Nandkishore Lalbhai Mehta vs New Era Fabrics P.Ltd.& Ors on 8 July, 2015

Equivalent citations: AIR 2015 SUPREME COURT 3796, 2015 (9) SCC 755, 2015 (6) AIR BOM R 400, (2015) 6 MAD LJ 102, (2016) 1 RECCIVR 98, (2015) 2 WLC(SC)CVL 598, (2015) 3 ALL RENTCAS 867, (2015) 7 SCALE 665, (2016) 130 REVDEC 217, (2016) 1 CLR 728 (SC), (2015) 113 ALL LR 243, (2016) 5 CAL HN 22, (2016) 1 ICC 449, (2015) 154 ALLINDCAS 102 (SC), (2016) 1 CIVILCOURTC 270, (2015) 5 BOM CR 269

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Bench: R.K. Agrawal, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

1 CIVIL APPEAL NO. 1148 OF 2010

Nandkishore Lalbhai Mehta .... Appellant(s)

Versus

New Era Fabrics Pvt. Ltd. & Ors. .... Respondent(s)

WITH

2 CIVIL APPEAL NOs. 1131-1132 OF 2010

3

J U D G M E N T

R.K. Agrawal, J.

Civil Appeal No. 1148 of 2010

1) This appeal has been filed against the judgment and order dated 06.05.2008 passed by the Division Bench of the High Court of Judicature at Bombay in Appeal No. 245 of 2006 in Suit No. 1414 of 1979 whereby the High Court allowed the appeal filed by respondents herein while setting aside the decree dated 12.12.2005 passed by the learned single Judge of the High Court in favour of the appellant herein in Suit No. 1414 of 1979 for specific performance of the agreement dated 19.10.1977. Brief facts:

> 2) (a) In October, 1977, Respondent Nos. 1 and 2 agreed to sell their respective right, title and interest in the property admeasuring approximately 13011 sq. yards or thereabouts of Mahim T.P.S. III, Plot No. 264 opposite Matunga Western Railway in favour of Shri Nandkishore Lalbhai Mehta – the appellant herein which was resolved under an Agreement for Sale dated 19.10.1977 on certain terms and conditions.
>
> (b) The relevant terms of the agreement are as under:-
>
> 1. Area of the Property : 13011 Square Yards.
>
> 2. Price : Lumpsum price of Rs. 78,06,600/- (Rupees Seventy-eight lacs six thousand and six hundred only); It is agreed that the price shall not be revised or amended for any reason whatsoever including any legislation or otherwise;
>
> 5. Payment : Rs. 11,50,000/- (Rupees Eleven lacs fifty thousand only) to be paid as earnest to your Solicitor Mr. D.H. Nanavati as follows:-
>
> (a) Rs. 7,50,000/- (Rupees Seven lacs fifty thousand only) on confirmation of this letter by you and balance of Rs. 4,00,000/- (Rupees four lacs only) on or before 24th October 1997 time being of the essence.

Provide further that the sums of Rs.7,50,000/- (Rupees Seven lacs fifty thousand only) be utilized by you New Era Fabrics Pvt. Ltd. for the purpose of carrying out the Consent Terms in the High Court and small Causes Court suit mentioned above.

The time for the payment thereof has expired and you will therefore offer the same to the other side and on their accepting to extend the time till the payment thereof under the said two Consent Terms the said amount will be paid by you to them; in the event of their declining and insisting on going on with the suit or your settlement of the suit as per the Consent Terms not materializing you will return the said amount to me on such refusal or settlement falling through and I will not be entitled to any interest thereon or costs. In the event of my failing to pay to your Solicitor the sum of Rs. 7,50,000/- on the execution thereof and Rs. 4,00,000/- (Rupees four lacs only) on or before 24th October 1977 you will be entitled to forfeit the amount of Rs. 7,50,000/- paid by me till such default and the Agreement herein will stand automatically cancelled. I enclose herewith my Solicitors' cheque of Rs. 7,50,000/- (Rupees Seven lacs fifty thousand only) in your Solicitor's favour which may be cashed after confirmation by you of the terms contained herein, if the terms are not confirmed you will return the said cheque to me;

(b) : Half of the balance of the consideration money mentioned in the paragraph 2 above will be paid by me on receipt of the permissions under Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act being obtained as also the permission for conversion into residential user being obtained as well as your settling with your labour and getting their permission as herein provided and vacant possession of the said land being handed over to me and the balance of the consideration by equal quarterly installments to be paid within one year from the date of possession of the plot being handed over to me as herein provided;

6. Sale : The sale shall be subject to permission being obtained under Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, 1976. The sale shall also be subject to the property being converted from Industrial Zone to residential use. The sale shall also be subject to your being able to settle with your labour and your labour agreeing to the sale contemplated herein. If N.O.C and change of users and the permission provided herein are not obtained within a period of 9 months from the date hereof and if you are not able to settle with your labour and to get them to agree to the sale herein contemplated you will not be bound to complete the sale herein contemplated and the Agreement will survive only to the extent of the return of my money which will be paid within 6 months of the expiration of the aforesaid nine months with interest at 18 % per annum from the date of refusal of any of the permission or consent or agreement set out above, till the repayment of money with interest and till then you will not be entitled to do any act, deed, matter or thing whereby or by reason whereof the security created as herein provided in my favour will be affected or jeopardize in any manner whatsoever..... (emphasis supplied) : You will sign such application forms, etc. for the aforesaid permissions as may be necessary, as well as forms for permissions of building Department from B.M.C. and sanction of plans etc. for new construction on the said property and any other permission from Town Planning or any other Department;

8. Vacant possession : Vacant possession shall be handed over to me within 3 months of all the above mentioned permissions being obtained and your settling with your labour agreeing to the sale herein contemplated.....

(c) Pursuant to the said agreement, the appellant herein paid a sum of Rs. 11,50,000/- as part of earnest money in two installments of Rs. 7,50,000/- and Rs. 4,00,000/- each on 20.10.1977 and 24.10.1977 respectively.

(d) Pursuant to Point No. 6 of the agreement dated 19.10.1977, the sale was subject to the permission being obtained under Sections 22 and 27 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as 'the ULC Act'); the property being converted from industrial zone to residential use and to give vacant possession of the land after settling with the labour.

(e) In order to materialize the agreement, further steps were taken. Respondent No. 1, vide letter dated 08.11.1977, intimated the Labour Union about the Agreement and requested to give their consent to the same. Vide letter dated 09.11.1977, Respondent No. 2 approached the Arbitrator, Town Planning Scheme to have the said property converted into residential zone from industrial zone.

(f) Vide letter dated 05.12.1977, Mill Mazdoor Sabha-Labour Union informed the respondents that they were not agreeable to the sale of the said property.

(g) Respondent Nos. 1 & 2 informed this fact to the appellant herein vide letter dated 15.12.1977 stating that the agreement stood cancelled and they would return the amount of Rs. 11,50,000/- with interest and also withdrew the application made to the Arbitrator, Town Planning Scheme for conversion of the property from industrial to residential zone.

