

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	15.10.2019
Judgment pronounced on	26.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P.Nos.698 and 711 of 2012

- 1.A.Murugan
- 2.Mr.Venkatachalam Ramakrishnan
- 3.Mrs.Alamelu Chandrasekaran @ Geetha
- 4.Ms.Neha Krishnan

... Petitioners
(in O.P.No.698 of 2012 and
Respondents 2 to 5 in
O.P.No.711 of 2012)

Vs.

- 1.M/s.Rainbow Foundation Ltd,
Anoop Chand Jain,
No.12, South Usman Road,
T.Nagar, Chennai – 600 017.

... 1st Respondent
(in both O.Ps.)

- 2.Baba Shankar

... 2nd Respondent in O.P.No.
698 of 2012 and Petitioner
in O.P.No.711 of 2012)

- 3.P.Dinesh Kumar

... 3rd Respondent in O.P.No.
698 of 2012 and
6th Respondent in O.P.No.
711 of 2012)

- 4.Hon'ble Mr. Justice D.Raju(retd)

... 4th Respondent in O.P.No.
698 of 2012 and 7th
Respondent in O.P.No.
711 of 2012)

Prayer in O.P.No.698 of 2012:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 20.08.2012 passed by the Arbitrator.

Prayer in O.P.No.711 of 2012:- Original Petition is filed under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the Award dated 20.08.2012 passed by the Arbitrator.

For Petitioners : Mr.T.V.Ramanujam,
Senior Counsel, Assisted by
Mr.D.Sai Ram Kumar
(in O.P.No.698 of 2012)

For Petitioner : Mr.E.Sathishkumar
(in O.P.No.711 of 2012)

For Respondents : Mr.R.Thiagarajan
Mrs.Vasudha Thiagarajan
(For R1 in both Ops.)

Mr.E.Sathishkumar
(For R-2 in O.P.No.698 of 2012)

M/s.Shah and Shah
(For R-3 in O.P. 698 of 2012 and
R-6 in O.P.No.711 of 2012)

COMMON ORDER

The first respondent in the arbitration is the Petitioner in O.P. No.711 of 2012 whereas the 2, 3, 4 and 5th respondents therein are the Petitioners in O.P. No.698 of 2012. Both the O.P.'s are filed to set aside the Award dated 20.08.2012 and, therefore, they are disposed of by this common order.

2. I heard the learned Senior Counsel, Mr.T.V.Ramanujam, on behalf of the Petitioners in O.P.No.698 of 2012 and Respondents 2 to 5 in O.P.No.711 of 2012, Mr.R.Thiagarajan, the learned counsel for the first respondent in both O.P.'s and Mr.Shah, the learned counsel for the 3rd Respondent in O.P. No.698 of 2012 and 6th Respondent in O.P. No.711 of 2012. For the sake of convenience, the Petitioner in O.P. No.711 of 2012 is referred to individually as Vendor No.1 and the Petitioners in O.P. No. 698 of 2012 are referred to as Vendors No.2. They are collectively referred to as the Vendors. Similarly, the first Respondent in both O.P.'s is referred to individually as the Purchaser company and the 3rd Respondent in O.P. No.698 of 2012 and 6th Respondent in O.P. No.711 of 2012 as Purchaser No.2. They are referred to collectively as the Purchasers.

3. The subject matter of the dispute is an Agreement of Sale dated 08.06.2006 (the Agreement) between the Petitioners in the two O.P.'s as the Vendors, on the one hand, and M/s.Rainbow Foundations Ltd and Mr. P. Dinesh Kumar as the Purchasers, on the other. As per the terms of the Agreement, the Vendors agreed to sell and the Purchasers agreed to purchase the property described in the schedule thereto for a total sale consideration of Rs.5 crores. Out of the said total sale consideration, it is the admitted position that a sum of Rs.1 crore was paid by the Purchasers by demand drafts dated 08.06.2006. The Agreement further provided

