

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.166 OF 2019

ALONG WITH

INTERIM APPLICATION (LODGING) NO.6707 OF 2020

IN

EXECUTION APPLICATION (LODGING) NO.1713 OF 2019

IN

(ORDER AND DECREE DATED AUGUST 5, 2019)

IN

NOTICE OF MOTION NO.1916 OF 2019

IN

SUTT NO.844 OF 2019

Ashok Kumar Kothari and Ors.

.... Applicants–Judg. Creditors

Versus

Sanwarlal Agrawal and Ors.

.... Respondents–Judg. Debtors

ALONG WITH

INTERIM APPLICATION NO.692 OF 2020

IN

EXECUTION APPLICATION (LODGING) NO.139 OF 2020

IN

(ORDER AND DECREE DATED 5TH AUGUST, 2019)

IN

NOTICE OF MOTION NO.1916 OF 2019

IN

SUTT NO.844 OF 2019

Sanwarlal Agrawal and Ors.

.... Applicants–Judg. Creditors

Versus

Ashok Kumar Kothari and Ors.

.... Respondents–Judg. Debtors

Mr. Dinyar Madon, Sr. Advocate, with Mr. Vishal Kanade and Mr. Mayur Khandeparkar, i/by Mr. Jamshed Ansari, for the Applicants–Judgment Creditors.

Dr. Birendra Saraf, Sr. Advocate, with Mr. Amogh Singh and Mr. Nikhil More, i/by Mr. Bhavin R. Bhatia, for the Respondents–Judgment Debtors.

CORAM : A. K. MENON, J.

DATE : 4TH JANUARY, 2021.

P.C. :

1. This order disposes the interim applications filed in two execution applications; one filed by the original plaintiffs and the other by the original defendants. For ease of reference, the plaintiffs, who are Judgment Creditors, in Execution Application (Lodging) No.1713 of 2019 are referred to as “*the Kotharis*”. Kotharis are Judgment Debtors in Execution Application (Lodging) No.139 of 2020. The original defendants in the suit having filed Execution Application (Lodging) No.139 of 2020 are referred to as “*the Agrawals*”.

2. The disputes between the parties pertain to original plaintiff no.6 – a company known as Speciality Ear, Nose, Throat Hospital Private Limited (*“the company”*). The company is Judgment Creditor No.6 in Execution Application (Lodging) No.1713 of 2019 and Judgment Debtor No.6 in Execution Application (Lodging) No.139 of 2020.

3. The Kotharis and the Agrawals are equal shareholders in the company. The joint venture proposed to set up a multi-speciality hospital in Mumbai. According to the Kotharis, an agreement had been arrived at with the Agrawals, whereby the Agrawals were required to sell 50% of their shareholding in the company on 27th March 2019 and as recorded in an e-mail dated 28th March 2019 addressed by Dr. Vikas Agrawal–the defendant no.2. Dr. Vikas Agrawal was also present in court when the decree came to be passed on his instructions. The copy of the e-mail is annexed at Exhibit-C to the plaint and it is agreed between counsel on both sides that the submissions are being made on the basis of the record and proceedings in EXAL/1713/2019.

4. EXAL/139/2020 seeks execution of the decree construed in favour of the Agrawals. There is no dispute as to the contents of the e-mail at Exhibit-C. The cause of action to file a suit is said to have arisen in April, 2019 when the Agrawals sought to contest the Kotharis version of the agreement between the

parties; more particularly, the meaning and intent of the e-mail dated 28th March 2019 (*"the Suit Email"*). The suit then came to be filed promptly by the Kotharis. Various defences have been taken up by the Agrawals in promoting their version of the effect and meaning of the decree. One of them allude to the lack of authority in the Kotharis to present the plaint on behalf of the company. Objection to maintainability will not survive in view of the Agrawals having submitted to the decree. Thus, it is a matter of construing the decree.

5. On behalf of the Kotharis, Mr. Madon, learned Senior Advocate submitted that reference may be made to the pleadings to understand the contract between the parties of which specific performance was being sought. He submitted that the Kotharis were required to pay consideration for transferring full control of the company, which included control of the plot on which the hospital was to be constructed, for a sum of Rs.36.75 crores. According to Mr. Madon, this would include price of the shares and loans of the Agrawals to the company. He submitted that the Agrawals had not made any separate provision in the agreement for repayment of the loan to the company or for seeking any payment of interest on the loan. He submitted that Rs.36.75 crores is a full and final consideration payable for transfer of all shares and writing off debt. In the alternative, Kotharis were willing to execute a contract on payment of Rs.43,46,52,700/- after forfeiture

