Contract Act. Accordingly, it is concluded that the registered agreement for sale bearing No.8706/07 dt.06-07-07 (Ext-10) is binding upon the plaintiffs. This issue is, thus, answered in affirmative."

7. With reference to the aforesaid findings, the learned counsel for the appellant submitted that it is the plaintiff who filed the case. But the sole evidence for the plaintiff has been led by the husband of the plaintiff, who is the plaintiff in the other suit.

8. It is submitted that the husband may have personal knowledge of some of the aspects of the plaintiff's case but the husband cannot testify as to the willingness and readiness aspect of his wife to pay the amount for the flat in question. The wife has filed the suit. In the pleadings, she has not mentioned that she is authorizing her husband as a power of attorney holder to depose in the case. In the verification paragraph, certain paragraphs are stated to be true to her knowledge, not the knowledge of her and her husband, or her husband solely. The husband can depose as a competent witness, but the competency of the witness has to be distinguished from knowledge. The pleadings have to lay the foundation for whatever evidence has to be led. In the evidence, the husband has not even stated that he is deposing on behalf of the plaintiff. He filed his evidence as a sole PW and thereafter he filed as exhibit number one an

unregistered power of attorney, which is dated 12.09.2013, whereas the suit was filed in 2010 and the cause of action arose in 2006. It is submitted that the plaintiff has shown a receipt from the builder, wherein both husband and wife are stated to have paid Rs. 30,00,000/- lakhs together, which they are relying on to prove the amount that they have paid as consideration. Therefore, the question arises as to how much money was paid by the wife, and how much money was paid by the husband.

9. The learned counsel for the appellant further submitted that two different agreements and two different sale considerations are there. Therefore the question arises as to whether is the husband is paying the check, the deposit money from his own account or is he transferring the money from his wife's account as a power of attorney holder? There being no averment to that effect, the husband cannot testify as to his wife's willingness and readiness to pay the remaining amount, because there is an amount of Rs. 3,00,000/- which remained to be paid, inasmuch as the plaintiff said, in her pleadings, that they are willing to pay Rs. 33,00,000/- lakhs for the entire premises, provided it is made suitable for becoming a doctor's clinic. Out of that, they have admitted to have paid Rs. 30,00,000/- lakhs but that 30,00,000/- lakhs is not pro-rated or divided. Parts of it have been paid in check, part of it has been paid in cash. And the receipts mentioned "received towards payment of Jatia flat. It is not

mentioned which flat number the payment has been made for. When the husband has made no averment that he has been authorized by his wife to enter into all transactions in respect of the suit flat as well as the suit property involved in Title Suit No. 186/2010 which was filed by the husband against the present appellants/defendants.

10. In this regard, the learned Trial Court has held that the decision rendered in ***Man Kaur by LRS Vs. Harthar Singh, (2010) 10 SCC 512***, further fortifies the fact that the attorney holder can depose as a witness with respect to matters which are within his personal knowledge and which he has handled, or the acts of business which he has transacted on behalf of the principal and there is no argument with that proposition, submits the learned counsel. In paragraph 18 of ***Man Kaur (Supra)*** the Hon'ble Supreme Court, while summarizing the position as to who should give evidence in regard to matters involving personal knowledge, in Clause B of said paragraph, laid down:

‘If the attorney holder has done any act or handled any transactions, then, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions, if the attorney holder alone has personal knowledge of such acts. The attorney holder shall be examined if those transactions have to be proved. But, in the instant case, it is

nobody's case is that the plaintiff does not have personal knowledge of what happened, having purchased the flat and she filed the case also. In the pleadings, she has not even stated that her husband is the one who has personal knowledge of all his transactions and that she has no knowledge and merely signed on the dotted line. If that had been the case, then this proposition would be applicable to the present case.'

11. The learned counsel also referred to the Judgment ***Janki Vasudev Bhojwani Vs. IndusInd Bank Limited (2005) SCC 217*** which is again on the lines of ***Man Kaur (Supra)***.

