

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

% **Date of decision: 16th July, 2019**

+ **CS(COMM) 1314/2016 & IA No.6194/2018 (of the plaintiff under Order XIII-A of the Commercial Courts Act, 2015)**

JINDAL SAW LIMITED

..... Plaintiff

Through: Mr. Akhil Sibal, Sr. Adv. with
Mr. Dinesh Pardasani, Mr.
Parinay T. Vasandani, Ms.
Abhilasha Singh, Mr. Nikhil
Pratap and Ms. Aastha Bajaj,
Advs.

Versus

**APERAM STAINLESS SERVICES AND SOLUTIONS
PRECISION SAS AND ORS**

..... Defendants

Through: Mr. Jayant Bhushan, Sr. Adv.
with Ms. Zeba Khair, Ms.
Shivambika Sinha, Ms. Mishika
Singh and Ms. Anandita
Sharma, Advs. for D-1&2.

AND

+ **CS(COMM) 45/2017**

APERAM ALLOYS IMPHY SAS

..... Plaintiff

Through: Mr. Jayant Bhushan, Sr. Adv.
with Ms. Zeba Khair, Ms.
Shivambika Sinha, Ms. Mishika
Singh and Ms. Anandita
Sharma, Advs. for D-1&2.

Versus

**IUP JINDAL METALS AND
ALLOYS LIMITED**

..... Defendant

Through: Mr. Akhil Sibal, Sr. Adv. with
Mr. Dinesh Pardasani, Mr.
Parinay T. Vasandani, Ms.
Abhilasha Singh, Mr. Nikhil
Pratap and Ms. Aastha Bajaj,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.6194/2018 in CS(COMM) No.1314/2016 (of the plaintiff under Order XIII A CPC)

1. These two suits, vide order dated 21st November, 2017 on IA No.13018/2017 in CS(COMM) No.1314/2016, were tagged and ordered to be tried together.

2. IA No.6194/2018 in CS(COMM) No.1314/2016 of the plaintiff therein under Order XIII-A of the CPC, as applicable to commercial suits, for summary judgment, is for consideration. Though the plaintiff in CS(COMM) No.45/2017 also had filed IA No.6764/2018 under XIII-A of the CPC for summary judgment and though the counsel for plaintiff in CS(COMM) No.45/2017 on 7th January, 2019 had also argued the said application, but the senior counsel for the plaintiff in CS(COMM) No.45/2017 after some arguments, on 8th January, 2019 withdrew the said application. Thus only IA No.6194/2018 in CS(COMM) No.1314/2016 is for consideration.

3. CS(COMM) No.1314/2016 has been filed for “specific performance of contract”, pleading that (i) Jindal Saw Ltd. (Jindal) and Aperam Stainless Services and Solutions Precision SAS (Aperam Stainless) being a company organized under the laws of France

entered into a Joint Venture Agreement dated 12th August, 2004 (JV Agreement) for formation of IUP Jindal Metals & Alloys Ltd. (IUP) (being defendant no.3 in CS(COMM) No.1314/2016 and sole defendant in CS(COMM) No.45/2017) with Jindal holding 73% and Aperam Stainless holding 27% of the shareholding of IUP; (ii) Aperam Stainless, though had also agreed to provide the requisite technical support to IUP, but failed to do so resulting in IUP suffering losses; (iii) Aperam Stainless lost complete interest in the business of IUP and stopped attending the meetings of the Board of Directors and shareholders; (iv) by the year 2009, 50% of the net worth of IUP was eroded and IUP was declared as potentially sick company, requiring capital infusion therein; however Aperam Stainless refused to invest any further equity and only Jindal invested substantial monies to save IUP, resulting in Jindal holding 80.7% and Aperam Stainless holding only 19.29% shareholding of IUP; (v) an addendum dated 19th November, 2009 to the JV Agreement was signed between Jindal and Aperam Stainless; (vi) in or about the year 2012, disputes and difference arose between Jindal and Aperam Stainless and after detailed negotiations and discussions, a Settlement Agreement dated 20th December, 2013 was entered whereunder Aperam Stainless agreed to sell its shares in IUP to Jindal for an amount of USD 50,000, at a price per share of USD 0.0185; (vii) Jindal was always ready and willing to perform its obligations under the Settlement Agreement dated 20th December, 2013 and to purchase the shareholding of Aperam Stainless in IUP, but Aperam Stainless was lax, inspite of repeated requests and reminders of Jindal and inspite of Jindal also

obtaining permission of Reserve Bank of India (RBI) on 28th January, 2016; (viii) Aperam Stainless, in its e-mail dated 16th April, 2016 alleged that the shares had been grossly undervalued by Jindal at the time of entering into the Settlement Agreement and there had been misrepresentations by Jindal; needless to state Jindal refuted and called upon Aperam Stainless to perform its part of the Settlement Agreement; (ix) Aperam Stainless issued a letter dated 13th September, 2016 to Jindal and IUP, alleging that, (a) there had been delay on the part of Jindal to close the Settlement Agreement; (b) Jindal and IUP had failed to co-operate with Aperam Stainless to carry out fresh valuations; and, (c) that there had been misrepresentation in valuation of share of IUP, and sought to terminate the Settlement Agreement; (x) the termination is illegal and Aperam Stainless is acting *mala fide*; and, (xi) one of the reasons cited by Aperam Stainless was non-payment by IUP of USD 450,000 to Aperam Alloys Imphy SAS (defendant no.2 in CS(COMM) No.1314/2016 and plaintiff in CS(COMM) No.45/2017 and hereinafter referred to as “Imphy”); however the said payment is linked to the transfer by Aperam Stainless of its shares in IUP to Jindal and permission required for making the said payment was also received from the RBI in January, 2016.

Hence, the suit for specific performance, directing Aperam Stainless to complete the sale and transfer of shares held by it in IUP in favour of the Jindal in terms of Settlement Agreement dated 20th December, 2013.

4. CS(COMM) No.1314/2016 came up first before this Court on 21st September, 2016 when, while issuing summons / notice thereof, vide *ex parte* ad-interim order, Aperam Stainless was restrained from alienating or encumbering the shares held by it in IUP in favour of any other person except Jindal. The said interim order was made absolute during the pendency of the suit on the statement of the senior counsel for the Aperam Stainless and Imphy that Aperam Stainless was not intending to sell the shares.

5. I may record that though CS(COMM) No.1314/2016 was found to be over-valued, but the plaint therein was not ordered to be returned owing to subsequent filing of CS(COMM) No.45/2017 and finding the two suits to be entailing common questions of law and fact.

6. Aperam Stainless has contested CS(COMM) No.1314/2016, pleading that (i) the Settlement Agreement dated 20th December, 2013 is voidable at the option of Aperam Stainless since the same is based on gross misrepresentation on the part of Jindal; (ii) the valuation of shares of IUP carried out at the behest of and on the basis of information and material supplied by Jindal, was patently false and grossly under-valued; (iii) Jindal first ousted Aperam Stainless from the affairs of IUP and Aperam Stainless being so ousted, relied in good faith on the representations made by Jindal as regards the valuation and had no way of verifying the same; (iv) Aperam Stainless has validly terminated the Settlement Agreement on account of gross delay in performance by Jindal and IUP; (v) Jindal being in violation of its obligation under the Settlement Agreement, is not entitled to the

