Heeral Constructions Pvt. Ltd vs Gee Gee Holdings (Chennai) Pvt. Ltd on 24 April, 2018

Author: M.Venugopal

Bench: M.Venugopal, S.Vaidyanathan

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.03.2018

Pronounced on : 24.04.2018

Coram

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

AND

THE HONOURABLE Mr. JUSTICE S.VAIDYANATHAN

O.S.A.No.190 of 2017

1.Heeral Constructions Pvt. Ltd.,
Represented by its Managing Director,
Mr.Gopichand Idandas
Having its registered office at
Gee Gee Minar, No.23,
College Road, Nungambakkam,
Chennai 600 086.

2.Gopichand Idandas
Having his address at
No.4, 2nd Street, Kasturi Ranga Road,
Chennai 600 086. .. Appellants

Vs.

1.Gee Gee Holdings (Chennai) Pvt. Ltd.,
Having its registered office at
SKS Complex, Old No.31, New No.6,
9th Street, Dr.R.K. Salai, Mylapore,
Chennai 600 004.

2.Blue Pearl Developments Pvt. Ltd.,
Having its registered office at
SKS Complex, Old No.31, New No.6,
9th Street, Dr.R.K.Salai, Mylapore,
Chennai 600 004.

3.G.Haresh Chand,
Having his address at
No.4, 2nd Street,
Kasturi Ranga Road,
Chennai 600 086. ..Respondents

Prayer: Appeal filed under Order 36 Rule 1 of O.S.Rules read with Clause 15 of the Lette

For Appellants : Mr.Murari
Senior Counsel
For M/s.Thriyambak J Kannan

For Respondents : Mr.P.R.Raman
Senior Counsel
For Mr.C.Seethapathy

JUDGMENT

M.VENUGOPAL, J.

PREFACE:

The Appellants have preferred the instant Original Side Appeal before this Court (as an aggrieved persons) as against the Judgment dated 06.01.2017 in C.S.No.875 of 2009 passed by the Learned Single Judge.

2.Plaint Germane Facts:

2.1.According to the Appellants/Plaintiffs, the 1st Appellant/1st Plaintiff Company was incorporated on 20.09.1978 with an object of undertaking Real Estate Business activities, the 2nd Appellant/2nd Plaintiff Company, the Managing Director of the 1st Appellant/1st Plaintiff's Company had subscribed to 10 Equity Shares out of the initial paid capital of 50 shares of Rs.50/- each. The remaining subscribers are his Family Members.

2.2.The Congress Committee Charitable Trust is the owner of the buildings and premises situated at 573, 574 and 574(A), Anna Salai, Chennai known as the Congress Grounds, Teynampet. The land was in the occupation of numerous tenants and vast portion of the land remained vacant. As a matter of fact, the Trustees of the Trust were desirous of developing the property by constructing, commercial complex, recreational complex and institutions for the promotion of Trust activities. The 1st Appellant/1st Plaintiff Company and another Company by name Sky High Builders not a party to the suit entered into negotiations for such development on a joint venture basis between the trustees of the Trust, Sky High Builders and the 1st Appellant/1st Plaintiff's Company an agreement was entered into on 28.05.1996 in and by which the 1st Appellant/1st Plaintiff's Company had jointly agreed to develop the property by putting up the construction.

2.3.The partners of Sky High Builders and the promoters of the 1st Appellant/1st Plaintiff Company formed the 2nd Respondent/ 2nd Defendant's Company on 02.01.1998 for the specific purpose of implementing the aforesaid project. The 2nd Appellant/2nd Plaintiff and the 3rd Respondent/3rd Defendant and two of the partners of Sky High Builders were subscribers to its Memorandum of Association and each of them subscribed to 100 shares in the 2nd Respondent/2nd Defendant's Company. Indeed, the object of the 2nd Respondent/2nd Defendant's Company was to implement and perform the Agreement of Development of the property called 'the Congress Grounds' at Thenampet, Chennai.

2.4.The 1st Respondent/1st Defendant was desirous of carrying out the development activities and the 3rd Respondent/3rd Defendant himself through the 2nd Respondent/2nd Defendant approached the Appellants/Plaintiffs offering to purchase the shareholding of the Appellants/Plaintiffs in the 2nd Respondent/ 2nd Defendant's Company. In fact, the Respondents/Defendants represented to the Appellants/Plaintiffs that they would commence and proceed with the construction expeditiously and therefore, the consideration for the purchase of shares could be paid partly by cash and partly by built up space within a period of six months. Since the Appellants/ Plaintiffs were agreeable for such a proposal as Share Purchase Agreement was entered into on 16.08.2006 between the Appellants /Plaintiffs and the Respondents 1 and 2/ Defendants 1 and 2 and the 1st Respondent/1st Defendant Company had agreed to purchased 2750,000 shares held by the 1st Appellant/ 1st Plaintiff Company and 100 shares held by the 2nd Appellant/2nd Plaintiff in the 2nd Respondent/2nd Defendant Company for a total consideration of Rs.5 Crores. The said amount of Rs.5 Crores would be paid by a cheque for sum of Rs.1.50 Crores and the balance consideration would be discharged by means of allotment of built up space in the proposed construction within a period of six months from the date of agreement. A further agreement was entered into in August 2006 between the same the parties agreeing to increase/ modified the consideration stated in the earlier agreement.

