M/S DABRIWALA STEEL AND ENGINEERING COMPANY LIMITED v. M/S. SAKET STEELS LIMITED,(2022-1)205 PLR 502

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Anil Kshetarpal.

M/S DABRIWALA STEEL AND ENGINEERING COMPANY LIMITED and another – Appellants,

Versus

M/S. SAKET STEELS LIMITED – Respondent.

RSA No.462 of 2021(O&M)

(i) Contract – Has to be read in its entirety to come to a just and logical conclusion – One part of the sentence cannot be read in isolation from others – While interpreting a contract, efforts are required to be made to harmoniously construe its various terms – The court is expected to gather the intent of the parties which they had while entering into the contract from the reading of the complete contract and is further expected to give effect to the contract in the light of such gathered intention, as a whole. [Para 12]

(ii) Contract – In the agreement itself that the vendor has assured that the property is free from all encumbrances – Once that is the position, it is apparent that the vendor has misrepresented the vendee – Thereafter, the vendor cannot be permitted to turn around and claim that since the plot in question is encumbered, therefore, the vendee should be denied the right to specifically enforce the contract. [Para 13, 14]

(iii) Contract Act, 1872 (9 of 1872) Section 5 – Counsel that in view of the provision of Section 56 of the Indian Contract Act, 1872, the agreement to sell stood frustrated after the attachment of the property by the Income Tax Department Department – If the agreement become impossible, only then it will become void – In the present case, the performance of the agreement to sell has not become impossible – No doubt, the plot in question at one stage was under attachment and charge, however, that itself does not result in frustration of the contract – The word "impossibility" to act as per the terms of the agreement, cannot mean that if the performance of the contract becomes onerous for one party, then it leads to impossibility – There is a difference between onerous liability and impossibility – The present case falls in the category of onerous liability and does not fall in the category of an impossible Act – Even otherwise such an impossibility must not arise due to the fault of the party itself. [Para 19]

(iv) Civil Procedure Code, 1908 (V of 1908) Order 6, Rule 2 – Only the facts are required to be stated in a concise manner in the pleadings and neither the evidence nor the arguments are required to be stated therein – In the present case, from the reading of the plaint, it is apparent that due to the fault of the defendant the required permission from the HUDA has not been received – The reason for such failure on the part of the vendor was not required to be pleaded. [Para 23]

(v) Civil Procedure Code 1908 (V of 1908) Order 41, Rule 2 – No doubt requires the appellant to assert all the grounds in the memorandum of appeal relied upon by the appellant – However, this is not the end of the matter – The appellant can be permitted to urge a point at a subsequent stage after taking the leave of the Court – Such a bar does not apply to the Court in view of the discretionary powers explicitly given to it. [Para 27]

(vi) Specific Relief Act, 1963 (47 of 1963) Section 16(2) – Requires the plaintiff to prove that he has always been ready and willing to perform the essential terms of the contract which are required to be performed by him – Explanation to clause (c) of the Specific Relief Act, 1963, clearly provides that it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any amount except when so directed by the Court. [Para 33]

(vii) Specific Relief Act, 1963 (47 of 1963) – Non grant of permission to transfer the property – Expression "due to any reason" in the clause which reads as "due to any reason, if the permission is not issued in 90 days after the scheme letter then without mutual extension by the parties, the contract shall automatically stand cancelled." – Such clause cannot be read in a manner to give undue advantage to the proposed vendor – If the permission has not been granted due to the fault of the proposed vendor himself, then he cannot be allowed to capitalize upon or take the benefit of such a default on his own part – Such an expression would only mean that if due to any reason beyond the control of the vendor, the permission to transfer the property is not granted, then the agreement will be cancelled – If any other meaning is assigned to the given expression, it will lead to a narrow construction giving unfair advantage to the proposed vendor which is against the object of the Specific Relief Act, 1963. [Para 10]

Cases referred to:-

1. (2019)3 SCC 704, *Kamal Kumar v. Prem Lata Joshi*.

Mr. Anand Chibber, Senior Advocate, with Mr. Vaibhav Sahni, for the appellants.