discretionary relief of specific performance; (vi) it is apparent from the Settlement Agreement, that the parties had agreed upon a purchase price for the shares, after valuation by N.C. Aggarwal & Company of the fair market value of the share at Rs.1.20 paise per equity share i.e. USD 0.0185185; (vii) since the relevant Foreign Exchange Management Act, 1999 (FEMA) Regulations required the price for transfer to be not more than the fair market value of the shares, Aperam Stainless had no option but to agree to the fair market valuation done by N.C. Aggarwal & Company; (viii) in June, 2016, it came to the attention of Aperam Stainless, that the valuation report which had been prepared at the behest and on the basis of information and material provided by Jindal to the auditor, was based on blatant misrepresentations and grossly under-valued the shares; (ix) owing to the delays on the part of Jindal in closing in terms of Settlement Agreement, Aperam Stainless started internal assessment of the statutory filings of IUP made after December, 2013 and was surprised to find that the value of the company had been greatly depressed at the time of negotiations and entering into the Settlement Agreement; (x) at the contemporaneous time, Jindal was representing the value of its shareholding in IUP at Rs.40.10 paise per share and the same auditor i.e. N.C. Aggarwal & Company had audited the financial statement disclosing the value of share at Rs.40.10 paise; (xi) the performance and finances of IUP could not have changed so significantly between the two valuations; (xii) Aperam Stainless being so alerted, got independent valuation of the shares done from KPMG who have also reported the valuation of N.C. Aggarwal & Company to be grossly

depressed; (xiii) the Settlement Agreement, while on the one hand provided for sale of shares, on the other hand provided for payment by IUP to Imphy of the amount of USD 450,000 towards materials admittedly supplied by Imphy to IUP and Jindal was not entitled to purchase of shares without IUP making payment of USD 450,000 to Imphy; (xiv) the Settlement Agreement also required payment of the purchase price of shares by Jindal, immediately on receipt of documents, which was not done by Jindal; (xv) the Settlement Agreement also required certain statutory formalities to be completed for getting the transfer of shares, but steps in that regard also were not taken by Jindal; and, (xvi) the Settlement Agreement also required IUP to within 30 days thereof remove from its name references to IUP which is the brand of Aperam Stainless, and steps in which regard also were not taken.

7. Imphy has also filed a written statement in CS(COMM) No.1314/2016 pleading Jindal and IUP to have failed to perform their part of the Settlement Agreement dated 20th December, 2013 by failing to pay the agreed amount of USD 450,000 to Imphy.

8. IUP has also filed a written statement in CS(COMM) No.1314/2016, supporting Jindal.

9. Though the application earlier filed by Imphy in CS(COMM) No.45/2017 for summary judgment of recovery of Rs.3,03,75,000/- with interest stands withdrawn, but it may be mentioned that CS(COMM) No.45/2017 has been filed pleading that (i) between January, 2007 and March, 2007, Imphy supplied to IUP, certain

quantities of 'Super Imphy T Cold Rolls Strip' and raised invoices for a total amount of Euro 3,50,878.81; (ii) however no payment thereof was made; and, (iii) in the Settlement Agreement dated 20th December, 2013, IUP agreed to pay USD 450,000 in lieu of Euro 3,50,878.81 to Imphy. However, the said amount has not been paid.

10. Jindal seeks summary judgment in its favour in CS(COMM) No.1314/2016, pleading that (a) there is no provision / clause under the Settlement Agreement, in terms of which the parties thereto were entitled to terminate the agreement; (b) no such provision was intentionally incorporated as the intent of the parties was to implement the agreement; (c) Jindal, in support of its case relies upon documents which are not disputed; (d) the documents show that there has been no delay on the part of Jindal and that Jindal has always been ready and willing to perform its part of the Settlement Agreement; (e) the shares of which transfer by way of specific performance is sought, are not goods obtainable in the market; (f) Aperam Stainless and Imphy have no real prospect of succeeding in the suit; (g) the allegations of misrepresentation are an afterthought; (h) the e-mail dated 20th September, 2012 of Aperam Stainless to Jindal shows that a consolidated amount of USD 500,000 was agreed towards the shares and the balance for equipment to Imphy; (i) no valuation was got done in the year 2012, to agree on the settlement amount for transfer of share and towards equipment, and the valuation was done in the year 2013 at the time of signing of the Settlement Agreement dated 20th December, 2013, to ensure that payment for shares made by Jindal to

Aperam Stainless should not be more than the fair market value as required by RBI; (j) the Settlement Agreement dated 20th December, 2013 does not refer to any valuation and the valuation was mutually agreed; and, (k) valuation has been questioned after delay of three years.

11. Aperam Stainless in its reply to the application for summary judgment has pleaded that, (i) the plea of misrepresentation cannot be decided summarily; (ii) the discretion implicit in the grant of relief of specific performance is not to be exercised in favour of Jindal who was itself in default of its obligations under the Settlement Agreement of which specific performance is sought; and, (iii) even in the absence of specific clause qua termination, an agreement can be terminated on reasonable grounds.

12. Before proceeding further, it is apposite to set out hereinbelow the relevant clause of the Settlement Agreement dated 20th December, 2013 and in which Jindal is described as “Jindal Saw”, IUP as “JVC”, Imphy as “Aperam Alloys” and Aperam Stainless as “Aperam Precision”, as under:

“F. WHEREAS JINDAL SAW and APERAM PRECISION could not agree on conditions for pursuing the joint venture.

G. WHEREAS JINDAL SAW and APERAM PRECISION wish to bring an end to their conflicting situations and to bring an end to the joint venture.

- H. WHEREAS APERAM PRECISION wishes to sell APERAM Shares in the JVC to JINDAL SAW and JINDAL SAW wishes to purchase the APERAM Shares.*
- I. WHEREAS the JVC wishes to pay USD 450,000 (Four Hundred and Fifty Thousand US Dollars) to APERAM ALLOYS for materials already supplied by APERAM ALLOYS to the JVC under the Supply Agreement.*
- J. WHEREAS the JVC agrees to change its name to exclude the term “IUP” and the logo resembling IUP (“Trademarks”).*
- K. WHEREAS the Parties agreed on the settlement in October 2012 and are hereby recording the terms thereof.*

In consideration of the above mentioned, the Parties have decided to enter into this Settlement Agreement.

ARTICLE I

Subject to the conditions of the present Settlement Agreement, the Parties have agreed the following:

I. TRANSFER OF THE APERAM SHARES

1.1 JINDAL SAW agrees to purchase and APERAM PRECISION agrees to sell the APERAM Shares for the Indian Rupee equivalent of USD 50,000 (Fifty Thousand US Dollars) (“Purchase Price”) at a price per share of USD 0.0185185. The Parties acknowledge that the Purchase Price has been mutually agreed between them and is not more than the fair market value of the APERAM Shares as determined by the auditors of the JVC according to their letter attached as Annex I. The Parties agree that the Purchase Price does not exceed the value of the shares calculated by using the discounted cash flow method applied currently by the Reserve Bank of India for the valuation of shares. The APERAM Shares shall be sold to JINDAL SAW free from all mortgages, charges, pledges, hypothecation, liens, assignments, privilege or priority of any kind having the effect of security or other such obligations, options, right of first refusal, right of pre-emption or other encumbrance or security interest of any kind (“Encumbrances”). Each of the Parties shall bear its own taxes and stamp duties with respect to the transfer and purchase of the APERAM Shares.

1.2 PAYMENT OF THE INVOICES

On the Closing Date the JVC agrees to pay USD 450,000 (Four Hundred and Fifty Thousand US Dollars) (“Supply Payment”) to APERAM ALLOYS for the supply of materials that it has received.

1.3 TERMINATION OF THE RIGHT TO USE TRADEMARKS OF APERAM GROUP

The Parties agree that the name of the JVC will be amended to exclude the term “IUP” from its name and that the JVC shall not use the Trademarks in its name or otherwise. The JVC shall not use of any of the trademarks of APERAM group or anything resembling them post the Closing Date.

ARTICLE 2

2.1 EXAMINATION OF DOCUMENTS AND ACKNOWLEDGMENT

APERAM PRECISION through its representatives has examined all the minutes of meeting of the Board and the shareholders and the corporate registers of the JVC. JINDAL SAW and the JVC acknowledge that APERAM PRECISION and APERAM Directors have not participated in the day to day management of the JVC from March 25, 2009 to the date hereof (the “Period”).