Rs.1,83,75,000/-, being 5% of the agreed consideration, which Mr. Madon submitted as a provision in default. It is submitted that in the Suit e-mail, reference was clearly made to the agreement to purchase the Agrawals' "stake" @ Rs.36.75 crores; however the Agrawals have since contended that the agreed consideration was only for 50% shareholding, excluding the loans and advances by the Agrawals to the company. It is contended that although the Suit e-mail did not mention that the agreed consideration excluded the loan, the Kotharis had reiterated that the loan was included only to be contested by the Agrawals. The meaning and intent of the suit e-mail was sought to be controverted by the Agrawals vide email dated 11th April 2019 sent at 11:55 a.m., annexed at Exhibit-G to the plaint, and subsequent email wherein Agrawals sought to contend that the agreed consideration did not include value of the loans. The Agrawals purported to terminate the agreement recorded in the Suit email. According to Mr. Madon, the Agrawals had waived their contention that the loans and advances are not part of the agreed consideration. That pursuant to the decree, the Kotharis had paid Rs.1,83,75,000/- being 5% of the agreed consideration. This payment was received by the Agrawals when the cheque was encashed. Mr. Madon submitted that when there is a difference of opinion after the decree on the aspect of the loan being part of the agreed consideration, the court had directed Agrawals to file an affidavit in which the deponent has stated that after making payment of 5% of the agreed consideration, the Judgment

Creditors viz. Kotharis were required to pay an additional amount, failing which the payment of 5% would be forfeited, but the deponent admitted that the Agrawals had no intention of doing so; the clear intention being to include the loan as part of the agreed consideration. Mr. Madon also submitted that the Agrawals cannot now raise the issue post decree on the ground of *res judicata* and seek further determination on that issue. He submitted that Agrawals' contention that the agreed consideration excludes the amount of Rs.10,32,55,000/- is contrary to prayer (B)-(iii) read with prayer clause (C), since the transfer of shares was to be effected free of all claims of the Agrawals. According to Mr. Madon, effect of prayer clause (B) or a decree in terms of prayer clause (B)-(iii) and (C) would entail the Agrawals certifying that there were no dues. Transfer of shares free of all claims of the defendants contemplated in the decree would certainly mean that loans and advances of the Agrawals were included as part of the agreed consideration. Since the court cannot now go behind the decree, the construing of the decree would only have to be based on the record and the pleadings. Mr. Madon then submitted that this court must as executing court order performance as pleaded.

6. Mr. Madon also submitted that reference being made by the Agrawals to a Board Resolution dated 21st June 2017 ought not to be entertained since it is a forged and fabricated document. In my view, there is no occasion to refer

to such a document at this stage. Making reference to the EXAL/139/2020, Mr. Madon submitted that what the Agrawals seek execution of is contrary to the decree itself. That reference made in EXAL/139/2020 to the part of the email dated 28th March 2019 along with the prayer made in the plaint also refers to acquisition by the Kotharis of 50% shares for a consolidated price of Rs.36.75 crores, which would also provide full control of the company and the plot acquired by the company for the hospital. Mr. Madon further submitted that Agrawals had bid for Rs.35 crores and that was improved upon by Kotharis by offering 5% more at Rs.36.75 crores and this offer is accepted. He submitted that EXAL/139/2020 is filed to defeat the contract between the parties. He submitted that the suit email did not make reference to the fact that the contract must be read as a whole. According to him, Kotharis failure to make payment of the amounts due on the 45th day or the 120th day would result in forfeiture of the token amount of 5% and automatic sale of Kotharis' shares to the Agrawals at the price of Rs.35 crores. Whereas, EXAL/139/2020 seeks to recover Rs.34,91,25,000/- for Kotharis' shares without reference to the consequence of forfeiture of Rs.1,83,75,000/-. Mr.Madon therefore submitted that the Agrawals' version was incorrect.

7. A compilation of the following Judgments was filed by the plaintiffs:-

- (i). *Bank of India and Anr. Vs. K. Mohandas and Ors., along with connected matters*¹
- (ii) *Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Ors.*²
- (iii) *V.B. Rangaraj Vs. V.B. Gopalakrishnan and Ors.*³
- (iv) *Hungerford Investment Trust Ltd. (in voluntary liquidation) Vs. Haridas Mundhra and Ors.*⁴
- (v) *Kedarnath Khetan Vs. Jainarain Ram Lundia and Ors.*⁵
- (vi) *Kartik Chandra Pal Vs. Dibahar Bhattacharjee*⁶

8. Reliance was placed by Mr. Madon on the judgment of the Calcutta High Court in *Kartik Chandra Pal Vs. Dibahar Bhattacharjee*⁷, wherein in an appeal filed by the Judgment Debtor against an order passed by the Additional Subordinate Judge, Burdwan, dismissing an objection u/s. 47 of the CPC in the suit which decreed specific performance, the court observed that, the most important part of the decree was the portion where the court directs the contract to be specifically performed and the details which follow do not limit the jurisdiction of the executing court to the steps mentioned in the decree

1 (2009) 5 SCC 313

2 AIR 1956 SC 359

3 (1992) 1 SCC 160

4 (1972) 3 SCC 684

5 AIR 1954 Pat 497

6 AIR 1952 Cal 362

7 AIR 1952 Cal 362

but would permit all other steps which ought to be taken for giving full effect to the decree. He also relied upon the observations in paragraph 15 that a decree in a suit for specific performance has to be considered as a preliminary decree, which cannot set out in the fullest detail all the steps to be taken to implement the decree.