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Anil Kshetarpal, J. – *(1st September, 2021)* – Through this Regular Second Appeal, the defendants (appellants) assail the correctness of the judgment and decree passed on

23.03.2021, by the District Judge, Faridabad (The First Appellate Court) while reversing the judgment and decree passed by the trial court.

2. This Bench has heard the learned counsel for the appellant at length and with his able assistance perused the paper book as well as the relevant part of the record of the courts below, copies whereof have been produced by the learned counsel. On 25.08.2021, while reserving the judgment, the learned senior counsel was permitted to file synopsis, who has graciously submitted the elaborate written submissions to corroborate the submissions made at the time of oral hearing.

FACTS

3. This appeal arises from a suit filed by the plaintiff (respondent herein) for passing a decree of possession by way of specific performance of the agreement to sell entered into between the parties on 14.07.1987. The execution of the agreement to sell on receipt of Rs.50,000/- out of the total agreed sale consideration of Rs.8,50,000/- is not in dispute. An industrial plot measuring 10000 Sq. Yards was agreed to be sold. The relevant clauses of the agreement read as under:-

“WHEREAS the Vendor has assured the Vendee that the property hereby agreed to be transferred / sold is free from all encumbrances and is not in any manner encumbered or under any lien etc. In case it is proved otherwise the Vendor shall be liable for all the damages to the losses etc. of the Vendee.

NOW THAT THE Vendor have agreed to sell/transfer the allotment rights in respect of above said industrial plot as mentioned above and the Vendee have agreed to purchase the above said plot measuring an area of 10,000 sq. yds. or thereabouts @ Rs.85/- per sq. yd. (less Govt. dues, if any) and the total price comes to Rs.8,50,000/- (Rupees eight lakhs fifty thousand only) and the Vendee have paid a sum of Rs.50,000/- (Rupees fifty thousand only) through Bank Draft No.964455 dated 14.7.87 on United Bank of India, Faridabad in favour of M/s. Dabriwala Steel & Engineering Company Limited as and by way of earnest money and the receipt whereof the Vendor do hereby admit and acknowledge and the balance consideration of Rs.8,00,000/- (8,00,000/-) (Rupees eight lakhs only) within ninety days from the date of issue of scheme letter from the Estate Office, Faridabad and at the time of registration of sale deed in Sub Registrar Office, Faridabad. A further sum of Rs. 50,000/- shall be paid by the Vendee to the Vendor on receipt of scheme letter issued by the Estate Office, on account of earnest money.

THAT on receipt of Rs.50,000/- (Rupees fifty thousand only) paid as earnest money by the Vendee to the Vendor, the Vendor shall immediately apply for permission to transfer the title rights of the plot to the Vendee herein. The Vendee agrees to obtain the clearance of their scheme for land use from the Director of Industries, Haryana, Chandigarh as required for by the Estate Officer, Faridabad within ninety days from the date of issue of letter by the Estate Officer, Faridabad asking them to get the industrial project approved from the Director of Industries, Haryana, Chandigarh. This approval of industrial scheme is pre-requirement for the grant of permission for the transfer of the title of the plot by the Estate

Office.

THAT it is an express condition of this agreement that the Vendor will apply for permission to the Estate Office, Faridabad to sell/ transfer the title rights of the plot of land to the Vendee immediately on the execution of this agreement. If due to any reason the requisite permission is not granted by the Estate Office, Faridabad or transfer is banned by the Govt. of Haryana, the Vendor agree to return the Vendee the full of Rs. 1,00.000/- (Rupees one lakh only) taken as earnest money without interest within fifteen days of the refusal of the permission in respect of plot No.142 sector 24, Faridabad. In case the Vendor fails to pay back the amount within fifteen days interest @ 18% per annum shall be paid to the Vendee from the date of receipt of payment.

THAT the Vendor will obtain Income Tax Clearance Certificate from the concerned Income Tax Office for the registration of the sale deed in favour of the Vendee.