that the Purchasers agree to pay the balance sale consideration of Rs.4 crores on or before the date of registration of the sale deed or within 30 days from the date of the Agreement, whichever is earlier. As per clause 11 of the Agreement, time is of the essence of the contract and in the event of non payment of sale consideration, the Agreement will not be kept subsisting after 7th July 2006. According to the Vendors, the Purchasers did not pay the balance sale consideration within the stipulated 30 day period and instead requested for an extension of time. Therefore, by a telegram dated 08.07.2006, the Agreement was terminated by the Vendors and the Purchasers were directed to take a refund of the advance amount. This was followed by a lawyer's notice dated 09.07.2006, wherein the Purchasers were informed about the termination of the Agreement and the advance amount of Rs.1 crore was refunded after forfeiting 25% thereof as per the terms of the Agreement. On the other hand, the case of the Purchasers is that they met the Vendors on 05.07.2006, 06.07.2006 and 07.07.2006 and offered to pay the balance sale consideration by two cheques dated 07.07.2006 for a sum of Rs.55,00,000/- and Rs.3,45,00,000/- respectively and that the Vendors refused to receive the cheques on the ground that they were in the midst of a pooja and that, therefore, the transaction could be concluded later. The Purchasers further stated that on 07.07.2006, they prepared and endeavoured to hand over a sale deed to be executed by Vendors No. 2

and a power of attorney to be executed by Vendor No.1. Thus, a dispute arose between the parties and in these facts and circumstances, after exchanging notices through lawyers, the arbitration clause in the Agreement was invoked and arbitration proceedings were initiated by the Purchasers under the Agreement seeking specific performance of the Agreement. In the said Arbitration, after pleadings were completed, the learned Arbitrator framed issues and each of the parties adduced both oral and documentary evidence. The Purchasers adduced evidence through three witnesses and filed documents, which were exhibited as Exhibits C1 to C16. The Vendors adduced evidence through six witnesses and filed documents, which were exhibited as Exhibits R1 to R23. Upon consideration of the pleadings, evidence and oral arguments, the learned Arbitrator held that the Purchasers are entitled to specific performance of the Agreement upon payment of the balance sale consideration of Rs.4 crores to the Vendors within two months from the date of the Award and directed the Vendors to execute and register the sale deed/power of attorney in favour of the Purchasers or their nominees within 10 days from the receipt of the balance sale consideration. As regards Purchaser No. 2, Mr.P.Dinesh Kumar, the parties were permitted to resolve the inter se issue as between them. The said Award dated 20.08.2012 is impugned herein by this Petition under Section 34 of the Arbitration and Conciliation Act,1996 (the Arbitration Act).

4. Mr.T.V.Ramanujam, the learned senior counsel, opened his submissions by stating that the main issue to be decided is whether the Agreement (Ex.C1) is specifically enforceable. In this regard, he first referred to the Agreement and, in particular, clause 3 thereof which specifies the time limit of 30 days from the date of the Agreement. After advertng to the said time limit, he pointed out that the 30 day time limit expired on 07.07.2006, if calculated from the date of execution of the Agreement, namely, 08.06.2006. On account of the default by the Purchasers in paying the balance sale consideration on or before 07.07.2006, he pointed out that a telegram(Ex.R5) was issued on 08.07.2006. With regard to the contention of the Purchasers that cheques were handed over for the balance sale consideration, he submitted that the said statement is false and, in this connection, he also submitted that there is no evidence as to when and how the said cheques were offered to the Vendors. By referring to the notice dated 09.07.2006(Ex.C6) from the counsel for the Purchasers to the Vendors, he pointed out that the alleged cheques are not referred to in the said notice although the cheques are dated 2 days earlier to the date of the notice thereby indicating that cheques were not handed over. He, thereafter, referred to the notice dated 09.07.2006 from the lawyer for the Vendors to the Purchasers and pointed out it was categorically stated therein that the Agreement is terminated by virtue of the notice and that