9. In *Bank of India and Anr. Vs. K. Mohandas and Ors., along with connected matters*⁸, reliance was placed on the principle that the court must construe the words used in a contract and not what the parties may contend afterwards. Mr. Madon therefore submitted that relief as prayed for be granted.

10. The Agrawals have filed IA/692/2020 in EXAL/139/2020, wherein it is contended that the Kotharis have been repeatedly offering to pay the balance of the agreed consideration but have failed to do so. That the Agrawals were ready and willing to comply with their part of the obligation under the decree and that in view thereof, the Kotharis must be directed to deposit Rs.34,91,25,000/- being the balance consideration and interest thereon, against which the Agrawals would deposit necessary share transfer forms along with the other documents. In the meantime, they seek orders that; (i) the Kotharis must be prohibited from making any change in the management

8 (2009) 5 SCC 313

of the company; (ii) all withdrawals from bank account be stopped and (iii) the Kotharis be directed not to deal with or transfer or otherwise enter into any contract relating to personal assets or assets of the original plaintiff-company till payment of all sums under the decree. IA/692/2020 in EXAL/139/2020 are being contested by the Kotharis on the basis of their interpretation of the decree.

11. The opposition to EXAL/1713/ 2019 and the IAs therein were led by Dr. Saraf. According to Dr. Saraf, the contention of the Kotharis is not correct. Execution proceedings cannot go beyond the decree and that is what EXAL/1713/2019 seeks. The decree for specific performance in the case at hand is in favour of both plaintiffs and defendants and the decree can be executed by either party. He submitted that the Kotharis are delaying execution and therefore they may be ordered to pay the amounts with interest. It is contended that as of 9th December 2020, the total amount payable is Rs.41,52,47,351/-.

12. According to the defendants, all original documents are with the Kotharis, who have destroyed original minutes of the board meetings and forged and fabricated minutes over last 10 years. Inspection has been sought, but has not been given. This aspect has since been taken care of by my order dated 16th December 2020 passed in IAL/7980/2020, in which liberty has

been granted to respondents 7 to 11 to apply and take inspection before the Company Registrar. According to Dr. Saraf and a fair reading of the decree and the email, the amount of debt owned by the company and Agrawals is separate and excluded from the agreed consideration. My attention is invited to the prayers in the Notice of Motion, pursuant to which the decree has been passed. Dr. Saraf submitted that the intention of the Kotharis in seeking the decree is evident from the prayers in the notice of motion. Prayer (A)-(iii) specifies that the agreed consideration of Rs.36.75 crores *“includes repayment/refund of the unsecured loans of the defendants on the books of accounts of the plaintiff no.6 and the sale by transfer of the entire 50% shareholding of the defendants in the plaintiff no.6 in favour of the plaintiff nos.1 to 5”*. He further submitted that prayer (B) of the motion also sought the decree on admission that the payment of the agreed consideration was in full and final payment of all debts and liabilities owed to the defendants by the plaintiff no.6, namely, the company. These prayers have not been pressed or granted. On the other hand, the decree is in terms of the prayers in the suit and hence the agreed consideration excludes the debt.

13. According to Dr. Saraf, the Kotharis are seeking to alter the scope of the decree by incorporating reliefs not contemplated in the decree itself. That the decree is silent about any adjustments of the loans and in any event the Kotharis are in default in not having permitted the amounts due under the

decree. That the loan amount was not in contemplation when the decree was passed on 5th August 2019 and that Kotharis are seeking to go beyond the decree which is not permissible. According to the Agrawals, Kotharis being in default, it is now necessary to direct the Kotharis to transfer their shares to the Agrawals on payment of Rs.41,52,47,351/-. In support of his contentions, Dr. Saraf has placed reliance on the compilation of judgments as follows :-

- (i) *Syndicate Bank Vs. W.B. Cements Ltd.*⁹
- (ii) *Central Bank of India Vs. Ravindra & Ors.*¹⁰
- (iii) *Syndicate Bank Vs. R. Veeranna and Ors.*¹¹
- (iv) *Canara Bank Vs. Marshall Cycle & Ors.*¹²
- (v) *TVC Skyshop Ltd. Vs. Reliance Communication and Infrastructure Ltd.*¹³
- (vi) *Punjab Financial Corporation Vs. Surya Auto Industries*¹⁴
- (vii) *State Bank of India Vs. Yasangi Venkateshwara Rao*¹⁵
- (viii) *Indian Bank Vs. Blue Jaggers Estate Ltd. & Ors.*¹⁶
- (ix) *Rameshwar Dass Gupta Vs. State of U.P. and Anr.*¹⁷
- (x) *S. Bhaskaran Vs. Sebastian (Dead) By Legal Representatives and Ors.*¹⁸

9 1988 SCC OnLine Del. 254

10 AIR 2001 SC 3095

11 (2003) 2 SCC 15

12 1998 SCC OnLine Del. 89

13 (2013) 11 SCC 754

14 (2010) 1 SCC 297

15 (1999) 2 SCC 375

16 (2010) 8 SCC 129

17 (1996) 5 SCC 728

18 (2019) 9 SCC 161

- (xi) *Oil and Natural Gas Corporation Ltd. Vs. Modern Construction and Company*¹⁹
- (xii) *Bajirao Domaji Shreerang and Ors. Vs. Kashirao Ajabrao Deshmukh*²⁰
- (xiii) *Dr. Renuka Datla (Mrs.) and Ors. Vs. Commissioner of Income Tax, Karnataka and Anr.*²¹
- (ix) *Potti Venkata Kasi Viswanadham Vs. Vallabha Vyas*²²

