

**IN THE HIGH COURT OF HIMACHAL PRADESH**  
**SHIMLA**

**RSA No. 176 of 2009.**

**Reserved on : 29<sup>th</sup> August, 2018.**

**Decided on : 31<sup>st</sup> August, 2018.**

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Shri Prem Chand

**.....Appellant/Plaintiff.**

Versus

Jai Singh (since deceased) through his legal heirs and others.

**.....Respondents/Defendants.**

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***Coram:***

***The Hon'ble Mr. Justice Sureshwar Thakur, Judge.***

*Whether approved for reporting?<sup>1</sup> Yes.*

**For the Appellant:**

Mr. K.D. Sood, Sr. Advocate  
with Mr. Rajneesh K. Lall,  
Advocate.

**For Respondents:**

Mr. G.D. Verma, Senior Advocate  
with Mr. B.C. Verma, Advocate.

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**Sureshwar Thakur, Judge.**

The plaintiff's suit for rendition, of, a decree for specific performance of agreement to sell, stood decreed, by the learned trial Court. The aggrieved defendants,

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<sup>1</sup> Whether reporters of the local papers may be allowed to see the judgment?

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preferred, the apt first appeal before the learned First Appellate Court, and, upon Civil Appeal No. 91 of 1999/RBT 302 of 2004, the learned First Appellate Court, hence while modified the primary decree rendered by the learned trial Court, and, rather proceeded to render a decree, vis-a-vis, the plaintiff, qua his being entitled for a recovery of sum of Rs.25,680/-, i.e. Rs.10680/- + Rs.15,000/- as damages, along with, interest at the rate of 6% per annum, commencing from the date of the suit, till its realization. The plaintiff/appellant herein hence being aggrieved therefrom, has, instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that the defendants' predecessor-in-interest, one Johanda Ram, was owner in possession of the suit land as described in para No.1 of the plaint, and had entered into an agreement to sell, on 13.05.1992 in respect of the part of the land measuring 6K-2M, for total sale consideration of

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Rs.39,000/-. The sale could not be executed on 13.5.1992 as Treasury Officer was not available. Therefore, the agreement was executed and sale deed was to be executed after 14.5.1992. The plaintiff had deposited amount of Rs.10,680/- with Sub Treasury, Bhoranj for procuring stamp for writing the sale deed. This amount was to be considered as a part payment towards the sale out of total consideration of Rs.39,000/-. In spite of notice and numerous requests, the defendants' predecessor-in-interest did not execute the sale deed. In the event of refusal to execute the sale deed, the plaintiff was entitled to refund the amount of Rs.10,680/- along with Rs.15,000/- and costs of litigation. Hence, on these averments decree for specific performance of the contract and in alternative, if plaintiff is not found entitled to specific performance due to any legal or formal defect, then a decree for recovery of Rs.10,680/- along with

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damages of Rs.15,000/- as per agreement and interest has been prayed for.

3. The defendants contested the suit and filed written statement, wherein, the defence of the predecessor-in-interest, of the defendants was that as a matter of fact land was agreed to be sold 5 kanals at the rate of Rs.20,000/- per kanal. The predecessor-in-interest of the defendant being uneducated and rustic villager and due to his old age, put thumb impression on certain papers, which had later on been forged. It was denied that the amount deposited for purchase of stamp was the earnest money or the part payment. The defendants' predecessor-in-interest had agreed to sell 5 Kanals at the rate of Rs.20,000/- per Kanal, which even now he is ready to execute the sale deed.

4. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

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1. Whether the plaintiff is entitled for the relief of possession by way of specific performance? OPP.
2. If issue No.1 is not proved, whether the plaintiff is entitled for recovery of Rs.10,680/- along with damages for Rs.15,000/-?OPP.
3. Whether the plaintiff is ready and willing to perform his part of the agreement?OPP
4. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom, by, the defendants/respondents herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, modified the judgment and decree recorded by the learned trial Court.

6. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assails the findings, recorded in its

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impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 22.04.2009, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether in view of the concurrent findings of the court below that the agreement of sale Ext. P-3 was genuine, legal and valid, the plaintiff could be denied the specific performance of the agreement and only granted damages in lieu of the agreement of sale as alternative relief?
2. Whether on the proper construction of the agreement of sale EX.P-3 and the provisions of the Specific Relief Act and the Judgment of the Aprx Court, the compensation was not an adequate relief and specific performance was the only relief which could be granted and the findings of the court below to the contrary are perverse, based on misreading of oral and documentary evidence?