2.5.The Clause (1) and (2) of Ex.P.4 - Undated August 2006 Second Agreement reads as under:

1.The aggregate additional consideration for the sale of the Shares payable by the Buyers, to the Sellers collectively shall be increased by an amount of equivalent to Rs.5,00,00,000/- (Rupees Five hundred lakhs only)

2.The Buyers will pay an additional consideration of a sum of Rs.5,00,00,000/- (Rupees Five hundred lakhs only) which will be given/allotted only the form of built up space, in the proposed construction at Congress Grounds whenever the project commences. The built up space will include proportionate shares in common areas.
2.6.The agreed consideration for the sale of shares was Rs.10 Crores and that the built up space was only a mode of discharge of such consideration. The 1st

Respondent/1st Defendant had reserved its right to effect payment of Rs.5 Crores in lieu of area to be allotted at any time. According to the Appellants/Plaintiffs, Rs.1.50 Crores was paid as part sale consideration under the first agreement and pursuant to the second agreement, the 1st Respondent/1st Defendant Company paid the Appellants/Plaintiffs a sum of Rs.25,00,000/- towards part sale consideration. Hence, out of the total consideration of Rs.10 Crores only a sum of Rs.1 Crore 75 lakhs was paid and the remaining consideration of Rs.8 Crores 25 lakhs was to be paid to the Appellants/Plaintiffs.

2.7.The Appellants/Plaintiffs pursuant to the First Agreement, they executed 'Share Transfer Deeds' as regards 27,50,000 shares held by them in the 2nd Respondent/2nd Defendant's Company and delivered the same to the 1st Respondent /1st Defendant's Company. The 2nd Appellant/2nd Plaintiff had also received his compensation from the Board of the 2nd Respondent/ 2nd Defendant's Company.

2.8.As per the First Agreement, the balance consideration was to be paid in the form of built up space to be provided to the Appellants/Plaintiffs within a period of six months from 16.08.2006. Furthermore, although time was not mentioned in the 'Second Agreement', inasmuch as it follows the prior agreement, the time schedule was six months from the date of the first agreement. Even if the specific time was not determined, a reasonable time was to be fixed.

2.9.The Respondents/Defendants was not in a position to vacate the existing tenants and was not in a position to secure necessary plan approval for the proposed construction. Chances of obtaining the necessary plan approval in the near future were extremely remote one. Inasmuch as the possibility of construction being put up and the built up space being allotted were being remote, the suit was filed by the Appellants/Plaintiffs seeking payment of the remaining sale consideration in cash.

2.10.The Appellants/Plaintiffs filed a C.P.No.29 of 2017 before the Company Law Board, Additional Principal Bench, Chennai [under Sections 111, 397, 398 and 402 of the Companies Act] seeking Rectification of the Register of Members of the 2nd Respondent/2nd Defendant's Company because of the reason that shares belonging to them was fraudulently transferred without the 1st Respondent/1st Defendant discharging the whole consideration.

2.11.Before the Company Law Board Proceedings, it was contended that such Appellants/Plaintiffs had only delivered the 'Share Transfer Deeds' and not share certificates, the shares could not have been transferred and that such transfer would be in breach of Section 108 of the Companies Act.

2.12.The Respondents/Defendants in the Company Law Board proceedings sought to justify the transfer of shares in their favour and also produced a fabricated letter dated 15.01.2007 to the effect that they were allotting 3500 sq.ft. of built up area in

the 4th floor of the proposed construction to the 1st Appellant/1st Plaintiff's Company.

2.13.Furthermore, the Company Law Board passed an order on 07.05.2009 wherein it was observed that the second agreement constituted additional consideration for the sale of shares and it was mentioned that since the Appellants/Plaintiffs had claimed the balance consideration, they should file a suit for ventilating their grievances. The Appellants/Plaintiffs had filed the present suit for balance sale of Rs.8 Crores and 25 Lakhs with interest at 15% p.a. till date of payment.

3.Resume of 3rd Respondent's Written Statement:

3.1.The Sky High Builders and the 1st Appellant/1st Plaintiff on 28.05.1996 had entered into an agreement with the Tamil Nadu Congress Charitable Trust for the joint development of the property situated at No.573, 574 and 574A, Mount Road, Chennai 600 006, commonly known as Congress Grounds in Teynampet. In fact, on 2nd January, 1998 the Managing Partner of Sky High Builders, Basant Kumar Ranka and the 3rd Respondent/3rd Defendant promoted the 2nd Respondent/2nd Defendant i.e. Blue Pearl Development Private Limited, Chennai 600 004.

3.2.The Sky High Builders and the 1st Appellant/1st Plaintiff on 18.01.1999 by virtue of an agreement dated 28.05.1996 had assigned all the rights in favour of the 2nd Respondent/2nd Defendant. As such, the 2nd Respondent/2nd Defendant obtained the sole and exclusive rights to develop the Congress Grounds, the 2nd Appellant/2nd Plaintiff, the 3rd Respondent/3rd Defendant and Basant Kumar Ranka held 100 shares each. The 1st Appellant/1st Plaintiff and Sky High Builders held 27,50,000 shares each in the 2nd Respondent/2nd Defendant's Company.

3.3.The 1st Respondent/1st Defendant by means of of an agreement dated 01.06.2006 purchased the entire 27,50,000 shares in the 2nd Respondent/2nd Defendant's Company belonging to the Sky High Group including the 100 shares each of Sohan Parmar and Basant Kumar Ranka. In fact, the Appellants/Plaintiffs collectively owned 27,50,000 shares in the 2nd Respondent/2nd Defendant's Company. Subsequently, the 2nd Appellant/2nd Plaintiff on his own volition approached the 1st Respondent/1st Defendant offering to sell the entire 27,50,100/- shares held by the Appellants/ Plaintiffs.