the Vendors are forfeiting 25% of the advance amount and refunding a sum of Rs.75 lakhs by way of two cheques for Rs.37,50,000/- each. He also referred to the subsequent notice dated 13.07.2006 (Ex.C8) from the Purchasers' lawyer and pointed out as to how the said rejoinder notice also does not refer to the alleged cheques dated 07.07.2006. In any event, he submitted that the Purchasers did not submit their bank account details to prove that they had Rs.4 crores in their bank account at the relevant point of time. Instead, the Purchasers relied upon a certificate dated 28.01.2009 from the Catholic Syrian Bank Ltd.(Ex.C12) evidencing that they had an overdraft facility for a sum of Rs.4,85,00,000/- as on 06.07.2006. According to the learned senior counsel, it is not sufficient to produce evidence that the Purchasers had an overdraft facility, especially in the absence of any evidence with regard to the total liabilities of the Purchasers. In addition, he submitted that the contractual requirement was to remit the balance sale consideration on or before 07.07.2006 and not merely produce cheques dated 07.07.2006 at a later point of time.

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5.After referring to the above mentioned documents, the learned senior counsel turned his attention to the impugned Award. In particular, he pointed out that the learned Arbitrator considered the question as to whether time is of the essence of the contract and recorded

a definitive finding that time is of the essence of the contract in view of the categorical stipulation, in that regard, in clause 11 of the Agreement. Notwithstanding the said conclusion, he pointed out that the learned Arbitrator relied upon irrelevant evidence so as to decide the case against the Vendors. In specific, he referred to the findings with regard to Ex.R9, which is a letter from the broker of the Vendors stating that the Purchasers had requested for additional time to pay the balance sale consideration. The learned senior counsel pointed out that the learned Arbitrator accorded undue importance to this document and concluded that it is a fabricated document and that it cannot be relied upon. He further submitted that the learned Arbitrator also recorded findings with regard to the evidence of RW-2 by referring to and relying upon the answers given to questions that do not have a material bearing on the case. In specific, the learned senior counsel pointed out that the learned Arbitrator referred to the answers of RW-2 to several questions, which are specified at paragraph 12(d) of the Award, in order to conclude that the evidence of RW-2 cannot be relied upon because he gave evasive answers. He, thereafter, pointed out as to how the learned Arbitrator entered the patently erroneous finding that the 30 day limit is only for the payment of balance sale consideration and not for the registration of the sale deed and, that, therefore, the Vendors could have registered the sale deed after encashment of the cheques. In this connection, he submitted

that the learned Arbitrator erroneously accepted the version of the Purchasers that cheques dated 07.07.2006 were attempted to be handed over to the Vendors although there was no corroborating evidence.

6. With regard to the Purchaser No.2, namely, Mr.P.Dinesh Kumar, the learned senior counsel submitted that there is a categorical finding that he received a refund of the amount paid by him as advance along with compensatory payment and that in spite of the same, the learned Arbitrator patently erred in awarding specific performance of a contract wherein one of the intending purchasers had admittedly taken a refund of advance and decided not to seek specific performance.

7. In a nutshell, the submissions of the learned senior counsel were that the learned Arbitrator had disregarded vital evidence, namely, the fact that the notices dated 09.07.2006 and 13.07.2006 did not refer to the alleged cheques at all and also that the learned Arbitrator relied upon irrelevant evidence so as to conclude that the Purchasers were entitled to specific performance. He also referred to and relied upon the judgments that are set out below:

(i) **Sumitomo Heavy Industries Ltd. vs. ONGC (2010) 11 SCC 296**, wherein, at paragraph 42, it was held that a perverse finding is one

based on no evidence or one that no reasonable person would have arrived at.

(ii) **Kumari Anandan vs. Dr. T. Balamukunda Rao 2002 (3) CTC 462**, wherein, at paragraphs 23 and 25, a Division Bench of this Court held that, in an action for specific performance, the plaintiff should establish its case and cannot succeed based on weaknesses in the defendant's case.

(iii) **Associate Builders vs. DDA (2015) 3 SCC 49 (the Associate Builders case)**, wherein the grounds for interference with an arbitral award were elucidated.

