



2024:DHC:4871



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 01st March, 2024

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Pronounced on: 28th June, 2024

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CS(COMM) 531/2020 & I.As. 7339/2022, 4991/2023

ROHIT MALHOTRA

S/o Mr. Navneet Kumar Malhotra,
R/o EB-158, Maya Enclave,
New Delhi-110058

..... Plaintiff

Through: Mr. Arjun Dewan, Mr. Akash Arora
& Mr. Aryan Deol, Advocates.

versus

GURVINDER SINGH TOOR

R/o E-2085, Palam Vihar,
Gurugram, Haryana-122017
Also at: E-2173, First Floor,
Palam Vihar, Gurugram,
Haryana-122017

..... Defendant

Through: Mr. Sagar Pathak, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

I.A.15134/2022 (u/O XIII A Rules 3 & 6(1)(a) & Order VIII Rule 10 r/w Section 151 of CPC, 1908 by plaintiff for Summary Judgment in relation to Prayers (A) to (D))

1. The plaintiff has filed the present **Suit for Declaration** of the Letter dated 18.03.2020 terminating the Memorandum of Understanding dated



14.02.2020 (*hereinafter referred to as “MoU”*), as illegal and has also sought the **Specific Performance** of MoU dated 14.02.2020 along with Recovery of Rs. 14,25,000/- as interest or in the alternative a Compensation of Rs. 1,08,41,860/- along with interest @18 per annum.

2. **Facts in brief** are that in November, 2018, the defendant along with one Mr. Manish Alag, approached the plaintiff for making investment in their business project, M/s Zoi International Pvt. Ltd., a Company incorporated in Thailand to engage in the business of recycling and selling of used clothes. The defendant explained the business model and assured the viability of the Company.

3. In terms of the understanding and business plan as forwarded by the defendant and Mr. Manish Alag, the plaintiff invested over a period of time, Rs. 76,40,000/- through Overseas Direct Investment in M/s Zoi International Pvt. Ltd and was allotted 45% of the total equity shareholding and total of 33,435 equity shares of the Company were given to the plaintiff *vide Equity Certificate bearing Folio Nos. 33436 to 66870* in the month of March, 2020.

4. The plaintiff thus, became the owner of 45% equity shareholding, while the defendant and Mr. Manish Alag were the shareholders to the extent of 45% and 10% shareholding of the Company, respectively.

5. The plaintiff has asserted that in February, 2020 on account of various factors including mismanagement of affairs of the Company by the defendant, certain disputes arose between them. Consequently, after due negotiations, *MoU dated 14.02.2020* was entered into between the parties, which was duly signed by them, whereby the plaintiff agreed to sell his 45% equity shares in the Company, to the defendant for an amount of Rs. 1,90,00,000/-. The plaintiff under the MoU also agreed to executing a *Share*



Purchase Agreement (hereinafter “SPA”) for transfer of his shareholding immediately on realisation of payment by him. It was further agreed that upon signing of SPA, the plaintiff shall resign from his post as a Director in the Company. It was also agreed that the plaintiff shall be absolved from all the liabilities, if any, arising on account of affairs of the Company.

6. Accordingly, one *Cheque bearing No. 385471*, for an amount of Rs. 1,13,50,000/- dated 30.03.2020 and another *Cheque bearing No. 385472*, for an amount of Rs. 76,50,000/-, dated 26.03.2020, were issued by the defendant in favour of the plaintiff with an assurance that the cheques shall be honoured on presentation.

7. However, even before the post-dated cheques could be presented by the plaintiff to the Bank, the defendant withdrew/terminated the MoU *via Termination E-mail dated 18.03.2020* by citing COVID-19 Pandemic as a reason. The defendant also asked the plaintiff not to present the cheques issued by him and to return the same.

8. The plaintiff replied *via E-mail dated 23.03.2020* asserting that there was no clause in the MoU for termination/withdrawal of the Agreement and that the alleged termination was illegal and invalid.

9. The defendant responded *vide E-mail dated 25.03.2020* asserting that it was only a non-binding Agreement to help the plaintiff to sell the equity shares in the Company with the premium.

10. *Per contra*, the plaintiff asserted that the position taken by the defendant is contrary to the express terms of MoU, wherein it was clearly stipulated that the defendant shall purchase the equity shares for the agreed amount. Consequently, the plaintiff in accordance with MoU presented the said two cheques, but they were returned/dishonoured to the plaintiff on



account of “*payment stopped by the drawer*”.

11. The plaintiff issued a *Notice of Demand dated 15.06.2020* under Section 138 of the Negotiable Instruments Act, 1881 seeking payment against the dishonoured cheques. However, the defendant failed to comply with the same and the Complaint under Section 200 of Code of Criminal Procedure, 1973 has been instituted by him against the defendant, which is pending adjudication.

12. The plaintiff resigned from the Post of Director of the Company *vide Resignation Letter dated 06.07.2020* which was accepted as communicated on 20.07.2020.

13. The plaintiff instituted the *pre-litigation mediation* against the defendant on 19.09.2020, but the defendant did not enter appearance on any of the dates and the matter was returned by the Delhi High Court Legal Services Committee on 05.10.2020, as a *non-starter*.

14. The plaintiff has alleged that he has always been *ready and willing* to perform his part of the obligations under the MoU and to transfer the equity shareholding owned by him in favour of the defendant. It is further asserted that the MoU is a binding Agreement which is not terminable.

15. Hence, the plaintiff has sought the *specific performance of the MoU dated 14.02.2020 and recovery of money* as well as a decree declaring the letter dated 18.03.2020 terminating the MoU, to be illegal and void. The prayers made are as under:

“PRAYER

22. In light of the aforesaid facts and circumstances of the present case, it is most humbly prayed that this Hon'ble Court may be pleased to:

A. Issue a Decree in favour of the Plaintiff and against the



defendant declaring the Letter/Communication dated 18.03.2020 sent by the Defendant to the Plaintiff purportedly and illegally terminating/withdrawing from the MoU dated 14.02.2020 as illegal, null and void having no effect in law; and

B. Issue a Decree in favour of the Plaintiff and against the Defendant directing the Defendant to perform his obligations in accordance with the MoU dated 14.02.2020 by making a payment of Rs. 1,90,00,000/- to the Plaintiff for purchase of the Equity Shares owned by the Plaintiff in the Company, Zoi International Company Limited, i.e., 45% of the total Equity Shareholding of the Company and to execute a Share Purchase Agreement in favour of the Plaintiff for the purchase of the Equity Shares owned by the Plaintiff in the Company; and

C. Issue a Decree directing the Defendant to' make payment of Rs 14,25,000/- [fourteen lacs twenty five thousand] as interest @ 18% p.a on the total consideration of Rs 1,90,00,000 [one crore ninety lacs] from 30.03.2020 till the date of institution of the Pre-Litigation Mediation by the Plaintiff i.e 19.09.2020; and

D. Issue a Decree in favour of the Plaintiff and against the Defendant directing the Defendant to pay further interest @ 18% p.a. to the Plaintiff pendente lite till the date the Defendant performs his obligation under the MoU and makes payment to the Plaintiff; and/or

In the alternative:-

E. Issue a decree in favour of the Plaintiff and against the Defendant directing the Defendant to pay compensation an amount of Rs 1,08,41,860 [Rupees One Crore Eight Lakhs Forty One Eight Hundred and Sixty Only] along with interest @ 18% p.a. till the date of realization.”

16. The Plaintiff has filed the present **Application u/O XIII A Rules 3 & 6(1)(a) & Order VIII Rule 10 r/w Section 151 of CPC, 1908** seeking



Summary Judgment in relation to the Prayers (A) to (D).