(h) The appellant herein waived the stipulation/condition of obtaining the consent of the labour but inspite of the efforts, the agreement did not materialize.

(i) Being aggrieved, the appellant herein filed Suit No. 1414 of 1979 before the High Court of Bombay for specific performance of the agreement dated 19.10.1977. Learned single Judge of the High Court, vide order dated 12.12.2005, decreed the suit in favour of the appellant herein.

(j) Being aggrieved by the order dated 12.12.2005, Respondent Nos. 1 and 2 filed Appeal No. 245 of 2006 in Suit No. 1414 of 1979 before the High Court. The Division Bench of the High Court, by order dated 06.05.2008, allowed the appeal of the respondents herein setting aside the decree of specific performance granted by learned single Judge of the High Court.

(k) Against the said order, the appellant has preferred this appeal by way of special leave before this Court.

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(l) The aforesaid appeals have been filed against the order dated 12.12.2008 passed by the Division Bench of the Bombay High Court wherein the cross-objections filed by the appellant herein were dismissed. These appeals were tagged with the main appeal at the SLP stage vide order dated 02.04.2009, hence will be disposed of by this common judgment.

3) Heard Mr. P.H. Parikh, learned senior counsel assisted by Mr. P.V. Yogeswaran, learned counsel for the appellant and Mr. Vinod A. Bobde, learned senior counsel and Mr. Shivaji M. Jadhav, learned counsel for the respondents.

Rival Submissions:

> 4) Learned senior counsel for the appellant submitted that the Agreement for Sale dated 19.10.1977 executed by the parties is not in dispute. The appellant had always been ready and willing to discharge his obligations and the plea of the respondents that there was no concluded agreement relying upon Clause 10 of the agreement was neither raised in the written statement nor any issue was framed by learned single Judge. Thus, it was not open to the defendants-respondents herein to plead that there was no concluded agreement. It was correctly negated by the learned single Judge.

In fact, the respondents were acting dishonestly as the agreement was terminated by them within two months of its execution. In fact, the agreement itself contemplated a period of nine (9) months and the plea taken by the respondents herein that the Mill Mazdoor Sabha refused to agree to the sale vide letter dated 05.12.1977 was within a very short time and the respondents did not take sufficient steps to get the consent of the Mill Mazdoor Sabha/labour/workmen. It appears that the respondents were in dire financial position and required money to perfect their title by making balance payment to the Zaveris under the consent terms. The defendants- respondents herein paid a sum of Rs. 7.5 lakhs received from the appellant to the Zaveris to perfect their title and after getting the same done, they dishonestly terminated the agreement. Learned senior counsel further submitted that the Division Bench had erred in reversing the judgment of the learned single Judge on the basis that was not even pleaded by the respondents. In fact, the Division Bench had wrongly reversed the judgment on the ground that the important facts including documentary evidence that were relied upon by the appellant were not pleaded in the plaint and the plaint was not even amended. Even though, an objection was raised by the respondents before the court that certain evidence were outside the scope of the plaint but no such objections were raised at the stage of final hearing. He further submitted that as the parties had contested the matter before the learned single Judge on the basis of the concluded agreement, the Division Bench was not at all justified in holding the agreement in question to be contingent in nature. In support of his contention, learned senior counsel relied upon a decision of this Court in Chandnee Widya Vati Maden vs. Dr. C.L. Katial and Others (1964) 2 SCR 495 wherein it was held that where all the terms are crystallized between the parties, the execution of a formal agreement is not a pre-requisite for the grant of specific relief. He further submitted that in view of the documents having been filed before the court and exhibited as P-27 to P-42, the Division Bench had wrongly held that they were outside the scope of evidence as these documents were not pleaded in the plaint nor was any amendment preferred. According to learned senior counsel, the only requirement under the Code of Civil Procedure, 1908 is that the plaint must contain essential pleas or contentions and it is not necessary to plead evidence. In paragraph Nos. 33 and 35 of the plaint, a specific plea was taken by the appellant that the respondents were on a false pretext seeking to wriggle out their contractual obligations and in support of the plea of false pretext, the appellant was entitled to adduce evidence to show that the refusal on the part of the Mill Mazdoor Sabha/labour to permit the sale of the suit property was nothing but an eye wash by the respondents. To establish this fact, the appellant had produced documents and also led oral testimony through one of the trade union office bearers, viz., Mr. Vasant Gupte, President and this evidence could not be shut out as the respondents were aware about it.

5) He further submitted that the Division Bench has wrongly held the agreement dated 19.10.1977 to be a contingent contract. No specific plea was raised by the defendants-respondents herein regarding it to be a contingent contract and further no specific issue was framed. According to him, on a correct construction and interpretation of the agreement, it cannot be termed as a contingent contract and it is always open to the party in whose favour a specific term is inserted to waive the term and seek specific performance of the remainder of the obligations. According to him, learned single Judge had categorically recorded, on appreciation of evidence on record that the labour union had actually consented to the sale of the property on certain terms being fulfilled, as is clear from Exhibit Nos. 43 and 44. Further, the grant of relief of specific performance is a matter of discretion

and if it has been granted by the learned single Judge, the Division Bench ought not to have substituted its assessment where the court had perceived dishonest conduct on the part of the defendants-respondents herein. Elaborating it further, learned senior counsel submitted that the appellant had waived the express term relating to the consent of the labour vide letter dated 19.04.1978 nearly six (6) months prior to the institution of the suit and, therefore, the respondents cannot take advantage of a stipulation which the party for whose benefit it was made has expressly waived the same for performance of his other obligations. This aspect has not been considered or dealt with by the Division Bench. Further, the Division Bench wrongly held that the appellant did not really mean to purchase the suit property and that the agreement of purchase of the suit property was a financial transaction. This plea was not even raised by the respondents herein in their written statement. As far as permission under the ULC Act is concerned, learned senior counsel relied upon a decision of this Court in The Maharao Sahib Shri Bhim Singhji vs. Union of India and Ors. (1981) 1 SCC 166 and submitted that sub-Section (1) of Section 27 of the Act is invalid insofar as it imposes a restriction on transfer of any urban or urbanisable land with a building or a portion only of such building, which is within the ceiling area. Such property will therefore be transferable without the constraints mentioned in sub-section (1) of Section 27 of the ULC Act.

6) Learned senior counsel further submitted that the Annual Reports of Respondent No. 1 categorically demonstrate that the workers were retrenched and as per Form-6, Respondent No. 1 had only 69 employees and if the workers were provided their legal dues they were willing to consent to the sale of the suit property. The Annual Reports/Balance Sheets of the Respondent No. 1 have been specifically appreciated by learned single Judge whereas the Division Bench had not at all considered the same. According to learned senior counsel, the appellant was justified in relying upon the letters Exhibited at P-27 to P-42 and filing the same before the Court which had material bearing on the issue and it could not have been excluded. In support of his submission, he relied upon a decision of this Court in Pasupuleti Venkateswarlu vs. Motor & General Traders (1975) 1 SCC 770 wherein it was held as under:-

> "4 .....If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy....."