3.4.It was clearly brought to his knowledge that the negotiated consideration for the share transfer would be paid directly to the 1st Appellant/1st Plaintiff in which the 2nd Appellant/ 2nd Plaintiff and his family members held controlling interest but not absolute interest and further, the consideration would be utilised in the interest of the Company and not for the personal benefit of the 2nd Appellant/2nd Plaintiff. The 2nd Appellant/2nd Plaintiff had accepted the same and after negotiations, the agreement was signed on 16.08.2006 by which the Appellants/Plaintiffs sold their entire share holding in the 2nd Respondent/2nd Defendant to the 1st Respondent/ 1st Defendant and thereby the 1st Respondent/1st Defendant and the 3rd Respondent/3rd Defendant became the sole shareholders of the 2nd Respondent/2nd Defendant's Company.

3.5.In the aforesaid agreement dated 16.08.2006, the consideration for the sale of shares was Rs.5 Crores, payable by a Cheque drawn on Corporation Bank bearing No.311704 dated 16.08.2006 for Rs.1.50 Crores and the remaining sum of Rs.3.50 Crores in the form of built up space in the proposed construction in the Congress Grounds within a period of six months from the date of agreement. But it was clearly understood that the allotment of built up space would mean the delivery of constructed area.

3.6.The Appellants/Plaintiffs knew very well about the difficulties faced by the 2nd Respondent/2nd Defendant in moving forward with the project and there was no possibility of the construction even beginning by the end of six months period from the date of agreement. The entire transfer of shares of the Appellants/Plaintiffs was signed and effected by the 2nd Appellant/2nd Plaintiff by affixing his signature on the reverse of the original share certificates and the share transfer forms allotted to the Appellants/Plaintiffs. The 2nd Appellant/2nd Plaintiff had also signed on the reverse on the original share certificate for 100 shares of the 2nd Respondent/2nd Defendant which were allotted to him.

3.7.Later, the 2nd Appellant/2nd Plaintiff approached the 3rd Respondent/3rd Defendant stating that they were not satisfied with sum of Rs.2.5 Crores worth of built up space and somewhere in October, 2006, the 2nd Respondent/2nd Plaintiff had approached the 3rd Respondent/3rd Defendant and asked for a loan of Rs.1 Crore, but only Rs.25 Lakhs was given by the 3rd Respondent/3rd Defendant. However, the 2nd Appellant/2nd Plaintiff claimed that a sum of Rs.25 Lakhs was paid in consideration of the said agreement entered into in August 2006, which was denied by the Respondents/ Defendants. The 3rd Respondent/3rd Defendant was visiting New Delhi to made the numerous Congress Party Leaders, there was no time limit and resultantly, there was not even a default clause.

3.8.The Appellants/Plaintiffs filed C.P.No.29 of 2007 before the Company Law Board, Chennai challenging the very transfer of shares from the 2nd Respondent/2nd Defendant Company to the 1st Respondent/1st Defendant and 3rd Respondent/3rd Defendant alleging fraud, forgery etc. and on 07.05.2009 the said Company Petition was dismissed by the Board. A sum of Rs.25 Lakhs claimed in the Plaint as consideration in respect of the second agreement was only a hand loan and not related to the second agreement. The two agreements were not related to each other. The agreements cannot be interpreted to mean that the Respondents/Defendants 1 and 3 purchased the shares but also agreed to specific time limit to permit the project and handed over the completed construction or in the alternative pay the consideration in terms of money. Moreover, this was not the understanding between the parties.

4.In the main Suit, nine issues were framed. During trial of the main suit on behalf of the Appellants/ Plaintiffs, witnesses P.W.1 and P.W.2 were examined and Exs.P1 to P8 were marked. On the side of the Respondents, witnesses D.W.1 was examined and Exs.D1 to D3 were marked.

5.The Learned Single Judge, while passing the impugned Judgment in C.S.No.875 of 2009 (filed by the Appellants as Plaintiffs) at paragraph 34, inter alia had observed and held that '.... it is only in the fitness of things that when he had handed over to the family of the 3rd Defendant the prospect of

execution of such huge project at Congress Grounds, the Defendants should pay the monetary consideration with respect to Ex.P3 1st agreement to the Plaintiffs alone and that there is no liability attached to the Defendants with respect to Ex.P4, 2nd agreement' and finally partly decreed the suit for a sum of Rs.3.50 Crores, with interest at 6% p.a. from 16.08.2006 till date of realisation, with costs. For making payment, three months time was granted.

6.Points for determination in O.S.A.:

1. Whether the business efficacy of an agreement entered into between the two consenting parties can be questioned by a Court of Law?

2. Whether the undated second agreement August 2006 is a distinct and separate one to that of the first agreement dated 16.08.2006?

3. Whether the suit filed by the Appellants/ Plaintiffs is in time?

4. Whether the Appellants/Plaintiffs are entitled to the suit claim from the Respondents/Defendants?

7.The Appellants/Plaintiffs Contentions:

7.1.The Learned Senior Counsel for the Appellants/Plaintiffs contends that the Appellants/Plaintiffs had filed the Civil Suit in C.C.No.875 of 2009 against the Respondents/Defendants seeking for passing of a Judgment in directing the 1st Respondent/1st Defendant to pay a sum of Rs.11,34,37,500/- with further interest on the principal amount of Rs.8,25,00,000/- at 15% per annum from the date of the suit till the date of realisation and for costs.

7.2.Advancing his arguments, the Learned Senior Counsel for the Appellants submits that the basis for the suit was that the Respondents/Defendants especially the 3rd Defendant had caused the Appellants/Plaintiffs to transfer their shares that they held in the 2nd Respondent/Company to the 1st Respondent/Company making the 1st and 3rd Respondents as sole shareholders of the 2nd Respondent Company.