17. It is submitted that the defendant was served in February, 2021 and he had put in appearance. However, the Written Statement was filed on behalf of the defendant on 10.06.2022, but the same was under objection and was not brought on record. Since the defendant failed to file their Written Statement even after a lapse of 120 days, the right to file the same was closed *vide* Order dated 10.10.2022.

18. Thus, it is prayed that the Plaint and the documents filed by the Plaintiff be considered and the reliefs as claimed by the Plaintiff, be granted by way of a Summary Judgment.

19. The defendant has moved an **Application bearing No. I.A. 4991/2023 under Order VII Rule 11 read with Section 151 of CPC, 1908** seeking rejection of the Plaint.

20. It is submitted that the MoU dated 14.02.2020 was not a binding document; rather the same was entered into between the parties with an understanding to execute the SPA in the future. The MoU dated 14.02.2020 was merely an Agreement for a future contract and thus, the plaintiff cannot seek its specific performance. Furthermore, the defendant had conveyed his intention of not being able to enter into the SPA *vide* E-mail dated 18.03.2020. The MoU dated 14.02.2020 already stands terminated and is not enforceable.

21. It is further claimed that the termination of MoU dated 14.02.2020 is valid and the Suit for Specific Performance of MoU for execution of the *Share Purchase Agreement (hereinafter "SPA")* is not specifically enforceable since it pertains to a future transfer of moveable property, which is barred by law under *Section 14 (d) of the Specific Relief Act, 1963*. It is,



therefore, submitted that the Suit of the plaintiff is liable to be rejected as not maintainable.

22. **The defendant in his Written Submissions** has averred that it is a settled proposition of law that that an Agreement to enter into an Agreement is neither enforceable nor does it confer upon the parties. Reliance has been placed on the decisions in Speech and Software Technologies (India) Private Limited vs. Neos Interactive Limited, (2009) 1 SCC 475 and Davender Kumar Sharma vs. Mohinder Singh & Ors., decided vide FAO(OS) 413/2012 on 28.08.2012 by the Division Bench of this Court.

23. Learned counsel for the defendant has further argued that the Suit is liable to be dismissed *as it is not valued as per Section 12 of the Commercial Courts Act, 2015*. The Suit has been valued on the basis of the consideration amount mentioned in MoU dated 14.02.2020, which is not permissible as per law. The determination of *specified value* of the subject matter of a commercial dispute has to be in accordance with Section 12 of the Commercial Courts Act, 2015 which makes it abundantly clear that the Suit has to be valued as per the market value of the movable property (shares herein). Admittedly as per the plaintiff's own averment contained in Paragraph-14 of the Plaint, the value of the shares at the time of filing of the Suit is Rs. 81,58,140/-. Now, the plaintiff cannot blow hot and cold at the same time by alleging the value of the shares as Rs. 81,58,140 on one hand, but when it comes to valuation of the Suit, he evaluates it in accordance with the amount mentioned in MoU dated 14.02.2020 and not in accordance with Section 12(b) of the Commercial Courts Act, 2015.

24. Further, the plaintiff has very cleverly added the *interest amount* while evaluating the Suit, which is not permissible under the law. The



interest part is taken into account while determining the specified value of the Suit in respect of the recovery Suits and not in Specific Performance Suit. The plaintiff has wrongly calculated the pecuniary jurisdiction only to bring the suit within the jurisdiction of this Court. The interest could not have been included in the amount in accordance with Section 12(b) of the Commercial Courts Act, 2015. This principle had been enunciated by the Supreme Court in Dipak Babaria & Anr. vs. State of Gujarat & Ors., decided *vide* CA No. 836/2014, Union of India & Ors. vs. Mahendra Singh, Civil Appeal No. 4807/2022 and Chandra Kishore Jha vs. Mahavir Prasad & Others, (1999) 8 SCC 266.

25. The defendant has further argued that the MoU dated 14.02.2020 was entered into before the COVID-19 Pandemic, but soon thereafter, the Government had announced the *force majeure*, leading to termination of MoU dated 14.02.2020 *via* E-mail dated 18.03.2020 by the defendant, explaining that because of the COVID-19 Pandemic, the defendant would not be able to enter into the Share Purchase Agreement. The defendant has also submitted that COVID-19 Pandemic was an unprecedented event with severe consequences all over the world. Hence, the subsequent execution of Share Purchase Agreement became impossible in terms of Section 56 of the Contract Act, 1872 and MoU dated 14.02.2020 became impossible to be acted upon. The reliance has been placed by the defendant on the decision in Delhi Development Authority vs. Kenneth Builders & Developers Private Limited & Ors., (2016) 13 SCC 561.

26. Moreover, MoU dated 14.02.2020 was *determinable in nature* and it could be terminated even in the absence of specific clause and without assigning any reason, as has been held in the case of Rajasthan Breweries



Limited vs. The Stroh Brewery Company, 2000 (55) DRJ (DB). Because MoU dated 14.02.2020 was an understanding which was determinable in nature, the specific performance of the same is barred under Section 14(d) of the Specific Relief Act, 1963. It is, therefore, submitted that the plaintiff is not entitled to any Summary Judgment, but the Suit itself is liable to be rejected as it discloses no cause of action.

27. The **Plaintiff in its Written Submissions**, has reiterated the assertions as contained in the Suit and the Application for Summary Judgement. The plaintiff has further explained that the Suit has been valued properly in accordance with law. In terms of Section 2(c)(i) of the Commercial Courts Act, the valuation of a Commercial Suit for the purpose of pecuniary jurisdiction and court fee has to be done in accordance with the provisions of the Suits Valuation Act, 1887 and the Court Fees Act, 1870. Section 12 of the Commercial Courts Act has to be read harmoniously with these two Acts as has been held by this Court in the case of Mrs. Soni Dave vs. M/s Trans Asian Industries Expositions Pvt. Ltd., AIR 2016 Del 186.

28. According to the *Section 7(x) (a) of the Court Fees Act, 1870* for the purpose of court fee for Specific Performance of a Contract for sale is to be according to the consideration agreed upon under the Agreement. This Court in the case Mukesh Kumar Gupta vs. Rajneesh Gupta and Ors., decided vide RFA 76/2016, had held that the valuation is not to be according to market value, but according to the consideration as stated in the Agreement. Thus, the Suit has been properly valued in accordance with law on the consideration for the shares as agreed in the MoU.

29. The plaintiff has further argued that MoU executed between the parties was *in relation to transfer of shares of the plaintiff* in Zoi



International Company Limited in favour of the defendant. In the case of M.S. Madhusoodhanan vs. Kerala Kaumudi (P) Ltd., 2004 9 SCC 204, it has been held that the Agreements for Sale of shares are specifically enforceable under Section 10 of the Specific Relief Act, 1963 (which is corresponding to Section 12 of the Specific Relief Act, 1877) as the shares of a Private Limited Company come within the phrase “*not easily obtainable in the market*”. Reliance has also been placed on the decision of the Federal Court in the matter of Jainrain Ram Lundia vs. Surajmull Sugarmull and Ors., AIR 1949 FC 211 which is similar to the facts of the present case.

30. Furthermore, the procedure for the Agreement executed in relation to sale of shares is akin to execution of an Agreement for sale, as it subsequent to receiving the consideration, the shares were to be transferred by execution of Share Purchase Agreement. For this reliance has been placed on the decision in Rathish Babu Unnikrishnan vs. State (Govt. of NCT of Delhi) and Anr., 2022 SCC OnLine SC 513.