12. In the case of ***Vidhyadhar Vs. Manik Rao, 1999 3 SCC 573***, it was observed at page 583 that "where a party to the suit does not appear in the witness box and states his own case or note, and does not offer himself to be cross-examined by the other side, a presumption would arise that the case setup by him is not correct. In a civil dispute, the conduct of the parties is material." In the case of ***Shambhu Dutt Shastri Vs. State of Rajasthan***, reported in ***1986 (2) WLL 713 AIR 1985***, it was held that the general power of attorney holder can appear, plead, and act on behalf of the party, but he cannot become a witness on behalf of the party. He may be a competent witness, corroborating the evidence led by the plaintiff, but he cannot be the

sole witness. 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 the witness box is all together 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. It is urged that he can depose on behalf of the plaintiff, but not in the capacity of the plaintiff but he is deposing in the capacity of the plaintiff who was his wife, without authorization on the basis of an unregistered power of attorney, executed in 2013, around seven years after the cause of action first arose and three years after the suit was filed, and that too, not in a representative capacity. Hence, the PW-1's evidence was liable to be discarded.

13. So far as the cross objection is concerned, it is submitted that no evidence has been led to show the damages suffered thereby. Therefore, they have not said how far they have been affected in their earnings, income, etc., and evidence has to be led on that count and since an appeal is a continuation of the suit, respondent could have availed of the opportunity to adduce evidence, even at the stage of the first appeal, but till date, no application has been submitted for adducing any evidence.

14. It is lastly submitted that the respondent is simply relying on the evidence of the husband on the sole ground that the husband knew of the

transactions, but how does he know which payment was made for which particular flat i.e., his flat, or his wife's flat? If he's paying in to, that would be incomplete evidence and it would not amount to proof that payment was made specifically on behalf of his wife towards her property.

15. The learned counsel for the respondents/cross objector/plaintiff, Mr. B.D. Deka countering the aforesaid submissions submits that there are separate exhibits against each payment, few addressed to the husband, others addressed to the wife. There is a chart in the plaint showing each payment made separately by the husband and the wife (plaint) and there are corresponding exhibits that have been shown for the wife. The argument of the learned counsel for the appellant hardly carries any weight in view of the fact that the suit proceeded ex parte, and these pleadings were never disputed. The appellants cannot now come in appeal and say that it is a cumulative or combined payment for both the properties there are supporting exhibits which have not been challenged in cross examination. The learned counsel submits that coming to the other issue regarding whether the husband could have deposed on behalf of his wife, the plaint lays the foundation. It is not as if the husband is acting on behalf, or deposing on behalf of the wife, because he is the one who has been corresponding with the builder, and that foundation is laid in the plaint as all correspondences are from the husband. In fact, in the plaint, it

has been categorically stated that it is the husband of the plaintiff who was informed about the non - grant of permission, it is the husband of the plaintiff who kept on requesting the builder/developer/defendant to honour the contract. So, he has deposed on the basis of personal knowledge. It is further submitted that a judgment has to be read in the context of facts and is an authority for the facts it decides, and therefore, going by the judgment in ***Janki Prasad (Supra)*** or the subsequent judgment of ***Man Kaur (Supra)***, they clearly say that when the power of attorney holder otherwise has personal knowledge, then he is competent to depose. If the attorney has done any act or handled any transaction in pursuance of the power of attorney granted by the principal, he may be examined as a witness. This judgment lays down the proposition that just because one has a power of attorney, he does not become a competent witness and is limited to that. If the person concerned is the one who's handling the transaction and he has personal knowledge, the court will not disregard his evidence only on the ground that he has a power of attorney. It's rather the other way around, which is that only because someone has a power of attorney, he will not be considered as a competent witness. Another very important aspect is the relationship between the plaintiff and the witness concerned: They are husband and wife and therefore, Section 120 of the Evidence Act comes into play which provides that in all civil proceedings, the parties to the suit and the