THAT the Vendee shall be bound to make payment of balance price of the plot in question within the period of ninety days after the date of issue of letter by the Estate Office, Faridabad as mentioned above (provided Government permission/instruction/approval) for the transfer of title of the lot in question has been received in the Estate Office, Faridabad from the Haryana Government i.e. the Estate Officer agrees to transfer the title of the plot in question. If due to any reason, the requisite approval for the transfer of title of the plot in question has not been issued the date of balance payment will be extended mutually) failing which the amount of earnest money of Rs.1,00,000/- (Rupees one lakh only) paid by the Vendee to the Vendor shall stand forfeited to the Vendor and this agreement shall automatically stand cancelled and the Vendee shall have no right or claim whatsoever for its refund from the Vendor.

THAT after the receipt of the permission from the Estate Office for the said transfer of the title of the plot in favour of the Vendee as mentioned above the Vendor does not complete the requisite formalities required for the transfer of the plot or refuse to get the same transferred/registered it shall be option of the Vendee to get the sale completed by the specific performance of this agreement through the court of law at Vendor’s cost, charges and responsibilities.”

4. As already noticed, the agreement to sell was executed on receipt of Rs.50,000/-. The defendant, on the very next day, applied to the Haryana Urban Development Authority (HUDA) for grant of permission to transfer the property in favour of the plaintiff. The HUDA issued recommendation letter on 24.07.1987 for arranging the project report/utilization plan for sanction which was duly submitted by the plaintiff. Thereafter, the plaintiff, as agreed, paid another sum of Rs.50,000/- on 28.07.1987. The plaintiff also further paid an amount of Rs.1,00,000/- to the defendant on 28.09.1987. The plaintiff submitted a project report and sought permission of the Director of Industries to establish an industrial project on the plot in question which was granted on 13.01.1988. The defendant, also, sought permission of the State Bank of India to sell the property to the plaintiff which is alleged to have been allowed as well. However, subsequently, it came to the knowledge of the plaintiff that the suit property has been attached by the Income Tax Department. The plaintiff sent

various notices from 12.03.1990 onwards, calling upon the defendants to perform their part of the contract but failed to get any positive response and therefore, filed the suit on 16.07.1990. The suit was decreed ex-parte on 19.04.1996. However, before that date, the defendant no.1-Company went into liquidation. The management of the defendant company applied for revival of the company. The plaintiff applied for execution of the decree. The proposal to revive the company was accepted by the Company Judge on 19.03.2009. During the pendency of the proceedings, the plaintiff also became a party before the Company Judge. While ordering the revival of the company, the Company Judge ordered refund of the amount to the plaintiff along with an interest @ 12% per annum. Against the aforesaid judgment of the Company Judge, as many as 4 appeals were filed including the appeal of the plaintiff. The other three appeals filed by the various parties were dismissed, whereas the plaintiff's appeal was partly accepted by relegating the plaintiff and the defendant to the proceedings in the suit while setting aside the ex-parte decree.

5. Thereafter, the defendant filed an amended written statement in order to incorporate all the subsequent developments.

6. The learned trial court passed a decree for recovery of the amount paid along with interest, whereas the first appellate court has reversed the judgment and passed a decree of possession by way of specific performance of the agreement to sell on the payment of the amount of Rs.65,00,000/- which is equivalent to 10 times of the balance sale consideration payable under the agreement to sell. The correctness of the aforesaid judgment and decree, as noticed above, is challenged in the present appeal.

7. Before proceeding further, it is appropriate to note the issues and the additional issues, framed by the Trial Court, which are extracted as under:-

"1. Whether the plaintiff company duly incorporated under the Companies Act as alleged in the plaint?OPP

2. Whether the transfer of the suit property in favour of the plaintiff company by the defendant was recommended by the Director of Industries on 28.12.1997, if so its effect?OPP

3. Whether the plaintiff has always been ready and willing to perform its part of the contract ?OPP

4. Whether the suit is bad for non-joinder of necessary parties?OPD

5. Whether the suit is liable to be stayed in view of preliminary objection no.2 ?OPD

6. Whether the plaintiff is estopped from filing the present suit by its own act and conduct?OPD

7. Whether the agreement of sale dated 14.7.87 was cancelled by mutual consent in July, 1990 as alleged in the written statement?OPD