31. Furthermore, subsequent to the amendment of Section 10 of the Specific Relief Act, 1963, post the judgment of Supreme Court in B. Santoshamma and Anr. vs. D. Sarala and Anr., Civil Appeal NO. 3574/2019, the Courts have an obligation to direct specific performance of the contracts which are not barred under Sections 11(2), 14 and 16 of the Specific Relief Act, 1963.

32. It is further asserted that there was no Clause for termination of the MoU in the absence of which the defendant could not have unilaterally terminated the MoU, which could have been brought to an end only with the consent of both the parties. Thus, the E-mail dated 18.03.2020 sent by the defendant, purportedly terminating the MoU, is invalid and illegal.



33. It is further submitted that MoU has been acted upon by the defendant who has accepted the resignation of the plaintiff from the Company w.e.f. 20.07.2020 *vide* E-mail dated 23.09.2020.

34. It is further submitted that the defendant has failed to fulfil his obligation under MoU dated 14.02.2020 with a dishonest intention, by sending the Letter dated 18.03.2020 terminating the MoU whereby he refused to fulfil his obligations under the MoU dated 14.02.2020. The plaintiff went ahead to present the cheques to the Bank, though they were returned/dishonoured by the Bank as the payment was stopped by the drawer.

35. It is asserted that it is not even the case of the defendant that there was any breach of condition by the plaintiff and thus, the unilateral termination of the MoU dated 14.02.2020 is bad in the eyes of law. The MoU dated 14.02.2020 still subsists and is valid, but with *mala fide* intention, the defendant is trying to avoid the obligations under the MoU. The defendant, in his Communication dated 25.03.2020, for the first time raised the plea that he never intended to purchase the equity shareholding of the plaintiff in Zoi International Company Limited, which is in complete contradiction to the express terms of MoU dated 14.02.2020.

36. It is further submitted that the defendant has averred that he was assisting the plaintiff in selling his shares at a premium. It is evident that the defendant is only trying to avoid his binding obligations under the MoU dated 14.02.2020 by claiming that he had never the intention to honour the obligations. On the other hand, the plaintiff has demonstrated beyond doubt that he had always been ready and willing to perform his obligations as contained in the MoU dated 14.02.2020. Consequently, the plaintiff



resigned from the Post of Director of the Company on 06.07.2020 and his resignation was accepted by the Company on 20.07.2020.

37. The plaintiff in support of his present application has also argued that *Section 14 of the Specific Relief Act, 1963* lays down three types of contracts, of which specific performance cannot be granted. Section 14 (d) of the Specific Relief Act, 1963 specifically states that those contracts which are determinable in nature cannot be specifically enforced, though those contracts which do not contain any termination clause, are not considered to be determinable and thus, fall within the bar of Section 14(c) of the Specific Relief Act, 1963. Since there was no term in the MoU dated 14.02.2020 for termination, the MoU dated 14.02.2020 cannot be deemed to be terminable and is, therefore, specifically enforceable. The reliance has been placed on Jumbo World Holdings Limited and Ors. vs. Embassy Property Developments Private Limited and Ors., decided vide OP No. 891/2015 decided of Madras High Court and Turnaround Logistics (P) Ltd. vs. Jet Airways (India) Ltd. and Ors., decided vide CS(OS) 574/2006.

38. It has been submitted that the defendant has not filed any Written Statement in the present Suit and his right to file the Written Statement stands closed vide Order dated 10.10.2022. Therefore, the entire Plaint and documents may be considered and the Suit of the plaintiff be allowed. The reliance has been placed on the decision in Impresario Entertainment & Hospitality Pvt. Ltd. vs. Mocha Blu Coffee Shop, decided vide CS(COMM) 773/2017.

39. It is submitted that since all the facts are admitted by the defendant and also are deemed to be admitted by virtue of Order VIII Rule 5 of CPC, 1908 as the defendant has failed to file the Written Statement, no oral



evidence is required to be recorded for adjudicating the present dispute. This Court may rely upon the Complaint and the documents to allow the present Suit of the plaintiff. The reliance has been placed on the decisions in Satya Infrastructure Ltd. and Ors. vs. Satya Infra & Estates Pvt. Ltd., decided vide CS(OS) 1213/2011 and Saregama India Limited vs. Mr. Jai Manjit Singh and Ors., decided vide CS(COMM) 488/2017.

40. It is thus, submitted that the plaintiff is entitled to Summary Judgment under Order XIII A Rules 3 & 6(1)(a) & Order VIII Rule 10 read with Section 151 of CPC, 1908, for which, reliance has been placed on Su-Kam Power Systems Ltd. vs. Kunwer Sachdev and Anr., 2019 SCC OnLine Del 10764.

41. **Submissions heard and Written Submissions as well as the record perused.**

42. Before delving into the merits of the case, it would be pertinent to discuss the scope of the *Summary Judgment under Order VIII Rule 10 and XIII A of CPC, 1908*.

Contours of Or. XIII- A and Or. VIII Rule 10 of CPC, 1908:

43. Order VIII Rule 10 of CPC, 1908 has been incorporated by the Legislature to expedite the process of justice in order to curb the dilatory tactics which have been resorted to by the defendant by not filing his Written Statement, which entitles the Court to pronounce a judgment in favour of the plaintiff and against the defendant. At the same time, the Courts must be cautious and judge the contents of the Complaints and documents on record, which must be of unimpeachable character not requiring any evidence to prove its contents before a Summary Judgment is given in



favour of the plaintiff.

44. The Co-ordinate Bench of this Court in Nirog Pharma Pvt. Ltd. vs. Umesh Gupta and Ors., 235(2016) DLT 354 observed that while defining *Commercial Suits* under the Commercial Courts Act, 2015 it was the clear intention of the Legislature that such Suits should be decided expeditiously and should not be allowed to linger. If the defendant fails to pursue his case or does it in a lackadaisical manner by not filing the Written Statement, the Courts should invoke the provision of Order VIII Rule 10 of CPC, 1908 to decree such Suits.

45. Similarly, in Satya Infrastructure Ltd. (supra), it was observed that no purpose would be served in such cases where the documents and the pleadings are of unimpeachable character, to direct the plaintiff to lead *ex parte* evidence by way of Affidavit which invariably is a repetition of the contents of the Plaint. The Plaint even, otherwise as per the amended provisions of CPC besides being verified is also supported by the Affidavit of Truth of the plaintiff. Once the Affidavit of Truth has already been filed along with the Plaint, no additional sanctity can be accorded merely by filing the affidavit of evidence afresh or exhibiting of the documents annexed along with the Plaint.

46. In the case of Impresario Entertainment & Hospitality Pvt. Ltd. (supra), while referring to the aforesaid judgements, it was concluded that *Order XIII A of CPC, 1908* empowers the Court to pass a Summary Judgment without recording of evidence in appropriate cases where it appears that the defendant has *no real prospect of defending its case*.

47. Similar provisions as under *Order XIII A of CPC, 1908*, finds mention in Rule 24.2 of Civil Procedure Rules in England. It refers to the words “no



real prospect of being successful or succeeding". The House of Lords in *Three Rivers District Council and Others vs. Governor and Company of the Bank of England* [2003] 2 A.C. 1, reiterated the observation in *Swain vs. Hillman* [2001] 1 All ER 91, to explain that the word "*real*" distinguishes "*fanciful*" prospects of success and it directs the Court to examine whether there is "*realistic*" as opposed to "*fanciful*" chances of success. It also held that while considering the words "*no real prospect*", the Court should see what will happen at the trial and that if the case was so weak that it has no reasonable prospect for success, it should be stopped before great expense is incurred; the test being: *whether the claim was bound to fail*.