7.3.It is represented on behalf of the Appellants that the 2nd Respondent/Defendant is the Assignee and Beneficiary of the right to put up a commercial construction to undertake the development of the Congress Grounds property. Furthermore, the consideration for the said shares which were transferred by the Appellants was initially a sum of Rs.5 Crores as mentioned in the agreement dated 16.08.2006. As a matter of fact, the said sum of Rs.5 Crores was paid in two parts and in the first part being a sum of Rs.1,50,00,000/- and the balance amount was to be paid in the form of allotment of built up space in the proposed construction, which was to be allotted in a period of 6 months. Later, the parties entered into another agreement in August 2006. According to the Appellants, the additional consideration of Rs.5 Crores under

the undated agreement and the said agreement referred to the consideration Clause of the Agreement dated 16.08.2006 and sought to enhance the consideration from Rs.5 Crores to Rs.10 Crores.

7.4.The Learned Senior Counsel for the Appellants proceeds to point out that additional consideration of Rs.5 Crores under the undated agreement was payable in the form of 'built up area', while the 2nd Respondent/2nd Defendant has a right to make the said payment in the form of cash also. After the initial payment of Rs.1,50,00,000/- as captured in the agreement dated 16.08.2006 and a further sum of Rs.25,00,000/- was given by the 1st Respondent/1st Defendant in the form of Cheque and inasmuch as the Respondents were not taking any steps in regard to the construction of commercial complex in the Congress Grounds, the Appellants issued a legal notice to the Respondents claiming the remaining sum of Rs.8,25,00,000/- with interest at 15/- p.a. from 15.02.2017 till date of payment. Since the demand in the said legal notice was not met with by the Respondents/Defendants, the suit was filed by them.

7.5.The Learned Senior Counsel for the Appellants that the Learned Single Judge was not correct in holding that the whole case rests on the interpretation of Ex.P3 -Share Purchase Agreement dated 16.08.2006. Also that, it is the stand of the Appellants that the Learned Single Judge had failed to appreciate that the suit was filed not only on the basis of Ex.P3 Agreement dated 16.08.2006, but also resting on Ex.P4 - Undated August 2006 Agreement.

7.6.The Learned Senior Counsel for the Appellants proceeds to take a plea that the Learned Single Judge should have seen that the Appellants/Plaintiffs case before the Company Law Board was not on the basis of any forgery in relation to share transfer deals, which were admittedly signed by the Appellants, but in regard to the share certificates in which the 2nd Appellant's signature as Director was forged.

7.7.Advancing his arguments, the Learned Senior Counsel for the Appellants takes a plea that the Appellants/Plaintiffs before the Company Law Board had not questioned the validity of either of the agreements but only questioned the manner in which the Respondents had caused the share transfers to take place by forging the signatures of the 2nd Appellant on the share certificates and having done so, failed to pay the consideration due under the agreement.

7.8.It is represented on behalf of the Appellants that the Learned Single Judge had erred in differentiating the allotment of built up space with delivery, by holding that delivery can be effected only when the construction takes place, which was never agreed to by the parties and all that was agreed was allotment of 'built up space'.

7.9.The Learned Senior Counsel for the Appellants projects an argument that the Learned Single Judge should have seen that the consideration for transfer of shares

disclosed in Ex.P3 was a sum of Rs.5 Crores and the reference to allotment of built up space was a manner of discharge of such consideration.

7.10.The Learned Senior Counsel for the Appellants submits that the Learned Single Judge had not appreciated the agreement in a proper perspective and came to the conclusion that Ex.D1 would honour the requirements of the agreement.

7.11.The Learned Senior Counsel for the Appellants takes a stand that the Respondents had clearly agreed to pay the Appellants the consideration mentioned in Exs.P3 and P4 agreements not out of 'Gratis' but because of the fact that the parties are agreed, that this would be the consideration for Rs.27,50,100/- shares transferred by the Appellants to the 1st Respondent and therefore, consideration such as marketable value to the outside world would have no relevance.

7.12.The Learned Senior Counsel for the Appellants submits that the finding of the Learned Single Judge that the 2nd Appellant's signature is found on the share certificate and therefore, he is unable to understand the sending of the same to Forensic Department by the Company Law Board is an incorrect one.

7.13.It is the contention of the Appellants that the Learned Single Judge should have seen that the order of the Company Law Board refers to the order of the Forensic Science Department in which it was mentioned that it was not possible to offer any opinion on the disputed signatures compared with the original signatures. Under such circumstances, it is not known on what basis the Learned Single Judge came to the conclusion that it was the 2nd Appellant's signature on the share certificates when the Forensic Department was not able to confirm the same.

7.14.Also that, it is projected on the side of the Appellants that before the Company Law Board, the issue was only the signatures on the share certificates and the signatures on the share transfer forms and the agreements were never disputed.

7.15.The Learned Senior Counsel for the Appellants contends that the instant suit is related to the terms of the agreements signed by both parties and neither of them had questioned their signatures thereon and hence, the contrary finding by the Learned Single Judge in this regard is an erroneous one.

7.16.The Learned Senior Counsel for the Appellants submits that the shares being movable commodities constitute 'Goods' under the Sale of Goods Act, 1932 and in fact, as per the provisions of the Sale of Goods Act, 1932 the quantum of consideration has no baring on the sale that is effected.

7.17.The Learned Senior Counsel for the appellants takes a plea that when the respective parties new well about the agreements they were entering into, then, it is not open to a Court of Law to question the commercial wisdom in this regard.