8. In response, Mr.R.Thiagarajan, the learned counsel submitted that the settled legal position is that time is not of the essence of an agreement of sale relating to immovable property. In this connection, he referred to and relied upon the judgment of a Five Judge Bench of the Hon'ble Supreme Court in **Chand Rani (SMT) (Dead) by L.R.s. vs. Kamal Rani (Smt) (Dead) by L.R.s (1993) 1 SCC 519 (the Chand Rani case)**. His next submission was that the Specific Relief Act, 1963 (the Specific Relief Act) and, in particular, the explanation to Section 16(c) thereof makes it clear that it is not necessary for the purchasers to make payment and that as long as the purchasers demonstrate that they were ready and willing and had the wherewithal to pay, they are entitled to

specific performance. His next submission was that the Vendors did not act in good faith and that this is evidenced by the execution of a Sale Deed dated 09.02.2009 in favour of the son of Vendor No.1, Mr.Baba Shankar, for the nominal sale consideration of Rs.20 lakhs and by the execution of a Settlement Deed dated 09.03.2009, once again, in favour of the said Rajesh Shankar, son of Baba Shankar. In other words, his submission was that the said transactions were entered into with the mala fide intention of defeating the legitimate rights of the Purchasers under the Agreement. In this regard, he submitted that the conduct of parties is an important factor to be considered in proceedings for specific performance. He also referred to the notice dated 09.07.2006(Ex.C7) and pointed out as to how the date of the said notice had been tampered with. He further submitted that the Purchasers had established that they had the capacity to pay the balance sale consideration on 07.07.2006 by providing a certificate from their bank, namely, the Catholic Syrian Bank Ltd., wherein it was stated that they had overdraft facilities to the extent of Rs.4,85,00,000/- as on 06.07.2006. He also referred to the Panjangam in respect of the relevant period to point out that 05.07.2006 and 06.07.2006 were inauspicious days for the conclusion of a transaction. He further submitted that the Agreement, in this case, is indivisible and although Purchaser No. 2 attempted to settle the matter with the Vendors, the other purchaser is entitled to specific performance. He also referred

to Ex.R19, which is a letter dated 22.12.2006 from Mr. P.Dinesh Kumar, Purchaser No.2, and pointed out as to how the said document mentions the address of the sender, namely, P.Dineshkumar, wrongly and he contended that this shows that the document is fabricated. He also referred to Ex.R9, which is the letter dated 05.07.2006 from the vendor's broker, and pointed out that this document has been created for the purposes of the case and was rightly rejected as unreliable and fabricated by the learned Arbitrator. He also referred to the alleged receipt issued by Purchaser No.2, namely, Mr.P.Dinesh Kumar(Ex.R16), and pointed out as to how the alleged execution of the said receipt was witnessed by the Vendors' broker and by the wife of Baba Shankar and that, therefore, the said document cannot be relied upon. He also referred to Ex.R20, which is a letter from Canara Bank to Mr. Baba Shankar, Vendor No.1, with regard to the fixed deposit accounts as on 09.07.2006 and pointed out that the said document had also been created for the purpose of the case.

9.He, thereafter, referred to judgments in support of the contention that specific performance is the rule and that payment of damages is the exception. He also referred to several judgments with regard to the limited scope of Section 34 of the Arbitration Act. The judgments that were referred to and relied upon by Mr.R.Thiagarajan are set out below along with context and principle:

(i) **G. Jayashree vs. Bhagwandas S. Patel (2009) 3 SCC 141**, wherein, at paragraphs 26 and 29, it was held that a contract may be enforced by a joint promisee even if the other joint promisee entered into a compromise.

(ii) **I.S. Sikandar vs. K. Subramani (2013) 15 SCC 27 (the Sikandar case)**, wherein, at paragraphs 37 and 38, the Hon'ble Supreme Court held that a suit for specific performance of a terminated agreement for sale was not maintainable without seeking a declaration that the termination was unlawful.