48. In *Swain*, (supra), Lord Woolf MR observed that under Rule 24.2 of Civil Procedure Rules in England, the Court now has salutary power, both to be exercised in a claimant's favour or where appropriate, in the defendant's favour. It enables the Court to dispose summarily both Claims or Defences which have no real prospect of being successful. The words "*no real prospect of being successful or succeeding*" do not need any amplification: they speak for themselves. The word "*real*" distinguishes fanciful prospects of success and word "*real*" directs the Court to the need to see whether there is a *realistic as opposed fanciful prospect of success*.

49. In *Swain* (supra), Lord Woolf MR gave further guidance by observing that by use of this Rule in appropriate cases, it would give effect to overriding objective of the expeditious disposal of a Suit; it saves time; it achieves expedition; it avoids the Court's resources being used up on cases where this serves no purpose and generally, is in the interest of justice. A word of caution was sounded by observing it is not meant to dispense with the need for trial where there are issues which should be investigated at the



trial. A proper disposal under the Summary Judgment does not involve the Judge conducting a mini trial and that is not the object of the provisions, but it is to enable cases where there is no real prospect of success either way, to be disposed of summarily.

50. The Supreme Court of Canada in the case of Robert Hryniak v. Fred Mauldin and Ors., 2014 SCC OnLine Can SC 53 also held that the trial should not be the default procedure; where there is a genuine issue requiring a trial for the Judge to be able to reach a fair and just determination on the merits of the case. It is a process which allows the Court to make necessary findings of fact, to apply the law to such facts and when such a process is proportionate, more expeditious and a less expensive means of achieving a just result. Consequently, when a Summary Judgment motion allows the judge to find the necessary facts and resolve the dispute, it would not be necessary to proceed to trial. In conclusion, it was observed that a Summary Judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial.

51. After referring to all the aforesaid judgments, in Su-Kam Power Systems Ltd. (supra), the Coordinate Bench of this Court opined that where the Court is of the opinion *that there are no real prospects of successfully defending the claim, when the Court is able to reach a fair and just determination on the merits by making necessary findings of fact and applying the law to such fact and the same is proportionate, more expeditious and less expensive means to achieve a fair and just result, the Summary Judgment must be given.*

52. Thus, it can be deduced that there majorly exist *two grounds* to grant a Summary Judgment: -



- a) Absence of any prospect for the Defendant to successfully defend a claim raised by the Plaintiff; and*
- b) Absence of a compelling reason for this Hon'ble Court to decide the dispute before recording of oral evidence of the parties.*

Analysis and Findings:-

53. In the light of these principles for Summary Judgment, the facts of the present case may be examined to analysed to understand if the conditions for grant of a summary Judgment in favour of the Plaintiff and against the Defendant, stand satisfied.

Whether MoU dated 14.02.2020 qualifies as a binding/concluded Contract between the parties?

54. It is no more *res-integra* that a Memorandum of Understanding can become binding as a contract under certain conditions. While MOUs that outline the intentions and expectations of the parties involved, are generally considered non-binding Agreements; however, they can be enforceable if they fulfil the essentials of *Section 10 of the Indian Contract Act 1872*. Essentially, the covenants of any MoU and words used to express a legal intention, make the MoU legally binding on the parties.

55. In the case of *Bikram Kishore Parida vs. Penudhar Jena* AIR 1976 Orissa 4, it was observed that an *objective test* must be used to determine whether there was an intent to establish legal relations and that even if the promisor may not have known that his promise would result in a legal obligation, he would nonetheless be obligated to fulfil his promise, if a reasonable person would believe that he meant to enter into a contract.

56. Similarly, in the landmark decision *Motilal Padampat Sugar Mills*



Co. Limited vs. the state of Uttar Pradesh, A.I.R. 1979 S.C. 621 it was reiterated that the doctrine of *promissory estoppel* is a principle evolved by equity to avoid injustice in situations where a promise has been made by a person knowing that it would be acted upon by the person to whom it is made and it is inequitable to allow the party making the promise to go back on it. Likewise, in the case of Subimalchandra Chatterji vs. Radhanath Ray AIR 1934 Cal 235, it was held that an MoU can be enforced despite its deficiencies, *based on principles of equity and promissory estoppel*.

57. Further, in Jai Beverages Pvt. Ltd. v. State of Jammu and Kashmir and Ors. 2006 (4) SCJ 401, it was observed the binding nature and enforceability of a MoU can be deduced from the intention of the parties, the language used in the Agreement, the nature of Agreement and also the conduct of the parties following the execution of the MoU.

58. In the case of M/s. Nanak Builders and Investors Pvt. Ltd. v Vinod Kumar Alag, AIR 1991 Del 315, while observing that the Agreement will not be considered an incomplete contract if the important and significant conditions have been consented upon and reduced to written form, it was held that the mere heading or title of a document would not be sufficient to determine its lawfulness and enforceability; *rather the terms of the MoU would have to be considered*.

59. The principles which thus, emerge for interpreting a MoU to ascertain if it an enforceable Contract are: (i) the nature of the Agreement, (ii) the language used, (iii) the intention of the parties to create a legal and enforceable obligation, (iv) the conduct of the parties; and (v) nomenclature or the heading of the Document is not sufficient to determine its enforceability.



60. Keeping the above principles in mind, the terms of the MoU dated 14.02.2020 on which the entire case of the plaintiff rests, may be analysed.

61. The plaintiff had invested in the Company i.e., Zoi International Company Limited, which is based in Thailand, in which the defendant and one, Mr. Manish Alag had a shareholding of 45% and 10% respectively. The plaintiff also made investments from time to time and was having a holding of 45% of equity shares in the Company, a fact not in dispute.

62. The plaintiff, being disgruntled by the apparent mismanagement of the Company, sought to make an exit and consequently, the plaintiff and the defendant entered into MoU dated 14.02.2020 which reads as under: -

“Memorandum of Understanding (MOU)

This Memorandum of Understanding (MOU) is entered on 14 February 2020 between Mr. Gurvinder Singh Toor, Son of Mr. Mohinder Toor, residing at E-2085, Palam Vihar, Gurgaon, Haryana, India 122017 and Mr. Rohit Malhotra, Son of Mr. Navneet Kumar Malhotra, residing at EB-158 Maya Enclave, New Delhi.

Mr. Rohit Malhotra had invested and holds 45% equity stake in ZOI International Co., Ltd, a company incorporated in the state of Thailand and having its Registered Office Address at 89/7 Moo 5, Free Zone, Tamboon Bangsamak, Ampur Bang Prakong Chachoengsao -24180 Thailand. The other shareholders of the Company are Gurvinder Singh Toor & Manish Alagh and their shareholding is 45% & 10% respectively.

Now, Mr. Rohit Malhotra wishes to sell his entire 45% shareholding in the said company to Mr. Gurvinder Toor and Mr. Gurvinder Toor has agreed to purchase the same in its entirety.

The above two parties hereby agree to the following terms under this MOU.

1. Mr. Rohit Malhotra agrees to sell his entire 45% shareholding in ZOI International Co., Ltd for a consideration



of INR 1,90,00,000/- (Indian Rupees Crore & Ninety Lakhs Only) to Mr. Gurvinder Toor.

2. Mr. Gurvinder Singh Toor agrees to pay the above consideration by way of following to cheques payable by 30th March 2020 and 26th March 2020.

Cheque No. 385471 dtd 30.03.2020 for Rs. 1,13,50,000/- (Rupees One Crore, Thirteen Lakhs, Fifty Thousand Only).

Cheque No. 385472 dtd 26.03.2020 for Rs. 76,50,000/- (Rupees Seventy Six Lakhs, Fifty Thousand Only).