**Substantial questions of Law No.1 and 2:**

7. The litigating parties before this Court, do not contest, vis-a-vis, the concurrent findings rendered, by

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both the learned courts below, qua Ex.P-3 being efficaciously proven to be validly and duly executed by one Johanda Ram, the predecessor-in-interest of the defendants. However, the learned counsel appearing for the appellant/plaintiff, has contended, with much vehemence that (a) the learned first Appellate Court, in not granting the primary relief of specific performance of the apt contract, rather it proceeding to grant the alternative relief qua the plaintiff, being entitled, to refund of sums of money, as borne therein, has hence visibly committed a gross legal fallacy, (b) fallacy whereof, ingraining the judgment and decree, is, espoused to stand, comprised in the learned first Appellate Court while rendering the aforesaid decree, its, inaptly placing reliance, upon, paragraph No.7, encapsulated in a verdict rendered by the Hon'ble Apex Court, in a case titled as ***Dadarao and another versus Rarao and others***, reported in ***2001(1) Cur. L. J.***

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**(C.C.R) SC, 18**, relevant portion whereof stand extracted hereinafter:-

“Specific Relief Act, 1963, Sections 14 and 16- Specific Performance- If the agreement had not stipulated as to what is to happen in the event of the sale not going through, the plaintiff could have asked the court for a decree of specific performance- Here the parties to the engagement had agreed to even if the seller did not want to execute the sale deed, he would only be required to refund the amount to complete the sale transaction.”

(c) whereas, the hereinbefore extracted paragraph only appertains, vis-a-vis, the recitals borne in the contract, of sale wherewith the Hon'ble Apex Court thereat, hence, stood seized, (d) and, wherein stood embodied a specific clause qua, upon, in the event of apt breaches, (e) thereupon, only damages being defrayable by the errant contracting party to the opposite party, (f) and, also a specific recital being borne therein qua hence no primary



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relief for specific performance, of, contract being claimable nor validly renderable; (g) also he contends, that, the aforesaid apt pointed distinguishing fact, as, borne, in, Dadarao's case (supra), hence visibly, is, *per incuriam*, vis-a-vis, the decision rendered by the Hon'ble Apex Court in a case titled as ***M.L. Devender Singh and others vs. Syed Khaja***, reported in ***1973(2) SCC 515***. The aforesaid submission addressed by the learned counsel appearing for the appellant/plaintiff before this Court, has, vigour and is vindicated, (a) given it being founded, upon, a judgment rendered by the Hon'ble Apex Court in a case titled as ***Kamal Kant Jain v. Surinder Singh (dead) through his Lrs***, reported in ***AIR 2017 SC 5592***, the relevant paragraph whereof, occurring at serial No.8, stands extracted hereinafter:-

“8. We may now examine whether the courts below were correct in their reading of paragraph 6 of the agreement to sell and Section 23 of the Specific Relief Act, which reads as under:

“23. Liquidation of damages not a bar to specific performance.-

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(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract”.

8. Be that as it may, hereinafter it is, the, predominant duty of this Court, to, analyse the verdict rendered by the Hon'ble Apex Court, in, M.L. Devender Singh's case (supra), (a) wherein, the Hon'ble Apex Court had after analysing, the, provisions of Section 10 of the Specific Relief Act, and, the provisions of Section 23 of the Specific Relief Act, hence squared, the, trite conclusion (b) qua with the errant defendant therein being placed, in, a position, to, rather exploit the need of the plaintiff, whereas, the plaintiff acting fairly and bonafidely, with, the errant defendant, (c) thereupon, hence recorded a conclusion, qua, the plaintiff being entitled, to, the primary decree of specific performance of

contract, and, the according of the alternative relief of damages or refunds, by the learned trial Court, in consonance with the apt recitals borne therein, in the contract of sale, (d) rather emanating from the learned trial Court, not, exercising its discretion, in accordance with law. Even if, the Hon'ble Appex Court in M.L. Devender's Case (supra), has in paragraph No.19 thereof, para whereof stands extracted hereinafter:-

“19. A reference to Section 22 of the old Act, (the corresponding provision is Section 20 of the Act of 1963) would show that the jurisdiction of the Court to decreespecific relief is discretionary and must be exercised on sound and reasonable grounds "guided by judicial principles and capable of correction by the Court of appeal". This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of Section 20 of the old Act (corresponding to Section 23 of the Act of 1963) so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.”