> 7) Learned senior counsel for the appellant further submitted that during the pendency of the present proceedings, the respondents have earned by way of rental charges from the suit premises a sum of Rs. 64,57,46,800/-

for the period 23.10.1978 till September 2012 as principal amount and if interest is computed thereupon it comes to Rs. 160,87,15,887/- as on September 2012. However, as on June 2014, the respondents have earned by way of rental charges upon the said premises a sum of Rs. 87,42,65,200/- as principal amount and if interest is computed thereupon @ 18% per annum, it comes to Rs. 226,89,85,346/-. It is further submitted that the appellant at the time of entering the agreement was 54 years and now he is 91 years. The suit was filed in the year 1979 and he had suffered all these years for no fault of his. He believed in the agreement and complied with all the

terms and conditions. Learned senior counsel further submitted that the judgment and order passed by the Division Bench of the High Court dated 06.05.2008 should be set aside and that of the learned single Judge dated 12.12.2005 be restored. Finally, in the alternative, he submitted that in case the suit for specific performance is not decreed and the appellant is given damages, it should be just, fair and equitable and not only Rs. 78 lakhs as given by the learned single Judge.

8) In reply, learned senior counsel for the respondents submitted that in the plaint filed by the appellant, a specific case of the labour union colluded with the present respondent was pleaded. However, at the time of leading of evidence, a completely new case vis., of two letters dated 05.12.1977 and 10.01.1978 has been made out which are the documents handed over to the appellant by one Mr. M.P. Agarwal. A specific objection was raised that such evidence could not be allowed to be led, or documents have been produced in the absence of pleadings in the plaint whereupon learned single Judge while noting the aforesaid objection held that this issue would be decided while hearing the matter finally. Instead of checking as to whether those documents can be relied upon or not, learned single Judge erroneously accepted the version contained in the letters dated 05.12.1977 and 10.01.1978 as produced by the appellant. According to him, no evidence can be led in the absence of any pleading and if there is any new ground, new plea or allegation of fact inconsistent with the previous pleadings of the parties, steps ought to have been taken to amend the plaint which has not been done for reasons best known.

9) Learned senior counsel further submitted that unless and until there is an amendment of the pleadings, no evidence with regard to the facts not pleaded can be looked into, for which he relied upon a decision of this Court in Bachhaj Nahar vs. Nilima Mandal & Anr. (2008) 17 SCC 491 wherein it was held as under:-

> "7. Feeling aggrieved, the plaintiffs filed a second appeal before the High Court. The High Court by judgment dated 14-5-2004 allowed the second appeal. The High Court held that the plaintiffs had failed to make out title to the suit property. It however held that the plaintiffs had made out a case for grant of relief based on easementary right of passage, in respect of the suit property, as they had claimed in the plaint that they and their vendor had been using the suit property and the first defendant and DW 6 had admitted such user. The High Court was of the view that the case based on an easementary right could be considered even in the absence of any pleading or issue relating to an easementary right, as the evidence available was sufficient to make out easementary right over the suit property. The High Court therefore granted a permanent injunction restraining the first defendant from interfering with the plaintiffs' use and enjoyment of the "right of passage" over the suit property (as also of the persons living on the northern side of the suit property).
>
> 10. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.

(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

11. The Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfilment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation should not be a ground to flout the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions.

12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

14. The High Court has ignored the aforesaid principles relating to the object and necessity of pleadings. Even though right of easement was not pleaded or claimed by the plaintiffs, and even though parties were at issue only in regard to title and possession, it made out for the first time in

second appeal, a case of easement and granted relief based on an easementary right. For this purpose, it relied upon the following observations of this Court in Nedunuri Kameswaramma v. Sampati Subba Rao:

> "6. ... No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion." But the said observations were made in the context of absence of an issue, and not absence of pleadings.

15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati Prasad v. Chandramaul:

> "10. ... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another." (emphasis supplied)

16. The principle was reiterated by this Court in Ram Sarup Gupta v. Bishun Narain Inter College:

> "6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet.

> In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal." (emphasis supplied)

17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta referred to above and several other decisions of this Court following the same cannot be construed as diluting the well-settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu".

10) Learned senior counsel further submitted that merely because the documents have been exhibited and also because in some of the documents one of the witnesses had identified the signature of the person who is alleged to have signed the document, does not establish that the contents of the documents have been proved. In support of this contention, learned senior counsel placed reliance on the decision of this Court in Shalimar Chemical Works Limited vs. Surendra Oil and Dal Mills (Refineries) and Others (2010) 8 SCC 423 wherein it was held as under:-

> "3. In course of the trial, the appellant produced before the court photocopies of registration certificates under the Trade and Merchandise Marks Act, 1958 along with the related documents attached to the certificates. The photocopies submitted by the appellant were "marked" by the trial court as Exts. A-1 to A-5, "subject to objection of

proof and admissibility". At the conclusion of the trial, the court dismissed the suit of the appellant by the judgment and order dated 28-9-1998 inter alia holding that the available evidence on record did not establish the case of the plaintiff and there was no prima facie case in favour of the plaintiff nor was the balance of convenience in favour of the plaintiff.

4. The trial court arrived at its findings mainly because the appellant did not file the trade mark registration certificates in their original. In that connection, the trial court made the following observations:

"All the above documents i.e. Exts. A-1 to A-5 are marked subject to objection of proof and admissible (sic admissibility) and also mention so in the deposition of PW 1. PW 1 in his cross-examination has admitted that all the above documents are xerox copies. He has also admittedly not filed legal certificate for the same.

Section 31 of the Trade and Merchandise Marks Act, 1958 specifically reads as follows:

'31. Registration to be "prima facie" evidence of validity.—(1) In all legal proceedings relating to a trade mark registered under this Act (including applications under Section 56), the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be "prima facie" evidence of the validity thereof.' Therefore, the plaintiff has to file the originals of the registration (sic certificates) or the certified copies thereof. Exts. A-1 to A-4 are xerox copies. It is well-settled law that xerox copies are not admissible in evidence. Once those documents are not held admissible, the plaintiff cannot be permitted to rely on it. These documents Exts. A-1 to A-4 are basic documents of the Trade and Merchandise Marks Act."

9. Mr P.P. Rao, learned Senior Advocate, appearing for the appellant assailed both, the procedure adopted by the trial court and the view taken by the Division Bench of the High Court, on the basis of the provisions of Order 41 Rule 27. Mr Rao submitted that if the trial court was of the view that the xerox copies of the documents in question were not admissible in evidence, it ought to have returned the copies at the time of their submission. In that event, the appellant would have substituted them by the original registration certificates and that would have been the end of the matter. But once the xerox copies submitted by the appellant were marked as exhibits, it had no means to know that while pronouncing the judgment, the court would keep those documents out of consideration, thus, causing great prejudice to the appellant.

10. Mr Rao submitted that the provision of Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, and the endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document can be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion

would depend, the document being endorsed, admitted or not admitted in evidence. In support of the submission he relied upon a decision of this Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple where it was observed as follows:

> "20. ... The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court." (emphasis in original)

15. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility. The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded.