3. Mr. Rohit Malhotra undertakes to transfer the above shareholding unconditionally to Mr. Gurvinder Singh Toor immediately on realisation of above referred cheques and agrees to perform such acts as may be necessary for legal transfer of title of such shares as per regulations prevalent in country of Thailand including signatures on the Share Purchase Agreement.

4. Post Signing of the Share Purchase Agreement and the Consideration of the Equity Stake sale being realised by Mr. Rohit Malhotra, he agrees to resign as a Director in the said company. Further, he agrees to hand over any documents, agreements, papers related to the company which he may be holding to Mr. Gurvinder Singh Toor.

5. It is also mutually agreed that since Mr. Gurvinder Singh Toor has been responsible for running of the ZOI International business since inception, Mr. Rohit Malhotra will be absolved of all liabilities, if any, arising from ZOI International business and commercial dealings to date.

6. Both the above parties will enter into a detailed Share Purchase Agreement to execute the transfer of the Shares as per the terms of this MOU and the Rules and Regulations as mandated.

7. The Equity Sale Consideration will be treated and remitted under the Reserve Bank of India Rules and will be guided by the Rules and Guidelines of the Government/Banks/Institutions from where the Overseas Investment was made by Mr. Rohit



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Malhotra and other shareholders in ZOI International.

Confidentiality

Both the above parties agree to meet the commitment dates and maintain confidentiality about the MOU and the terms mentioned herein.

Signed by:

Sd/-

Witness

Sd/-

Gurvinder Singh Toor

Kuldeep Kumar

Sd/-

Rohit Malhotra

”

63. From the express terms of the MoU dated 14.02.2020, it emerges:
- i. the plaintiff agreed to resign as a Director in the Zoi International Company Limited;*
 - ii. the plaintiff for the purpose of his exit, agreed to sell his entire 45% shareholding in the Company, to the defendant for a consideration of Rs. 1,90,00,000/-;*
 - iii. the defendant in acceptance, issued two Cheques bearing No. 385471 for an amount of Rs. 1,13,50,000/- dated 30.03.2020 and another bearing No. 385472 for an amount of Rs. 76,50,000/- dated 26.03.2020 adding upto the agreed consideration of Rs. 1,90,00,000/- in favour of the plaintiff;*
 - iv. the parties agreed to enter into the detailed SPA for transfer of shares as per MoU dated 14.02.2020, once the cheques were encashed (date of the cheques being 26.03.2020 & 30.03.2020);*
 - v. the plaintiff resigned from the post of Director on 06.07.2020,*



which was accepted on 20.07.2020 and he also handed over all the documents, agreements, papers related to the said Company to the defendant;

vi. the parties agreed that since the defendant had been responsible for the running of the Company since its inception, therefore, the plaintiff would be absolved of all the liabilities and commercial dealings up to date of the Company;

vii. finally, both the parties agreed to meet the commitment dates and maintain confidentiality.

64. The *first challenge* that has been raised by the defendant is that it is merely the MoU whereby the parties agreed to execute the SPA in future. It is only an expression of intent and did not result in any concluded contract. Therefore, there cannot be any specific performance of this MoU.

65. This contention of the defendant is clearly not tenable. As noticed above, by way of this MoU dated 14.02.2020, the parties agreed for the exit of the plaintiff from the Company. The shareholding of the plaintiff was ascertained as Rs. 1,90,00,000/- and two cheques totalling to the said consideration amount had also been issued by the defendant.

66. The very fact that the said two cheques were issued for the entire consideration amount as ascertained, for exiting of the plaintiff from the Company clearly *shows the intention of the parties that it was a concluded Agreement wherein the parties had already decided for the plaintiff to resign from the Directorship of the Company*. Only its execution by formal tender of resignation and also execution of the SPA for transfer of shares was deferred till the encashment of cheques, which was to happen on 30.03.2020.



67. The *second aspect* of this MoU dated 14.02.2020 was that the parties quantified the 45% shareholding of the plaintiff as Rs. 1,90,00,000/- and two cheques totalling to the said consideration amount had also been issued by the defendant. *This again is implementation of the concluded contract.*

68. The execution of the SPA which was contingent upon the realisation of the said two cheques, only was deferred, which admittedly got dishonoured when presented for encashment.

69. The *third aspect* is that the plaintiff admittedly acted on this MoU dated 14.02.2020 and gave his resignation on 06.07.2020 which was accepted by the defendant on 20.07.2020.

70. The covenants of the MoU dated 14.02.2020, when read as a whole, clearly show that it was not an MoU to enter into an Agreement in future *but a comprehensive Agreement for the exit of the plaintiff*. The rest of the terms were only the mode of effecting the exit. The first step was to pay the agreed consideration to the plaintiff for his exit, by the defendant who had performed his part of the obligations under this MoU dated 14.02.2020, by issuing the two post - dated cheques which were accepted by the plaintiff. It is the defendant who had subsequently defaulted in performance of his part of the MoU by terminating it *vide* E-mail dated 18.03.2020 by simply stating that because of COVID-19 Pandemic, he is unable to perform his obligations under the MoU. The language used for termination also reflects that there was a concluded Agreement and the defendant chose to resile from it on the ground that it became onerous for him to perform on account of COVID-19 Pandemic and the same stood frustrated because of *force majeure*.

71. This contention of the defendant of terminating the MoU, further



confirms that he had terminated the MoU which had already fructified into a complete Agreement, but what remained was the implementation/execution of the terms already agreed between the parties. The cheques already issued for the agreed consideration, were undertaken by the defendant to be honoured on presentation, which was then to be followed by the execution of Share Purchase Agreement (SPA). The execution of SPA was contingent to the realisation of the cheques given by the defendant to the plaintiff; the defendant however, retracted and stopped the payments against the said two cheques. Therefore, it cannot be said that the MoU dated 14.02.2020 was merely an expression of interest and not a concluded contract.

72. The defendant has placed reliance on the decision in Speech and Software Technologies (India) Private Limited (supra), wherein the parties had agreed to enter into a Tripartite Share Purchase Agreement. In the said case, the parties entered into a Tripartite Agreement dated 15.07.2006, but it stood completely rescinded, revoked and novated by a Letter of Intent dated 01.08.2006 executed by the parties. In this context, it was observed that the Letter dated 01.08.2006 was merely an Agreement to enter into another Agreement as both the parties had agreed to set a deadline for signing of the Agreement by a subsequent date. It was thus held, that an Agreement to enter into a future Agreement is not enforceable nor does it confer any rights upon the parties. The defendant has also placed reliance on the decision in Davender Kumar Sharma (supra), wherein, again the Agreement in question was an Agreement to agree to the future transfer of shares in the property, in favour of the respondents.

73. However, the facts of the present case are totally distinguishable, as the MoU dated 14.02.2020 was not an Agreement which was enforceable in



future; rather, it was a concluded contract between the parties, whereby the plaintiff agreed to resign from the Company on payment of Rs. 1,90,00,000/- which in fact, was tendered by way of cheques, by the defendant. It was not a Letter of Intent; but as already observed it was an Agreement which was a concluded Contract and its terms were specifically enforceable.