ARTICLE 3

CLOSING AND CLOSING DATE

3.1 The Agreement is effective from the date of signing of this Settlement Agreement and closing shall take place within a period of thirty (30) days from the date of signing of this Settlement Agreement or on any other date as may be mutually agreed between the Parties (“Closing Date”).

3.2 The following chronological events shall take place on the Closing Date:

(a) APERAM PRECISION shall submit all necessary documents to the JVC for issuance of duplicate share certificates in lieu of the original APERAM Share certificates misplaced by APERAM PRECISION representing APERAM Shares and the JVC shall issue duplicate share certificates to APERAM PRECISION in terms of the Companies (Issue of Share Certificates) Rules, 1960 (“Duplicate Share Certificates”)

(b) APERAM PRECISION shall deliver (or cause to be delivered) to JINDAL SAW:

(i) duly issued Duplicate Share Certificates as issued under the Companies (Issue of Share Certificates) Rules, 1960

representing all of the APERAM Shares, free and clear of all Encumbrances together with copies of the duly signed share transfer deeds for the transfer of APERAM Shares to JINDAL SAW;

(ii) any document required (if any) to vest in JINDAL SAW the full legal and beneficial ownership of the APERAM Shares and to enable JINDAL SAW to be registered as the holder of the APERAM Shares; and

(iii) duly signed form FC-TRS (provided by JINDAL SAW) and all necessary documents required for the purpose of an effective filing of form FC-TRS in relation to the APERAM Shares with the Reserve Bank of India.

(c) Simultaneously on receipt of the Duplicate Share Certificates and the share transfer deeds JINDAL SAW shall remit the Purchase Price for the APERAM Shares, via wire transfer to the account specified by APERAM PRECISION. The specific details of such bank account shall be provided by APERAM PRECISION to JINDAL SAW in writing five (5) days prior to the Closing Date;

- (d) the APERAM Directors shall resign from the Board of the JVC;*
- (e) The JVC shall make the Supply Payment to APERAM ALLOYS in USD via wire transfer of immediately available funds to the Account specified by APERAM ALLOYS. The specific details of such bank account shall be provided by APERAM ALLOYS to the JVC in writing five (5) days prior to the Closing Date;*
- (f) The JVC shall provide a draft of the amended Articles of Association to APERAM PRECISION, which shall provide for the provisions stated herein;*
- (g) The JVC shall hold a Board meeting at which necessary resolutions in respect of the following matters shall be passed:*
 - (i) record the transfer of the APERAM SHARES in the name of JINDAL SAW;*
 - (ii) amend the register of members of the JVC to reflect JINDAL SAW as the legal and beneficial owners of the APERAM Shares;*
 - (iii) to approve the amendment to the Articles of Association, amended to provide for the provisions herein and adopt the reinstated*

Articles of Association subject to approval of the same in the shareholders meeting;

- (iv) to change the name of the JVC excluding the name "IUP" from the name of the JVC or anything resembling it;*
- (v) to convene an extra-ordinary general meeting of the shareholders of the JVC at shorter notice on the Closing Date ("EGM") to approve the amendments of the Articles of Association to adopt the revised Articles of Association and giving requisite authorization for issuance of the notice convening the EGM;*
- (vi) to take note of resignation of APERAM Directors from the JVC;*
- (vii) to take note of filing of form FC-TRS with the Reserve Bank of India and the share transfer deeds establishing the transfer of APERAM Shares from APERAM PRECISION to JINDAL SAW and approve the said transfer;*
- (viii) to authorize the termination of the Joint Venture Agreement and JV Related Agreements;*

- (ix) *to pass any other resolutions required to implement the terms of this Settlement Agreement.*
- (h) *Pursuant to the resolution passed by the Board, the JVC shall hold an EGM and at such EGM, the shareholders of the JVC shall approve:*
 - (i) *the amendment of the Articles of Association and adopt the amended Articles of Association in the agreed form;*
 - (ii) *the change in name of the JVC;*
 - (iii) *authorize the termination of the Joint Venture Agreement and JV Related Agreements; and*
 - (iv) *pass any other resolutions required to implement the terms of this Settlement Agreement.*
- (i) **3.3 Post Closing Date Obligations**
 - 3.3.1 *As promptly as practicable the JVC shall and the Parties shall cause the JVC to deliver to the Parties a certified true copy of the minutes of the aforesaid meeting of the Board and the minutes of the aforesaid EGM.*

3.3.2 The JVC shall immediately apply to the authorities for a change of name and shall no later than thirty (30) business days from Closing Date alter the name of the JVC excluding the terms “IUP” from the name of the JVC or anything resembling it.

ARTICLE 4

GENERAL TERMS WITH REGARD TO THE APERAM SHARE TRANSFER

(e) each Party agrees that the other Party or its attorneys, have not made any statement or representation to it regarding any fact relied upon by it in making this Settlement Agreement, and that it has not relied upon any statement or representation in executing this Settlement Agreement other than the terms and provisions set forth herein:

ARTICLE 5

MISCELLANEOUS

- (a) This Settlement Agreement shall not be modified except by further written agreement of the Parties.*
- (c) This Settlement Agreement shall become effective upon its signature hereof by the respective Parties.*
- (d) The Parties agree that, given the subject matter hereof, it is of the utmost urgency and importance that*

the transfer of the shares takes place as contemplated herein and the Parties are entitled to specific performance of this Settlement Agreement.

(m) This Settlement Agreement shall be governed by the laws of India and the Courts in Delhi shall have exclusive jurisdiction with regard to the interpretation, validity and performance of the terms of this Settlement Agreement.”

13. The senior counsel for Jindal has argued, that (i) though closing of the Settlement Agreement was to take place within 30 days from the date of signing thereof on 20th December, 2013 or on any other date as may be mutually agreed upon between the parties and the closing did not happen within 30 days but the agreement was not terminated by Aperam Stainless till 13th September, 2016; (ii) while Aperam Stainless is resisting the claim of Jindal for specific performance in CS(COMM) No.1314/2016, Imphy, which is related to Aperam Stainless, by filing CS(COMM) No.45/2017 is seeking enforcement of the Settlement Agreement dated 20th December, 2013; (iii) all the documents are admitted and there are no disputed documents; (iv) for transfer of shares of a foreign JV partner in favour of the Indian partner, the requirement of RBI is that it should not be for a valuation higher than the fair market value; (v) the claim of Aperam Stainless that any misrepresentation qua valuation was made to it is fallacious as the price of shares mentioned in the Settlement Agreement is the mutually agreed price and is not on the basis of any representation; (vi)

attention is invited to Clause (e) of Article 4 of the Settlement Agreement recording that the settlement was not based on any representation of one to another; (vii) attention is invited to e-mail dated 20th September, 2012 of the attorney of Aperam Stainless to the attorney of Jindal *inter alia* as under:

“Please find below a summary of our discussions in the teleconference on September 10, 2012. I would be grateful for your comments.

The following terms were agreed between the parties i.e. Aperam Stainless Services & Solutions Precision successor to IUP (“Aperam”), Jindal Saw Limited (Jindal) and IUP Jindal Metal & Alloys Limited (JVC):

- 1. Aperam will be paid a lump sum amount of USD 500,000 made up as follows.*

A) Shares

Jindal shall purchase all the shares of Aperam in the JVC and Jindal shall pay Aperam a price for the shares equal to the Indian rupee value of the shares calculated according to the current guidelines of the Govt. of India. Against payment, Aperam shall transfer to Jindal all the shares that Aperam holds in JVC.

B) the balance of the USD 500,000 shall be paid to Aperam by the JVC in settlement of the amounts due by the JVC to Aperam for supplies of equipment received by the JVC from Aperam.