16. The learned Single Judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41 Rule 27. But then the Single Judge seriously erred in proceeding simultaneously to allow the appeal and not giving the respondent-defendants an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence.

18. The judgment and order dated 25-4-2003 passed by the Division Bench is set aside and the matter is remitted to the learned Single Judge to proceed in the appeal from the stage the originals of the registration certificates were taken on record as additional evidence. The learned Single Judge may allow the respondent-defendants to lead any rebuttal evidence or make a limited remand as provided under Order 41 Rule 28.

19. In the result, the appeal is allowed, as indicated above but with no order as to costs".

11) Further, learned senior counsel relied on H. Siddiqui (Dead) By Lrs. vs. A. Ramalingam (2011) 4 SCC 240 which held as under:-

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide Roman Catholic Mission v. State of Madras, State of Rajasthan v. Khemraj, LIC v. Ram Pal Singh Bisen and M. Chandra v. M. Thangamuthu.)

13. The trial court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the trial court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother, R. Viswanathan to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant-plaintiff to call upon the defendant to produce the original power of attorney on the ground that the

photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (R. Viswanathan, the second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property.

14. In our humble opinion, the trial court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessarily lead to drawing any inference unless the contents thereof have some probative value.

15. In State of Bihar v. Radha Krishna Singh this Court considered the issue in respect of admissibility of documents or contents thereof and held as under:

"40. ... Admissibility of a document is one thing and its probative value quite another—these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil."

16. In Madan Mohan Singh v. Rajni Kant this Court examined a case as a court of fifth instance. The statutory authorities and the High Court had determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age.

17. Therefore, it is the duty of the court to examine whether the documents produced in the court or contents thereof have any probative value".

12) Further, in R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and Another (2003) 8 SCC 752 it was held as under:-

"19. Order 13 Rule 4 CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, which endorsement signed or

initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the court to the person from whose custody it was produced.

20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:

(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as “an exhibit”, an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons:

firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection

amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court".

13) Learned senior counsel further submitted that the appellant has taken a case of collusion between the defendants-respondents herein with the labour union and in the cross examination of Shri N.L. Mehta (PW-1), it has been conceded by him that he had no material to show that the refusal of permission by the workmen was instigated by the defendants-respondents herein. In view of this admission alone, the appellant is not entitled to any relief as he has failed to prove his own case. He further submitted that if a condition of a contract is for mutual benefit of both the parties then such a condition cannot be waived by a party unilaterally. According to him, Clause 6 of the agreement provides that the vendor will not be bound to complete the sale, if the labour does not consent to it. This clause was included as the subject matter of sale was not a running business as a going concern but a sale of land per se, meaning thereby, that the business which was being conducted would have to be shut down. In such a situation, permission of the Labour Commissioner was required under Section 25-O of the Industrial Disputes Act, 1947 before closing down the unit. Further, Regulation 56(3)(c)(1) of the Development Control Regulations, 1991 also required permission of the Labour Commissioner in case of conversion from industrial to residential use of the land is purported. Therefore, these two conditions were not only for the benefit of one party and in fact, it was for the benefit of both the parties. Such a condition cannot be waived unilaterally.

14) In support of this claim, reliance was placed on HPA International vs. Bhagwandas Fatehchand Daswani and Others (2004) 6 SCC 537 wherein it was held that:-

"99. The decision in Jiwan Lal (Dr.) v. Brij Mohan Mehra is also distinguishable on the facts of that case. There clauses 5 and 6 of the agreement provided for execution of sale deed within three months from the date the premises agreed to be sold were vacated by the Income Tax Authorities. It was further provided that if the Income Tax Authorities did not vacate the premises or they stood requisitioned by the Government before registration of sale deed — the vendor shall refund the consideration to the purchaser. As the premises were requisitioned by the Government, the stand taken by the vendor was that it was contingent contract and on requisition of the premises, the contract failed. On the evidence of the parties, the finding reached was that the vendor had manipulated requisition of the premises. This Court, therefore, in appeal held that the contract did not provide that the sale would be effected only if the premises remain non-requisitioned or that on requisition of the premises, the contract would come to an end. The clause providing for refund of consideration if the premises were not vacated by the Income Tax Authorities or subsequently requisitioned by the Government was held to be solely for the benefit of the vendee. It was held that if the vendor manipulated the

requisition, the vendee could waive that condition and insist on sale of premises in the condition of it having been requisitioned.

100. In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court's sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit.

101. Where the clause requiring obtaining of sanction was to protect interest of both the parties and when the sanction could not be obtained for reasons beyond the control of the parties, the contract cannot be directed to be specifically enforced. The House of Lords in the case of New Zealand Shipping Co. Ltd. v. Societe Des Ateliers Et Chantiers De France in similar circumstances, negatived the claim of specific performance. It was held in that case that where two parties are equally blameless and none of them could be said to have brought about a situation by their act or omission to frustrate the contract, the contract cannot be directed to be specifically enforced.

102. On behalf of the vendee, support for his claim was sought from the following observations of Lord Atkinson:

"The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party it is said that the contract is voidable, but that is only another way of saying that the blameable party cannot have the contract made void himself, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of any party to it. I am not dealing with such a case as that. It may well be that the question whether the particular event upon the happening of which the contract is to be void was brought about by the act or omission of either party to it may involve a determination of a question of fact." (emphasis supplied)

103. As has been observed by Lord Atkinson, it is always a question of fact to be determined in each case as to who is guilty of the act or omission to render the contract void or unenforceable. In the case of New Zealand Shipping Co. Ltd on facts the ultimate conclusion reached unanimously by Their Lordships was that the clause

> of the contract in that case was a stipulation in favour of both the parties and the situation was not brought about by any of the parties to give rise to avoidance. It was found that the failure to fulfil the contract was not due to any fault on the part of the respondents but was due to a cause beyond their control.
>
> 104. In the present case also, we have come to the conclusion that the vendor waited for a reasonable period for grant of sanction to the sale by the Court. There was a pressing need for sale as the public dues and taxes could have been recovered from the property by coercive process at any time. The vendor, therefore, advisedly withdrew from the contract, negotiated sale on different terms with the subsequent vendee and ultimately entered into the contract with the latter. The vendor did not actually withdraw the suit for sanction. The vendee himself became co-

plaintiff to the suit and unsuccessfully tried to prosecute it. The sanction suit was rendered infructuous by the vendee's own conduct of filing an affidavit restricting his claim to life interest. He suffered the dismissal of sanction suit as infructuous and did not question the correctness of the Court's order in appeal before the Division Bench, although the subsequent vendee, against grant of decree of specific performance of life interest, had preferred an appeal.

105. In this situation, even if we come to a conclusion that the vendee had rightly tried his utmost to obtain the Court's sanction and cannot be blamed for transposing himself as a co-plaintiff and prosecuting the sanction suit, the sanction sought could not be obtained for reasons beyond the control of the parties. The vendor cannot be held guilty of the breach as to entitle the vendee to seek specific performance of life interest of the vendor. The contract entered into between the parties was for conveying full interest in the property, namely, life interest of the vendor and chance of succession of reversioners. The contract was one and indivisible for full interest. There is no stipulation in the contract that if sanction was not obtained, the vendor would transfer only his life interest for the same or lesser consideration. On the contrary, the contract stipulated that if the sanction was not granted, the contract shall stand cancelled and the advance money would be refunded to the purchaser".