14. *Rameshwar Dass Gupta (supra)* reiterates that the power of the executing court cannot go beyond the decree. Likewise, as reiterated in *S. Bhaskaran (supra)*, Dr. Saraf likened the attempt of the Kotharis to claim in excess of what has been granted under the decree and submitted quite to the contrary that the Agrawals are entitled to execute the decree and that being defendant in the suit, did not prevent the Agrawals from proceeding with execution in EXAL/139/2020 in keeping with the decisions of this court, referring to *Bajirao Domaji's case (supra)*, in which the court observed that the person in whose favour the decree has been passed is not restricted to the plaintiff but in a case of specific performance could include the defendant as well. In support of his contention that he is entitled to interest on the sum payable by Kotharis, if at all reliance is placed on the judgment of the *Central*

19 (2014) 1 SCC 648

20 AIR 1978 Bom. 350

21 (2003) 2 SCC 19

22 1982 (2) (HC) AP Law Journal 56

Bank of India (supra), that award or interest post-decree is discretionary within the power of this court.

15. Relying on other judgments in the compilation pertaining to power of the court to grant interest, Dr. Saraf submitted that this is a fit case where interest must be ordered to be paid as sought in EXAL/139/2020.

16. For the sake of convenience, brief reference is required to be made to the applications filed.

17. EXAL/1713/2019 is filed on 17th September 2019 by the Kotharis to enforce a decree dated 5th August 2019 passed by this court. The Agrawals filed an affidavit-in-reply dated 22nd September 2020, to which a rejoinder was filed by Kotharis dated 6th October 2020. On 10th October 2019, Kotharis filed IA/166/2019. Agrawals have filed a reply on 25th November, 2019. Kotharis have filed a rejoinder thereto dated 30th November 2019. Agrawals filed sur-rejoinder dated 3rd December, 2019.

18. The second interim application being IA/950/2019 filed by the Kotharis on 18th November 2019 for appointment of the Company Registrar to hold the Annual General Meetings of the company has been disposed. The third interim application being IA/426/2020 filed by the Kotharis on 16th

January 2020 seeking amendment to the prayers in the EXAL/1713/2019 has also been disposed. The fourth interim application filed by the Kotharis being IAL/6707/2020 on 24th November 2020 is now pending. The reliefs sought are identical to IA/950/2019, which was disposed. An additional affidavit has been filed in support of the IA by the Kotharis. A reply has been filed by the Agrawals and the rejoinder thereto has been filed by the Kotharis.

19. EXAL/139/2020 was filed by Agrawals on 20th January 2020 also seeking enforcement of decree passed on 5th August 2019. An affidavit-in-reply has been filed dated 20th October 2020 by the Kotharis and a rejoinder has been filed by the Agrawals on 12th November 2020. The Agrawals have also filed IA/692/2020 in EXAL/139/2020, to which a reply has been filed by the Kotharis. This IA has been filed seeking an order directing the Kotharis to deposit Rs.34,91,25,000/- in court.

20. By the present order, I dispose IA/166/2019, IA/692/2020 and IAL/6707/2020. The aforesaid IAs are instituted at the stage of execution of a decree dated 5th August 2019. The drawn-up decree has been dispensed with and on a reading of this order, it is evident that the defendants have submitted to a decree in terms of prayer clauses (A) to (D) of the plaint. Those prayers have been reproduced in the order.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY AND ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1916 OF 2019
IN
SUIT NO.844 OF 2019

Ashok Kumar Kuchari & Ors. ..Plaintiffs
Vs.
Sanwarlal Agarwal & Ors. ..Defendants

Mr. Dnyan Madan, Senior Advocate a/w Mr. Mayur Khundeparkar 1/b
Jamshed Ansari for Plaintiff/Applicant
Mr. Kirit Hakani a/w Mr. Rahul Hakani and Ms. Niyati Mankad for
Defendant Nos. 1, 4 and 5;
Mr. Ashok M. Saraogi for Defendant Nos. 2 and 3.