husband or wife of any party to the suit shall be competent witnesses. Therefore, going by the relationship, regardless of whether the husband has a power of attorney or not, he can still depose because he is a competent witness under Section 120 of the Evidence Act. Further, the husband can depose on the basis of his personal knowledge, for which a foundation has already been laid in the plaint. In the first paragraph of the evidence on affidavit, it is stated that "*I am the husband of the plaintiff and I am in the know of the facts and circumstances of the case. I further say that I was involved in respect of the dealings of the flat in question, which my wife, Dr. Madhumita Das Mazumdar, (the plaintiff) had entered into by an Agreement dated 06.07.2007 and as such I am in know of the facts and circumstances of the instant case. Furthermore, I have been authorized to adduce evidence by the plaintiff in respect to the instant case on the basis of a Power of Attorney dated 12.09.20213 which is exhibited herein as Ex-I. The signature of my wife, Dr. Madhumita Das Mazumdar is exhibited herein as Ex-I(1), I(2) and I(3) and my signature is exhibited herein as Ex-1(4).*"

16. The first portion of the above assessment that deponent/Pw-1 was the one who was doing the dealing and that he was the one who was involved in respect of the dealings for flat of the present suit also, has not been controverted in cross examination. The learned counsel for the

respondent/cross-objector has placed reliance on the decision of a co-ordinate bench of this High Court in the case of **Rupak Sharma Vs. M/S M.G. Enterprises & Anr.** reported in **GAHC0101 2023 2012** wherein a similar issue had cropped up: "*Whether non-examination of the respondent number two who was the proprietress of the respondent number one firm would dis entitle the respondents for any decree as prayed for in the play?*" was dealt with in at para 10 of the aforesaid judgment as follows:

"a. *It is not disputed; rather it is admitted by the appellant in his written statement as well as in the evidence on affidavit by the appellant that he handed over the daily accounts as well as daily cash to the appellant No. 2, as well as to her husband, namely Sanjib Goswami. It is also seen that the husband of the respondent number two had lodged the ejahar(Ext.4) with the concerned police station. In the statement dated 29.03.1992(Ext.14), there is a signature of Sanjeev Goswami; the same person is the complainant as per the charge sheet submitted in connection with Panbazar P.S. Case No. 36/1992 u/s 408 IPC. Hence, there is no way to hold that the husband of the respondent No. 2 had personal knowledge of the transaction with regard to which he had given evidence in the suit. Not only the connection of the husband of the respondent No. 2 is disclosed in the plaint, but his association with the respondent No. 1 firm and respondent No. 2, his wife, who is the proprietress of the respondent*

No. 1 firm is squarely admitted by the appellant. It is also the specific defence of the appellant in the written statement, as well as in his evidence- on-affidavit that his blank signature was taken on the letter pad of the respondent No. 1, by the husband of the respondent No. 2, by threat and force, which was later on converted to his account statement, showing due payable to respondent No. 1 firm. Therefore, there is nothing to hold that Sanjeev Goswami, PW-1, the husband of the respondent No. 2, was not a competent witness to depose on the basis of his personal knowledge. Moreover, the learned counsel for the appellant could not show that there was any cross examination of the PW-1 on the point of his authority to depose on behalf of the plaintiff."

17. The bench further held:"*c. That as per the provisions of section 120 of the Evidence Act 1872, the husband or wife of any party can be said to be a competent witness in all civil suits. Under the circumstances, when the admitted pleading by the appellant in his written statement is that the husband of the respondent No. 2 participated in the affairs of the firm of his wife, i.e., the respondent No. 2, this court is of the considered opinion that the competency of PW1 to depose on behalf of respondents has not been questioned by the appellant before the learned trial court or in the course of cross examination of PW1, the respondent number two cannot be non-suited at this appellate stage.*

*“d. For the reasons as stated above, this court finds that the ratio of the case of **Ratan Dev(Supra)** referred to by the learned counsel for the respondent, is found to be appropriately applicable in the fact situation of the present case in hand.”*

“e. Thus, in view of the discussion above, the point of determination No. (i) is answered in the negative and against the appellant by holding that non-examination of respondent No. 2, proprietress of the respondent No. 1 firm, would not dis entitle the respondents for reliefs as prayed for in the plaint.”