15) Further, in Irwin v Wilson [2011] EWHC 326 (Ch), it was held thus:-

> "22. Beguilingly straightforward as the matter appeared to Judge Madge, I consider that the issues raised are far from simple. They break down into four separate points. (a) Benefit of condition
>
> 23. The test for determining whether a contract term is for the exclusive benefit of one party, failing which and in the absence of any express power of waiver the term is not capable of unilateral waiver by the party to the contract who claims to have the benefit of it, is that stated by Brightman J (as he then was) in Heron Garage at 426e - h;

"Without seeking to define the precise limits within which a contracting party seeking specific performance may waive a condition on the ground that it is intended only for his benefit, it seems to me that in general the proposition only applies where the stipulation is in terms for the exclusive benefit of the plaintiff because it is a power or right vested by the contract in him alone... , or where the stipulation is by inevitable implication for the benefit of him alone ... If it is not obvious on the face of the contract that the stipulation is for the exclusive benefit of the party seeking to eliminate it, then in my opinion it cannot be struck out unilaterally. I do not think that the court should conduct an enquiry outside the terms of the contract to ascertain where in all the circumstances the benefit lies if the parties have not concluded the matter on the face of the agreement they have signed."

24. In a decision of the New Zealand Court of Appeal, to which Mr Carlisle referred me, namely Globe Holdings Ltd v Floratos [1998] 3 NZLR 331 (and to which I shall return later) there is (at page 334) a citation from an earlier decision of the same court (Hawker v Vickers [1991] 1 NZLR 399 at 402-3) setting out the following statement of the approach in law:

> "A party may waive a condition or provision in a contract which is solely for that party's own benefit and is severable. In such a case the other party is denied the right to treat the condition as unsatisfied and is obliged to complete notwithstanding the loss of that advantage. The question is one of construction of the contract. It turns on whether the stipulation is in terms or by necessary implication for the exclusive benefit of the party, and the answer is derived from consideration of the contract as a whole in the light of the surrounding circumstances..." That seems to me, with respect, to be an entirely accurate summary of the relevant approach..
>
> 33. What then of the presence in clause 25.2 of the right, conferred separately on both the buyer and the seller, to terminate the contract in the event that, despite having used all reasonable endeavours, the seller has not secured performance of the documents service term by 1 February 2010? It was the presence of this right that persuaded Judge Madge to conclude that clause 25.1 was not capable of waiver by the defendants.
>
> 34. In my judgment, the presence of that right is irrelevant to whether the documents service term is for the exclusive benefit of the seller. The principle is that a party may waive a contract term if that term, if performed, is of benefit to him but not to the other party (or parties) to the contract. By contrast, the right to terminate the contract conferred by clause 25.2 is exercisable if and only if the term cannot be or is not performed.
>
> 35. This very point was discussed in Globe Holdings, the New Zealand decision referred to earlier. In that case a condition of the contract for the sale of an apartment block stipulated that, within 60 days of acceptance, the purchaser would obtain planning consent from the local council for the sub-division of the block. The contract contained a general condition that in relation to any financial or other conditions

> either party could, at any time before the condition was fulfilled or waived, avoid the contract by giving notice. Within the 60 days the purchaser's solicitors gave notice that the special condition was waived and that, accordingly, the contract could be regarded as unconditional. The question was whether the notice was legally effective. In the course of a judgment dealing with a number of points, the New Zealand Court of Appeal (at 339) cited a passage from the earlier decision of Hawker v Vickers which stated that "...there is nothing inconsistent in providing expressly or by necessary implication for unilateral waiver of a condition up to a certain date and thereafter for allowing either party to avoid the contract for non fulfilment of the condition. Such a provision simply recognises the commercial reality that the nature and significance to the parties of a condition in a contract may change over time or at a point in time. If the contract [sic] is fulfilled or waived, the parties then have the certainty of an unconditional contract. If not fulfilled or waived by the nominated date, each is free to end the contract by appropriate notice to the other." The court then pointed out that: "The argument against waiver rests upon the desirability of certainty for a vendor from being able immediately to bring the contract to an end, or see it immediately collapse, once the given time has elapsed. But certainty is achieved by a different rule, namely that any waiver must occur on or before the condition date, or at least before the contract is actually brought to an end (if it is not automatically void). It has to be remembered that we are at this point concerned with a situation in which it is to be accepted that there is no substantive benefit to [the vendors]. Therefore, their only legitimate interest is in knowing whether the transaction is to proceed or not. Once the time allowed for the fulfilment of the condition expires they can forthwith give notice of cancellation if they have not already been informed that the sale will go ahead. It matters not to them whether it does so because of fulfilment or because the purchaser elects to proceed anyway. The achieving of certainty is in the vendors' own hands if there has been no action by the purchaser. If there has been a waiver the transaction proceeds as it would have done if the condition had been satisfied on the date of the waiver... We conclude therefore that a distinction is to be drawn between the benefit of the substance of the condition and the benefit of the time limit ..."
>
> 36. The reasoning in that passage thus distinguishes between the benefit of the condition - here the documents service term contained in clause 25.1 -

and the benefit of the right to terminate the contract if the condition has not been fulfilled by the due date - here the right to terminate the contract after 1 February if the information in question has not been provided. These are two distinct terms of the contract. The existence of the right in either party to terminate the contract if a particular condition is not performed by the due date is not inconsistent with the condition in question being for the exclusive benefit of the other party to the contract and with that other party having the right, if necessary by implication of law, to waive the condition.

37. Heron Garage is not authority for a contrary view. The condition in that case was that the purchaser would obtain a particular planning consent. Obtaining that consent was a condition precedent to the contract. Brightman J put the matter thus (at 426b):

> "The town planning consent is expressed in cl.7 of the sale agreement as a condition fundamental to the enforceability of the sale agreement as a whole. It is not expressed as a condition which is precedent only to the liability of Heron as purchaser. Clause 7 is not a clause which is expressed only to confer rights on Heron. It is expressed to confer a right also on the vendors." It is perhaps the presence of the last sentence in that passage which needs some elaboration. The right there referred to was a right in either party, if the stipulated planning consent should not have been obtained within 6 months or within such extended period as the parties might agree, to terminate the agreement by notice in writing to the other. It was part and parcel of the very clause stating that the contract was conditional upon the particular planning consent being obtained. The purchaser, Heron, had shortly before the expiry of the 6 month period given notice in writing to the vendor's solicitor purporting to waive what it described as the benefit of clause 7 of the contract. It is not surprising therefore that Brightman J concluded that the condition was not capable of waiver by the purchaser:
>
> it was a condition precedent to the very existence of the contract and, what is more, it contained a provision expressed to be for the benefit of both parties.
>
> 49. In my judgment, the notice given under clause 25.2 enables the parties to bring an end to their relationship if one of them chooses to do so and the relevant information has not been provided by 1 February. The more natural contruction of the clause is to read it as having that effect when it is given. It is inconsistent with that purpose to allow an obligation to complete to arise (either because the documents service term is performed or the term is waived) after the notice has been given. The whole point of the notice is that the time for completion has passed".