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At Closing the following shall take place.

a) Aperam shall sign the transfer form and transfer the share certificates to Jindal and Jindal shall simultaneously pay Aperam the agreed amount for the shares.

b) the JVC shall pay Aperam the amount agreed for the equipment.”

(viii) the closing date was mutually extended awaiting the RBI permission which was obtained only on 28th January, 2016; (ix) it is not even pleaded by Aperam Stainless or Imphy that time for payment was of the essence; (x) attention is invited to Section 55 of the Contract Act, 1872; (xi) for the delay in grant of permission, Aperam Stainless is at best entitled to interest; (xii) Aperam Stainless in its written statement itself has pleaded that Aperam Stainless and Imphy, on 12th October, 2015 expressed their concern at the amount of time being taken to achieve closing and requested that the same be completed within next couple of weeks – the same itself is indicative of the time for performance having been extended till then; (xiii) attention is invited to the e-mail dated 11th August, 2014 of Aperam Stainless to Jindal, filed by Aperam Stainless itself before this Court, to contend that the same is indicative of the Settlement Agreement being treated as subsisting till then; (xiv) attention is also invited to the letter dated 17th February, 2011 of Aperam Stainless to Jindal, again filed by Aperam Stainless itself before this Court, to contend that Aperam Stainless had exercised the Put Option pursuant to the JV Agreement; (xv) that misrepresentation qua valuation of shares has been introduced as a red herring, to avoid obligations under the Settlement Agreement; (xvi) attention is invited to Article 33 of the

JV Agreement, to show that the same was to stand terminated automatically upon Aperam Stainless exercising the Put Option or Jindal exercising the Call Option; (xvii) attention is invited to Article 7.1.2 of the JV Agreement providing that in the event of Aperam Stainless exercising a Put Option, the price of the shares held by Aperam Stainless shall be either the fair market value of Aperam Stainless or the value of Aperam Stainless's initial contribution less depreciation of the equipment supplied by Aperam Stainless, whichever is higher, and for appointment of eminent auditor to decide the fair market value; and, (xviii) no oral evidence is required in the aforesaid scenario.

14. Per contra, the senior counsel for Aperam Stainless had argued that (a) it is *inter alia* the defence of the Aperam Stainless that (i) the Settlement Agreement dated 20th December, 2013 was got executed by misrepresentation as to value of shares; (ii) Jindal is also in breach of its obligations under the Settlement Agreement; and, (iii) the Settlement Agreement for this reason has been terminated by Aperam Stainless; (b) once the Settlement Agreement has been so terminated, the question of specific performance thereof does not arise; (c) Section 10 of the Contract Act defines only those agreements as contracts, which have been *inter alia* been made with the free consent of the parties; Section 14 of the Contract Act provides that consent is free when it is not caused *inter alia* by misrepresentation; (d) the Settlement Agreement having been caused by misrepresentation, is not a contract, specific performance whereof can be obtained; (e) a

fraud within the meaning of Section 17 of the Contract Act has been played upon Aperam Stainless, because the same valuer has give two different valuations of the same shares; (f) fraud and misrepresentation are not mutually exclusive; (g) Section 19 of the Contract Act makes an agreement, consent whereto is caused by misrepresentation, voidable at the option of the party whose consent was so obtained; (h) attention is invited to the Valuation Certificate of N.C. Aggarwal & Company, Chartered Accountants, annexed to the Settlement Agreement dated 20th December, 2013, to show that the same itself records that they were retained by Jindal for the purpose of valuation; (i) Order XIII-A of the CPC as applicable to commercial suits is not concerned with weightage to be given to a written contract; (j) there is no principle that there can be no fraud in a commercial contract; (k) Clause (e) of Article 4 of the Settlement Agreement excludes valuation of shares; (l) N.C. Aggarwal & Company, Chartered Accountants relied on documents and information furnished by Jindal and projections made by Jindal; (m) attention is invited to the Annual Report for the year 2013-14 of Jindal, to show that the same lists the value of the shares held by Jindal in IUP at Rs.4,531.80 lacs i.e. at about about Rs.40/- per share; (n) it is inconceivable that the shares of IUP which were worth Rs.40/- as on 31st March, 2013, would be worth only about Rs.1/- in November, 2013; (o) once Aperam Stainless succeeds in proving fraud, it is a complete defence to the suit for specific performance; (p) though explanation (2) to Section 25 of the Contract Act provides that an agreement is not void merely because the consideration is inadequate, but only if consent is

freely given and attention in this regard is invited to illustrations (f) and (g) thereto; (q) attention is invited to, *Niaz Ahmad Khan Vs. Parshotam Chandra* AIR 1931 All 154 on difference between fraud and misrepresentation; *John Minas Aparcar Vs. Louis Caird Malchus* AIR 1939 Cal 473 and *Kopparthi Venkataratnam Vs. Palleti Sivaramudu* AIR 1940 Mad 560, following the above; (r) it is irrelevant whether a party had means to and / or could have discovered the truth on due diligence, once there is an active fraud; (s) in any case the same raises a triable issue; (t) the question of valuation is also a triable issue; (u) absence of the plea of fraud in pleadings is irrelevant; (v) reliance is placed on *Bishunath Tewari Vs. Ms. Mirchi* AIR 1955 Patna 66, *Kedar Lal Seal Vs. Hari Lal Seal* AIR (39) 1952 SC 47 and *Varanaseya Sanskrit Vishwavidyalaya Vs. Rajkishore Tripathi* (1977) 1 SCC 279 to contend that law is not to be pleaded; (w) the Settlement Agreement provided for time of about 30 days for closing; (x) though the Settlement Agreement also provided for the time of closing to be mutually changed but the intent was of payment immediately or within a reasonable time; however payment was admittedly not made for three years and Aperam Stainless became entitled to repudiate the agreement as it did; and, (y) whether the delay was on account of Jindal or not, is also a triable issue.

15. The senior counsel for Jindal, in rejoinder argued that (i) it has to be pleaded and proved that the consent was obtained by fraud and / or by misrepresentation; (ii) no plea has been taken by Aperam Stainless in the written statement, of Jindal indulging in fraud and the

plea of mutual mistake and misrepresentation was taken; (iii) it is only in reply to the application for summary judgment, that fraud has been pleaded; (iv) in admission / denial of documents, the e-mail dated 20th September, 2012 has been admitted; (v) the reply to the application seeking summary judgment has to disclose evidence and documents, proof whereof would disentitle the party seeking summary judgment to judgment in its favour; no such thing has been disclosed by Aperam Stainless in its reply; (vi) the consent of Aperam Stainless to the Settlement Agreement is not induced by valuation; (vii) Pricewaterhouse Coopers had valued the share at Nil; (viii) attention is drawn to the e-mail of Aperam Stainless claiming the value of the shares at one million USD; (ix) the Settlement Agreement merely records the agreement earlier reached and with respect where to e-mail dated 20th September, 2012 was sent, agreeing to sell the shares at half of one million USD which was demanded; (x) the Settlement Agreement dated 20th December, 2013 does not say that the price agreed is based on auditor's report; (xi) the senior counsel for the Aperam Stainless has failed to deal with Section 55 of the Contract Act; (xii) Aperam Stainless, in para no.24 of Preliminary Submission in its written statement, has admitted that obligations as mentioned therein were to be performed by Jindal as well as Aperam Stainless for effecting the transfer of shares; (xiii) for the delay if any, the only claim can be of compensation; (xiv) reliance is placed on ***M.S. Madhusoodhanan Vs. Kerala Kaumudi Pvt. Ltd.*** (2004) 9 SCC 204 to contend that shares are not ordinary articles of commerce; (xv) reliance is placed on ***Arosan Enterprises Ltd. Vs. Union of India***

(1999) 9 SCC 449 laying down that when the contract itself provides for extension of time, the same cannot be the essence of the contract and default does not make the contract voidable; (xvi) reliance is placed on *Swarnam Ramachandran Vs. Aravacode Chakungal Jayapalan* (2004) 8 SCC 689 laying down that the onus to plead and prove, that time is of the essence of the contract is on the person alleging it; (xvii) reliance is placed on *Bibi Jaibunisha Vs. Jagdish Pandit* (1997) 4 SCC 481, also laying down that in the matter of enforcement of agreement, time is not always the essence of the contract unless the agreement expressly stipulates and there are special facts and circumstances in support thereof and further laying down that it must be specifically pleaded, so that the other party has a right to lead evidence; and, (xviii) reliance is placed on *P. D'Souza Vs. Shondrilo Naidu* (2004) 6 SCC 649, laying down that once the defendant had consciously waived his right, he cannot turn around and contend that time was of the essence of the contract and the plaintiff was not ready and willing.