(iii) **A. Kanthamani vs. Nasreen Ahmed (2017) 4 SCC 654 (the Kanthamani case)**, wherein, at paragraphs 24-26, the Hon'ble Supreme Court held that it is not necessary to produce the money or cash to prove readiness and willingness.

(iv) **Himayam Engineers and Builders vs. S. Ravichandran MANU/TN/2768/2017**, wherein, at paragraph 36, this Court ordered specific performance of a development agreement notwithstanding the purported termination thereof.

(v) **Dharampal Satyapal Ltd. vs. Sanmati Trading and Investment, C.S. No.320 of 2006, Judgment dated 18.03.2014**, wherein, at paragraph 20, the Delhi High Court held that the subsequent sale at a lower price was intended to defeat the legitimate claim of the plaintiff therein.

(vi)**Kushal Infraproject Industries India Ltd. vs. Dalel Singh , C.S. No. 2170 of 2013, Judgment dated 31.05.2019**, wherein , at paragraphs 16 and 18, the Delhi High Court held that the suit for specific performance is maintainable even in the absence of a prayer for declaration that the termination is bad in law.

(vii)**V.S.Ekambaram, Proprietor, Sangupani Fuels vs. Sri Krishna Tiles and Potteries(Madras) Pvt Ltd. (2017) 5 CTC 420**, wherein, at paragraph 6(xii), a Division Bench of this Court held that a petition under Section 34 of the Arbitration Act is a challenge to the award and not an appeal.

(viii)**Madras Port Trust vs. S & S Enviro Technologies Ltd. (2018) 3 CTC 337**, wherein a Division Bench of this Court considered the law in respect of challenges to arbitral awards and declined to set aside an award of loss of profits.

(ix)**Projects Director, Tamil Nadu Road Sector Project II, Chennai vs. RNS Infrastructure Ltd - GPL (JC) (2018) 2 CTC 593**, wherein the principles relating to interference under Section 34 of the Arbitration Act were considered.

(x)**Interbulk Trading SA vs. Adam and Coal Resources Private Limited (2017) 2 CTC 491**, where this Court held that only where fraud or compromised integrity is established or the award is

plainly erroneous and against the stated position of law, it should be set aside.

(xi) **Marg Limited vs. Van Oord Dredging & Marine Contractors BV and others (2018) 6 CTC 609**, where a Division Bench of this Court held, in paragraph 19, that the award could not be interfered with because there was no error apparent on the face of the record, perversity, patent illegality or violation of public policy.

10. The learned counsel, thereafter, referred to the Award. In particular, he pointed out as to how the learned Arbitrator duly considered the relevant evidence such as Ex.R16, Ex.R19, Ex.C13 and Ex.C14 and recorded findings with regard thereto. He further submitted, in conclusion, that the Purchasers had complied with all requirements of Clause 11 of the Agreement and that, therefore, they are entitled to specific performance.

11. Mr.Shah, the learned counsel for Mr.P.Dinesh Kumar, made submissions after Mr. Thiagarajan. He submitted that the cheques were not ante-dated by referring to Paragraph 9 of the reply of Mr.Baba Shankar. He further submitted that the contents of the Vendors' lawyer's notice dated 09.07.2006 to the effect that the Purchasers met the Vendors on 07.07.2006 and 08.07.2006 contradicts the conduct of the

Vendors in issuing a telegram at 12.00 noon on the same date terminating the Agreement. With regard to the receipt issued by Mr.Dinesh Kumar, namely, Ex.R16 dated 04.12.2006, he submitted that he does not deny the signature or the fact that a sum of Rs.37,50,000/- was received by his client but denies the execution of the said document.