16) Learned senior counsel for the respondents further submitted that as in the present case, the workmen had refused to grant their consent for the sale, the contract stood frustrated being contingent upon the said condition and, therefore, discretionary remedy of specific performance cannot be granted. To substantiate this claim, he relied on a decision of this Court in M. Meenakshi and Others vs. Metadin Agarwal and Others (2006) 7 SCC 470 wherein it was held as under:-

> "9. It is not disputed that the parties to the agreement were aware of the proceedings pending before the ceiling authorities. It is also not in dispute that the Central Government was the appropriate authority to deal with the matter as the lands pertained to a cantonment area. The agreement envisaged that the defendant would obtain necessary sanction from the competent authority. It was made clear that he had not submitted any layout nor had he got any sanction therefor.

23. It was, therefore, not a case where the trial court found that the defendant had committed a fraud on the statutory authorities or on the court. The expression "fraud" in our opinion was improperly used. It must be noticed that admittedly when the agreement was entered into, the proceedings under the 1976 Act were pending. The parties might have proceeded under a misconception. It is also possible that the defendant had made misrepresentation to the plaintiff; but the question which was relevant for the purpose of determination of the dispute was as to whether having regard to the proceedings pending before the competent authority under the 1976 Act, the defendants could perform their part of the contract. The answer thereto, having regard to the order of the competent authority dated 8-8-1980, must be rendered in the negative.

25. It was, therefore, not a case where a notice under Section 26 of the 1976 Act could have served the purpose and in the event, the competent authority did not exercise its statutory right of perception (sic purchase) within the period stipulated thereunder, the defendant was free to execute a deed of sale in favour of any person he liked.

26. Strong reliance has been placed by Mr Nageswara Rao on a decision of this Court in HPA International v. Bhagwandas Fateh Chand Daswani1. Our attention in particular has been drawn to the following observations:

"100. In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court's sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit."

27. The said observations were made in the fact situation obtaining therein.

28. In this case, we are concerned with a situation where the sanction, it will bear repetition to state, has expressly been refused.

29. Dharmadhikari, J. in that case itself has noticed a judgment of the House of Lords in New Zealand Shipping Co., Ltd. v. Scoiete des Ateliers et Chantiers de France wherein it was held that a man shall not be allowed to take advantage of his own wrong, which he himself brought about.

30. The parties were aware of the proceedings under the 1976 Act. The plaintiff-respondents were also aware that sanction under the said Act is necessary. The consequence for non-grant of such sanction was expressly stipulated. Even the parties were clear in their mind as regards the consequences of wilful non-execution

of a deed of sale or wilful refusal on their part to perform their part of contract.

31. We may notice that Lord Atkinson in New Zealand Shipping took into consideration the inability or impossibility on the part of a party to perform his part of contract and opined the principle that man shall not be permitted to take advantage of his own wrong, which he himself brought about.

32. Our attention has rightly been drawn by Mr Gupta to the deed of sale executed by the defendant in favour of others. By the said deeds of sale all the six co-sharers have sold portions of their house properties and lands appurtenant thereto. The total land sold to the purchasers by all the six co-sharers was below 900 sq. m.

33. The comment made by the Division Bench that the competent authority under the 1976 Act failed to take into consideration the Muslim law of inheritance and succession is again besides the point. Each of the claim petitions by the appellants and their co-sharers was determined having regard to the 1976 Act. The Muslim law of inheritance and succession may not have any role to play. In any event, the same could not have been the subject-matter of a decision at the hands of the Division Bench.

34. We have noticed the reports of the Commissioner appointed both by the trial court and the learned Single Judge of the High Court. The Commissioner appointed by the trial Judge in his report stated:

"... I also found some numbers were painted in black on the compound wall inside the western compound wall as 3-42-67 and I also found one small brick mound near the middle unfinished room touching the western compound wall. I also found some numbers on the gate painted in black as 65-66-67-68-

69. While I was proceeding with the execution of warrant, some persons brought a board and tied it to the gate which contained some letters painted as 'This land and construction area Cantonment H. Nos. 3-42-65 to 3-

42-69 belong to Murthy Cooperative Housing Society — Trespassers will be prosecuted'."

35. It was, therefore, accepted that the plots mentioned therein had already been sold to Murthy Cooperative Housing Society. The said Cooperative Society, it is beyond any cavil of doubt, purchased the land from the original owners pursuant to or in furtherance of the exemption accorded in that behalf by the competent authority in exercise of its power under Section 20 of the 1976 Act. The land sold to the Cooperative Society which might have included the vacant land and which was the subject-matter of the agreement but was not the subject-matter of the suit. They were not parties thereto. The sanction accorded in their favour by the competent authority had never been put in question.

36. The Advocate-Commissioner appointed by the trial court, observed:

> "Opinion and observation.—Taking all the aforesaid facts and circumstances I conclude that Plot No. 2 in Survey No. 71 as mentioned in the agreement of sale Ext. A-2 in the trial court and House Nos. 3-9-51/A, B, C and D situated in Survey No. 71/part, West Marredpalli on which I conducted the local inspection are the same."

37. The learned Commissioner, therefore, only inspected Plot No. 2 situated in Survey No. 71 and not the lands which were the subject-matter of sale in favour of the subsequent purchasers.

38. The High Court, in our considered view, also committed a manifest error in opining that the appellants should have questioned the orders passed by the competent authority. If they have not done so, the same would not mean that the Division Bench could go thereinto suo motu.

39. Furthermore, Section 20 of the Specific Relief Act confers a discretionary jurisdiction upon the courts. Undoubtedly such a jurisdiction cannot be refused to be exercised on whims and caprice; but when with passage of time, the contract becomes frustrated or in some cases increase in the price of land takes place, the same being relevant factors can be taken into consideration for the said purpose. While refusing to exercise their jurisdiction, the courts are not precluded from taking into consideration the subsequent events. Only because the plaintiff-respondents are ready and willing to perform their part of contract and even assuming that the defendant was not entirely vigilant in protecting his rights in the proceedings before the competent authority under the 1976 Act, the same by itself would not mean that a decree for specific performance of contract would automatically be granted. While considering the question as to whether the discretionary jurisdiction should be exercised or not, the orders of a competent authority must also be taken into consideration. While the court upon passing a decree for specific performance of contract is entitled to direct that the same shall be subject to the grant of sanction by the authority concerned, as was the case in Chandnee Widya Vati Madden v. Dr. C.L. Katial and Nirmala Anand v. Advent Corpn. (P) Ltd.; the ratio laid down therein cannot be extended to a case where prayer for such sanction had been prayed for and expressly rejected. On the face of such order, which, as noticed hereinbefore, is required to be set aside by a court in accordance with law, a decree for specific performance of contract could not have been granted".