16. The senior counsel for Aperam Stainless, in sur-rejoinder contended, that though permission for payment of USD 4,50,000 was received on 28th January, 2016 but still no payment was made till September, 2016; in the circumstances readiness and willingness of Jindal is a triable issue.

17. The senior counsel for Jindal added that Jindal, on 9th March, 2016 itself asked Aperam Stainless to close the Settlement Agreement

but Aperam Stainless instead, in September, 2016 repudiated the Settlement Agreement.

18. The senior counsel for Aperam Stainless, with reference to the contentions in rejoinder of senior counsel for Jindal of Section 55 of the Contract Act, referred to Section 46, providing that where no time for performance is specified, performance must be within a reasonable time; the senior counsel for Jindal contended, that invocation of Section 46 is an admission of no time of performance having been specified.

19. I may record that the counsel for the Aperam Stainless during the hearing on 7th January, 2019 had also raised an argument, that at least share price of USD 50,000 should have been paid on receipt of RBI permission in the year 2015, without awaiting the RBI permission for payment of USD 450,000, but admitted that neither was any such payment demanded nor has any such plea been taken in the written statement.

20. Moreover, the senior counsel arguing for Aperam Stainless, on 8th January, 2019 did not touch the said aspect.

21. I have considered the rival contentions.

22. Order XIII A of the CPC, as made applicable to commercial suits within the meaning of Commercial Courts Act, is titled “Summary Judgment”. Rule 2 thereof provides, that an application for summary judgment may be made at any time after summons have

been served on the defendant, till the framing of issues. Rule 3 is as under:

“3. *Grounds for summary judgment.....*

- (a) *the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and*
- (b) *there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.”*

23. Rule 4 thereof providing the procedure for applying for a summary judgment *inter alia* requires the applicant to state the reason why there are no real prospects of succeeding on the claim or defending the claim and requires notice of the said application to be given to the opposite party of 30 days, and the reply to such application to precisely identify the points of law if any and the reasons why the relief of summary judgment should not be granted and why there are real prospects of succeeding on the claim or defending the claim and to state the issues to be framed for trial and what evidence is to be lead thereon and permits additional documentary evidence to be filed with such reply.

24. The Delhi High Court (Original Side) Rules, 2018, in Chapter XA thereof, also provides for summary judgment and do not provide for any application to be moved therefor. I have in ***K.R. Impex***

Vs. Punj Lloyd Ltd. 2019 SCC OnLine Del 6667 and *Mallcom (India) Limited Vs. Rakesh Kumar* (2019) 259 DLT 1 had occasion to deal with the said Rules and the need to reiterate the same here and burden this judgment therewith is not felt. Suffice it is to state that an application is not essential to seek summary judgment and the Court, on its own or on the asking of either party, is entitled to see/adjudicate, whether a case for summary judgment is made out.

25. Thus while under the procedure prescribed in CPC, the Court had no option but to list the suit for trial, howsoever negligible, in the light of documents and circumstances, the weightage to be attributed to a factual plea taken in the pleadings be, the Commercial Courts Act, introduced with the object and reason of early resolution of commercial disputes to create a positive image to the investor world about the independent and responsive Indian legal system, has done away with that and entitled the Courts to weigh, on the basis of pleadings and materials on record, the real prospect of succeeding on the claim or defence, unless there is any other compelling reason why the claim should not be disposed of before recording of oral evidence.

26. It cannot be lost sight of that most commercial transactions today, considering the availability of electronic and instantaneous means of communication, are in black and white and with a track record, with no element whatsoever of verbal talks / conversations. Such verbal talks / conversations / discussions in the past were often pleaded to plead what was the intention of the parties to the contract. However, when all that has transpired between the parties to the

contract, before signing a contract as well as after signing the contract is in black and white, there is no scope left for any witness to appear and depose what was spoken and discussed with another and what was the understanding arrived at with the other. The intention of the parties is thus to be gathered from a reading of the communication exchanged between the parties in black and white. Needless to state, there is little, if no scope left to explain the written word in black and white.

27. Before proceeding further, another argument raised may be dealt with. It is the contention of the senior counsel for Jindal, that Aperam Stainless, in its reply to the application of Jindal for summary judgment, pleaded beyond its written statement. I have considered, whether a party to the suit, when faced with an application for summary judgment against it, in reply thereto plead more than what is already pleaded in its pleadings in the suit. The answer, in my view, whichever way one looks at it, has to be NO. My reasons therefore are:-

- (a) A suit is to be decided on issues framed and which issues, vide Order XIV Rule 1(5) are to be framed on a reading of plaint and the written statement;
- (b) Once it is so, the summary judgment in the suit also, has to be on a reading of plaint and written statements and materials on record in support thereof;

- (c) All application and replies thereto, in the course of the decision of the suit, are in aid of such decision and cannot travel beyond the jacket of pleadings;
- (d) To hold, that the reply to an application for summary judgment can travel beyond the pleadings, will defeat the provision for summary judgment; a party to the suit, when faced with an application for summary judgment pointing out weaknesses in its case, to defeat the application for summary judgment, in reply thereto, will take new pleas, depriving the applicant of the summary judgment and taking away the advantage/benefit which had accrued to it from the pleadings; this is impermissible in law;
- (e) Even otherwise, once an application in writing for summary judgment is not necessary, there can be no discrimination between a party to a suit against whom application for summary judgment has been filed and a party to a suit against whom summary judgment is sought without application, with the party against whom application in writing is filed having opportunity to file reply taking new pleas and the other having no such opportunity;
- (f) Rule 4(3) of Order XIII A, providing for reply to the application for summary judgment also does not permit or can be read as permitting pleas beyond pleadings; all

the facts to be disclosed, reasons to be stated, must be in confines of pleadings in the suit. Thus, no plea in the reply to application for summary judgment, beyond the written statement, is to be seen.

28. None of the pleas of Aperam Stainless in its written statement to the suit or in the reply to the application for summary judgment, read with the documents on record disclose that the defendant Aperam Stainless has any real prospect of successfully defending the suit. No person of Aperam Stainless has been mentioned who may be able to throw any better light on the exchanges which took place between the parties and it is also not the plea that any person on behalf of Jindal made any representation or said something which may be relevant for explaining any communication. To the said extent, Aperam Stainless, in its reply has not disclosed any reason why summary judgment should not be passed, if on the basis of documents containing the exchanges between the parties, it were to be found that there is no chance of Aperam Stainless succeeding on its pleas of misrepresentation and breach by Jindal itself and / or on its argument of the transfer being vitiated by fraud. On the contrary, Aperam Stainless and Imphy, whose interest is one and the same though technically two different persons, by filing an application for summary judgment in CS(COMM) No.45/2017 and also arguing the same, though subsequently withdrew, confirmed that there is no reason why trial should be ordered.