74. ***Thus, it is concluded that the MoU dated 14.02.2020 was a binding and a concluded Contract, duly signed by the parties, recording the clear intention of the parties of the exit of the Plaintiff.*** The MoU expressly records the agreement of both the parties to sell the 45% Equity shares of the plaintiff, for a consideration of Rs.1,90,00,000/-. The value of the shares already stood ascertained and it was not as if the shares were to be sold on a subsequent date at the value, then prevailing. The cheques were also issued and the parties had also agreed to take all necessary steps to honour the obligations in the MoU. The parties had also agreed to execute the SPA as only a final mode to execute the MoU and even the *confidentiality clause in the end, binding both the parties to meet the commitment dates and to maintain confidentiality about the terms of MoU* highlights that the parties intended to meet the decided timelines and fulfil the commitments as agreed. It is clearly discernible that the parties had entered into the binding and concluded Agreement, were conscious of the consequences and had agreed to be bound by the terms of the same.

Whether the performance of the MoU dated 14.02.2020 became impossible due to COVID-19 pandemic or merely onerous?

75. The defendant rescinded the MoU *vide* letter dated 18.03.2020 by claiming *force majeure* on account of Covid- 19 Pandemic for which he has



relied upon *Delhi Development Authority* (supra).

76. First and foremost, the MoU dated 14.02.2020 has been rescinded on 18.03.2020 when it was only the advent of COVID-19 Pandemic and the future was not even predictable on that date. The Lock Down was imposed on 24.03.2020. Can it be said that the Covid -19 was a valid justification for recession of Contract by the defendant?

77. The first aspect which needs consideration is whether the performance became impossible or merely onerous due to complete lockdown on account of COVID Pandemic. To put it differently, *the fundamental question is whether the business of the defendant was hindered leading to loss of business or it resulted in an altered situation making it impossible for him to pay the consideration amount and perform his obligations.*

78. The origin of the *doctrine of Frustration* can be traced back to the principle of *absolute liability* forming the basis of contracts in England, as the English courts were reluctant to excuse non-performance of contracts. In order to rectify and avoid the deficiencies of the theory of *absolute liability*, the concept of doctrine of frustration was introduced which allowed a contract to be set aside when an unforeseen event rendered the contractual obligations impossible to perform or radically changed the principal purpose of the contract.

79. Thus, the basis to attract the doctrine has essentially been unforeseeability, unpredictability and inevitability of the event, Impossibility/ Impracticability to perform the contractual obligations, Radical Change/ alteration of the of situation and *No Fault* of the party seeking relief. The prime object is to mitigate the harshness of holding parties to their contractual obligations when extraordinary events occur.



80. In the Indian Context, the term '*frustration of contract*' does not find mention in the Indian Contract Act, 1872. However, **Section 56 of the Indian Contract Act, 1872** makes the agreement that is impossible or incapable of being performed void indicating towards doctrine of frustration and the same is based on the maxim "*les non cogit ad impossibilia*" which means that the law will not compel a man to do what he cannot possibly perform.

81. In the Indian context, while performance of the contractual obligations remains the general rule, the exception of *frustration of Contract* and contours of Section 56 of the Indian Contract Act 1872, have been discussed in the seminal decision of *Satyabrata Ghose v. Mugneeram Bangur & Co.*, (1953) 2 SCC 437 : 1954 SCR 310. The second paragraph of Section 56 of the Contract Act has been adverted to and it was stated that this is exhaustive of the law on impossibility of performance of Contract as it stands in India. It was held was that the word "*impossible*" *has not been used in the Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties.* If an untoward event or change of circumstance *totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do.* It was further held that where the Court finds that the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If,



however, frustration is to take place de hors the contract, it will be governed by Section 56 of the Contract Act.

82. In *Alopi Parshad & Sons Ltd. v. Union of India*, (1960) 2 SCR 793, this Court, after setting out Section 56 of the Contract Act, held that the Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract, are often faced in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. *It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind.* It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties.

83. Similarly, in *Naihati Jute Mills Ltd. v. Hyaliram Jagannath*, (1968) 1 SCR 821, the Apex Court went into the English law on frustration in some detail, and then cited the celebrated judgment of *Satyabrata Ghose v. Mugneeram Bangur & Co.* and ultimately concluded that a contract is not frustrated merely because the circumstances in which it was made, are altered. *The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.*



84. It may thus, be observed that the doctrine of frustration must always be within narrow limits. The most illustrative English judgment to understand its nuances is *Tsakiroglou & Co. Ltd. v. Noblee Thorl GmbH*, [1961] 2 All ER 179, wherein because of the closure of the Suez canal, the ships had to undertake an alternate route and had to go around the Cape of Good Hope, which was three times the distance through Suez canal. The House of Lords held that even though the contract had become *more onerous to perform*, *it was not fundamentally altered*. Where performance is otherwise possible, merely because the performance of the contract entails more expense/price, *it would not allow one of the parties to claim that the contract stands discharged by impossibility of performance*.

85. In the case of *Energy Watchdog v. Central Electricity Regulatory Commission*, (2017) 14 SCC 80, the Apex Court concluded that the doctrine of frustration cannot apply to the cases where the fundamental basis for performance of the Contract remains unaltered. Merely, because the performance of the Contract has become onerous, *it cannot be held to be a case of impossibility of performance of the Contract*.

86. In the present case, the COVID-19 Pandemic, may have made the performance of obligation onerous for the defendant, but it cannot be categorically said that COVID-19 Pandemic *per se* was a situation of *force majeure* making the MoU impossible of performance. A contract may be performed theoretically but may not be profitable to any of the parties. It may be unprofitable or cause monetary loss to either of the parties but even in such circumstances the parties cannot be discharged from their contractual obligations merely because the performance of the contract became onerous. Partial hinderance in the performance of the Contract, is



not sufficient to claim impossibility. It is only when then situation arises which was never visualized at the time of entering into the Agreement and *there is radical change in the circumstances*, that the party may succeed in seeking discharge from its obligations under the Contract.

87. Pertinently, the MoU was executed on 14.02.2020 and two post-dated cheques had been issued, it is difficult to comprehend as to how, when the COVID-19 Pandemic had not struck in its fullest earnestness, the defendant became unable to perform his obligations. *Clearly, it is not the COVID-19 Pandemic which was instrumental in rescinding of the Obligations, but the defendant for the reasons best known to him, had rescinded this MoU.* The reason for rescission is clearly not tenable and the defendant could not have wriggled out of its concluded obligations under the MoU by simply writing a Letter. ***The defendant is held bound by the terms of MoU which he has to honour and is liable to pay Rs.1,90,00,000/- to the plaintiff.***

Whether the Specific Performance of the MoU dated 14.02.2020 can be granted by directing execution of SPA or the same is barred by Section 14(d) of the Specific Relief Act, 1963?

88. A plea has been raised by the defendant that since the MOU is determinable in nature, the specific performance of the same is barred by Section 14(d) of the Specific Relief Act, 1963 and the same could be terminated even in the absence of a specific clause and without assigning any reason.

89. At this juncture, it becomes apposite to analyse the regime of the Specific Relief Act, 1963 with respect to the enforceability of *determinable contracts*.



90. The 2018 Amendment to Section 10 of the Specific Relief Act has changed the words “*specific performance of any contract may, in the discretion of the Court, be enforced*” have been substituted with the words “*specific performance of a contract shall be enforced subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16*”. Post the 2018 Amendment, Specific Performance has been made a non-discretionary and mandatory relief under Section 10 of the Specific Relief Act, as now it emphasises that the court shall enforce specific performance, subject to the provisions carried under Sections 11(2), 14, and 16 of the Specific Relief Act, 1963.

91. In *B. Santoshamma v. D. Sarala* (supra), the Supreme Court while examining the amended provisions of Specific Relief Act, especially the changes made to it, concluded that although the relief of specific performance of a Contract is no longer discretionary, the same would still be subject to Section 11, Section 14, and Section 16 of the Specific Relief Act after the 2018 Amendment.