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(I) mandated qua the jurisdiction, of, Civil Courts, to render a primary decree, of, specific performance of contract, though, being discretionary, (ii) yet its exercise being founded, upon, sound and reasonable principles, (iii) and, also expostulations, stand borne therein, qua the afore apt jurisdiction of the Civil Courts, being not amenable for curtailment, merely by fixing pecuniary, sums, as, liquidated damages, yet obviously reading thereof does not foist any rigid principle of law qua (iv ) it being always incumbent, upon, the civil courts to render, a, primary decree, of specific performance of contract of sale, (v) and, the alternative thereto contemplated relief, of, refund of money, hence, by the errant contracting party, to, the opposite party, being throughout rather grossly impermissible; (vi) thereupon, for want of fixity of, a, rigid principle, and, further when the plaintiff herein, in, consonance with the apt recitals borne, in Ex.P-3, and, with a clear contemplation borne therein, vis-a-vis, upon

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the defendant hence breaching the obligations cast therein, upon him, his, being enjoined to refund the moneys contemplated therein, (vii) hence espousing, in, substitution of the primary relief of rendition, of, a decree of specific performance of contract of sale, rather qua the apt contemplated refunds, is rather a valid espousable, and, decreeable relief, being made to him, (ix) paramountly, when a reading, of, verdict of the Hon'ble Apex Court, in M.L. Devender's case (supra), does not reflect (x) that the plaintiff in the afore case making an alike espousal, (xi) thereupon, when hereat the apt alternative relief, is, espoused by the plaintiff, thereupon, prima facie, he is estopped, given his hence waiving and abandoning, the primary relief to hence claim qua a compliant decree, in consonance therewith, being rendered.

9. Be that as it may, even though the afore conclusion, for the reasons ascribed hereinafter, make

upsurgings, vis-a-vis, the plaintiff's willful abandonments, and, waivers, whereupon, his espousal for claiming qua the primary decree of specific performance, of contract of sale, being pronounced qua him, is, per se oustable, (a) also reiteratedly given the plaintiff, in, M.L. Devender Singh's case (supra), contra-distinctively, vis-a-vis the plaintiff hereat, not rearing espousals in alternative, to the according, of, the apt primary decree, (b) yet the vigour of the aforesaid inference does get prima facie scuttled, by the Andhra Pradesh High Court, in a verdict, rendered in a case titled as ***Asia Begum (died per L.Rs vs. Mahmuda Begum***, reported in ***2010(2) Civil Court Cases 391 (A.P.)*** (c) rendering a clear mandate, qua, even with, the plaintiff pleading a relief alternative, to his, espousing for rendition, of, a primary decree for specific performance of contract of sale, (d) thereupon, unless evidence makes emergence, vis-a-vis, the plaintiff being not ready or willing to perform his part of

obligation, (e) thereupon, it being incumbent, upon, the civil courts to rather proceed to render the primary decree, of specific performance of contract, of, sale. However, for the reasons to be assigned hereinafter, even the aforesaid verdict, is, grossly inapplicable hereat. Nonetheless, before proceeding to assign apt reasons, it is worthwhile, to extract hereinafter, the, provisions of Sections 10, 16, 14 and 23 of the Specific Relief Act, provisions whereof read as under:-

***“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 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

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

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(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.

### ***14. Contracts not specifically enforceable.—***

(1) The following contracts cannot be specifically enforced, namely:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any



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subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:—

(a) where the suit is for the enforcement of a contract,—

(i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once: Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company;

(b) where the suit is for,—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land: Provided that the following conditions are fulfilled, namely:—

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

**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; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(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 purposes 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 in court any money except when so directed by the court;

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

**23. *Liquidation of damages not a bar to specific performance.***—

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(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

The opening underlined apt portion of Section 10, of, the Specific Relief Act, make clear statutory expostulations, qua excepting, the, provisions to the contrary, standing, borne in the Act, thereupon, the civil court concerned, being enjoined to render a decree for specific performance of contract of sale, (a) upon, want of standard evidence for ascertaining, the, actual apt damages as may ensue, upon, the plaintiff, and, as arises, from, the apt contractual breaches, by the errant vendor; (b) or upon evidence making upsurging, qua the

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mandated compensation, for, apt breaches, rather not adequately and satisfactorily, hence recompensing, the, non derelicting contracting party. Furthermore, the provisions of Section 14 of the Specific Relief Act, make trite underlinings (i) qua, upon, the plaintiff demonstrably acting in fraud of the contract, and, with the coinage “except as otherwise” occurring in Section 10 of the Act, rather excluding, the, thereunderneath borne, the afore referred statutory expostulation(s), comprised, in the coinage, “when the act agreed to be done in such that compensation in money for its non-performance would not afford adequate relief”, (ii) upon , contra therewith provisions, hence, standing borne in a chapter similar, vis-a-vis, wherein Section 23 stands borne, (iii) thereupon with Section 23, of, the Act, being borne in a chapter similar, wherewithin, Section 10 is borne, (iv) and, with hence the provisions, of, Section 23 of the Act, rather acquiring, the, excepting therewith, rather apt