8. Whether afresh agreement was arrived at between the parties as alleged in the written statement if so its effect?OPD

9. Whether in the alternative, the plaintiff is entitled to recover an amount of Rs.8,50,000/- along with interest at the rate of 18% p.a. as alleged in the plaint? OPP

10. Whether the agreement dated 14.07.1987 cannot be enforced on account of the non-compliance of the stipulation for getting the permission to transfer the suit property from the defendant no.1 to the plaintiff from Estate Officer HUDA/OPD

11. Whether the agreement to sell dated 14th July, 1987 entered between the parties had become frustrated and could not be performed due to unforeseen contingencies?OPD

12. Whether the agreement to sell dated 14th July, 1987 (for short "said agreement), entered into between the plaintiff and the defendants was rescinded/novated in pursuance of the undertaking for the plaintiff agreeing to take the refund of the advance money Rs.2,00,000/- given by it to the defendants in pursuance of the said agreement?OPD

13. Whether the plaintiff had the knowledge of the encumbrances of the suit property under the deeming provisions of law?OPD

14. Whether the defendant company has validly entered into the agreement to sell dated 14th July, 1987?OPD

15. Whether the plaintiff has been liable for delay and latches to pursue the remedy of specific performance against the defendants, which disentitle it to claim the relief of specific performance of the said agreement in view of the facts and circumstances of the matter?OPD

16. Relief."

8. In order to prove its case, the plaintiff examined PW1-Manoj Kumar and produced various documents whereas the defendant examined DW1 Jai Singh, Clerk, DW2 Avinash Singh, DW3 Navnit Jhamb and the defendant K.K.Dabriwala as DW4. The defendant produced various documents in its evidence.

WRITTEN SYNOPSIS

8. In the written synopsis, learned senior counsel representing the appellant has proposed the following substantial questions of law:-

"1. Whether the first appellate court has omitted to read/misread/misinterpreted the material terms of the agreement to sell dated 14.07.1987.

2. Whether the learned appellate court has gone beyond the pleading of the matter while passing the impugned order on the issue of HUDA permission.

3. Whether the learned first appellate court has wrongly discarded the secondary evidence,

and violate the principles of Order XLI Rule 2 of the CPC by accepting the arguments not even the part of the ground of the appeal.

4. Whether the learned first appellate court has committed illegality by not accepting the secondary evidence of the documents, which was admitted by the plaintiff in Fahrist Destwaz, particularly of the letter dated 25.05.1990-26.05.1990.

5. Whether the suit was no maintainable due to the variance set up under Section 18c of the Act for the refund of money in terms of the agreement to sell.

6. Whether the agreement to sell was novated between the parties subsequently by the understanding of the refund of money.

7. Whether the first appellate court has failed the test of preponderance.

8. Whether the learned first appellate court has wrongly applied section 65 and 66 of the Indian Evidence Act while considering the secondary evidence and also not adhere to the law laid down by the Supreme Court in two judgment; namely *Rakesh Mohindra v. Anita Beri and Ors.* (2016) 16 SCC 483, *Dhanpat v. Sheo Ram (Deceased) through Lrs & Ors.* (2019) 16 SCC 209.

9. Whether the learned first appellate court has committed illegality in the test of determining the readiness and willingness test of the plaintiff in terms of law laid down by the Hon'ble Supreme Court in *Kamal Kumar v. Prem Lata Joshi & Ors* (2019) 3 SCC 704."

ARGUMENTS

(i) Learned senior counsel, while drawing attention of the court to the various clauses of the agreement to sell, has submitted that the agreement to sell could not be ordered to be specifically enforced because the Estate Officer of HUDA never gave the permission to transfer the property. While elaborating, he submits that the agreement to sell was not specifically enforceable, particularly, in view of the terms of the agreement between the parties.

The agreement to sell stood automatically cancelled in view of its terms. In the agreement to sell itself, it has been agreed that in case the suit property is subject to encumbrance then only the damages shall be payable. He relies upon the expression "if due to any reason" in the clause which reads as "due to any reason, if the permission is not issued in 90 days after the scheme letter then without mutual extension by the parties, the contract shall automatically stand cancelled" and hence, contends that in the present case, the money was liable to be refunded. He contends that the suit could only be filed if the permission was granted by the Estate Officer but despite that the defendant fails to register the sale deed in plaintiff's favour.