12.By way of rejoinder submissions, the learned senior counsel, Mr.T.V.Ramanujam, pointed out that Mr.Baba Shankar filed an affidavit dated 28.01.2007 in M.P.No.1 of 2007 in O.S.A. No.223 of 2006(Ex.R2), wherein it was categorically stated that Mr.Dinesh Kumar had colluded with the Vendors and had received a sum of Rs.37,50,000/- in order to scuttle the purchase of the property as per the Agreement. The learned senior counsel pointed out that Ex.R2 was a vital piece of evidence, which was disregarded by the learned Arbitrator. Moreover, he submitted that the learned Arbitrator did not take into consideration the implication of clause 11 of the Agreement which categorically stipulates that the Agreement would not subsist if the balance sale consideration is not paid on or before 07.07.2006. He further submitted that as per Section 14 of the Specific Relief Act, a contract, which is in its nature determinable, cannot be specifically performed or enforced and that the Agreement is determinable in nature. He also pointed out that the Purchasers did not contend that clause 11 is void. In this regard, he

referred to and relied upon the judgment of the Hon'ble Supreme Court in **Indian Oil Corporation Ltd. vs. Amritsar Gas Service (1991) 1 SCC 533 (the Indian Oil case)**. He concluded his submissions by pointing out that there was no evidence that the sale deed or power of attorney were produced or handed over to the Vendors but the Arbitral Tribunal proceeded on such erroneous assumptions and recorded perverse findings.

13.The records were examined and the oral submissions of the parties were carefully considered. The principal question that arises for consideration is whether the Purchasers are entitled to specific performance and, consequently, whether the Award which directs specific performance of the Agreement is liable to be set aside. In order to answer this question, it is necessary to examine the Agreement closely. In particular, it is necessary to examine two clauses of the Agreement, namely, clauses 3 and 11, which are set out below:

"3.The purchasers doth hereby agree to pay the balance of Rs.4,00,00,000/- (Rupees Four Crores only) on or before the date of Registration of Sale Deed or within 30 days from the date of this agreement whichever is earlier.

11.Time is the essence of this contract. In case of default due to any reason whatsoever the VENDORS have the right to forfeit 25% of the

advance amount paid by the PURCHASERS and return the balance without interest and terminate the agreement. In any event the agreement will not be kept subsisting after 7th July 2006 and if it is not concluded by then only the issue of refund of advance and nothing else. Both the parties agree to this Agreement.”

14. On examining the above mentioned two clauses, it is evident that time is of the essence of the Agreement. In fact, the parties have not merely specified that time is of the essence of the Agreement, they have further specified in clause 11 that the Agreement will not be keep subsisting after 07.07.2016, if it is not concluded by then, and that only the issue of refund of advance would remain. This is an unequivocal expression of the intention of the parties to enable the termination of the Agreement if the sale is not consummated on or before 07.07.2006 and satisfies the test in the **Chand Rani case**, at paragraph 19, that the intention to make time of the essence should be expressed in unequivocal language. In fact, the learned Arbitrator also concluded that time is of the essence of the Agreement by analyzing Clause 11 at paragraph 9(e) of the Award.

15. In light of the above clause, can it be concluded that the Agreement is a contract, which is in its nature determinable? If the

Agreement is a contract, which is in its nature determinable, as per Section 14 of the Specific Relief Act, the Agreement cannot be specifically enforced. The Specific Relief Act, 1877 (SRA 1877) had an analogous provision, Section 21(d), albeit the word "revocable" was used therein instead of the word "determinable". In **Pravudayal Agarwala v. Ramkumar Agarwala AIR 1956 Cal 41**, a Division Bench of the Calcutta High Court held that a partnership at will is a contract, which is in its nature revocable, as per Section 21(d) of SRA 1877 and, therefore, not specifically enforceable. Similarly, an agreement for sale that contained a clause for re-conveyance was held, in **Jamahir Sao v. Satrughna Sonar, AIR 1961 Pat 482**, to be a contract which is in its nature revocable. In effect, all contracts that were inherently revocable or determinable at the volition of one party, such as partnerships at will, licences, etc. were considered to be contracts that were revocable by nature and, therefore, not specifically enforceable under SRA 1877. Did this position change under the Specific Relief Act especially with the replacement of the word "revocable" by the word "determinable" and, if so, to what extent? In the **Indian Oil case**, the Hon'ble Supreme Court held that a dealership agreement that could be unilaterally terminated by either party with a 30 day notice, as per clause 28 therein, was a contract, which is in its nature determinable, and therefore, not specifically enforceable. However, in the said case, clause 27 of the

contract, which provided for breach-based forthwith termination, was held to be invalidly resorted to by the arbitral tribunal and this was interfered with on the basis of clause 28 as would be evident from the following extract from paragraph 14 thereof:

".... However, the arbitrator having held that clause 27 was not available to the appellant-corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revocable by either party in accordance with clause 28 by giving 30 days' notice, the only relief which could be granted was the award of compensation for the notice period, that is 30 days...."