17) Learned single Judge decreed the suit for specific performance by directing the respondents herein to apply to the concerned authorities for change of user of land from industrial/commercial to residential use and also to apply for the permission under the ULC Act and in the event the permission is not granted by the authorities then a decree in terms of prayer b(i) to b(v) of the plaint shall be granted. In the present case, permission was applied for and rejected by the Labour Commissioner as well as the office of the Joint Director of Industries on 02.03.2006 and 28.02.2006 respectively. The permission under the ULC Act under Section 22 also came to be rejected on 06.03.2006. Thus, if at all, without admitting that the appellant had succeeded making out of case for a decree of specific performance, the appellant would have only become entitled for damages.

18) Learned senior counsel further submitted that the respondents terminated the contract on 15.12.1977, that is, within two month. The question of waiver of a condition would not at all arise so as to revive the contractual obligations into existence and thereby claim his contractual rights under the contract so revived. It is settled position of law that once a contract has been terminated, either on the breach of the terms of the contract by one party and subsequent repudiation by the other or by frustration of the contract due to circumstances beyond the control of either of the parties, the contract legally comes to an end between the parties. Then there is no question of any contract/agreement subsisting between the parties, what follows is only the legal consequences which may have been contemplated in the terms of the contract e.g. liquidated damages, etc. However, the parties are at liberty to mutually novate the contract by bringing into existence a new contract altogether which would replace the old contract between the parties and the terms of the new contract take the place of the old contractual terms. It will not only be illogical but also absurd to contend that once the contract has been terminated by a party, it will still subsist in the background and either of the parties may be able to waive a condition attached to that contract so as to revive that contract from a period of slumber. This will in fact amount to saying that even though a contract has been terminated by putting it to an end but it is actually still available, at the option of one of the parties, to be revived back to its original form and content through unilateral waiver of a contractual condition. In order to substantiate this claim, learned senior counsel placed reliance on K. Narendra vs. Riviera Apartments (P) Ltd. (1999) 5 SCC 77 which held as under:-

> "36..... We are clearly of the opinion that at one point of time the contract had stood frustrated by reference to Section 56 of the Contract Act. We do not think that the subsequent events can be pressed into service for so reviving the contract as to decree its specific performance".

19) According to learned senior counsel, Clause 6 of the agreement which provides for a period of nine (9) months was only for obtaining No Objection Certificate (NOC) from the Urban Land Ceiling authorities and from the authority for conversion of land from commercial to residential use. There was no time period provided for obtaining consent from the labour union and once the Labour Union on 05.12.1977 and again on 10.01.1978 declared their intention not to negotiate, the contract stood frustrated, and therefore, the question of specific performance of the contract did not arise. He further submitted that without prejudice to the aforesaid submissions, the Division Bench, even after holding that the learned single Judge erred in looking at evidence and documents which were filed beyond the stated case in the plaint, nevertheless examined the case of the appellant on the strength of even those documents, more specifically, letters dated 05.12.1977 and 10.01.1978.

20) Learned senior counsel further submitted that letter dated 05.12.1977 as produced by the respondents is in line with the same letter which has been obtained through RTI. On the other hand, the letter on which the appellant is relying upon does not match with the one obtained through the Labour Commissioner's Office. Moreover, the Division Bench has found version of the appellant to be untrustworthy as according to it the post- script as introduced by the plaintiff was found to be inconsistent with the main body of the letter. Further, letter dated 10.01.1978, produced by the

appellant is also an interpolated document as Mr. Vasant Gupte (PW-2) in his statement had said that this letter must have been sent by the Mill Mazdoor Sabha and the post-script might have been written by Mr. Pathak as it bears his signature. The Division Bench has therefore rightly held that it cannot be relied upon. Moreover, two undisputed documents i.e., letter dated 08.11.1977 (Exh. P-4) and letter dated 10.02.1978 (Exh. P-15) make it clear that the respondent had offered the full amount of dues to the workmen and not 60 per cent as is sought to be suggested in the two letters filed by the appellant. Even letters dated 14.12.1978 and 15.12.1978 (Exhibit Nos. P-39 and P-40) have adversely been commented upon by the Division Bench. So far as letter dated 10.06.1978 is concerned, the Division Bench has found that PW-2 had no personal knowledge with regard to the facts stated in the letter and that Mr. Pathak who is said to have written this letter was not alive.

21) It is further submitted that the respondents have deposited a sum of Rs. 11,50,000/- along with interest thereon which is lying with the Registry of the Bombay High Court in a Fixed Deposit which amount can be paid over to the appellant and the Division Bench has rightly set aside the order of the learned single Judge.

22) In reply, it has been stated that the additional documents which have been filed before this Court cannot be taken into consideration as they were not part of the record before the learned single Judge or before the Division Bench and no leave has been obtained from the court.

23) A reading of Clause 6 of the agreement stipulated the period of nine (9) months for all the formalities to be observed. It also applied to obtaining consent of the labour. According to learned senior counsel for the appellant, the decree of specific performance or any decree cannot be set aside vide an interim order, more so, when this Court, in its order dated 11.02.2008 had directed that the order of status quo passed on 08.12.2006 shall continue till the disposal of the appeal by the High Court. It was, therefore, submitted that the appeal be allowed and respondents be directed to execute the sale deed in favour of the appellant.

Discussion:

> 24) From the rival submissions noted above, the only question which is to be decided in the present appeals is as to whether the termination of the agreement for sale dated 19.10.1977 by the respondents was justified or not especially when the appellant claims that the respondents had colluded with the labour for not making them agreeable to the sale.
>
> 25) In the plaint filed before the High Court of Bombay being Suit No. 1414 of 1979, a specific case was set up by the appellant in paragraph 33 that the defendants are wrongfully seeking to back out of the agreement for sale on false and wrong pretexts and at the instigation of the defendants and in collusion with them, the said Mill Mazdoor Sabha has refused to give its permission to the sale of the mill premises. Relevant portion of paragraph 33 of the plaint filed by the appellant in Suit No. 1414 of 1979 is reproduced below:-

"....The Plaintiff says that the Defendants are however wrongfully seeking to back out of the said agreement for sale on the false and wrongful pretexts. At the instigation of the defendants and in collusion with them the said Mil Mazdoor Sabha has also allegedly refused to give its permission to the sale of the mill premises of Defendant No. 1 to the plaintiff. The plaintiff says that the alleged refusal of the said Mill Mazdoor Sabha to consent to the sale of the said Mills property to the Plaintiff has been instigated by the Defendants and the same is collusive and the same is made a false pretext to enable the Defendants to back out of the said agreement for sale dishonestly and wrongfully...." (emphasis supplied)

26) The Mill Mazdoor Sabha, which is a union of workmen of the respondents herein, vide letter dated 05.12.1977, informed the respondents that they are not agreeable to the sale of the mill premises. This was reiterated by the Mill Mazdoor Sabha vide letter dated 10.01.1978. The appellant, however, relied upon the alleged letters dated 05.12.1977 and 10.01.1978 which according to them have been handed over by Shri M.P. Agrawal-a former Director of the Respondent No. 1. The letters dated 05.12.1977 and 10.01.1978 which were sent by the respondents to the appellant are re-produced below:-

"Dear Sir, This has reference to the meeting held in your office on 29th November, 1997 when our representatives and your Directors were present.