92. Section 14 of the Specific Relief Act, 1963 provides for *Contracts not specifically enforceable*. In terms of the provisions contained in Section 14 of the Specific Relief Act, the following contracts cannot be specifically enforced:

- (i) Where a party to the contract has obtained substituted performance of the contract in accordance with the provisions of Section 20;
- (ii) A contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;



- (iii) A contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; or
- (iv) *A contract which is in its nature determinable.*

93. The term “*determinable*” means something that is “*liable to end upon the happening of a contingency*”, or in other words, is “*terminable*”. In essence, a determinable contract would generally mean a contract that can be ended by either party at will or upon the occurrence or non-occurrence of a particular contingency.

94. The Kerala High Court in T.O. Abraham v. Jose Thomas, 2017 SCC OnLine Ker 19872, defined what is meant by *determinable Contract*. It was observed that for a Contract to become determinable, it has to be shown by defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason.

95. The word ‘*inherently determinable*’ as used in Section 14(d) of Specific Relief Act, 1963 makes it unambiguously clear that the Contract can be terminated by a party on their own will without any further reason and without showing any cause, would be the ones that are inherently determinable. However, if the Agreement is shown to be determinable at a happening of an event or on the occurrence of a certain exigency then it is ineluctable that only on the happening of such event or exigency alone that the Contract can be determined.

96. The *determinable Contract* was further explained in N.H. & Co. v. S.M.E. Pvt. Ltd., (2020) 5 Mah LJ 173, wherein it was observed that



when a Contract contemplates unilateral right in a party to a Contract to determine it without assigning any reason or for that matter without any reason, it is a determinable Contract. However, where it is determinable only in the event of other party to the Contract committing breach of the Agreement, its determination depends upon such eventuality which may or may not occur and the Contract is clearly not determinable.

97. In Intercontinental Hotels Group India Pvt. Ltd. v. Shiva Satya Hotels Pvt. Ltd., 2013 SCC OnLine Guj 8678, the Gujarat High Court observed that the expression “*in its nature determinable*” as used in Section 14 (1) (c) [renumbered as clause (d) of Section 14(1) as substituted by Act 18 of 2018 with effect from 1.10.2018] of Specific Relief Act, 1963 would require one to address the question whether it is possible to issue an order of specific performance and enforce that order.

98. The principles to ascertain whether an Agreement was determinable or not, were explained in the case of Jumbo World Holdings Limited and Ors. (supra) as under: -

“ 23. The other aspect that remains to be considered is whether time is of the essence of the SPA and, therefore, whether the Petitioners were entitled to avoid the SPA as per Section 55 of the Contract Act. In this connection, upon appraisal of evidence, the Arbitral Tribunal concluded that time is not of the essence. In addition, the Arbitral Tribunal also held that the Petitioners were in breach of their obligations under the SPA and, therefore, could not insist on the consummation of the transaction within the stipulated time limit. I see no reason to interfere with these factual findings as per applicable legal principles. As regards the contention that the SPA is not specifically enforceable because it is in its nature determinable, I set out below my analysis from an earlier order dated 26.11.2019 in O.P. No. 698 and 711 of 2012 on this issue:



*“16. On examining the judgments on Section 21(d) of SRA 1877 and Section 14(c) of the Specific Relief Act, as applicable to this case, i.e. before Act 18 of 2018, I am of the view that Section 14(c) does not mandate that all contracts that could be terminated are not specifically enforceable. If so, no commercial contract would be specifically enforceable. Instead, Section 14(c) applies to contracts that are by nature determinable and not to all contracts that may be determined. If one were to classify contracts by placing them in categories on the basis of ease of determinability, about five broad categories can be envisaged, which are not necessarily exhaustive. Out of these, undoubtedly, two categories of contract would be considered as determinable by nature and, consequently, not specifically enforceable : (i) contracts that are unilaterally and inherently revocable or capable of being dissolved such as licences and partnerships at will; and (ii) contracts that are terminable unilaterally on “without cause” or “no fault” basis. Contracts that are terminable forthwith for cause or that cease to subsist “for cause” without provision for remedying the breach would constitute a third category. In my view, although the **Indian Oil case** referred to clause 27 thereof, which provided for termination forthwith “for cause”, the decision turned on clause 28 thereof, which provided for “no fault” termination, as discussed earlier. Thus, the third category of contract is not determinable by nature; nonetheless, the relative ease of determinability may be a relevant factor in deciding whether to grant specific performance as regards this category. The fourth category would be of contracts that are terminable for cause subject to a breach notice and an opportunity to cure the breach and the fifth category would be contracts without a termination clause, which could be terminated for breach of a condition but not a warranty as per applicable common law principles. The said fourth and fifth categories of contract would, certainly, not be determinable in nature although they could be terminated*



under specific circumstances. Needless to say, the rationale for Section 14(c) is that the grant of specific performance of contracts that are by nature determinable would be an empty formality and the effectiveness of the order could be nullified by subsequent termination.”

99. In the case of Indian Oil Corporation vs. Shriram Gas Service, 57 (1995) DLT 279, while referring to the terms of the contract, it was held that the Agreement was determinable in nature as the same contained an express termination clause and therefore, no specific performance or injunction could be granted in light of the bar contained in the Specific Relief Act 1963.

100. In the case of Chheda Housing Development Corporation vs. Bibijan Shaikh Farid and Ors., 2007 SCC OnLine Bom 130, it was held that whether a contract is specifically enforceable or not, is a fact which is to be determined by analysing the factual context of each case and the Agreement under consideration.

101. Pertinently, in the case of Staffordshire Area Health Authority vs. South Staffordshire Waterworks Company, 1978 3 AIR 769, it was observed that even in those Agreements which contain no provision for termination, they can be terminated on giving a reasonable notice.

102. From this detailed appraisal of the law on enforceability of Contracts under the Specific Relief Act 1963, it is evident that the contracts cannot be specifically enforced if it is determinable in nature and injunctions cannot be granted on breach of a contract, no performance of which could not be specifically enforced. Further, when the party has an equal efficacious remedy available, Specific performance of an Agreement cannot be granted where breach of which can be compensated by money. It is also settled



principle that in certain cases, even if the Agreement between the parties was terminated validly or was determinable in nature, then the plaintiff shall only be entitled to damages which will be the adequate relief in the facts and circumstances.

103. Coming to the facts of the present case, it emerges that the defendant has terminated the MoU dated 14.02.2020 *vide* his E-mail dated 18.03.2020 on the ground of it having become impossible to perform on account of COVID-19 Pandemic. *First and foremost*, from the recitals of the MoU dated 14.02.2020 under consideration, it is evident that it was a concluded contract, under which the defendant had already performed what was required to be done by him by issuing the Cheques, though he retracted by stopping payment of the said two cheques.

104. The plaintiff in the performance of his obligations under the MoU tendered his resignation on which was even accepted by the Defendant on 20.07.2020 i.e. after the alleged termination of MoU via e mail dated 18.03.2020. Where was the question of subsequent acceptance of resignation of the plaintiff if the MoU already stood rescinded. The conduct of the parties reflect that the parties have performed their respective obligations under the MoU though the defendant is now avoiding to honour its obligation of making the payment of the agreed amount.

105. In the case of Hussey vs. Horne-Payne, 1879 4 AC 311, it was observed that if after a contract is concluded and its terms settled, even if further negotiations are started with regard to new matters, it would not prevent full effect being given to the contract already existing. A contract already concluded can be rescinded or varied with the consent of both the parties or where it is treated as incomplete or inconclusive.