CORAM : K.R.SHRIRAM, J.
DATE : 5th AUGUST 2019

P.C.:

1 Mr. Saraogi and Mr. Hakani on instructions from Dr. Vikas Agarwal, Defendant no.2, who says that he has instructions on behalf of other defendants to make the statement, state that they are submitting to a decree in terms of prayer clauses (a) to (d), which read as under:

"(a) That this Hon'ble Court be pleased to declare that the said agreement arrived at on March 27, 2019 which is reduced in writing by the defendant no.2 and is accepted by the email dated March 28, 2019 in respect of the 50% shares held by the Agarwal Group in the capital of the plaintiff no.6 is valid, subsisting and binding upon the defendants and upon persons claiming by, through or under the defendants;

(b) That this Hon'ble Court be pleased to order and direct the defendant to specifically perform the said agreement arrived at on March 27, 2019 for sale of the 50% shareholding of the defendants in the plaintiff no.6 as reduced into writing and as accepted by the email dated March 28, 2019 of the defendant no.2 upon file by ;

Plaintiff's Advocate

(i) executing, signing and attesting all necessary deeds and documents necessary to transfer, assign and vest the fifty percent shareholding of the defendants in the plaintiff no.6 in favour of the plaintiff or their nominees;

(ii) handing over original title deeds, documents and writings in respect of the suit plot which are piling with the defendant no.2 and in the locker to be opened jointly by the defendant no.2 and the plaintiff no.2 to the plaintiff;

(iii) doing or causing to be done all acts, deeds, matters and things and to sign, execute and register all deeds, documents and writings as may be necessary for the transfer of the said 50% shares of the Agarwal Group to the plaintiff nos.1 to 5 and/or to their nominee free of all claims of the defendants.

(iv) Tendering their resignation from Directorship of the plaintiff no.6 company.

(v) That this Hon'ble Court be pleased to order and decree the defendants to do or cause to be done all acts, deeds, matters and things and to sign and execute all deeds, documents or writings necessary under the supervision of this Hon'ble Court for the purpose of the order of specific performance or to give effect to the reliefs sought in terms of prayer (i) above.

(vi) That for the purposes aforesaid all transfers be made, records be made, orders be passed, directions be given and accounts be taken as this Hon'ble Court may deem just and proper in the facts and circumstances of the case."

- 2 Time mentioned in the agreement will begin from today.
- 3 Suit accordingly stands disposed. Notice of motion accordingly also stands disposed.
- 4 Refund of court fees, if any, in accordance with rules.
- 5 Drawn up decree dispensed with.
- 6 All to act on authenticated copy of this order.

(K.R. SHIRIRAM, J.)

Shri. S. S. S.

21. I may observe here that the decree was passed when the notice of motion was pending. No reply had been filed to the Notice of Motion. The defendants also had not filed a written statement in the suit. It is by now fairly well settled that an executing court cannot go behind a decree but is required to construe the decree and as observed in *Bhavan Vaja and Ors. Vs. Solanki Hanuji Khodaji Mansang & Ors.*²³. In an appropriate case, the court can construe the pleadings and proceedings leading upto the decree and the circumstances under which the decree came to be passed. The court also observed that the executing court and the appellate court had not construed the decree at all but had gone by the words in the decree and that was found to be an omission to exercise the jurisdiction vested in the executing court.

22. In the case at hand, one has to consider whether the decree is ambiguous and if so, it is the duty of this court as executing court to construe the decree and in doing so, the court is entitled to look into the pleadings. (See *Topanmal Vs. Kundomal Gangaram*²⁴). The court is therefore entitled to look into the pleadings. By pleadings, I mean the pleadings prior to passing of the decree. The pleadings in these IAs in pending execution applications, in my view, being post the decree would not qualify for consideration in construing the decree. Let us therefore examine the pleadings that will aid the court in construing the decree dated 5th August 2019. As observed earlier, after the

23 *AIR 1972 SC 137*

24 *AIR 1960 SC 388*

suit was filed, the defendants did not file a written statement. The plaintiffs therefore moved Notice of Motion No.1916 of 2019. The prayers in the notice of motion seeking a decree on admission under Order XII Rule 6 of the CPC in terms set out in prayer clauses (A), (B) and (C) and in the alternative, in terms of prayer clause (D). It will be useful to refer to those prayers;

“A. That this Hon’ble Court be pleased to pass a decree on admission under Order XII Rule 6 of the Code of Civil Procedure, 1908 that :

- i – the defendants have admitted that there is a valid and subsisting agreement dated March 27, 2019 between the parties to this suit;*
- ii – the defendants have admitted the contents of their email dated March 28, 2019 which contains the terms and condition of the agreement between the parties to this suit;*
- iii – the entire consideration payable to the defendants by the plaintiffs is the sum of Rs.36.75 crores which includes repayment / refund of the unsecured loans of the defendants on the Books of Accounts of the plaintiff no.6 and the sale by transfer of the entire 50% shareholding of the defendants in the plaintiff no.6 in favour of the plaintiff nos.1 to 5.*

B. That this Hon'ble Court be pleased to pass a decree on admission of the defendants that the agreement arrived at on March 27, 2019 is to be performed by payment by the plaintiff nos.1 to 5 to the defendants of the sum of Rs.36,75,00,000/- (Rupees Thirty-six Crores Seventy-five lakhs only) within 120 days of the order which may be passed by this Hon'ble Court .