18. It is submitted by the learned counsel for the Respondent that in the instant case also, all the correspondences are with the husband only. As the pleadings will also show, all the disputes, the arguments etc took place with the husband of the respondent/plaintiff. And secondly, the contention that the wife did not enter the witness box, is also not an inflexible rule. When there is sufficient evidence to show what had transpired between the parties, mere non-examination of the plaintiff herself would not be fatal. That is what was held in **Ratan Dev(Supra)** also. It is not an inflexible rule and at times, it is merely a presumption against the plaintiff, but it can be re-butted by other evidence, submitted learned counsel.

19. As far as readiness and willingness to perform, i.e., pay the contract amount, the same is already taken care of as the husband and wife have paid Rs.33,00,000/- in total for two flats, out of which one flat the husband did not even get. The contract price of the flat of the wife/plaintiff is Rs. 13,50,000/-. So, payment has been made in excess, in fact, and that is why refund has been

ordered by the learned Trial Court in the husband's suit. With reference to the allegation that though appellants have not disputed the total amount, part of it has gone for interior works, which was not part of the contract, the defendants ought to have denied the statements made in the and have should also led evidence to the contrary. As rightly held by the learned Court in the husband's suit, there is no evidence to the said effect. Hence, given this state of affairs, the agreement stands admitted and the payments are not disputed as it ought to have been, submitted the learned counsel. With regard to compensation, details of the damages that has been caused to the plaintiff have been set out in the plaint, which have not been denied by filing any written statement but the learned Trial Court did not make any discussion on this aspect, i.e., the damages aspect. The learned Trial court granted specific performance, but the learned Court lost sight of section 21 of the Specific Relief Act, which provides that in any such suit, when the Court decides that specific performance ought to be granted but that it is not sufficient to satisfy the justice of the case and that certain compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. But despite there being pleadings, there being a prayer, this aspect was totally lost sight of and this provision was not even taken note of, and ultimately the words used in the Section are "*not sufficient to satisfy the justice of the case.*" The suit flat was

supposed to be delivered on 06.07.2010 and now, it is 2026. By this time, the suit maybe totally in a dilapidated condition, requiring extensive renovation, and not even a single penny has been awarded in this regard and the moment the Court decides to grant specific performance in favor of the plaintiff, it implies that plaintiff was always been ready and willing to perform her part of the contract, but no compensation was deemed necessary to satisfy the ends of justice, and now the requirement is even more because the matter has been taken in appeal unnecessarily, and now a decade and a half has passed since that initial date of delivery. Therefore, it is submitted that this Court will maintain the judgment in so far as specific performance is concerned but also consider the cross-objection for grant of compensation for the delay that has been occasioned.

20. The Learned counsel for the respondent/plaintiff claims compensation/damages on account of losses suffered on account of the following heads:-

1.Loss of income that would have accrued from the doctor's clinic sought to be established by the plaintiff along with her husband.

2.Mental agony suffered by her due to non-conveyance of the apartment in scheduled department.

3.Loss suffered on account of price escalation of the property of the scheduled property.

21. It has been submitted that the plaintiff along with her husband could have earned income by establishing the doctor's clinic, and in determining the said income, some amount of guest work is to be resorted to. Accordingly, the plaintiff has made the claim as stated in the plaint. Furthermore, the compensation that would accrue on account of mental agony is a subjective matter which is left to the discretion of the court.

22. As far as loss on account of price escalation is concerned, the learned counsel has referred to the evidence of DW-3, who has deposed that he has been doing constructions of building at Juri Park, which is under Shankar Dev Konna Kalakhetra, and the rate per square foot of flats at Juri Park is Rs. 2,600/-, inclusive of garage. The rate is rupees 150 more than the aforesaid rate of Rs. 2,600/- per square foot at the location where the scheduled flat is located. Therefore, the price differential per square foot is rupees Rs. 2,750/- per square foot, which is the loss suffered by the plaintiff on account of non-conveyance of the aforesaid flat to the plaintiff.

23. Countering the aforesaid claims made in the cross objection as well as in his reply to the arguments of learned counsel for the respondent in the present appeal, it is submitted that there is no basis to claim any amount on account of price differential, inasmuch as, in the event of the plaintiff getting possession of

the suit as a result of the outcome of the instant appeal, she would anyway reap the benefit of the price differential because she would be getting the flat at the present value. Therefore, there is nothing to be awarded as compensation on account of price differential. Had it been the case that the flat could not be built or handed over to the plaintiff on account of some other reason, she would conceivably be entitled to compensation under that head.