(ii) Additionally, it was submitted that as per the subsequent agreement, there is a variance in the original contract as the plaintiff agreed to accept refund of the earnest money along with interest.

(iii) It was also sought to be projected that the time was the essence of the contract and the first appellate court erred in granting decree for possession by way of specific performance of the agreement to sell after a period of 34 years.

(iv) The contract between the parties stood frustrated in terms of Section 56 of the Indian Contract Act, 1872 and therefore, the specific performance could not be ordered.

(v) In the absence of the pleadings to the effect that the defendant did not pursue the application for grant of permission to sell the plot with Haryana Urban Development Authority, the Court erred in recording a finding to that effect.

(vi) The first appellate has erred in setting aside the order of the trial court granting permission to the defendant to lead secondary evidence. He contends that in the absence of challenging the same in the grounds of appeal, the court could not set aside the said order.

(vii) The Court erred in passing a decree in accordance with the previous agreement to sell which stood superseded by a subsequent agreement.

(viii) He further contends that the plaintiff has failed to prove its readiness and willingness in terms of Section 16(c) of the Specific Relief Act, 1963, as the plaintiff did not produce the bank accounts to prove that the balance amount was available with the plaintiff.

(ix) He further contends that the plaintiff became party in the Company Court in the year 2006 but he never deposited the payment and therefore, the plaintiff was sleeping over his rights for a period of 11 years.

(x) Lastly, he contends that the first appellate court has failed to apply the rule of hardship before granting the decree for possession by way of specific performance of the agreement to sell. He submits that the management of the defendant-company has revived the company after discharging the debt of approximately 52 crores by making the payment of Rs.6 crores as One Time Settlement to the various secured and unsecured creditors. He further contends that the first appellate court has erred in looking into the conduct of the defendant before examining the conduct of the plaintiff itself.

FINDINGS

9. Let’s now proceed to analyze the various terms of the admitted agreement to sell. On harmonious construction of the various clauses which have been extracted above, it is apparent that the parties agreed to transfer the plot in question against a sum of Rs.8,50,000/-. No doubt, it is also provided that if the proposed vendor makes a default, then he shall be liable to pay damages. However, the aforesaid clause does not result in absolving the proposed vendor from specific performance through the court of law. At this stage, it shall be appropriate to extract Section 23 of the Specific Relief Act, 1963:-

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

(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."

10. It is apparent that a contract which makes a provision for liquidated damages itself does not result in excluding the remedy of the specific performance. Still further, on a con-joint reading of the various clauses of the agreement to sell, this Bench is of the considered view that the parties to the agreement intended to specifically enforce the agreement to sell through the court of law. In the agreement itself, it was provided that the vendee shall have the option to get the sale completed by filing a suit for specific performance of the agreement to sell. Thus, from the reading of the agreement to sell, the intention of the parties is categorically clear. Still further, learned senior counsel has laid stress on the expression "due to any reason" in the clause which reads as "due to any reason, if the permission is not issued in 90 days after the scheme letter then without mutual extension by the parties, the contract shall automatically stand cancelled." In the considered view of this Bench, such clause cannot be read in a manner to give undue advantage to the proposed vendor. If the permission has not been granted due to the fault of the proposed vendor himself, then he cannot be allowed to capitalize upon or take the benefit of such a default on his own part. Such clause has to be read in a proper perspective. Such an expression would only mean that if due to any reason beyond the control of the vendor, the permission to transfer the property is not granted, then the agreement will be cancelled. If any other meaning is assigned to the given expression, it will lead to a narrow construction giving unfair advantage to the proposed vendor which is against the object of the Specific Relief Act, 1963.

11. This matter can be examined from yet another perspective.

12. This expression cannot be read on a stand-alone basis, to the exclusion of the rest of the contract. The contract has to be read in its entirety to come to a just and logical conclusion. One part of the sentence cannot be read in isolation from others. While interpreting a contract, efforts are required to be made to harmoniously construe its various terms. The court is expected to gather the intent of the parties which they had while entering into the contract from the reading of the complete contract and is further expected to give effect to the contract in the light of such gathered intention, as a whole.