In this connection we have to inform you that we have been informed by your employees that they are not agreeable to your selling the Mill premises. The employees have given us a representation to the effect that they are not agreeable to your selling of the Mill premises. In accordance with the workers representation we have to inform you that we are not agreeable and therefore we cannot give our consent to the sale of the mill premises.

In the circumstance there is no question of your setting the payment of the workers' dues as proposed by you. Please also note that we are also moving the labour commissioner in the regard.

Yours faithfully, Sd/-

Asstt. General Secretary Copy to Commissioner of Labour" "Dear Sir, At your instance the undersigned met your proposed purchased on 9th January 1978.

We want to make it clear that our letter of 5th December 1977 is final and we do not agree to the proposed sale. We hereby treat this matter as closed as far as we are concerned and we will not meet you or any one else for any discussion further, in respect thereof.

Yours truly for MILL MAZDOOR SABHA Sd/-

Asst. General Secretary The aforesaid letters were marked as Exhibit D-10 and Exhibit P-11 respectively.

The letters which the appellant had filed subsequently being marked as Exhibit Nos. P-27 and P-28 are also reproduced below:-

“Dear Sir, This has reference to the Meeting held in your office on 29th November, 1977 when our representatives and your directors were present.

In this connection we have to inform you that we have been informed by your employees that they are not agreeable to your selling the Mill Premises. The employees have given us a representation to the effect that they are not agreeable to your selling of the Mill premises unless you provide alternate employment and pay full compensation to those workers who do not want alternate employment as per the law. In the circumstances there is no question of your setting the payment of the workers’ dues as proposed by you. Please also note that we are also moving the Labour Commissioner in this regard. (emphasis supplied) Yours faithfully, Assistant General Secretary Copy to Commissioner of Labour P.S. Your proposal to pay 60% compensation only to the workers is not acceptable hence we object to the sale.

Signed Assistant Secretary General” “Dear Sir, At your instance the undersigned met your proposed purchaser on 9th January 1978.

We want to make it clear that our letter of 5th December, 1977, is final and we do not agree to the proposed sale. We hereby treat this matter as closed as far as we are concerned and we will not meet you or any one else for any discussion further, in respect thereof.

Yours truly for MILL MAZDOOR SABHA Sd/-

Asst. General Secretary P.S. : In the discussion you mentioned that in case we agree you would shift the Factory to Andheri or Thane are and provide alternate work to the workers on first priority basis and those workers who do not agree to this you would compensate fully. We are agreeable to this proposal as stated in the presence of the workers and as such we agree to your proposed sale.

(emphasis supplied) Sd/-

Asstt. General Secretary”

27) It may be mentioned that in the plaint filed by the appellant, the plea set up was that at the instigation of the defendants and in collusion with them, the Mill Mazdoor Sabha has refused to give its permission to the sale of the mill premises of Defendant No. 1 to the plaintiff. It was not a case set up by the appellant that the Mill Mazdoor

> Sabha had agreed to the proposed sale on certain conditions offered by the respondents. In view of the settled position of law, fresh pleadings and evidence which is in variation to the original pleadings cannot be taken unless the pleadings are incorporated by way of amendment of the pleadings. In our considered opinion, the Division Bench of the High Court was perfectly justified in holding that unless the plaint is amended and a specific plea is taken that the Mill Mazdoor Sabha had agreed for the proposed sale on certain terms and conditions offered by the respondents herein, the two letters viz., Exh Nos. P-27 and P-28 could not have been taken into consideration at all.

Further, it is the case of the appellant that the aforesaid two letters were given by one Shri M.P. Agrawal-a former Director of the Respondent No.

1. Shri M.P. Agrawal has not been produced as a witness so as to establish that these two letters were in fact given by the Mill Mazdoor Sabha. Further, in the statement of Mr. Vasant Gupte (PW-2), he has only stated that the letter must have ben sent by the Mill Mazdoor Sabha and the post- script might have been written by Mr. Pathak as it bears his signature. He had not stated that it was written in his presence. Mere identifying the signature of Mr. Pathak does not prove the contents of the said letter which is being relied upon by the appellant. Even if the two letters viz., Exh. Nos. P-27 and P-28 are taken into consideration, from a reading of the said letters, it appears that the contents are contradictory of one another. In the letter dated 05.12.1977 (Exh. P-27), in the underlined portion reproduced above, we find that the Mill Mazdoor Sabha had demanded an option to provide alternate employment and to pay full compensation to those workers who do not want alternate employment as per the law. In the note below the said letter, a mention has been made that a proposal was given to pay 60 per cent compensation which was not acceptable.

28) In the earlier part of the letter dated 10.01.1978 (Exh. P-28), it has been specifically mentioned that they do not agree to the proposed sale and the matter be treated as closed. However, in the note, it is mentioned that they are agreeable to the proposal given in the discussion and to the proposed sale. Letter dated 10.01.1978 is contradictory to the earlier part of the letter, and therefore, in our considered opinion, the Division Bench had rightly disbelieved these two letters viz., Exh. P-27 and Exh. P-

28.

29) From the aforesaid discussion it is absolutely clear that the Mill Mazdoor Sabha categorically refused to give their consent to the sale of the mill premises.

30) The submission that the appellant has waived the condition regarding taking of consent from the labour for the proposed sale and, therefore, this could not be a ground for cancelling the contract is misconceived. In the agreement dated 19.10.1977, it was specifically mentioned that the sale also be subject to your (defendants) being able to settle with your labour and your labour agreeing to the sale contemplated herein and if you are not able to settle with your labour and to get them to agree to the sale herein contemplated you will not be bound to complete the sale. The moment labour do

not agree to the sale contemplated, under the terms of the contract, the respondents were not bound to complete the sale. The maximum period of nine (9) months does not mean that once the labour had declined to give their consent for the proposed sale, the contract subsists for a period of nine (9) months and it cannot be terminated before that period. The agreement for sale is a contingent agreement depending upon obtaining permission under Section 22 and Section 27 of the ULC Act, property being converted from industrial zone to residential use and settlement with the labour and the labour agreeing to the sale contemplated therein. If any of the conditions are not fulfilled, the respondents were not bound to complete the sale and the appellant was only entitled for return of the money with interest @ 18% per annum from the date of refusal of any of the permission or consent or agreement mentioned above. As in the present case we find that the Mill Mazdoor Sabha has not given its consent to the proposed sale, agreement for sale could not have been performed and had ceased. The appellant is only entitled to refund of the amount along with interest @ 18% per annum stipulated therein.

31) In view of the above, we are of the considered opinion that the High Court was right in setting aside the decree passed by learned single Judge of the High Court. We do not find any merit in these appeals, hence, the appeals fail and are hereby dismissed with no order as to costs. Interlocutory Applications, if any, are disposed of accordingly.

.....J. (RANJAN GOGOI) .....J. (R.K. AGRAWAL)
NEW DELHI;

JULY 8, 2015.