29. With respect to the withdrawal of the application filed by Imphy in CS(COMM) No.45/2017 for summary judgment, I may state that CS(COMM) No.45/2017 was instituted on 9th January, 2017, re-filed on 16th January, 2017 and came up first before the Court on 18th January, 2017. The plaint in CS(COMM) No.45/2017 pleads the cause of action thereof to have first accrued when goods were supplied by Imphy to IUP and when IUP defaulted in paying the price thereof, thereafter on 20th December, 2013 when the Settlement Agreement dated 20th December, 2013 was executed and last on 19th January, 2014, being the closing date of the Settlement Agreement when payment of the amount of USD 450,000 claimed therein was to be made. The goods, price whereof is sought to be recovered in CS(COMM) No.45/2017, are pleaded to have been supplied between January, 2007 and March, 2007.

30. I have during the hearing enquired from the senior counsel for Aperam Stainless and Imphy, whether not as on the date of signing of the Settlement Agreement dated 20th December, 2013, the limitation for suing for recovery of the amounts claimed in CS(COMM) No.45/2017 had long since expired.

31. The senior counsel for Aperam Stainless and Imphy agreed.

32. It was further enquired by me during the hearing, that if the claim for recovery of price of the goods supplied between January, 2007 and March, 2007 had become barred by time, how was the suit, being CS(COMM) No.45/2017, maintainable.

33. The senior counsel for Aperam Stainless and Imphy contended that there was an acknowledgment of the said liability in the Settlement Agreement dated 20th December, 2013.

34. It was enquired, whether not for such acknowledgment to confer a fresh period of limitation under Section 18 of the Limitation Act, it was necessary for the acknowledgment to be before the expiration of limitation, and how acknowledgment dated 20th December, 2013 of liability, cause of action whereof had accrued between January, 2007 to March, 2007, was within time.

35. It was further enquired from the senior counsel for Aperam Stainless and Imphy, whether not promise to pay USD 450,000 to Imphy in the Settlement Agreement dated 20th December, 2013, was without consideration.

36. The senior counsel for Aperam Stainless and Imphy drew attention to Section 25(3) of the Contract Act, though constituting an agreement without consideration to be void, providing an exception for a promise made in writing and signed by the person to be charged therewith a debt of which the creditor might have enforced payment but for the law for the limitation of suits and contended that such an agreement is not void.

37. However, the counsel for Aperam Stainless and Imphy, at that stage withdrew the application for summary judgment in CS(COMM) No.45/2017.

38. Though the application was withdrawn in CS(COMM) No.45/2017, but filing thereof cannot be wiped out from the record. In filing thereof, there is an admission of the suit not requiring any evidence to be recorded and being disposable by a summary judgment.

39. I will first take up the defence of Aperam Stainless, of misrepresentation. The defence is that the consent of Aperam Stainless to sell all shares held by Aperam Stainless in IUP for USD 50,000 equal to USD 0.0185 per share was obtained by misrepresenting the fair market value of the price which as per the RBI Regulations was to govern the sale which required prior permission of RBI.

40. It is not in dispute that Aperam Stainless, whether for reasons attributable to Jindal or for any other reason, since the year 2009 had no participation in IUP, created in joint venture with Jindal in 2004.

41. It is also not in dispute that Aperam Stainless exercised the Put Option on 3rd February, 2009 and whereunder the Jindal had a right to purchase the shares held by Aperam Stainless.

42. The senior counsel for Aperam Stainless and Imphy had no response whatsoever, neither in the pleadings nor in the arguments, to the e-mail dated 20th September, 2012 which is of much before the valuation report of 22nd November, 2013 qua which misrepresentation is alleged. The said e-mail reproduced above shows that in the teleconference on 10th September, 2012 it was agreed between the

parties that Aperam Stainless will be paid a lump sum amount of USD 500,000/- being half of USD 1,000,000 earlier demanded and since the price to be paid by Jindal, of the shares held by Aperam Stainless in IUP and to purchase which Jindal had a preemptory right, was regulated, it was further agreed that if the agreed amount of USD 500,000/- was more than the regulated amount/price which could be paid towards share price, the excess/balance after adjusting regulated amount/price, shall be paid towards due of Imphy.

43. I may highlight that the supplies by Imphy to IUP were between January and March 2007 and the limitation prescribed by law for recovery of price thereof, vide Article 14 of the Schedule to the Limitation Act, 1963, of three years, had lapsed in March 2010. It is not the plea that the limitation stood extended. Thus, as on 20th September, 2012, the price of the supplies from Imphy to IUP, even if any remaining, was not legally recoverable.

44. This becomes clear as daylight, from a reading of some other unrebutted documents. Aperam Stainless, vide its letter dated 3rd February, 2009 to Jindal, in accordance with Clause 7.2.1 of the JV Agreement, communicated its decision to exercise its Put Option right over the 2,70,00,000 shares of IUP representing 27% of the share capital of IUP and further informed that the price of the purchase and sale, again in accordance with Clause 7.2.1 of the JV Agreement, shall be the value of the initial contribution net of depreciation of the equipment supplied during the period up to the date of exercise of the option calculated according to a straight line method and the result of

the said calculation was 137.64 million Indian rupees. Jindal, vide its letter dated 30th December, 2010 to Aperam Stainless, with reference to the Put Option exercised by Aperam Stainless stated, that (i) in accordance with the terms of the JV Agreement, Price Waterhouse Coopers (PWC) was appointed to decide the fair market value of the shares held by Aperam Stainless in IUP and PWC had submitted its report setting out the fair market value of the IUP shares to be Nil; (ii) thus no amount was payable by Jindal to Aperam Stainless for transfer of shares of Aperam Stainless in favour of Jindal; and, (iii) since the Put Option had already become effective, Aperam Stainless should immediately deliver the original share certificates and execute the transfer forms in favour of Jindal. Aperam Stainless responded to the said letter vide its letter dated 17th February, 2011 wherein (a) it contested the valuation of PWC; (b) called upon Jindal to change the name of IUP and to remove all references to IUP in the Articles of Association of IUP; and, (c) proposed resolution of the disputes by a single settlement and on this basis proposed to “settle outstanding issues for an aggregate consideration of USD one million”. Jindal, vide its letter dated 7th April, 2011 communicated its refusal to settle for aggregate consideration of USD one million and further stated that as per Regulations, the maximum amount which could be paid towards the shares could not be more than fair market value and as the shares were not listed on any stock exchange, the valuation of PWC should be accepted. Jindal, vide its reminder dated 19th January, 2012 to Aperam Stainless, also intimated that Aperam Stainless had ceased to continue to hold shares in IUP and the nominees of Aperam

Stainless had ceased to be the Directors of IUP and called upon Aperam Stainless to transfer the shares. It was in the said background that the e-mail dated 20th September, 2012 reproduced hereinabove was sent by Aperam Stainless to Jindal, recording the agreement reached in the discussion in the teleconference on 10th September, 2012, of payment by Jindal to Aperam of USD 500,000 towards shares of IUP held by Aperam Stainless and to purchase which Jindal had the first right, on Aperam Stainless exercising Put Option. I may highlight that in the correspondences detailed in this paragraph, of prior to 20th September, 2012, there was no reference to the dues/claims of Imphy and only in the e-mail dated 20th September, 2012, while agreeing to lump sum payment by Jindal of USD 500,000, it was provided that if the fair market value of the shares was less than USD 500,000, the balance shall be paid in settlement of amounts due from IUP to Imphy towards equipment.

45. It is not in dispute that the sale of shares could not take place without RBI permission and for grant of which permission it was necessary that the sale was either for a price invested towards equity less depreciation or fair market value, whichever is more.