- (i) in consideration of the transfer of the entire shareholding and proportionate share of the assets of the defendants in the plaintiff no.6 and;*
- (ii) in consideration of the satisfaction and full and final payment of all debts and liabilities owed to the defendants by the plaintiff no.6 and;*
- (iii) in consideration of the defendants declaring that they have no subsisting right, title or interest whatsoever, either directly or indirectly, in any of the assets, rights and liabilities of the plaintiff no.6.*

(C). That this Hon'ble Court be pleased to pass an order and decree of specific performance of this Hon'ble Court ordering and decreeing the defendants to specifically perform the said agreement arrived at on March 27, 2019 for sale of the 50% shareholding of the defendants in the plaintiff no.6 as reduced to writing and as recorded by the

email dated March 28, 2019 of the defendant no.2 inter alia by :

- i – executing, signing and attesting all necessary deeds and documents necessary to transfer, assign and vest the fifty percent shareholding of the defendants in the plaintiff no.6 in favour of the plaintiffs or their nominees;*
- ii – handing over original title deeds, documents and writings in respect of the suit plot which are lying with the defendant no.2 and in the locker to be operated jointly by the defendant no.2 and the plaintiff no.2 to the plaintiffs;*
- iii – doing or causing to be done all acts, deeds, matters and things and to sign, execute and register all deeds, documents and writings as may be necessary for the transfer of the said 50% shares of the Agrawal Group to the plaintiff nos.1 to 5 and/or to their nominees free of all claims of the defendants;*
- iv – Tendering their resignation from Directorship of the plaintiff no.6 company.*

(D). In the alternative and without prejudice to prayers (A) to (C) above, if the defendants are desirous to perform the agreement arrived at on March 27, 2019 by themselves

then in that event, this Hon'ble Court be pleased to direct the defendants to pay to the plaintiffs an amount of Rs.43,46,52,700/- (Rupees Forty-three crores forty-six lakhs fifty two thousand seven hundred only) in terms of clause 4 of the agreement dated March 27, 2019 for :

- (i) transfer of the entire shareholding and proportionate share of the assets of the plaintiff nos.1 to 5 in the plaintiff no.6 and;*
- (ii) in consideration of the satisfaction and full and final payment of all debts and liabilities owed to the plaintiff nos.1 to 5 by the plaintiff no.6 and;*
- (iii) in consideration of the plaintiff nos.1 to 5 declaring that they have no subsisting right, title or interest whatsoever, either directly or indirectly, in any of the assets, rights and liabilities of the plaintiff no.6."*

23. The notice of motion was filed on 29th July 2019. No affidavit-in-reply has been filed to the notice of motion. When the matter came up on board on 5th August 2019, the defendants, through defendant no.2, submitted to a decree in terms of prayer clauses (A) to (D) of the plaint. It can be seen that the decree is not in terms of the prayer clauses in the motion. In view of the decree in terms of prayer clauses (A) to (D) of the plaint, the notice of motion was disposed. Hence, no purpose will be served in relying upon the prayers in the notice of motion, although on behalf of the Agrawals, learned Senior

Advocate has relied upon the prayers in the notice of motion to support the Agrawals' case.

24. All that is required to be considered are the averments in the plaint since the decree is in terms of prayer clauses (A) to (D) of the plaint. Brief reference may also be made to the annexures to the plaint; however, in view of the decree being passed in terms of the plaint, the plaintiffs' version in plaint would, in my view, prevail in construing the decree. To that extent, the task is less complex than it would have been, if written statements were filed by the defendants. The dispute between the parties falls within a narrow compass. Although parties have filed written submissions making reference to numerous documents and the correspondence exchanged, the executing court, in my view, would be required to consider the pleadings that have been existed as on 5th August 2019, when the court came to pass the decree on admission in the notice of motion.

25. While the hearing in the above matter was initially conducted on video conference, after written submissions were filed, brief oral submissions were made, when the aforesaid contentions were reiterated by both learned counsel. Having considered the aforesaid set of facts, the only pleading to be considered is the plaint; especially in view of the fact that the prayers in the notice of motion were not pressed and the defendants submitted to the decree

in the suit in terms of the prayers in the plaint. Although the cause-title indicates that the order was passed in the notice of motion, the decree to which the Agrawals submitted was in terms of prayers in the plaint.

26. I may observe here that in the plaint, prayer clause (E) sought relief in the alternative i.e. if specific performance cannot be granted, the Agrawals be directed to pay Rs.45 crores or such higher amount including but not limited to escalation in the project costs by way of recompense. In other words, the alternative claim was for damages. In the Notice of Motion, alternative prayer was sought in terms of prayer clause (D) to the effect that if the Agrawals were desirous of taking over the Kotharis' share, they be directed to pay to the Kotharis Rs.43,46,52,700/-. The alternative relief has not been pressed. It is pertinent to note that the decree came to be passed by consent of the parties. Clause (2) of the order dated 5th August 2019 records as follows :-

"Time mentioned in the agreement will begin from today."

27. Reference to the "Time mentioned in the agreement" meant that the successful bidders, being the Kotharis, would be required to pay 50% of the agreed consideration within 45 days from the date of the decree. Since 5% had already been paid, the remaining 45% was to be paid within 120 days from the date of the decree. In the suit email Agrawals, through defendant no.2, have recorded that the Kotharis had *"agreed to purchase stake at*

Rs.36.75 crores.” In performance of the agreement, Agrawals have acknowledged receipt of Rs.1,82,50,000/-.