24. Further, as far as the claim for compensation on loss of income due to non-establishment of the doctor's clinic is concerned, the plaintiff has not laid any evidence in this regard, as is evident from his cross examination as PW1, who could not say anything about the income of the plaintiff in the absence of the balance sheet, which was not adduced in evidence. Furthermore, the question of compensation on account of mental agony is also not tenable. The plaintiff was not prevented from earning due to non-establishment of the doctor's clinic as there is no pleading to that effect, i.e., that the plaintiff, who is herself a qualified gynaecologist, was deprived of her regular income from her practice due to such non-establishment of the doctor's clinic.

25. Further, with regard to the question of non-joinder of necessary party, it is submitted by the learned counsel for the appellant that from the cross examination of PW1, it is evident that he has admitted that the PW-1 and the

plaintiff i.e., his wife have jointly paid an amount Rs. 30,00,000/- lakhs for the two units involved in the present suit and in the suit filed by the husband of the plaintiff. It is also evident that they had agreed to pay Rs. 33,00,000/- lakhs for the two units, not as per their exhibited agreements, but as per their own informed or modified understanding, out of which they had paid Rs. 30,00,000/- lakhs, and therefore Rs. 3,00,000/- lakh remained to be paid. Since, their remains an amount of Rs. 3,00,000/- lakh to be paid as per their own admission, the PW-1, not being the plaintiff or a party to the agreement involved in the present suit, cannot depose to the willingness and readiness of the plaintiff to pay the remaining amount, and therefore a decree for specific performance could not have been passed by the learned Trial Court. Furthermore, because of the joint payment of Rs. 33,00,000/- lakhs with Rs. 30,00,000/- lakhs already paid and with Rs. 3,00,000/- lakh remaining to be paid jointly by the husband and the plaintiff, the husband was also a necessary party in the suit, and merely because there is no relief claimed against the husband, it cannot be said that he is not a necessary party, inasmuch as there existed a joint liability involving the plaintiff as well as her husband. If not, then, the existing agreement and the considerations mentioned in the said agreement would have to prevail. Otherwise, the question of non-joinder/misjoinder of parties is squarely attracted, submitted by the learned counsel for the appellant.

26. Referring further to the cross-examination of the PW-1, it is pointed out that he had stated that he cannot say whether his wife can claim that she has paid more than what was agreed to be paid, and therefore he does not even know what was actually paid by his wife, although he was deposing on behalf of the plaintiff wife. He admitted that he had not agreed to pay the balance amount of Rs. 3,00,000/- lakh prior to the execution of the sale deed, and that he had agreed to pay the amount of Rs. 3,00,000/- lakh after handing over of the conveyance deed, and that he agreed to pay the stamp duty after the handing over of the conveyance deed. Therefore, the question which arises is that how would the sale deed be executed without paying the stamp duty. As per the agreement, it is the responsibility of the plaintiff to pay the stamp duty, but PW-1 says in his cross-examination that he will not pay unless the sale deed, duly executed, is handed over to him, and thereby he has imposed subsequent conditions. Therefore, the suit was liable to be dismissed on account of non-joinder of a necessary party as well as due to absence of readiness and willingness to perform the plaintiff's part of the contract.

27. Upon hearing the extensive arguments advanced by the learned counsel for the parties, the following points for determination arise in the instant appeal along with the cross-objection:

Point No.i).Whether the suit was bad for non-joinder/misjoinder of parties.