13. Similarly, there is no substance in the argument of the learned counsel that since the property is subject to encumbrance, therefore, the only remedy available with the plaintiff was to recover damages. It may be noted here that the learned senior counsel has over looked the various clauses of the agreement to sell. It is provided in the agreement itself that the vendor has assured that the property is free from all encumbrances.

14. Once that is the position, it is apparent that the vendor has misrepresented the vendee. Thereafter, the vendor cannot be permitted to turn around and claim that since the plot in question is encumbered, therefore, the vendee should be denied the right to specifically enforce the contract.

15. Similarly, there is also no substance in the argument of the learned counsel representing the appellant that the agreement to sell stood substituted by a subsequent agreement. It is apparent that no subsequent agreement has been produced. When Mr. K.K.Dabriwala appeared in evidence he admitted that there is no subsequent agreement between the parties and the plaintiff has not signed any subsequent agreement. No doubt, there are certain letters written by the broker calling upon the defendant to refund the amount. However, such communications send by the broker do not bind the plaintiff in the absence of any clear evidence that the plaintiff had consented to receive the refund of the amount. It is well settled that the subsequent agreement between the parties has to either be in writing or if made orally, it is required to be proved. The plaintiff has not written any communication calling upon the defendant (Appellant) to refund the amount. Still further, the defendant has examined Navneet Jhamb son of late Sh. O.P.Jhamb. The broker was late Sh. O.P.Jhamb. Navneet Jhamb has not stated that the plaintiff agreed to receive the refund of the earnest money with interest. In such circumstances, bald statement of Sh. K.K.Dabriwal is not sufficient to conclude that there was any subsequent agreement.

16. This bench also does not find any substance in the next argument of the learned counsel that no decree should have been passed after of period of 34 years. It is important to note that the plaintiff filed the suit within a period of less than 2 years. Thereafter, at the first instance exparte decree was passed in favour of the plaintiff. Subsequently, the matter got delayed due to the defaults committed by the defendant and the plaintiff has not contributed in the same. Furthermore, the First appellate Court, in order to balance the equities, has already ordered the plaintiff to pay a sum of Rs. 65,00,000/- in place of Rs. 6,50,000/- which was due and payable as per the agreement to sell.

17. Similarly, there is also no substance in the argument of the learned senior counsel that in view of the provision of Section 56 of the Indian Contract Act, 1872, the agreement to sell stood frustrated after the attachment of the property by the Income Tax Department on 08.02.1989.

18. At this stage, it is important to notice Section 56 of the Indian Contract Act, 1872, which reads as under:-

56. *Agreement to do impossible act.—An agreement to do an act impossible in itself is void.* —An agreement to do an act impossible in itself is void." Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.1 —A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. 2″

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise. —Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void. (a) A agrees with B to discover treasure by magic. The agreement is void."

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void. (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void."

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise. (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise."

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

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(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void."

19. Section 56 of the Indian Contract Act, 1872, has been interpreted to mean that if the agreement become impossible, only then it will become void. In the present case, the performance of the agreement to sell has not become impossible. No doubt, the plot in question at one stage was under attachment and charge, however, that itself does not result in frustration of the contract. The word "impossibility" to act as per the terms of the

agreement, cannot mean that if the performance of the contract becomes onerous for one party, then it leads to impossibility. There is a difference between onerous liability and impossibility. The present case falls in the category of onerous liability and does not fall in the category of an impossible act. Moreover, the specific performance of the agreement to sell cannot be denied to the plaintiff only on the ground that the defendant has failed to obtain the permission to transfer. From the facts available on record, it is apparent that after the attachment of the property by the Income Tax Department, the defendant did not pursue its request for grant of permission to transfer made to the Estate Officer, HUDA. A careful reading of Section 56 of the Indian Contract Act, 1872, it is apparent that the contract to do act impossible would fall within the definition of Section 56 of the Indian Contract Act, 1872, only, if the contract after it has been made becomes impossible or by reason of some event which the promisor could not prevent becomes unlawful. In the present case, the conditions as laid under Section 56 of the Indian Contract Act, 1872, do not stand fulfilled.