In **Rajasthan Breweries Limited vs. The Stroh Brewery Company** **2000 (55) DRJ (DB)**, a Division Bench of the Delhi High Court followed the **Indian Oil case** and relied upon G.H. Trietel on the "The Law of Contracts", 6th Edition, where it is stated that specific performance would not be ordered "if the party against whom specific performance is sought is entitled to terminate the contract." On the above bases, the Delhi High held that even a contract that was terminable for cause would qualify as a contract, which is in its nature determinable, and, therefore, not specifically enforceable. This was, nonetheless, a case of a licence to produce a brand of beer. By contrast, in a later decision of the Division

Bench of the Delhi High Court in **Upma Khanna vs. Tarun Sawhney and others 2012 SCC Online Del 2716**, it was held that contracts, which are terminable for cause or on fault basis, are not contracts, which are determinable in nature. A Division Bench of this Court considered the issue in **Indian Oil Corporation Ltd. vs. Bhagawan Balasai Enterprises, (2018) 2 Mad LJ 275**, and held that a contract that enables termination, without assigning reasons, is determinable in its nature by following the ratio of the **Indian Oil case**.

16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically unenforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable: (i) contracts that are unilaterally and inherently revocable or capable of being

dissolved such as licences and partnerships at will; and (ii) contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable forthwith for cause or that cease to subsist "for cause" without provision for remedying the breach would constitute a third category. In my view, although the **Indian Oil case** referred to clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier. Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination.

17. In this case, there is no doubt that the balance sale consideration was not received by the Vendors on or before 07.07.2006. Clause 11 of the Agreement stipulates that if there is default for any reason whatsoever, the Vendors would have a right to terminate the Agreement and that it would cease to subsist after 07.07.2006. This Clause discloses that the Agreement is determinable for cause forthwith and also ipso facto. Consequently, it would fall within the third category of contract, as per the discussion in the preceding paragraph, and is not determinable by nature. Nonetheless, the relative ease of determinability and the facts and circumstances relating to termination would be relevant and material factors in deciding on the validity of the Award. The learned Arbitrator took note of Clause 11 and its implications by stating, inter alia, as under in paragraph 9(e) of the Award:

" the parties seem to have consciously and positively while stipulating the time for completion of the transaction by paying the balance sale consideration within 30 days, unmistakably and categorically provide for the consequences of non payment as well **by putting an end to the transaction itself leaving thereafter in issue only the question of refund of advance and nothing else.** (emphasis added). *Consequently, in my opinion, time has been stipulated by the parties to be the essence of the transaction, in so far as it related to payment of the balance of consideration*

though not for the completion of it by registration also.” (italics added).

Clause 11 of the Agreement should be read with Clause 3 thereof, which provides that payment of the balance sale consideration should be made “on or before the date of registration of the Sale Deed or within 30 days from the date of this Agreement whichever is earlier.” When the above extract from the Award is examined in light of Clauses 3 and 11, it is evident that the conclusion, in bold, that the parties intended to put an end to the transaction if not concluded by 7th July 2006 leaving only the issue of refund of advance and the conclusion in the last sentence, in italics, that completion of registration could be done later are contradictory, incompatible and patently erroneous in as much as, as per Clauses 3 and 11, 30 days is the outer limit both for payment of the balance sale consideration and for registration of the sale deed. Besides, once the transaction ends, there can be no registration. Needless to say, the Vendors could have waived the condition but that was admittedly not the position in this case. Moreover, the Vendors issued a telegram dated 08.07.2006 and a lawyer's notice dated 09.07.2006, whereby the termination of the Agreement was communicated. In these facts and circumstances, the Purchasers filed the statement of claim requesting for specific performance and by the impugned Award, the Arbitral Tribunal awarded specific performance. In light of the above analysis of Clauses 3