46. Once the parties on 20th September, 2012 had arrived at such an agreement, they took time of over one year i.e. till 20th December, 2013, to sign the Settlement Agreement. The Settlement Agreement dated 20th December, 2013 mentions the same figure of 500,000 as agreed in teleconference of 10th September, 2012 and recorded in the email dated 20th September, 2012. It is not the plea that anything

transpired between 20th September, 2012 and 20th December, 2013, to influence the total consideration agreed. The only inference is that the consideration agreed to in the Settlement Agreement was the consideration agreed to as far back as on 20th September, 2012 and the parties, as per commercial exigencies, agreed to, out of USD 500,000, appropriate USD 50,000 towards price of shares and USD 450,000 towards price of material supplied.

47. However while signing the Settlement Agreement, the parties in compliance of the requirement of RBI recorded therein that the consideration of USD 50,000 for shares held by Aperam Stainless in IUP was the fair market value of the shares and in support cited the valuation report of N.C. Aggarwal & Company, Chartered Accountants and annexed a copy of the report to the Settlement Agreement. N.C. Aggarwal & Company, Chartered Accountants also have while certifying the valuation taken care to specify the said valuation to be “considering the provisions contained in Reserve Bank of India Circular No.RBI/2009 – 10/445/A.P.(DIR Series) Circular No.49 dated 4th May, 2010”.

48. Section 18 of the Contract Act defines “misrepresentation” as meaning and including (i) positive assertion of that which is not true though he believes it to be true; (ii) breach of duty which, without any intent to deceive, gains an advantage of the person committing it, by misleading another to his prejudice; and, (iii) causing a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement. Section 14 defines “free consent” as

consent which is not caused *inter alia* by misrepresentation. It however proceeds to further provide that consent is said to be caused by misrepresentation when it would not have been given but for the misrepresentation. Thus, even if there is misrepresentation but is not the cause of the consent, there is no misrepresentation in law, for it to be said that consent is not free. Finally, Section 19 of the Contract Act provides that when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. It however again further explains, that a misrepresentation which did not cause the consent does not render a contract voidable and carves out an exception for a case where the party whose consent was so caused by misrepresentation, had the means of discovering the truth with ordinary diligence.

49. Applying the aforesaid law, the contemporaneous correspondence between the parties does not support the plea of Aperam Stainless, of Jindal having practiced any misrepresentation qua the valuation of the shares or of, the consent of Aperam Stainless to the Settlement Agreement dated 20th December, 2013 of which Jindal is seeking specific performance, being not free and the Settlement Agreement being voidable at the option of Jindal. The first demand of Aperam Stainless, after exercising the Put Option, for the price of its shares in IUP, which Jindal had a preemptory right to buy, was of 137.64 million Indian rupees i.e. equal to USD 2,008,463.39 i.e. of USD two million. However the same was subsequently lowered

by Aperam Stainless itself, to USD one million, in its email dated 17th February, 2011. Finally, in the teleconference on 10th September, 2012 between Jindal and Aperam Stainless, a lump sum amount of USD 500,000 i.e. half million was agreed, and knowing fully well that the price which could be paid and received towards shares was regulated by RBI, it was also agreed that if the said regulated price of shares was less than USD 500,000, the balance amount remaining out of USD 500,000, after appropriating the regulated price, would be paid and received towards price of material supplied, which though on that date was not legally recoverable from Jindal and/or from IUP. This is confirmed in email dated 20th September, 2012. It is the agreement reached in the teleconference on 10th September, 2012 and confirmed in e-mail dated 20th September, 2012, which was given effect to in the Settlement Agreement dated 20th December, 2013, relying on the report of N.C. Aggarwal & Co. Chartered Accountants, by appropriating an amount USD 50,000 towards price of shares and USD 450,000 towards price of material. Once the total amount to be paid by Jindal and to be received by Aperam Stainless and Imphy was settled voluntarily, appropriation of the same under different heads was a matter of commercial exigencies and convenience of the parties and it is not open to Aperam Stainless and/or Imphy to subsequently claim that while the commitment qua USD 450,000 mentioned in the Settlement Agreement to be paid towards price of materials binds Jindal, Aperam Stainless is not bound by the price agreed to be appropriated of USD 50,000 towards the consideration of shares. The documents establish that not only was it felt at the contemporaneous

time that if the entire amount of USD 500,000 was agreed to be paid towards shares, permission therefor will not be granted by RBI, but even otherwise, commercially it suited the parties to receive bulk of the total amount of USD 500,000 already agreed / settled, to be paid and received towards price of material and only the minimum towards price of shares. The price of the shares to be paid to a foreign joint venture partner is regulated, to prevent outflow of foreign exchange, and realizing the same, the parties at the contemporaneous time felt that permission required would be obtained if the price of shares was kept at minimum. In any case, it cannot be said that the consent of Aperam Stainless was caused by valuation of shares of N.C. Aggarwal & Co. Chartered Accountants. It cannot also be forgotten that it is not as if there was any relationship of trust between Jindal and Aperam Stainless, for Aperam Stainless to rely on valuation got done by Jindal. Aperam Stainless, in the letter dated 3rd February, 2009, exercising the Put Option and whereupon Jindal became entitled to purchase the shares, itself was blaming Jindal for the state of affairs of IUP and demanded the price of about USD two million as aforesaid. This was followed by valuation got done from PWC, which reported nil value of the shares. In pursuance thereto, Jindal was calling upon Aperam Stainless to transfer the shares at nil value. This was followed by negotiations as to price, with Aperam Stainless successively bringing down its demand from that of USD two million, to USD one million and then to USD half million, which was agreed to by Jindal. There can certainly be no misrepresentation qua price which has been agreed to after such negotiations. Moreover, since the

relationship with Jindal was already strained, the minimum due diligence expected from Aperam Stainless exercising Put Option was, to have its own valuation done. The case thus also falls in the exception to Section 19 of the Contract Act. No case of misrepresentation is made out.

50. Once there is no misrepresentation, even if there were to be any inadequacy of the price of shares, the same, vide Explanation 2 to Section 25 of the Contract Act, does not make the agreement void.

51. As far as the argument of the senior counsel for the Aperam Stainless, of N.C. Aggarwal & Co. Chartered Accountants having differently valued the shares of IUP for the purposes of Annual Report for the year 2013-14 of Jindal, and KPMG also having reported the value of the shares to be much higher, are concerned, I may mention that the relevant RBI circular of the relevant time by which the parties were governed, provided for the fair valuation to be “As per the discounted free cash flow method”. N.C. Aggarwal & Co. Chartered Accountants, in their valuation report appended to the Settlement Agreement dated 20th December, 2013, have stated the valuation to have been done by the discounted free cash flow method, as per the circular of RBI. I am unable to find in the report of KPMG qua “review of the valuation of shares” “computed under the Settlement Agreement dated 20th December, 2013” any mention of the valuation done to be as per the discounted free cash flow method. ***Commissioner of Wealth Tax Vs. Mahadeo Jalan*** (1973) 3 SCC 157 notices different ways of valuation of shares and mentions break-up

value method and yield value method and the different valuations achieved applying different methods. *Miheer H. Mafatlal Vs. Mafatlal Industries Ltd.* (1997) 1 SCC 579 also observes that valuation of shares is a technical and a complex problem and that many imponderable enter the exercise of valuation of shares. For this reason only, the RBI circular, while providing for the fair market value also laid down the method to be adopted for valuation. *G.L. Sultania Vs. Securities & Exchange Board of India* (2007) 5 SCC 133 also holds that valuation of shares has many imponderables and can be by several methods and when a method of valuation is prescribed, the valuation must be made adopting scrupulously the method prescribed. Seen in this light and the objective of valuation under the RBI circular aforesaid and for the purposes of balance sheet of Jindal, the two are naturally diverse. While objective of one is to keep the valuation at the minimum, that of the other is to show the maximum valuation to reflect a healthy balance sheet and annual report. Adopting different methods of valuation would lead to different valuations and Aperam Stainless cannot gain any advantage therefrom. *K.K. Modi Vs. K.N. Modi* (1998) 3 SCC 573 may also be cited on different valuations.