20. Hence, Section 56 of the Indian Contract Act, 1872, has no application.

21. Even otherwise, such an impossibility must not arise due to the fault of the party itself. To fall in the ambit of Section 56 of the Indian Contract Act, 1872, such an impossibility must be beyond the contemplation of the parties at the time of making the contract and be independent of their conduct. However, in the present case, the defendant is clearly in default.

22. The next argument of learned senior counsel that once the terms of the contract are clear, the court can do little about it, is also without substance because the various terms of the contract clearly lead the court to a conclusion that the parties intended to specifically perform the contract through the Court of law.

23. The next argument of the learned counsel also does not hold any ground. It is apparent from the reading of Order 6 Rule 2 CPC that only the facts are required to be stated in a concise manner in the pleadings and neither the evidence nor the arguments are required to be stated therein. In the present case, from the reading of the plaint, it is apparent that due to the fault of the defendant the required permission from the HUDA has not been received. The reason for such failure on the part of the vendor was not required to be pleaded. Furthermore, there is also no substance in the arguments of the learned counsel that since no permission was received within a period of 90 days, therefore, the agreement to sell stood automatically cancelled. On a careful reading of the various terms, it is apparent that the parties were conscious of the chances of delay in receiving the permission and therefore, a specific provision for extension of the period was itself made in the contract. It may be noted here that the period of 90 days was only a tentative time fixed for performance from the date of issuance of the scheme letter. It is nowhere provided in the agreement that if the permission to transfer is not received within a period of 90 days from the date of issue of the scheme letter, the agreement shall be terminated.

24. The next argument of the learned senior counsel is with respect to the order passed by the first appellate court setting aside the order passed by the trial court which permitted

the defendant to lead secondary evidence.

25. Learned senior counsel quite passionately submits that the first appellate court has erred in passing such an order. It may be noted here that the first appellate court has found, as a matter of fact, that neither the defendant nor his counsel signed the application for permission to lead the secondary evidence. In the considered view of this Bench, this aspect can be examined from a different perspective as well. It may be noted here that even if that part of the order passed by the first appellate court is ignored, still it is apparent that the defendant has failed to prove that there was any subsequent agreement which resulted in variance of the original terms. It may be noted here that the first appellate court as well as this Court has considered the evidence which is sought to be produced by way of secondary evidence and it is observed that the aforesaid documents or evidence sought to be produced does not improve the case of the defendant.

26. In such circumstances, it is not appropriate for the Court to enter into a purely academic discussion.

27. The next argument of learned counsel is with regard to the absence of challenge to the order of the trial court granting permission to lead secondary evidence in its grounds of appeal filed before the First Appellate Court. As already noticed, the discussion is purely academic. Order 41 rule 2 CPC, no doubt, requires the appellant to assert all the grounds in the memorandum of appeal relied upon by the appellant. However, this is not the end of the matter. The appellant can be permitted to urge a point at a subsequent stage after taking the leave of the Court.

28. Such a bar does not apply to the Court in view of the discretionary powers explicitly given to it. Order 41 Rule 2 CPC is extracted as under:-

Order 41 Rule 2 CPC

2. *Grounds which may be taken in appeal.*—The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

Keeping in view the aforesaid facts, no further elaboration is required.

29. The next argument of the learned counsel is with regard to the non-enforcement of the contract except with variance. Once the defendant has failed to prove any subsequent contract which result in variation of the original terms of the agreement then Section 18 shall have no application.

30. The next argument of learned counsel is with regard to the plaintiff having failed to prove its readiness and willingness. It may be noted here that the defendant has failed to draw the attention of the court to any default committed by the plaintiff. The plaintiff, on receipt of the communication, applied for permission to set up the industry to the Director of Industries along-with the project report, which was granted in January, 1988. Upon receiving the permission, the plaintiff requested the defendant to get the permission to transfer the property from the Estate Officer, HUDA. Thereafter, the plaintiff has been requesting the defendant to perform its part of the contract. The plaintiff also sent notices to the defendant on 08.03.1990 and 12 03.1990. Thereafter, the plaintiff filed a suit while specifically asserting that the plaintiff was already ready and willing to perform the contract. In such circumstances, it cannot be said that the plaintiff was not ready and willing. The learned counsel has further submitted that even after the ex-parte decree, the plaintiff did not deposit the amount. It may be noted here that the plaintiff would have deposited the amount if the defendant-company had not gone into liquidation before the decree was passed.