28. As per the exhibit-9 agreement for sale bearing No. 8706/07 dated 06.07.2007, the same is between the present plaintiff and the defendant Nos. 1 & 2, whereby the latter have agreed on the terms and conditions set forth in the said agreement which is in connection with a three-bedroom flat measuring 1375 square feet on the first floor, bearing allotment No. 101/A1 in their (appellants) project, Meghmalar Hill View. There is no other party to the said agreement, and only the parties to the agreement can enforce the said agreement, as rightly held by the learned Trial Court. Therefore, the question of joint liability of the plaintiff and her husband to pay the agreed amount does not arise at all. The liability rest on and only on the party to the agreement i.e., the wife. If the husband has paid any amount from his own account, that does not concern the Seller (Appellant). In case, for whatever purpose, the defendants wished to establish the fact of joint liability, it was for their i.e., defendants to prove the same by whatever available procedure and no duty was cast upon the plaintiff to join her husband as a party in the suit. Therefore, the question as to from whose account the money was actually transferred is neither material nor necessary to decide, keeping in view the fact that the same was received by the defendants/appellants and in respect of which receipts have been issued by the

said defendant/appellant company's representative. Under the aforesaid circumstances, the argument of the learned counsel to the effect that the evidence of Dr. Kishore Kumar Das, husband, cannot be taken to account since he's not the plaintiff and party to the agreement with the defendant is not sustainable. And, in any case, that too is an evidentiary issue for which it is not necessary to array the husband of the petitioner/plaintiff as a party to the suit. Either way, that question would only arise when the defendant is able to establish that the money for the said flat was paid from the account of the husband of the plaintiff, either in full or in part, which the defendant has failed to do, as the said principal defendants/appellant had failed to submit their written statement. The issue of non-joinder of the husband of the plaintiff was raised only by defendant No. 3, who himself was a mis-joined party to the suit as held by the learned Trial Court and therefore had no locus standi to object to the non-joinder of the husband of the plaintiff. Therefore, the point is determined accordingly by holding that the suit was not bad for non-joinder of the husband of the plaintiff/appellant.

Point No. ii). Whether the plaintiff had performed her part of the contract and/or in view of the failure of the plaintiff to depose regarding her willingness and readiness to perform her part of the contract, the suit for specific performance ought not to have been decreed solely on the testimony of the PW-1/husband of the plaintiff?

29. The plaintiff had proved by way of her un rebutted pleadings and

unchallenged exhibits, being exhibits that she had paid a total amount of Rs. 18,00,000/- lakhs for the scheduled flat mentioned in the agreement, and as per the said agreement, the parties had contracted for an amount of Rs. 13,50,000/- only as the total cost of the scheduled property, which presumably included stamp duty, as no amount has been mentioned towards stamp duty separately. There is no such pleading in the absence of a written statement on the part of the defendants/appearance that any amount was due over and above the total cost of Rs. 13,50,000/- on account of stamp duty and other charges. Moreover, as already adverted to, the plaintiff had paid a total amount of Rupees Rs. 18,00,000/- lakhs, which would definitely cover any such extra charge as may have been required to be paid. The learned counsel for the appellant has harped much on the purported admission of PW-1 during cross-examination, that an amount of Rs. 3,00,000/- lakh was still due from the plaintiff. However, a perusal of Exhibit B, a letter dated 19.02.2009 from the husband of the plaintiff to the defendant No. 2, Managing Director of the defendant No. 1 company, states as follows:-

‘At that time, the project was in the initial stage and the NOC for construction of the GFS had not yet been received by the company. After discussing with other directors of the company, he informed us on 20.06.06 that the company will provide the GFS if they get a NOC and a three-bedroom flat. If the NOC for the GFS is not possible, then the company will provide a two-bedroom flat on the

first floor contiguous with the three-bedroom flat allotted to my wife. The price was fixed at Rs. 33,00,000/- lakhs, provided we made an advance payment. We readily agreed and paid Rs 4,00,000/- on 26.06.06 around six months before the project started. Another Rs. 4,00,000/- were paid on 12.02.07.

We had taken a loan of Rs. 9,00,000/- lakhs from SBI, PBB, Ganeshguri branch and the bank paid the amount directly to Meghmallar on 13.10.07 and 22.01.08 in two installments. We received a final call letter on 29.05.08 informing us about the balance payment of Rs. 11,01,025/- only including all extra bills for the project and a single car parking space. After receiving the final call letter we paid Rs. 2,00,000/- lakhs on 09.08.08 and Rs. 3,00,000 lakhs on 05.09.08. So, we have paid a total of Rs. 30,00,000 lakhs till 05.09.08. We have always paid the money long before the scheduled time.'