7.18.The Learned Senior Counsel for the Appellants contends that the Respondents had six months time to allot the built up space to the Appellants and the performance for the same should have been completed on or before 15.02.2007 and therefore the cause of action would have started only on 15.02.2007. Furthermore, the main suit was filed during September 2009, i.e. before the completion of three years from 15.02.2007 viz., the February 2010, it is the plea of the Appellants that the suit filed by them is well within limitation.

7.19.The Learned Senior Counsel for the Appellants, in support of the contention that an agreement ought to be read in a manner to give its business efficacy and further, a Court of Law must endeavour to uphold an agreement ought not to invalidate the same, places reliance on the decision of the Hon'ble Supreme Court in Nabha Power Limited (NPL) V. Punjab State Power Corporation Ltd. (PSPCL) and others, 2017 (12) SCALE 241 at paragraphs 46 to 48, it is observed as under:

6. There were, once again, parallel developments in India during this period in various High Courts but the views of this Court can be found expression in M/s. Dhanrajamal Gobindram vs. M/s. Shamji Kalidas and Co. MANU/SC/0362/1961: (1961) 3 SCR 1020:

9. .Commercial documents are sometimes expressed in language which does not, on its face, bear a clear meaning. The effort of Courts is to give a meaning, if possible. This was laid down by the House of Lords in Hillas & Co. v. Arcos Ltd. [MANU/UKHL/0003/ 1932 : (1932) All ER 494] , and the observations of Lord Wright have become classic, and have been quoted with approval both by the Judicial Committee and the House of Lords ever since. The latest case of the House of Lords is Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [MANU/UKWA/0016/1957 : (1959) AC 133] There, the Clause was This bill of lading , whereas the document to which it referred was a charter-party. Viscount Simonds summarised at p. 158 all the Rules applicable to construction of commercial documents, and laid down that effort should always be made to construe commercial agreements broadly and one must not be astute to find defects in them, or reject them as meaningless.

47.In The Union of India vs. M/s. D.N. Revri & Co. and Ors. MANU/0003/ 1976 : (1976) 4 SCC 147, P.N. Bhagwati, J. (as he then was), speaking for the Bench of two Judges said in para 7 as under:

.It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must

not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation ..

48. Lastly in Satya Jain (Dead) Through LRs. And Ors. vs. Anis Ahmed Rushdie (Dead) Through LRs. MANU/SC/1063/ 2012: (2013) 8 SCC 131, Ranjan Gogoi, J., elucidated the well established principles of the classic test of business efficacy to achieve the result of consequences intended by the parties acting as prudent businessmen. It was opined as under:

3. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)] . This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J. in Moorcock [(1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68) In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

34. Though in an entirely different context, this Court in United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera [MANU/SC/ 7754/2008 : (2008) 10 SCC 404] had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434) 1. Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common Oh, of course! Shirlaw v. Southern Foundries (1926) Ltd. [(1939) 2 KB 206 : (1939) 2 All ER 113 (CA)], KB p. 227.' * * * An expressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term

that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. Trollope and Colls Ltd. v. North West Metropolitan Regl. Hospital Board [MANU/UKHL/0017/1973: (1973) 1 WLR 601 : (1973) 2 All ER 260 (HL)] , All ER p. 268a-b.

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement .. .

8.Respondents' Submissions:

8.1.Per contra, it is the submission of the Learned Senior Counsel for the Respondents that Ex.P3 Agreement dated 16.08.2006 is a self contained exhaustive one and did not contemplate further performance by the Appellants/Plaintiffs.

8.2.The Learned Senior Counsel for the Respondents contends that Ex.P3 Share Purchase Agreement dated 16.08.2006 between the 2nd Appellant/2nd Plaintiff represented by 1st Appellant/1st Plaintiff [Sellers] AND the Respondents 1 and 2/Defendants 1 and 2 [Buyers] mentions that the Sellers are collectively legal and beneficial owners of 27,57,100 shares (Twenty seven lakhs fifty seven thousand and one hundred only) of Rs.10/- each of the Target Company and in the Target Company, their respective shareholding interest are (i) Idandas 100 shares; (ii) Heeral 27,50,000 shares. Furthermore, in the said Ex.P3 Agreement, it was mentioned that the Appellants (Sellers) are desirous of selling their entire shareholding in the Target Company and the Respondents/Defendants (Buyers) had agreed to purchase either directly or through their nominees, the entire shareholding of the Sellers. Further, it was agreed that the Appellants (Sellers) shall transfer, on the date of signing of this agreement, the aforesaid shares to the Buyers (Respondents) or their nominee(s).

8.3.As a matter of fact, in Ex.P3 Agreement dated 16.08.2006, the respective parties had agreed to the following:

. On the Signing Date, the Sellers shall transfer to the Buyers or their nominee(s) 27,50,100 Shares, (Twenty Seven Lakhs Fifty Thousand and one hundred only) for a consideration of Rs.5,00,00,00/- (Rs.Five hundred lakhs only) and cause the register of members of the Target Company to updated accordingly this day itself.

2. On and up to the date hereof the Buyers have paid the sellers towards the consideration a sum of Rs.5,00,00,000/= (Rupees Five hundred lakhs only) paid as follows:

3. On the date of Singing of this Agreement the Buyers have paid the sellers towards the consideration a sum of Rs.1,50,00,000/- (Rs. One hundred and fifty lakhs only) drawn on Corporation Bank Ch No.311704 dated 16th August 2006 the receipt of which sum the sellers do hereby admit and acknowledge.

4. The balance consideration of Rs.3,50,00,000/= (Rs Three hundred and fifty lakhs only) will be allotted in the form of built up space, in the proposed construction at Congress Grounds within 6 months from this date.