28. It is true that there is no specific mention of the amount of the debt, but in the opening paragraph, the author – defendant no.2 has congratulated the Kotharis on acquiring 50% shares in plaintiff no.6–company *“at a consolidated price of Rs.36.75 crores”*, which will provide full control of the company and the hospital plot acquired by the company. It is in this context that one has to construe the decree and in doing so, it is necessary to refer to the plaint, which is the only pleading of some relevance in construing the decree. Paragraph 12 of the plaint records that mediation meetings were held at the hospital premises of the plaintiff no.4 in the presence of the third party – Pawan Didwania, whereat defendant no.2 – Dr. Vikas Agrawal, representing the Agrawals, joined the meeting vide telephone. During the meeting, after discussing the market value of the property with the hospital plot, Agrawals offered to acquire Kotharis 50% shareholding at about Rs.35 crores. The averments in paragraph 12(iv) and (v) reads as under :-

“12(iv). The market value of the property as per the Agrawal Group (as communicated to the plaintiffs by Mr. Pawan Didwania) was the sum of Rs.70.00 crores. Thus, the Agrawal Group offer to acquire the Kothari Group 50% shareholding in the plaintiff no.6 closed at Rs.35 crores (the offer price included

the repayment of the unsecured loan of plaintiff nos.1 to 5 in the books of plaintiff no.6 and the consideration for the 50% shares held by Kothari Group).

12(v). The Kothari Group offer was five percent higher. The Kothari Group valued the suit plot at the sum of Rs.73.50 crores and agreed to acquire the 50% shareholding of the Agrawal Group in the plaintiff no.6 at the sum of Rs.36.75 crores (the offer price included the repayment of the unsecured loan of defendants in the books of plaintiff no.6 and the consideration for the 50% shares held by Agrawal Group)."

29. The plaint goes on to record that Kotharis' offer of Rs.36.75 crores was accepted by Agrawals. Thus, a concluded contract is said to have been arrived at in the presence of the Mediator. Paragraph 13 which is material since it makes reference to the suit agreement states as follows :-

"13. The terms and conditions of the agreement arrived at on March 27, 2019 as above are recorded in an email dated 28th March 2019 at 8:03 am written by the defendant no.2 to the plaintiff no.2 where he states that the terms and conditions for sale of the 50% shareholding of the Agrawal Group in the plaintiff no.6 to the Kothari Group are as follows :

(i) the total agreed consideration payable by the Kothari

Group to the Agrawal Group is the sum of Rs.36.75 crores.

- (ii) the token / earnest money payable was five percent of the agreed consideration.*
- (iii) fifty percent of the consideration within 45 days after which the Kothari Group would be allowed to commence work on the project.*
- (iv) balance forty-five percent of the consideration within 120 days.*
- (v) failure to pay fifty percent amount within 45 days would lead to forfeiture of token amount of five percent and automatic sale of fifty percent shares of Kothari Group to Agrawal Group at their bid price of Rs.35.00 crores on the same terms and conditions starting with the 45th day term of payment.*
- (vi) failure to pay the final forty-five percent amount in time will lead to forfeiture of five percent consideration and automatic sale of fifty percent shares of Kothari Group to Agrawal Group at their bid price of Rs.35.00 crores on the same terms and conditions starting with the 120th day term of payment. There will be no interest paid by Agrawal Group on the balance consideration."*

30. Thus, in paragraph 13, clear reference is made to the *“total agreed consideration”*, as recorded in the Suit Email. Paragraph 18 of the plaint seeks to record the contents of the email dated 29th March 2019, which is annexed at Exhibit-E to the plaint, by which Kamal Kothari and Ashok Kumar Kothari reproduced relevant clauses of the email and reiterated separately the value of the shares @ Rs.26,45,45,000/- and the adjustments of the interest free loans of Agrawals @ Rs.10,29,55,000/-, which would be paid and discharged through a bank account of the company. This is reflected in plaint in paragraph (18.1). There does not appear to be immediate response to this email. After this, paragraph 19 of the plaint records that on 3rd April 2019, the Kotharis once again addressed an email to Dr. Vikas Agrawal to reduce into writing the terms of the Shareholders Agreement into a Memorandum of Understanding. No response is on record. It is only on 11th April 2019 that the Agrawals sought to deny the contention of the Kotharis contending inter alia that the only alternative was to sub-divide the suit plot and seeking to cancel the agreement between the parties. This led to a rejoinder dated 19th April 2019, by which the Kotharis rejected the unilateral cancellation of the concluded transaction and expressed their willingness to pay the amounts due towards token money by RTGS and in paragraph 25, the Kotharis have reiterated their willingness to stand by the agreement.