30. What transpires from the above is that the price of Rs. 33,00,000/- lakhs was fixed for two properties, the first being the flat contracted for on the first floor of the building by the plaintiff, and the second property being the space on the ground floor 1000 sq ft on the ground floor, failing which, one contiguous two-bedroom flat, which admittedly was never allocated or agreed to be allotted to the plaintiff or her husband by the appellant company. Further, the aforesaid letter dated 19.02.2009 appears to be nothing more than an offer which has not been incorporated in the form of any agreement or contract. Therefore, the amount of Rs. 3,00,000/- lakh, claimed to have remained unpaid, and which is on account of two properties, and not solely for the property contracted for by

the plaintiff, cannot be regarded as forming a part of the original contract, the part performance of which remains to be completed by the plaintiff, and consequently, no question of readiness and willingness to perform any remaining part of the contract arises.

31. Although it is stated in the said letter dated 19.02.2009 that a lot of changes had been made to make the ground floor space and the three-bedroom flat on the first floor become contiguous under the supervision of the site engineers after taking consent from the husband of the plaintiff, there is no evidence to show that any part of the said payment made by the present plaintiff, as proved by the aforesaid exhibits was in fact, expended on account of such changes that were said to be made for making the two properties contiguous.

32. This brings us to the question of the evidence of the case being led, not by the plaintiff, but by her husband as PW1.

33. It is not in dispute that the husband is a competent witness in view of Section 120 of the Evidence Act. The question, therefore, is the knowledge, or the extent there of, of the husband, PW1, with regard to the transaction in question.

34. There is no real dispute that it was the husband/PW1, who had carried out

all the negotiations with the appellants/defendants, and also had knowledge of the financial transactions of the plaintiff/wife and considering the documents exhibited, there is an overwhelming preponderance of probability pointing towards the said fact. It is true that it was the plaintiff/wife, who had verified the contents of the plaint as true to her knowledge, which is as it should be, as the law does not require or permit the verificant/deponent to testify to the knowledge of any other person/witness about such contents. That is for the concerned witness to depose to at the time of submission of his or her evidence.

35. Before advertng to the authorities cited by learned counsel for the appellants, an aspect of the case that is required to be set straight is that the husband/PW1, did not depose in the case in the capacity of a power of attorney holder of his wife, inasmuch as the Exhibit 1 power of attorney was executed on 12.09.2013, whereas the transactions or acts in question took place much prior to that. It is a basic principle of the law of evidence that any person with knowledge of the facts, excluding hearsay, can depose in a suit/proceeding, and Section 120 of the Evidence Act explicitly makes the husband or wife a competent witness. Therefore, the PW1 had both competence as well as sufficient knowledge to depose as a witness and hence, the aforesaid plea of the appellants cannot be accepted. More so, in view of the fact that no written

statement was filed by the principal defendants in rebuttal of the stand of the plaintiff/respondent.

36. In the cited case of ***Man Kaur (Supra)*** relied upon by the appellants, the Hon'ble Supreme Court had held:

‘12(b). If the attorney holder has done any act or handled any transactions, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

37. Since the PW1 did not act in pursuance of any power of attorney, as explained herein above, the above decision has no application to the present case, and therefore, even if the PW/husband, is not the sole repository of knowledge of such acts and transactions, he is not barred from testifying upon personal knowledge of such acts and transactions, regardless of the extent of the knowledge of the plaintiff with regard to such facts.

38. With regard to the contention regarding the incapacity of the PW1 to depose as to the readiness and willingness of the plaintiff to perform the remaining part of the contract, in the same aforementioned judgment, it was held as follows:

‘12(e). Where the entire transaction has been conducted through a particular

attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.'

39. Therefore, it logically follows that since the entire transactions were handled by the husband/PW1, it is he who has to be examined not the plaintiff.

40. It was further held in ***ManKaur(Supra)*** in para 12(g) that '*Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct, normally the person concerned alone has to give evidence and not an attorney holder. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bonafides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.'*

41. Therefore, if the spouse as power attorney holder can depose to such readiness and willingness, there is no logical reason as to why he cannot depose to the same, absent a power of attorney.