5. The Shares shall be sold with full title guarantee free from all Encumbrances and together with all rights attaching to them. 8.4.The Learned Senior Counsel for the Respondents/ Defendants refers to para 17 of the Plaint of the Appellants wherein it is, among other things, mentioned as under:

... It is reiterated that under the First Agreement, the balance consideration was to be in the form of built-up space which was to be provided to the Plaintiffs, within 6 months of 16.08.2006. In other words, such built-up space was to be constructed and handed over to the Plaintiffs by 15th February 2007. Likewise, under the Second Agreement also, consideration in the form of further built-up space was to be allotted to the Plaintiffs. While no specific time frame was set out in the Second Agreement, it nevertheless necessarily follows that since this Agreement also refers to built-up space in the same Project which is the subject matter of the First Agreement, this built-up space should also have been provided within the 6 month period specified in the First Agreement. That apart, even otherwise, the well settled position is that when an agreement does not specify any time, performance is to be effected within a reasonable time. The six month period provided for in the First Agreement would therefore constitute a reasonable time for such performance and consequently the built up space in the Second Agreement would also have to be provided to the Plaintiffs on or before 15th February 2007. 8.5.The Learned Senior Counsel for the Respondents refers to the evidence of P.W.1 (in cross examination) wherein P.W.1 had deposed that all the shares in Blue Pearl Developments Private Limited, the 2nd Respondent/2nd Defendant were transferred to the 1st Respondent/1st Defendant and further had proceeded to state that as per agreement between them viz., himself and the 3rd Respondent/3rd Defendant they exit to P.W.1 was confirmed on transfer of the aforesaid shares (27,50,000) to the 1st Defendant.

8.6.The Learned Senior Counsel for the Respondents draws the attention of this Court to the averments of the Respondents/ Defendants at para 9 wherein it was mentioned that upon execution of the agreement and payment of the part consideration in the manner specified on 16.08.2006 the transfer of shares was effected and registered of Members of the 2nd Respondent/2nd Defendant was updated and accordingly, on 16.08.2006 itself as required under the Agreement as per Clause 1 under the caption 'Sale Purchase Shares'.

8.7.Added further, the Learned Senior Counsel for the Respondents/Defendants proceeds to point out that Ex.P4 Undated August 2006 Agreement is not supported by consideration and therefore, the said agreement is an unenforceable one and in this regard, in the Written Statement of the Respondents/ Defendants, there are adequate pleadings are very much available and hence, the ingredients of Order 6 Rule 8 of the Civil Procedure Code cannot be pressed into service.

8.8.The Learned Senior Counsel for the Respondents takes a plea that in the Written Statement, the Respondents/Defendants at para 19 had stated that they had only promised allotment of built up area of the value of Rs.2.5 Crores on the 2nd Appellant/2nd Plaintiff and his family. Furthermore, no consideration was promised in the second agreement to be paid to the 1st Appellant/1st Plaintiff which held the entire transferred shares except for 100 shares transferred from the 2nd Appellant/2nd Plaintiff. Apart from that, even assuming without admitting that the consideration sum agreed to be paid was Rs.10 Crores, only Rs.5 Crores was meant to be paid to the 1st Appellant/1st Plaintiff and that the major portion in the form of allotment of built up area which was done.

8.9.The Learned Senior Counsel for the Respondents also refers to para 20 of the Written Statement of the Respondents/ Defendants wherein it was mentioned that the second agreement was executed much after the transfer of shares and the consideration for the sale of shares had already been concluded in the first agreement itself. Moreover, the promise was only allotment of built up space, which was done by the 2nd Respondent/2nd Defendant's letter dated 15.01.2017.

8.10.Besides the above, the Learned Senior Counsel for the Respondents/Defendants submits that in the Written Statement at paragraph 22, the Defendants had stated that they had agreed that as and when the construction was in advanced stage, the conveyance of the proportionate UDS of land at the cost of the Appellants/Plaintiffs were promised.

8.11.The Learned Senior Counsel for the Respondents adverts to para 27 of the Written Statement of the Respondents/Defendants wherein it was inter alia averred that the 2nd Appellant/2nd Plaintiff wanted to exit from the 2nd Respondent/2nd Defendant Company along with the 1st Appellant/1st Plaintiff Company run by him in his capacity as Managing Director.

8.12.Apart from that, the Learned Senior Counsel for the Respondents points out that in paragraph 29 of the Written Statement, the Respondents/Defendants had clearly mentioned that the whole issues raised by the Appellants/Plaintiffs were based on the alleged second agreement which could not be enforced and added further, there was no interest agreed to be paid by the Respondents/Defendants at any point of time and as such, the Respondents/Defendants are not liable to pay any sum to the Appellants/Plaintiffs.

8.13.The Learned Senior Counsel for the Respondents/ Defendants contends that in Ex.P3 - Share Purchase Agreement dated 16.08.2006 it is specifically mentioned as under:

The balance consideration of Rs.3,50,00,000/- (Rs. Three hundred and fifty lakhs only) will be allotted in the form of built up space, in the proposed construction at Congress Grounds within 6 months from this date. 8.14.However, the Learned Senior Counsel for the Respondents/Defendants by referring to Ex.P4 Undated August 2006 Second Agreement, points out that in the said agreement, it is mentioned that 'The Buyers will pay an additional consideration of a sum of Rs.5,00,00,000/- (Rupees Five Hundred Lakhs only) which will be given/allotted only in the form of built up space, in the proposed construction at Congress Grounds whenever the project commences.