overwhelming clout, and, operation, vis-a-vis, the provisions borne in Section 10 of the Act, (v) and, with theirs making a candid statutory expostulation, against, any decree, vis-a-vis, liquidation of damages or deceeable recitals in consonance therewith, as, borne in the apt agreement, per se, not operating as a bar, upon, the civil court concerned, to render the primary relief, of, specific performance, of, contract of sale, (vi) unless, apt satisfaction, stands drawn, by the Civil Court, that, the contemplated sums of money aptly refundable to the non derelicting contracting party, being recited therein only for the purpose, of securing the performance, of, the contract, and, not for the purpose, giving the defaulting party an option of, paying money, in, lieu of specific performance of contract. However, in, the drawing, of, the aforesaid satisfaction, by, the Civil Court concerned, it is, enjoined to mete deference to the requisite terms, of, the contract, and, also to other attending therewith

circumstances. Consequently, while proceeding to draw a conclusion qua the sums of money contemplated in the purported contract of sale, borne in Ex.P-3, and, sums of money whereof, were purportedly contracted, to be refunded by the errant/derelicting contracting party, to the non derelicting contracting party, upon, the former breaching the obligations cast upon him, (vii) rather being contemplated, only, for the purpose of securing the performance of contract, and, not for the purpose of giving an option to the party, in default, to, pay money in lieu, of, specific performance of contract, (viii) and, when for making the aforesaid fathomings therefrom, this Court, is, also enjoined to mete apposite deference, to, the terms of the contract, and, other attending circumstances, (ix) thereupon, this Court is enjoined, to, not only comprehend ad nauseam, all the apt recitals, borne in the purported agreement to sell, borne in Ex.P-3, (x) AND in consonance wherewith, the, relief alternative,

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to the relief of primary decree of specific performance of contract, stood, rendered, (xi) for, hence thereafter determining whether the decree in respect of the apt refunds, rendered, by the learned first Appellate Court, being well founded or otherwise.

10. A perusal of Ex.P-3, makes, a, disclosure qua it not bearing, the, signatures of the plaintiff. The concomitant effect thereof, is, qua it being a unilaterally drawn agreement, (i) whereas, a contract of sale is enjoined, to be bilaterally drawn in ter se the contracting parties, and, thereupon, alone the plaintiff being equipped, with, a valid enforceable cause of action, to, hence validly espouse, for, rendition of a decree of specific performance, of, contract. Reiteratedly, hence, for want of, the, apt contract being bilaterally executed, (ii) thereupon, the plaintiff had no enforceable cause, of action, to make, any valid claim for rendition of a primary decree for specific performance of contract.

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Furthermore, upon, a reading, of, the mandate borne in Section 16 of the Specific Relief Act, qua, upon evidence emerging, vis-a-vis, the plaintiff acting in fraud of the contract, or other attending therewith circumstances, as, borne in the evidence existing on record, hence , also facilitating this Court, to make a conclusion qua sums of money, named therein, being not for the purpose of securing the performance of the contract, (iii) thereupon, this Court proceeds, to, allude to the apt recitals borne therein, wherein, there occurs a unilateral declaration, by the purportedly errant defendant, one Johanda Ram, the predecessor-in-interest of the defendants qua, on, 13.05.1992, a sum of RS.10,680/- being tendered by the plaintiff in the Sub Treasury concerned, for non judicial stamp papers being released therefrom, for facilitating the scribings, of, the apt recitals thereon. Preeminently, therefrom, also with the plaintiff omitting to adduce the apt evidence, with, respect to his depositing, the



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aforesaid moneys, in the Sub Treasury concerned, for the apt purpose, (iv) and, whereas, emanations or adduction of aforesaid evidence, was, both mandatory, as well as, a prime necessity, for making a further firm conclusion, qua, the readiness and willingness of the plaintiff to perform his part of obligation, if any, as may be fastenable, upon him, under a unilaterally drawn purported agreement of sale, borne in Ex.P-3. However, omission of adduction of the aforesaid evidence, does constrain this Court, to unflinchingly galvanise, a candid conclusion qua the plaintiff being never ready or willing to perform his part of obligation, rather his, on a unilaterally drawn agreement to sell, borne in Ex.P-3, making legally inapt strivings, qua, the primary relief of rendition of a decree for specific performance of contract, being rendered qua him.

11. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court

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being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents/defendants, and, against the appellant/plaintiff.

12. In view of the above discussion, there is no merit in the present Regular Second Appeal and it is dismissed accordingly. In sequel, the judgement and decree rendered by the learned Addl. District Judge, Fast Track Court, Hamirpur, H.P., upon, Civil Appeal No. 91 of 1999/RBT 302 of 2004, is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

**31<sup>st</sup> August, 2018.**  
**(jai)**

**(Sureshwar Thakur)**  
**Judge.**