42. But all of that is beside the point, inasmuch as, when the Act in performance of the Contract itself has already been performed/completed before institution of the suit, as already proved, no question of proving readiness or willingness on the part of the plaintiff remains or arises.

43. The next cited decision in ***Jhanki(Supra)***, being on the same point as ***ManKaur(Supra)*** does not aid the appellant either. However, in the said decision, a reference was made to the case of ***Vidhyadhar Vs. Manikrao & Anr*** reported in ***(1999) 3 SCC 573*** wherein, it was observed at page 583 that *'where a party to the suit does not appear in the witness-box and states is 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.'*

44. However, in ***Ratan Dev Vs. Pasam Devi*** reported in ***(2002) 7 SCC 441***, it was held by the Apex Court as follows:

'4. In our opinion, the first appellate court was bound to apply its mind to all the evidence available on record and then test the legality of the findings arrived at by the trial court. While doing so, the first appellate court could have taken the factum of the non-examination of the plaintiff also into consideration. The manner in which the appeal has been disposed of by the first appellate court cannot be said to be satisfactory. Non-application of mind by the appellate court to other material, though available, and consequent failure of the appellate court to discharge its judicial obligation, did raise a question of law having a substantial impact on the rights of the parties, and therefore, the second appeal deserved to be heard on merits.'

5. *Learned counsel for the respondent has placed reliance on Iswar Bhai C. Patel v. Harihar Behera [(1999) 3 SCC 457] wherein this Court has emphasized that withholding of the plaintiff himself from the witness box and thereby denying the defendant an opportunity for cross-examination of himself results in an adverse inference being drawn against the plaintiff. That proposition of law is undoubtable. However, as we have already said, that is a fact to be kept in view and taken into consideration by the appellate court while appreciating other oral and documentary evidence available on record. Maybe, that from other evidence — oral and documentary — produced by the plaintiff, or otherwise brought on record, the plaintiff has been able to discharge the onus which lay on him, and, subject to the court forming that opinion, a mere abstention of the plaintiff himself from the witness box may pale into insignificance.”*

43. The decision was also followed by this High Court in ***Rupak Sharma Vs M/S MG Enterprises & Anr: GAHC010120232012*** relied upon by the learned counsel for the respondent.

44. Therefore, it is apparent that the said presumption is a rebuttable one and in view of the untraversed pleadings and evidence led in the instant case, establishing the case of the plaintiff on a preponderance of probability, such presumption stands rebutted. The third and last authority cited on behalf of the appellant i.e., ***Pushparani S. Sundaram & Ors. Vs. Pauline Manomani James (Deceased)*** reported in ***(2002) 9 SCC 582***, being on the point of readiness and willingness to perform, the remaining part of the contract, demands no further consideration in view of the discussion already made above on this point.

45. In view of the above discussion, I find that there is no infirmity in decreeing the suit for specific performance in the absence of the evidence of the plaintiff and by relying solely upon the testimony of the husband of the plaintiff/PW-1 as well as the unrebutted pleadings of the plaintiff. The point is determined accordingly.

Point No. iii) Whether the plaintiff is entitled to any compensation/damages as claimed.

46. Thereafter, in view on the of the findings on point No. 2, it is evident that the appellant/defendant had committed breach of contract by not handing over the suit flat to the respondent/plaintiff. The suit flat was supposed to be handed over to the respondent/plaintiff on 06.07.2010 and by now nearly 16 years have elapsed, which has definitely caused loss to the respondent/plaintiff and therefore, the respondent/plaintiff is entitled to compensation/damages. However, the learned trial court failed to direct its mind to this aspect of the matter, while decreeing the suit directing specific performance of contract, despite the fact that pleadings and prayers in this respect were present in the plaint.

47. In view of the above, I consider it fit to remand back the case to the learned trial court for a decision only on the point of compensation/damages

that may be found to be due to the plaintiff/respondent, the other findings remain as they are.

48. Accordingly, the appeal stands dismissed and the cross objection is allowed with a direction for remand to the learned trial court to decide the issue of damages/compensation. Decree accordingly.

49. Send back the TCR.

JUDGE

Comparing Assistant