52. The language of the operative Clause 1.1 of the Settlement Agreement dated 20th December, 2013 is also clear in this regard. It is nowhere recorded by the parties that the purchase price agreed is on the basis of representation contained in the Valuation Report. On the contrary, the parties have recorded that the “purchase price has been

mutually agreed between them and is not more than the fair market value of Aperam shares as determined by auditors of the JVC” according to their value report. The reference of Valuation Report is only in support of the purchase price being not more than the fair market value, and not as determinative of the purchase price agreed. Even in Clause 4(e) of the Settlement Agreement, it has been explicitly recorded that either party has not made or relied on any representation regarding any fact relied on in making the Settlement Agreement.

53. Sections 91 and 92 of the Evidence Act, 1872 bar any evidence contradicting, varying, adding to or subtracting from the terms of a documents reduced to writing. The parties having expressly stated in their agreement in writing that the price was mutually agreed, it is not open to Aperam Stainless to plead or prove that the price was agreed on the misrepresentation of Jindal to Aperam Stainless.

54. As far as the argument urged by the senior counsel for Aperam Stainless / Imphy of fraud is concerned, the senior counsel also could not controvert that there is no basis thereof in the pleading. The only argument was that it is a plea of law which is not required to be pleaded. However the said argument ignores that fraud is defined in Section 17 of the Contract Act as an act committed by a party to a contract with the intent to deceive another party thereto or to induce him to enter into the contract. Thus the plea of fraud is a factual plea and Order VI Rule 4 of the CPC also provides that in all cases in which a party pleads or relies on any fraud, particulars shall be stated

in the pleading. There are no particulars of who with the intent to deceive whom had offered what inducement to enter into the contract. I have in *Om Prakash Vs. IOCL Officers Welfare Society* 2019 SCC OnLine Del 6719 dealt with the requirement of full particulars for a plea of fraud and the need to reiterate the same is not felt. In the absence of any foundation and pleadings, no credence can be given to the arguments at the bar on the ground of fraud.

55. That leaves only the defence, of Jindal being not entitled to specific performance for the reason of being itself in default.

56. However again, no explanation whatsoever has been given by Aperam Stainless to the communications dated 11th August, 2014 and 12th October, 2015 whereby the Settlement Agreement dated 20th December, 2013 was admitted to be pending closure and proposing closure within “couple of weeks”. The same indicate that the time of performance was extended.

57. It is admitted by Aperam Stainless in para no.24 of its written statement in CS(COMM) No.1314/2016 that there were obligations to be complied with also before closure. It is not in dispute that there could be no closure without RBI permission. I have minutely perused the pleadings and do not find any plea that they were any defaults / deficiencies by Jindal in securing the RBI permission. Once the closure of the Settlement Agreement was not possible without RBI permission which was obtained on 28th January, 2016, it cannot be said that Jindal was in default, to be not entitled to specific performance.

58. The Specific Relief Act, 1963 has been amended with effect from 1st August, 2018 (notified from 1st October, 2018) to remove some impediments imposed thereby to specific performance of contracts and to facilitate specific performance. While Section 10 of the Act as it stood prior to amendment, made the grant of the relief of specific performance discretionary, post amendment, “specific performance of a contract shall be enforced by the Court subject to the provisions contained in sub Section 2 of Section 11, Section 14 and Section 16”. The senior counsel for the Aperam Stainless has not argued that Section 11(2) or Section 14 or Section 16 are attracted or bar specific performance in the present case, except as hereinabove mentioned. Jindal, on the contemporaneous documents discussed hereinabove, is found to have performed and/or to have been ready and willing to perform the essential terms of the contract, and immediately on receipt of RBI permission on 28th January, 2016, called upon Aperam Stainless to perform its part and on refusal of Aperam Stainless, filed the present suit on 20th September, 2016. Though the amendment to the Specific Relief Act is of after the institution of the suit, but it has been held in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd.* (2007) 7 SCC 125 that the law of specific relief in its essence is a part of the law of procedure, for, specific relief is a form of judicial redress. With respect to procedural laws, it has been consistently held that amendments thereto are retrospective. Reference if any required may be made to *Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board* (2012) 7 SCC 462, *Thirumalai*

Chemicals Ltd. Vs. Union of India (2011) 6 SCC 739 and ***Rajendra Kumar Vs. Kalyan*** (2000) 8 SCC 99.

59. Reference may be made to ***Vijaya Myne Vs. Satya Bhushan Kaura*** (2007) 142 DLT 483 (DB) of prior to the amendment to the Specific Relief Act, allowing a suit for specific performance on an application under Order XII Rule 6 of the CPC.

60. I thus find that Aperam Stainless indeed has no real prospect of successfully defending the claim. There is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

61. IA No.6194/2018 is thus entitled to be allowed and is allowed.

CS(COMM) No.1314/2016 and CS(COMM) No.45/2017.

62. Jindal is thus entitled to a decree for specific performance of the Settlement Agreement dated 20th December, 2013 sought in CS(COMM) No.1314/2016, directing Aperam Stainless to, against receipt of consideration as mentioned in Settlement Agreement dated 20th December, 2013, transfer the shares held by it in IUP in favour of Jindal and to perform its other obligations under the Settlement Agreement dated 20th December, 2013.

63. Jindal, under the said Settlement Agreement dated 20th December, 2013, simultaneously with the amount of USD 50,000 towards price of shares, is also liable to pay the amount of USD 450,000 towards supply of material and for recovery of which

CS(COMM) No.45/2017 has been filed by Imphy. Though the application of Imphy for summary judgment in CS(COMM) No.45/2017 has been dismissed as withdrawn but there can be no decree for specific performance of Settlement Agreement dated 20th December, 2013 in favour of Jindal, without a decree being also passed in CS(COMM) No.45/2017, in favour of Imphy and against IUP, of recovery of USD 450,000.

64. Imphy, in CS(COMM) No.45/2017 has also claimed interest at 18% per annum from the date of institution of the suit till realization, on the rupee equivalent of USD 450,000 claimed therein. The senior counsel for Jindal also during the hearing had agreed that interest should be paid to compensate for delay.

65. The said interest would not only be on the amount sought to be recovered in CS(COMM) No.45/2017 but would also be on the amount payable by Jindal to Aperam Stainless towards its obligations under the Settlement Agreement dated 20th December, 2013, of which specific performance has been ordered.

66. I have considered the rate at which interest should be awarded. Having found the refusal of Aperam Stainless to perform its part of the Settlement Agreement dated 20th December, 2013 to be uncalled for and further considering the interest to be awarded to be *pendente lite*, interest at the rate of 6% per annum is found to be apposite.

67. A decree is accordingly passed,

(A) in CS(COMM) No.1314/2016, in favour of Jindal and against Aperam Stainless, of specific performance of Settlement Agreement dated 20th December, 2013, by directing Aperam Stainless to, against payment of Jindal of USD 50,000 with interest at 6% per annum from 20th September, 2016 till the date of payment, which is directed to be tendered/paid within 45 days herefrom, and against payment by IUP to Imphy of USD 450,000 with interest at 6% from 16th January, 2017 till the date of payment, which is directed to be tendered/made within 45 days herefrom, perform all its obligations under the Settlement Agreement particularly of transfer of shares of IUP held by Aperam Stainless in favour of Jindal; and,

(B) in CS(COMM) No.45/2017, in favour of Imphy and against IUP, of recovery of USD 450,000 with interest at 6% per annum from 16th January, 2016 till recovery.

68. The parties are however left to bear their own costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JULY 16, 2019

‘gsr/pp’..