31. The Learned counsel has relied upon the judgment passed by the Supreme Court in *Kamal Kumar v. Prem Lata Joshi* [1] (2019) 3 SCC 704. This Bench has carefully read the judgment. The Supreme Court while dismissing the appeal filed by the plaintiff, held that the court should not interfere with the concurrent findings of fact arrived at by the Courts below and once it is proved that the plaintiff was neither ready nor willing to perform his part of the contract, then the decree for specific performance should not be granted. With the greatest respect, the aforesaid judgment has no application to the facts of the present case.

32. The next argument of the learned counsel is with respect to Section 16(c) of the Specific Relief Act, 1963, which is extracted as under:-

Section 16(c):-

(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 over performance of, or readiness and willingness to perform, the contract according to its true construction.

33. It is apparent that Section 16(c) of the Specific Relief Act, 1963, requires the plaintiff to prove that he has always been ready and willing to perform the essential terms of the contract which are required to be performed by him. Explanation to clause (c) of the Specific Relief Act, 1963, clearly provides that it is not essential for the plaintiff to actually

tender to the defendant or to deposit in court any amount except when so directed by the court. In the present case, the plaintiff has asserted that he has always been ready and willing to perform his part of the contract.

34. Thereafter, the plaintiff has been regularly requesting the defendant to perform its part of the contract. The plaintiff applied to the Director of Industries with the project report proposed to be set up on the industrial plot which was also permitted within reasonable time. Thereafter, the plaintiff called upon the defendant to seek permission of the authority for transfer of the property. It is the defendant who failed to get the permission to transfer.

35. Furthermore, the plaintiff proved his readiness and willingness by sending two notices before filing the suit. Still further, when Manoj Kumar appeared on behalf of the plaintiff, he specifically deposed that the plaintiff-company has always been ready and willing to perform the essential terms of the contract. The learned First Appellate Court, on appreciation of the evidence, has found that the plaintiff has always been ready and willing to perform his part of the contract. The learned counsel has failed to draw the attention of the court to any perversity in the aforesaid finding.

36. Additionally, once the Division Bench, in a company appeal in a inter parties litigation, had directed the parties to get the matter adjudicated from the Civil Court, the defendant cannot be permitted to submit that the plaintiff did not deposit the amount after the ex-parte decree and hence, the relief of specific performance should be denied.

37. Moreover, the learned first appellate court has noticed that it was the defendant who committed numerous defaults in the performance of its legal obligations. In such circumstances, the aforesaid default cannot visit the plaintiff with adverse consequences. The learned senior counsel representing the appellant has failed to draw the attention of the court to any error in the aforesaid finding of the first appellate court.

38. The next argument of the learned counsel is with regard to the test of hardship in terms of Section 20 of the Specific Relief Act, 1963. It has been highlighted that the management of the defendant-company has discharged its liabilities by making payment under One Time settlement to the extent of 6 crores to various secured and unsecured creditors. In this regard, it may be noted that the plaintiff has acted bonafidely and in good faith and has not committed any default. The fault squarely lies upon the defendant. Therefore, the test of hardship has to be applied in the context of entitlement of the plaintiff. It is clear from the aforesaid discussion that the defendant has failed to draw the attention of the court to any default committed by the plaintiff. Furthermore, the learned trial court has already directed the plaintiff to pay the amount of Rs.65,00,000/- i.e. 10 times of the balance payment as per the agreement to sell. In these circumstances, this Bench is of the considered view that the defendant has failed to make out a case for denying the relief of specific performance to the plaintiff.

39. In view of the aforesaid discussion, finding no merit, the appeal is ordered to be dismissed in limine.

R.M.S. – *Appeal dismissed.*