106. *Lastly*, it is not even the case of the Defendant, there was a breach of any condition of the MoU by the Plaintiff and thus, the defendant could not have unilaterally chosen to not honour his obligations under the MoU and thereafter, unilaterally terminated it. The only way in which the MoU could have been terminated is with the consent of both the parties, however, as is evident from the conduct of the Plaintiff, he never backed out from his obligations and was always ready and willing to perform his part.

107. *The next question which now arises is whether the plaintiff can seek specific performance of the SPA which was agreed by the parties under Clause 6 of the MoU dated 14.02.2020 ?*

108. The specific performance of a Share Purchase Agreement and its determinability was considered by the Supreme Court in the case of M.S. Madhusoodhanan (supra), wherein it was observed that the shares are moveable properties and are transferrable. However, the right to transfer shares is circumscribed and prohibited by seeking invitation from the Public to subscribe for any shares or debentures of the Company which is defined in *Section 3(1)(iii) of the Companies Act, 1956*. Subject to this restriction, a holder of shares in a private Company may agree to sell his shares to a person of his choice. Such agreements are specifically enforceable under *Section 10 of the Specific Relief Act, 1963* which provides that specific performance of such contracts may be enforced when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. In such a case, of contract to transfer movable property normally specific performance is not granted except in circumstances specified in the



Explanation to Section 10. One of the exceptions is where the property is “*of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market*”.

109. As has been held by the Privy Council in *The Bank of India Ltd vs. J.A.H. Chinoy*, AIR 1950 P.C. 90, wherein having regard to the nature of the Company and the limited market for its shares, damages would not be an adequate remedy. Similar observations have been made in *Jainrain Ram Lundia* (supra).

110. Relying on these judgments, in the case of *M.S. Madhusoodhanan* (supra), the Apex Court concluded *that the specific performance of a contract for transfer of shares in the private limited company could be granted*.

111. Therefore, it may be concluded that where the shares are of a private Limited Company which are not ordinarily available in the market, it is quite proper to grant a decree of specific performance of a contract for sale of such shares.

112. In the present case specifically, it is the case of the plaintiff, which has not been rebutted by the defendant during the course of the arguments, that it being a private limited company, its shares cannot be sold in the market and had to be sold to the defendant as was agreed in the MoU.

113. ***Thus, the defendant refusing to honour its commitment to purchase the shares of the Company under the MoU for no justifiable reason is not tenable and the plaintiff is entitled to seek specific performance of MoU which contains reciprocal obligations of payment of Rs. 1,90,00,000/- towards the relinquishment/transfer of 45% shares in favour of the defendant by executing a Share Purchase Agreement.***



Whether the Suit has been improperly valued?

114. An objection has been taken on behalf of the defendant that the Suit has not been valued properly. The defendant has claimed that as per the plaintiff, the value of the shares at the time of institution of the present Suit was Rs. 81,58,140/-, while the Suit has been wrongly assessed based on the agreed value under the MoU i.e., Rs. 1,90,00,000- along with interest. *Section 21 of the Commercial Courts Act, 2015* gives an overriding effect to this provision of this Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. The contention of the defendant is that Section 21 of the Commercial Courts Act, 2015 thus overrides and supersedes the provisions of the Suits Valuation Act, 1887 and the Court Fees Act, 1870.

115. The Supreme Court in A.G. Varadarajulu & Anr. vs. The State of Tamil Nadu & Ors., 1998 (4) SCC 231, while dealing with the non-obstante clause, observed that the Court must try to find out the extent to which the Legislature had intended to give one provision and overriding effect over another provision. Though the non-obstante clause is a very potent clause, intended to exclude every consideration arising from other provisions of the same statute or other statute, but when Section containing such clause, does not refer to any particular provision which it intends to override but refers to the provision of statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself.

116. Similar were the observations made by the Apex Court in the case of Central Bank of India vs. State of Kerala & Ors., 2009 4 SCC 94.

117. This Court in the case of Mrs. Soni Dave (supra) while considering the effect of *Section 21 of the Commercial Courts Act, 2015* in the context of



Section 12 of the Commercial Courts Act, 2015 and the provisions of *Suits Valuation Act, 1887* and the *Court Fees Act, 1870* observed that Section 12 of the Act is not intended to provide a new mode of determining the valuation of the Suit for the purpose of jurisdiction and court fee. It would be incongruous to hold that while for the purpose of payment of court fee, the deemed fiction provided under the Act for determining the value of the properties to apply but not for determining the specified value under the Commercial Courts Act, 2015. Section 12 has to be read harmoniously with Suits Valuation Act, 1887 and the Court Fees Act, 1870 and on reading so, the specified value of a Suit where the relief sought relates to immovable property or to a right thereunder has to be according to the market value of the immovable property. Even if the relief claimed in regard to the immovable property or the right therein is anything other than the market value, as in the case of landlord and tenant for recovery of possession of immovable property.

118. Similarly, a Co-ordinate Bench of this Court in Mukesh Kumar Gupta (supra) observed that the valuation of the Suit for the purpose of jurisdiction as per *Section 8 of the Suits Valuation Act, 1887* has to be the same as the value for the purpose of court fee. Further, in a Suit for Specific Performance of a Contract for Sale, the court fee has to be calculated according to the amount of consideration as agreed between the parties in the contract. Therefore, it is not the current market value of the shares which is to be considered as specified value under Section 12 which would determine the valuation or the payment of the court fee.

119. As already discussed in detail, the shares involved are of a Private Limited Company which are not easily saleable in the market and their



market value is not easily ascertainable. Though the plaintiff had claimed that the shares at the time of institution of the Suit valued at Rs. 81,58,140/- but it is not the sale of shares which is the core issue *inter se* the parties, but it is of execution of MoU dated 14.02.2020, wherein the plaintiff had agreed to exit the Company by resigning from the Directorship. His interest in the Company was ascertained as Rs. 1,90,00,000/- which the defendant paid by way of cheques, though they got dishonoured. The plaintiff in order to ensure his exit from the Company, was required to necessarily execute the Share Purchase Agreement for transfer of the 45% of the equity shares that he was holding in the Private Limited Company in which defendant was a shareholder and also the Director. It is not actually the Share Purchase Agreement which is the core issue, but it is the specific performance of the reciprocal obligations by both the parties which got crystalised and determined under the MoU dated 14.02.2020 and the agreed obligation was of Rs. 1,90,00,000/-. The plaintiff has claimed this amount along with interest, which has been rightly stated to be the valuation of the Suit and Court Fee is accordingly paid.

120. The objection thus, taken by the defendant about the Suit not being properly valued or the court fee not affixed accordingly is not tenable.

Relief:-

121. In the light of the above discussion, it is held that all the conditions for grant of a Summary Judgment in terms of Order XIII A Rules 3 and 6(1)(a) and Order VIII Rule 10 read with Section 151 of the CPCP 1908, are satisfied.

122. The present application is allowed and it is hereby held that the SPA agreed to be executed under the MoU dated 14.02.2020, is amenable to



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specific performance.

123. The defendant is hereby directed to pay a sum of Rs. 1,90,00,000/- within two months and on payment of the said amount, the Share Purchase Agreement, transferring his 45% equity shareholding shall be executed forthwith by the plaintiff in favour of the defendant.

124. Though the plaintiff has also claimed an interest on the said amount, but because the shareholding till date continues to be with the plaintiff, he is not entitled to the interest on the amount as claimed by him.

125. **The Suit is decreed accordingly. Parties to bear their own costs.**

126. **The Decree Sheet be drawn.**

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127. The Commercial Suit and the pending application(s) stand disposed in the above terms.

**(NEENA BANSAL KRISHNA)
JUDGE**

JUNE 28, 2024
S.Sharma