8.15.The plea of the Learned Senior Counsel for the Respondents/Defendants is that the differences between Ex.P3 and Ex.P4 Agreements are exclusion of any other mode of payment of consideration except built up space by employment of the word 'only in the form of built up space'. Furthermore, it is represented on behalf of the Respondents/Defendants that time is not determined for performance, but consciously left to attach itself to the beginning of the project, whenever that takes place. As such, it is the stand of the Respondents/Defendants that even assuming that Ex.P4 is enforceable in Law, the suit filed by the Appellants/ Plaintiffs is a premature and otiose one.

8.16.The Learned Senior Counsel for the Respondents/ Plaintiffs by expatiating his contention draws the attention of this Court to the fact that as per Ex.P4 Undated August 2006 Second Agreement, the 2nd Appellant/2nd Plaintiff's family had agreed to receive one half leaving the other half to the 3rd Respondent/3rd Defendant and his father.

8.17.That apart, as on date of Ex.P3 Agreement dated 16.08.2006, the 2nd Appellant/2nd Plaintiff had only 100 shares in his name and upon the transfer of these 100 shares, no claim as per Ex.P4 Second Agreement can be maintained and that too for Rs.2.5 Crores to him and his family.

8.18.In short, it is the submission of the Learned Senior Counsel for the Respondents/Defendants that Ex.P4 Undated August 2006 Second Agreement was executed only with a view to comfort and accommodate the 2nd Appellant/2nd Plaintiff being the paternal uncle of the 3rd Respondent /3rd Defendant.

8.19.The Learned Senior Counsel for the Respondents/ Defendants brings it to the notice of this Court that the Appellants/ Plaintiffs before the Company Law Board, Additional Principal Bench, Chennai filed C.P.No.29 of 2007 as Petitioners against the Respondents/Defendants alleging certain acts of oppression and mismanagement

in the affairs of M/s.Blue Pearl Development Private Limited Company and also sought rectification of the Register of Members.

8.20.The Learned Senior Counsel for the Respondents/ Defendants adverts to Ex.P5 - Order dated 07.05.2009 passed by the Company Law Board in C.P.No.29 of 2007, wherein the Appellants/Petitioners/Plaintiffs had pleaded that they were not issued with the share certificates by the 1st Respondent Company and further that, the payments due to them were not made and in any event, the transfer is invalid, illegal, non est and void ab initio and that they are deemed to be the holders of the shares.

8.21.The Learned Senior Counsel for the Respondents/ Defendants contends that the Appellants/Petitioners before the Company Law Board came out with a false case that the 2nd Appellant/2nd Plaintiff's signature was forged with a view to effect the transfer of the shares and therefore, they continued in ownership of the whole 27,50,100 shares, which are contrary to the averments made in the suit and the evidence adduced thereto by them.

8.22.The Learned Senior Counsel for the Respondents/ Defendants submits that the Company Law Board in its Order dated 07.05.2009 [Ex.P5] at paragraph 30 had observed that during pendency of the proceedings, the Appellants/Petitioners had disputed the signatures on the two original share certificates and sought a direction to send the same to the Forensic Sciences Department for comparison with that of 2nd Appellant/2nd Petitioner's signature in the share transfer forms, Minutes of the Board Meeting held on 07.08.2006 and that in the resignation letter dated 16.08.2006 for an opinion in the matter and when the two share certificates along with the two share transfer forms, the Board Minutes and Resignation Letter all in original to the Forensic Science Department and that the report of Forensic Science Department dated 17.06.2008 stated that it is not possible to offer any reliable opinion on the red enclosed signatures stamped and marked Q1`and Q2 on a comparison with the red enclosed signatures similarly stamped and marked S1 to S4 and that Q1 and Q2 were the disputed signatures and S1 -S4 were the admitted signatures and further that, because of the inconclusive report of the Forensic Science Department, the Board would not in a position to render any finding on the disputed signatures.

8.23.The Learned Senior Counsel for the Respondents/ Defendants refers to Ex.P5 - Order of the Company Law Board dated 07.05.2009 in C.P.No.29 of 2007 wherein at paragraph 32, the Board had clearly mentioned that the 2nd Appellant/2nd Plaintiff had admitted his signatures on the share transfer forms and the resignation letter dated 16.08.2006 in pursuance of the agreement dated 16.08.2006 and hence, the veracity of the signatures of the reverse side of the share certificate was no relevance to the share transfer which was effected in pursuance of the agreement.

8.24.The Learned Senior Counsel for the Respondents/ Defendants points out that the allegation of illegal and fraudulent transfer of shares as alleged by the Appellants/Petitioners were negatived by the Company Law Board and ultimately it was held that the Appellants/Petitioners were not entitled to any relief and dismissed the Company Petition as devoid of merits.

8.25.The Learned Senior Counsel for the Respondents/ Defendants strenuously takes a plea that the Appellants/Plaintiffs' conduct is a tainted one, since they had not come to Court with clean hands and further that, Ex.P4 Second Agreement is not supported by consideration. Furthermore, Ex.P4 Undated August 2006 Agreement was only a 'Gratuitous Offer' by the Respondents to the Appellants and the same does not relate to increased sale consideration.

8.26.The Learned Senior Counsel for the Respondents/ Defendants puts forward an argument that Section 25(2) of the Indian Contracts Act, 1872 applies only when the Goods or Services are conveyed or rendered as the case may be, voluntarily as they opposed to a situation where the goods or services are transferred or rendered against consideration.