31. None of the averments in the plaint have been denied till the passing of

the decree either by filing a written statement or by contesting the notice of motion by filing an affidavit-in-reply. If the averments in the plaint were disputed, it is not possible to comprehend why the defendants sought a decree in terms of prayer clauses (A) to (D), since these are the very prayers which the Kotharis sought in the plaint. The notice of motion and affidavit-in-support have been filed on or about 29th July 2019 and the Agrawals submitted to a decree on 5th August 2019. The contents of the affidavit-in-support of the notice of motion have also not been controverted. The Agrawals having submitted to the decree in terms of the prayers in the suit, the question is whether the option of submitting to a decree in terms of the prayers in the motion was available to the defendants? Assuming that the prayer in the motion are also to be considered in construing the decree, one possibility is that despite the Kotharis claiming a decree in terms of the prayers in the motion gave up those prayers but that does not appear to be correct. When one considers the effect of the averments in the plaint, read with the prayers in the plaint, it is clear that basic understanding between the parties was that the shares of the Agrawals would be transferred to the Kotharis. The agreed consideration is also not in dispute. The agreement is now to be specifically performed, as recorded in the email. Kotharis have enumerated the steps to be taken by the parties in order to specifically perform the agreement. Clause (i) of prayer clause (B) contemplates execution of deeds and documents to transfer the 50% shareholding so that the same

vests in the Kotharis or their nominees. Prayer clause (B)-(ii) contemplates handing over of title deeds and documents and writings in respect of the suit plot and for operation of a locker. Prayer clause (B)-(iii) contemplates transfer of the shares of the Agrawals *“free of all claims of the defendants”*. Prayer clause (B)-(iii) reiterates the need for execution of deeds, matters and things, which contemplate doing or causing to be done all acts, deeds, matters and things and to sign, execute and register all deeds and documents necessary for transfer of the shares free of all claims. The claims of the Agrawals would, in my view, include the amount of the loan. The prayers will have to be read in conjunction with the averments. The intention of the Kotharis to be found in the averments is clear, that the amount of loan of Rs.10,32,55,000/- was included in the total agreed consideration. Thus, in construing the decree, the averments in the plaint are the only aid that the court has in the facts and circumstances of the present case. The Agrawals bid of Rs.35 crores included retention of the debt. The Kotharis higher bid of Rs.36.75 crores was accepted by the Agrawals without any qualification. If the Agrawals intended that the amount of debt was payable over and above the agreed consideration, the Agrawals would have specified that promptly upon the bid being accepted and would have also disputed the inclusion of the amount of debt in the agreed consideration by filing a pleading. Furthermore, portion of paragraphs 12(ii) and 12(v) of the plaint reveals that Agrawals offer included the loan of the Kotharis. Likewise, Kotharis offer included loan of the Agrawals. These

averments have not been denied and are deemed to be admitted. Hence, it is clear as crystal that the agreed consideration included the amount of debt in both sides' offers.

32. Under Rule 2 of Order VIII, the defendants are required to raise by the pleadings all grounds of defence. General denial is insufficient and every allegation in the plaint is required to be denied. The allegations in the plaint have not been denied. Under Order VIII Rule 5(2) where the defendant has not filed a pleading, the allegations in the plaint, if not denied specifically, shall be taken as admitted. Order VIII Rule 5(1) and (2) of CPC reads as follows :-

“Order VIII . Written Statement, Set-of and Counter-Claim.

5. Specific denial —

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability : Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a

disability, but the Court may, in its discretion, require any such fact to be proved.”

33. The defendants had an opportunity of avoiding the decree by contesting the suit and the Notice of Motion. Instead, they chose to submit to a decree. Thus, in the instant case, the defendants have not filed the pleading and as contemplated by Rule 5, the court is entitled to pass judgment on the basis of the facts in the plaint. It is not the defendants’ case that they are persons under any disability. The defendants have not put the plaintiffs to proof, nor have the defendants filed any counter-claim. Thus, on all counts, the Agrawals have not disputed the averments in the plaint. The averments in the plaint have consistently sought to include the amount of the loan as part of the agreed consideration. The prayer clauses seek reliefs on the basis of the averments in the plaint and in that light of the matter, I am of the view that in construing the decree, the averments in the plaint indicate that the price or agreed consideration clearly included the amount of the loan.

34. I have, therefore, no hesitation in holding that absent a written statement or denial of averments in the plaint and by submitting to a decree in terms of prayer clause (B)-(iii), the price payable was inclusive of the loan inasmuch as after payment of the agreed price or agreed consideration and transfer of the shares, the Agrawals would not have any further claims.

35. In view thereof, I am of the opinion that IA/166/2019 is liable to be

allowed to the extent provided in this order. As a consequence, IA/692/2020 cannot survive. In view thereof, I pass the following order :-

- (i) IA/166/2019 is made absolute in terms of prayer clauses (a)-(i), A, B, C, (d)-(i) to (d)-(vi) (*both inclusive*), (e), (f) and (g).
- (ii) The parties are at liberty to fix meetings on a mutually convenient date per paragraph 4(iii) of order dated 16th December 2020. In view of the aforesaid, IAL/6707/2020 is disposed with liberty to apply, if so advised.
- (iii) As a consequence, IA/692/2020 does not survive and is disposed.

(A.K. MENON, J.)

36. After this order was pronounced, Dr. Saraf seeks stay of operation of this order. The request is declined.

(A.K. MENON, J.)

Sneha
A. Dixit

Digitally signed
by Sneha A. Dixit
Date: 2021.01.04
19:14:59 +0530