

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 20th December, 2019.**

+ **CS(COMM) 634/2019 & IAs No.16100/2019 (u/O XXXIX R-1&2 CPC), 16101/2019 (for condonation of 20 days delay in re-filing the suit)**

JASBIR SINGH & ANR.

..... Plaintiffs

Through: Mr. R.M. Sinha, Mr. Sheetesh
Khanna and Mr. Prateek Mohan
Sinha, Advs.

Versus

PHEONIX ARC PVT. LTD. & ANR.

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The two plaintiffs namely Jasbir Singh and Raj Dulari have instituted this suit against Pheonix Arc Pvt. Ltd. and Karnataka Bank, for specific performance of the Agreement/Settlement dated 16th January, 2017, by directing the defendant no.1 Pheonix Arc Pvt. Ltd. to accept the balance payment as per the Settlement Agreement and to release the mortgaged property of the plaintiffs bearing no.E-52, Multan Nagar, Paschim Vihar, New Delhi.

2. The suit, instituted on 22nd August, 2019 and re-filed on 31st August, 2019, 11th September, 2019, 20th September, 2019, 9th October, 2019, 13th November, 2019 and 16th November, 2019, came up first before this Court on 19th November, 2019 when after hearing the senior counsel then appearing for the plaintiffs, the suit was not found to be maintainable. On

request of the senior counsel for the plaintiffs, the reasons therefor were not recorded and the suit adjourned to 11th December, 2019.

3. On 11th December, 2019, Mr. Sandeep Khatri, Advocate who had filed the suit for the plaintiffs stated that he did not want to appear in this suit and wanted to send a notice of discharge. Acceding to the said request, the suit was adjourned to 20th December, 2019.

4. Mr. R.M. Sinha, Mr. Sheetesh Khanna and Mr. Prateek Mohan Sinha, Advocates appear for the plaintiffs and Mr. R.M. Sinha, Advocate has been heard. However on a query being put to Mr. R.M. Sinha, Advocate during the hearing, Mr. Sandeep Khatri, Advocate sitting in the second row is also found to be instructing him.

5. The case of the plaintiffs is, that (i) the plaintiffs are husband and wife and proprietors of Royal Associates and Raj Associates respectively; (ii) Royal Associates and Raj Associates availed an overdraft facility from the defendant no.2 Karnataka Bank and to secure re-payment, the plaintiffs created equitable mortgage of property no.E-52, New Multan Nagar, New Delhi in favour of the defendant no.2; (iii) the plaintiffs drew under the said facility from the defendant no.2 but were unable to re-pay and therefore the accounts of Royal Associates and Raj Associates turned Non Performing Assets (NPA) on 5th December, 2012 and 29th January, 2013 respectively; (iv) the defendant no.2, on 4th May, 2013 issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) for an amount of Rs.5,83,44,764/- qua the account of Royal Associates and an amount of Rs.1,65,40,584/- qua the account of Raj Associates; (v) the

defendant no.2 took symbolic possession of the mortgaged property on 16th August, 2013; (vi) several other litigations started between the plaintiffs and defendant No.2 Karnataka Bank; applications under Sections 14 and 17 of the SARFAESI Act were filed; (vii) in the first week of January, 2016, the plaintiffs learnt that the defendant no.2, vide Assignment Deed dated 28th December, 2015, had assigned/sold the said loan as well as mortgage in favour of defendant no.1, for a consideration of Rs.3,30,00,000/-; (viii) the plaintiffs approached defendant no.1 for settlement; (ix) on 1st March, 2016 the plaintiffs accepted the offer of the defendant no.1 as sent by e-mail dated 29th February, 2016; (x) on 10th April, 2016 the settlement arrived at between the plaintiffs and defendant no.1 failed and defendant No.1 filed several litigations against the plaintiffs including Cont.(Cas) No.485/2016 on 30th April, 2016 and Cont.(Cas) No.1028/2016 on 8th September, 2016; (xi) on 7th December, 2016 again settlement talks commenced between the plaintiffs and defendant no.1; (xii) on 16th January, 2017 the plaintiffs accepted the offer of the defendant no.1 as proposed vide e-mail dated 29th February, 2016; (xiii) on 19th January, 2017, 27th January, 2017 and 31st January, 2017, in terms of clause (a) of the Final Settlement Agreement dated 16th January, 2017, the plaintiffs made payments of Rs.3,00,000/-, Rs.21,00,000/- and 29,00,000/- respectively towards repayment of obligation of the settlement amount; that by making the said payments the plaintiffs partly performed the Agreement dated 16th January, 2017; (xiv) as per the Settlement Agreement dated 16th January, 2017, the next payment was due from the plaintiffs on 31st March, 2017; (xv) paragraphs 22 to 24 of the plaint are as under:

“22. That the defendant no.1, after part compliance of the clause-A of the agreement dated 16.01.2017 by the plaintiff, sent a filing version of consent terms to be filed by the parties before various Hon’ble courts and to withdraw the proceedings pending against each other. That the email dated 16.02.2017 very specifically and categorically stated that;

“.....and file the same in the High court pending contempt proceeding and seek directions for handing over the keys to Mrs. Raj Dulari...”

That the aforesaid communication clearly shows that the above mentioned contempt petitions as filed on behalf of defendant no.1 is nothing but a form of execution for recovery of loan amount.

23. That since filing version of the consent terms as sent by the defendant no.1 on 16.02.2017 was never agreed upon by the plaintiff, therefore the plaintiff sent a revised and corrected filing version of the consent terms to the defendant no.1 on 28.02.2017, as agreed in terms of agreement dated 16.01.2017.

24. That to the utter shock and surprise of the plaintiff, the defendant instead of being agreeing to the revised filing version of the consent terms as sent by the plaintiff, withdrawn from the settlement on 14.03.2017, and started pressing the above mentioned contempt petitions as well as filing the applications and petitions against the plaintiffs, inter-alia of application u/s 14 of SARFAESI Act.”;

and, (xvi) the plaintiffs have always been ready and willing to perform the agreement entered into with the defendant no.1 but it is the defendant no.1 who is not coming forward and raising false and frivolous pleas.

6. The counsel for the plaintiffs, on enquiry admits that under Section 17 of the SARFAESI Act the Debt Recovery Tribunal (DRT) has jurisdiction. It is however contended that this Court also has jurisdiction.
7. The plaintiffs in fact, in the plaint, have pleaded filing of application under Section 17 of the SARFAESI Act and which must be by the plaintiffs. The present status thereof however is not disclosed.
8. Be that as it may, the document at page 21 of Part-III A file described in the plaint as the 'Final Settlement Agreement' dated 16th January, 2017, is in fact an Offer of Settlement by the defendant no.1 to the plaintiffs. It is deemed relevant to set-out the same hereunder:-

"FW: Offer of Settlement

Dear Mr. Jasbir Singh,

This has reference to the appended mail below and the subsequent discussions with respect to your offer for settlement of the debts due and payable by Raj and Royal Associates by agreeing to pay a sum of Rs.5,95,00,000/- (Five Crores Ninety Lacs) + Rs.3,00,000/- (Three Lacs) = Rs.5,98,00,000/- (Five Crores Ninety Eight Lacs) towards settlement of the Entire Outstanding Debt of Rs.2,65,29,645/- for Raj Associates and Rs.10,17,86,724/- for Royal Associates as on 30.12.2016 (excluding expenses), is acceptable to Phoenix on the following terms and conditions:

(a) The sum of Rs.5,95,00,000/- (Five Crores Ninety Five Lacs) + Rs.3,00,000/- (Three Lacs) = Rs.5,98,00,000/- (Five Crores Ninety Eight Lacs) will be the principal settlement amount which will be payable in the following order:

- Rs. 3,00,000/- will be paid towards reimbursement of expenses before 31-01-2017;

- Rs.50,00,000/- will be paid towards repayment obligation of the settlement amount on or before 31-01-2017;

- Rs.2,00,00,000/- will be paid towards repayment obligation of the settlement amount on or before 31.03.2017;

(b) Failure to comply with CLAUSE (A) herein above will amount to an event of default at the very first instance and the settlement offer will be treated as cancelled/withdrawn without any further reference, and Phoenix will be entitled to proceed for recovery of the entire debt due and payable by Raj and Royal Associates and the guarantors independently without any objection or hindrance of the borrowers and guarantors.