and 11 of the Agreement, the claim made in the Arbitration was liable to be rejected unless there was proof of payment on or before 07.07.2006, which is evidently not the case. Nevertheless, the learned Arbitrator framed an issue as to whether the contract was lawfully terminated and entered a finding that it was unlawfully terminated and that, therefore, it should be treated as subsisting. This finding is patently erroneous and directly contrary to Clauses 3 and 11 of the Agreement and makes out a case for interference as per the law laid down in paragraph 15 of **ONGC v. Saw Pipes Ltd. (2003) 5 SCC 705**, which was followed subsequently in several judgments.

18. In addition, as correctly contended by the learned senior counsel for the Vendors, the Arbitral Tribunal disregarded vital documentary evidence, namely, the lawyer's notices dated 09.07.2006 and 13.07.2006 (Ex.C6 and 8, respectively), wherein there is no reference to the alleged cheques dated 07.07.2006 although these notices were subsequent to the dates on which cheques were allegedly drawn. Instead, the learned Arbitrator largely relied on oral evidence - in spite of the denial by Vendor No.1 that the cheques were attempted to be handed over to him - on this critical issue that goes to the root of the matter, and the impressions of the learned Arbitrator as to the veracity or otherwise of the witnesses. Moreover, Ex.R2, namely, the affidavit filed by Mr.Baba

Shankar in O.S.A.No.223 of 2006 and the implications thereof were also disregarded by the Arbitral Tribunal. I also find that the learned Arbitrator disregarded the fact that Mr.Dinesh Kumar admittedly received a sum of Rs.37,50,000/- towards refund of the advance paid by him along with compensation and failed to consider the implications thereof and instead focused entirely on the receipt (Ex.R16) and its genuineness, which becomes irrelevant when receipt of the sum of Rs.37,50,000/- is not denied by the party concerned. Therefore, it may be concluded that material evidence, which has a strong bearing on the entitlement to specific performance, was also over looked and this also makes out a case for interference with the Award as per the principles laid down in Paragraph 31 of the judgment of the Hon'ble Supreme Court in the **Associate Builders case (cited supra)**.

19.All the judgments that were relied upon by Mr.R.Thiagarajan to the effect that time is not of the essence of a contract in respect of immovable property also provide that this is only a rebuttable presumption and that it is subject to a contract to the contrary. In this case, clause 11 is unequivocal that time is of the essence and the said clause also provides for forthwith determination as the consequence of not performing within time. The judgment in the **Sikandar case** is relevant but nothing turns on it because the termination, in this case, was as per the terms thereof. The judgment in the **Kanthamani case** with

regard to the non-necessity of producing the money to prove readiness and willingness is distinguishable in the context of Clauses 3 and 11, whereby the payment of the balance sale consideration and the conclusion of the transaction on or before 07.07.2006 is of the essence of the Agreement.

20. As stated earlier, the flaws in the Award are patent, in this case, as they are discernible on the face of the Award, especially with regard to the awarding of specific performance of a contract in spite of the non-compliance with Clauses 3 and 11 of the Agreement, and the determination of the Agreement as a consequence thereof. Therefore, the Award is patently illegal and is liable to be set aside.

21. In the result, the Award dated 20.08.2012 is set aside. However, the Purchaser company is granted leave to initiate appropriate legal proceedings for refund of the advance sale consideration paid by it along with interest thereon and, if such proceedings are initiated, the Purchaser company would be entitled to the benefit of Section 14 of the Limitation Act, 1963, in respect of time taken in the arbitration and these proceedings. No costs.

26.11.2019

Speaking order
Index: Yes
Internet: Yes

O.P.Nos.698 and 711 of 2012

SENTHILKUMAR RAMAMOORTHY, J.
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