(c) The balance principal amount of Rs.3,45,00,000/- will be paid in 8 quarterly installments commencing from 01st June 2017 and end 01st March, 2019;

(d) Interest on the balance principal amount of Rs.3,45,00,000/- will be serviced monthly @ 12% per annum compounded quarterly, commencing from 01st April, 2017;

(e) Borrowers and guarantors acknowledge that they are liable to jointly and severally pay the entire outstanding debt along with interest and other charges as claimed DRT OA No.104/2015 (Raj Associates) and DRT OA No.105/2015 (Royal Associates) filed by the Assignor Bank (Karnataka Bank) and which will also be recorded in the consent terms:

(f) *The SARFAESI action initiated as against the borrower by Phoenix shall be suspended and the borrower/guarantor will be appointed Manager of the security, who will undertake to return back possession of the entire secured asset to Phoenix in the event of default of the repayment obligations and/or called upon to do so so by Phoenix in the event of any breach of the terms of the detailed settlement which will be recorded by way of consent terms in all the pending proceedings;*

(g) *The Borrowers shall deposit with Phoenix, respectively, postdated cheques (“PDCs”) for payment of all the installments as per scheduled which will be drawn for the repayment of the principal sum of Rs.3,45,00,000/- separately and PDC for payment of the monthly interest @ 12% per annum compounded quarterly as per the schedule, which will be annexed to the consent terms;*

(h) *Until the Final Settlement Date, the security shall extend to secure and continue as security for the due repayment of the Entire debt;*

(i) *The Borrower/Guarantors shall jointly and severally pay, bear and reimburse all costs, expenses incurred/to be incurred by Phoenix with respect to any act, deed and/or thing done or to be done in relation to the debt, security or any of the underlying assets/properties in respect of or over which security is created/to be created or any part thereof;*

(j) *The Borrowers further agree and undertake that all proceedings filed by each other in the various forums will be disposed of in terms of the broader and detailed terms as recorded in the consent terms, which will be filed within 30 days of the Borrower/Guarantor complying with the terms stipulated in CLAUSE (A) herein above;*

(k) *The Borrowers and Guarantors further agree and confirm that they will ensure that all third party litigations filed and/or initiated with respect to the secured assets shall have also been withdrawn as against the said secured asset within 30 days of compliance of CLAUSE (A) herein, and failure to do so; will entitle Phoenix to treat this an event of default and/or in the event such litigation continues, and Phoenix is required to defend its interest, the costs for defending the said litigations will be borne and/or reimbursed by the Borrowers and guarantors jointly and severally as and when demanded within 15 days from such demand. Failure to comply with this clause will amount to an event of default and the settlement offer will be treated as cancelled/withdrawn without any further reference, and Phoenix will be entitled to proceed for recovery of the entire debt due and payable by Raj and Royal Associates and the guarantors independently without any objection or hindrance of the borrowers and guarantors. It is clarified that the said costs which will have to be reimbursed will be over and above the settlement amount payable with interest as stipulated herein above;*

(l) *All payments to be made by the Borrower shall be made free and clear of and without any Tax Deduction unless the Borrower are required to make a Tax Deduction, in which case the sum payable by the Borrower (in respect of which such Tax Deduction is required to be made) shall be increased to the extent necessary to ensure that the Phoenix receives a sum net of any deduction or withholding equal to the sum which it would have received had no such Tax Deduction been made or required to be made;*

(m) Upon receipt of the entire settlement amount along with interest and other charges, including reimbursement of any expenses as stipulated in (i), (k) & (l) herein, within the time line stipulated therein, Phoenix will release the security interest/mortgage of the secured asset as also issue NO DUES;

You further agree that a detailed settlement/consent terms recording the aforesaid terms along with the broader terms will be signed by the borrower and guarantors within 30 days from the date of compliance of CLAUSE (A) herein above, and that the said consent terms will supersede all previous correspondence/settlements, exchange of letters/emails etc in this regard entered into by and between the Borrowers, Guarantors, the Assignor Bank and/or Phoenix with respect to the repayment of the Entire Outstanding Debt due and payable by Raj and Royal Associates.”

9. Though the counsel for the plaintiffs has not shown any response sent by the plaintiffs, acceding the offer of settlement of 16th January, 2017 of the defendant no.1, but the plaintiffs at page 26 of Part-IIIA file has filed a communication dated 31st January, 2017 of the plaintiffs to the defendant no.1, informing the defendant no.1 that the plaintiffs had paid the amounts as per settlement terms and asking the defendant no.1 to do the needful.

10. I have enquired from the counsel for the plaintiffs, whether the plaintiffs, besides the payment of Rs.3,00,000/- and Rs.50,00,000/- pleaded to have been made before 31st January, 2017, made payment of Rs.2,00,000/- towards re-payment/obligation of the Settlement Agreement,

on or before 31st March, 2017 or any other payments as mentioned in the Offer of Settlement.

11. The counsel for the plaintiffs draws attention to Page 29 of Part-III A file, being the communication dated 16th February, 2017 from the defendant no.1 to the plaintiffs, enclosing therewith the filing version of the consent terms to be filed by the parties in the pending DRT proceedings and informing the plaintiffs, that post filing of the consent terms in the DRT, the defendant no.1 shall obtain a certified copy of the said consent terms and file the same in the High Court in the pending contempt proceedings and seek directions for handing over the keys to the plaintiff no.2 and asking the plaintiffs to comply with certain other requirements. The counsel for the plaintiffs further states that however the filing version of the consent terms forwarded by the defendant no.1 contained an acknowledgement by the plaintiffs of jointly and severally owing a sum of Rs.10,17,86,724/- and Rs.2,65,29,645/- as on 30th December, 2016 and further provided that in the event of the plaintiffs failing to pay the amounts in terms of Settlement Agreement, a decree for recovery of the said amounts shall stand passed in favour of the defendant no.1 and against the plaintiffs. The counsel for the plaintiffs contends, that the same was never agreed to by the plaintiffs and the said term included by the defendant no.1 in the settlement/consent terms to be filed, was not justified, as in the event of default by the plaintiffs in payment of amounts as per the settlement, the only entitlement of the defendant no.1 was to claim the amounts as determined by the DRT and the plaintiffs thus refused to comply with the same and the defendant no.1 wrongly withdrew from the settlement, entitling the plaintiffs to the relief of specific performance.

12. Before proceeding further I may record that the consent terms forwarded by the defendant no.1 to the plaintiffs *inter alia* provided as under:-

“b) Defendants further agree, confirm and acknowledge that they jointly and severally owe a sum of Rs.10,17,86,724.00(Rupees Ten Crores Seventeen Lacs Eighty Six Thousand Seven Hundred And Twenty Four Only) for the loan account of Royal Associates (proprietorship concern of Mr. Jasbir Singh), and a sum of Rs.2,65,29,645.00 (Rupees Two Crores Sixty-five Lacs Twenty-Nine Thousand Six Hundred And Forty Five Only) for the loan account of Raj Associates (proprietorship concern of Mrs. Raj Dulari), as on 30.12.2016, to the Applicant acting in its capacity as Trustee of Phoenix Trust FY-16-15, pursuant to the Assignment Agreement, dated 28.12.2015 collectively referred to as (“Outstanding Debt”). The Defendants further agree and confirm that”

and

“gg) Defendants jointly and severally agree and confirm that on the occurrence of any Event of Default, the Entire Outstanding Debt shall become due and payable to the Applicant. The Applicant shall also be entitled to resume pursue the action initiated under the SARFAESI Act and RDDBFI Act, or any other act, from the stage where it has been suspended and that the period of suspension shall not be construed as waiver of the Applicant’s right for taking any further action.”

13. I may further record that the revised filing version of the consent terms as forwarded by the plaintiffs to the defendant no.1 and not agreed by the defendant no.1 were entirely different and did not contain the aforesaid clause and instead provided as under:-

“4. Upon the occurrence of any Event of Default and if the same is not rectified within Thirty (30) days from the date of communication of the Event of Default, then,

(i) the balance Entire Outstanding Debt shall forthwith become due and payable by Defendants jointly and severally and all the benefits, concessions and waivers granted to Defendants by the Applicant, contained herein in or by way of any other deed or document, shall forthwith stand automatically withdrawn;

(ii) the Applicant shall be immediately entitled to recover the balance Entire Outstanding Debt by adopting such recovery measures including but not limited to exercising its rights to enforce the underlying security interest to recover the Entire Outstanding Debt or any other amounts due and payable by Defendants jointly and severally, as it may deem fit;”

14. I have enquired from the counsel for the plaintiffs, how in the aforesaid state of affairs it can be said that there was any concluded agreement between the parties, specific performance whereof can be sought.

15. I have not been able to decipher clear answer to the said query in the arguments of the counsel for the plaintiffs.

16. In my view, no concluded agreement came into existence. The communication dated 16th January, 2017 not only was titled as 'Offer of Settlement' but envisaged drawing up of "detailed settlement/consent terms recording the aforesaid terms along with the broader terms" to be signed within 30 days from the date of compliance of CLAUSE (A) of the communication dated 16th January, 2017. It was only the said consent terms to be signed, which would supersede all previous correspondence / settlements. Admittedly the parties could not agree on the form of "detailed settlement/consent terms".

17. Merely because the plaintiffs, in terms of the said communication, paid a sum of Rs.53,00,000/- to the defendant no.1, which was to be paid on or before 31st January, 2017, would not bring about a concluded agreement between the parties. A concluded agreement was to be reached on the parties, within further 30 days of 31st January, 2017 signing a detailed settlement/consent terms and which never came to be signed. The communication dated 16th January, 2017 is not only unilateral but even if accepted by the plaintiffs, was merely an agreement to enter into a further agreement. It is a settled position in law that an agreement to enter into a further agreement is not specifically enforceable when no further agreement is entered into. Reference in this regard can be made to *Speech and Software Technologies (India) Private Limited Vs. Neos Interactive Limited* (2009) 1 SCC 475, *Vesta Holding Private Limited Vs. AKM Enterprises Private Limited* 2019 SCC OnLine Del 11547, *Sobhag Narain*

Mathur Vs. Pragya Agrawal (2007) 141 DLT 356, ***H.S. Khan & Sons Vs. Homi J. Mukadam*** 1990 SCC OnLine Bom 254 (DB) and ***R. Radhakrishnan Vs. G. Ekambaram*** 2011 SCC OnLine Mad 1753 (DB).

18. It is for this reason that the plaint and the documents filed therewith do not disclose cause of action for the relief of specific performance.

19. There is another aspect of the matter. Even if there was a concluded contract, as per the said contract, the plaintiffs were required to pay Rs.2,00,000/- on or before 31st March, 2017 and the balance amount of Rs.3,45,00,000/- in eight quarterly instalments commencing from 1st June, 2017 and ending on 1st March, 2019. This suit has been filed much thereafter and neither of the said payments have been made. In this state of affairs, even if the defendant no.1 were to be held to be in the wrong, the plaintiffs can still not be said to be ready and willing to perform their part of the Agreement. The plaintiffs have approached this Court long after 30 days from 31st January, 2017, by which date the detailed settlement/consent terms were to be signed and after the time till 1st March, 2019 by when the entire amount as per the Settlement was to be paid. A plaintiff which is itself in default of its obligation under the agreement, cannot compel the other party to specifically perform its obligations under the agreement. The readiness and willingness of the plaintiffs is essential to a claim for specific performance under Section 16(c) of the Specific Relief Act, 1963 and constitutes a cause of action for the relief of specific performance. Reference in this regard may be made to ***Bal Krishna Vs. Bhagwan Das*** (2008) 12 SCC 145, ***N.P. Thirugnanam Vs. Dr. R. Jagan Mohan Rao*** (1995) 5 SCC 115 and ***Rama Arora Vs. Davinder Singh Narang*** 2019 SCC

OnLine Del 7208. Even after the amendment of 2018 of the Specific Relief Act, the said requirement remains, in as much as what is not pleaded, cannot be proved. In the present case, the facts speak for themselves.

20. I am also of the view that the jurisdiction of this Court is barred by Section 34 of the SARFAESI Act. The jurisdiction of DRT under Section 17 of the SARFAESI Act is pleaded to have been already invoked and the Civil Court, if starts invoking its own jurisdiction, would only result in conflicting outcomes as held in *Jagdish Singh vs. Heeralal* (2014) 1 SCC 479, *Neha Aggarwal Vs. PNB Housing Finance Ltd.* 2016 SCC OnLine Del 3765, *Oriental Bank of Commerce Vs. Harinder Singh* 2017 SCC OnLine Del 9236 and *Radnik Exports Vs. Standard Chartered Bank* 2014 SCC OnLine Del 3404 [RFA(OS) 139/2014 preferred whereagainst was dismissed as withdrawn vide order dated 10th October, 2014] and which cannot be permitted.

21. Since the aforesaid reasons suffice, need to consider other defects is not felt.

22. The suit is dismissed.

23. I refrain from imposing costs.

RAJIV SAHAI ENDLAW, J.

DECEMBER 20, 2019

‘pp’