8.27.In support of this plea the Learned Senior Counsel for the Respondents/Defendants cites the decision of the Hon'ble Supreme Court in T.V.Krishna Iyer V. The Official Liquidator, the Cape Comorin General Traffic Company Limited, AIR 1952 Travancore Cochin 99, 100 wherein it is observed as under:

... To recognise the employees of the company in respect of bonus as preferential creditors within the meaning of Section 230 of the Indian Companies Act corresponding to Section 285 of the Travancore Companies Act is certainly not warranted. The learned counsel for the liquidators wanted to rely upon S. 25 of the Indian Contract Act sub-s.(2) by contending that the promise to pay bonus will come under the category of compensation agreed to be paid for service rendered in the past. This clause of S.25 cannot be applied to the present case because it contemplates cases in which services have been voluntarily rendered. Here the workmen have rendered services in return for the wages payable to them and if they have only discharged their duties as required by the agreement entered into by them with the employees no extra compensation promised to them will come within the meaning of S.25, sub-s.(2) of the Indian Contract Act. This is clear from the decided cases which are all collected together in the commentary of Pollock and Mulla on the Indian Contract Act, pp. 182 and 183, 7th Edition. Analysis and Findings:

Point Nos.1, 2 and 4:

9.At the outset, this Court pertinently points out that as per Ex.P4 Undated August 2006 Second Agreement refers to the First Agreement dated 16.08.2006 and that the parties were desirous of

increasing/modifying the terms of the sale of shares and in fact, preamble of the 2nd Agreement mentioned about the sellers entering into an agreement Ex.P3 dated 16.08.2006 with the buyers. In short, Clause 4 B of Ex.P4 Undated August 2006 Second Agreement reads as under:

> Accordingly the Parties had agreed subsequently to increase/modify the consideration mentioned in the agreement dated 16th August 2006 executed between them and are now therefore desirous of entering into this Agreement to record the increase/modify the terms and conditions for the sale of the Shares.

10.The core stand of the Appellants/Plaintiffs in the present Appeal is that when an Agreement was signed and neither party is assailing the validity of the said agreement, the Learned Single Judge was not correct in coming to the conclusion in the main suit that the two agreements in question are not interlinked and that they are not supplementary to one another. That apart, it is also the stand of the Appellants that the Learned Single Judge was not correct in holding that Ex.P4 Undated August 2006 Second Agreement was not an increased in sale consideration but it was purely a Gratuitous Offer by the Respondents/Defendants to the Appellants/Plaintiffs.

11.The plea of the Appellants is that the Respondents/ Defendants at paragraph 13 of the Written Statement of the Respondents/Defendants had clearly averred that the 2nd Respondent/2nd Defendant would be committed to allot Rs.2.50 Crores worth of building space to the 3rd Respondent/3rd Defendant and his father viz., Gordandas Idandas and another Rs.2.50 Crores to the 2nd Appellant/2nd Plaintiff and his family.

12.It is the case of the Appellants that D.W.1 (3rd Respondent/ 3rd Defendant) in his cross examination had denied the suggestion that the allotment in the form of built up space in the proposed construction and further stated that it was the only method of discharge of consideration of Rs.3.50 Crores. It is represented on behalf of the Appellants that D.W.1 (3rd Defendant/3rd Respondent) in his evidence had denied the increase in consideration.

13.The Appellants forcefully projects that the Learned Single Judge, at paragraph 31 of the Judgment in the main suit, had opined that if the consideration was by means of increasing the market value from Rs.10 per share, they could have correspondingly increased the consideration towards the sale of shares amounting to Rs.27,50,100 but they had not and in fact, the said observation of the Learned Single Judge was contrary to the Respondents because of the reason even the consideration in respect of the Ex.P3 First Agreement dated 16.08.2006 was in a lumpsum, hence, a different yardstick could not be do in so far as the Second Agreement Ex.P4 was concerned.

14.The version of the Appellants is that the performance under Ex.P3 Agreement dated 16.08.2006 was not executed not even completed and/or executed though Ex.P4 Undated August 2006 Agreement be characterised as an agreement without consideration.

15.Also that, the plea of the Appellants is that void agreement in terms of Section 25 of the Indian Contract Act, 1872 was not pleaded by the Respondents/Defendants in the Written Statement and

also in the proof affidavit of D.W.1 (3rd Respondent). Therefore, the Respondents had failed to set out material facts as per Order 6 Rule 9 of the Civil Procedure Code.

16.On the side of the Appellants, it is pointed out before this Court that D.W.1 (3rd Respondent/3rd Defendant) in his evidence deposed that he had mentioned that in para 13 of his proof affidavit that he gave a sum of Rs.25 lakhs but had not taken any receipt or acknowledgement from the Plaintiffs for the payment of the said loan. In this connection, the Appellants come out with a plea that the 2nd Respondent had not issued a cheque for a sum of Rs.25 lakhs in favour of the 1st Appellant/1st Plaintiff and this was not demanded back which would unerringly point out that this was not a personal hand loan.

17.It is to be noted that the onus is on a Person/Litigant who controverts/disputes a binding nature of contract under the circumstances in which he had signed in the contract. Also that, a contract is considered to be a 'Bilateral Transactions' between two or more persons. In Law, there ought to be an absolute and unqualified acceptance of promise for a concluded contract. Furthermore, if a contract is an unambiguous one, quite explicit and not a vague one, then, the same is not hit by Section 23 and 28 of the Indian Contract Act, 1872. If a promise to pay is a conditional one, the condition must be fulfilled before a suit is to be decreed as per decision Bollapragada Ramamurthy V. Thammanna Gopayya reported in AIR 1917 Madras 892.

18.In fact, a mistake mentioned in Section 20 of the Indian Contract Act, 1872 operates to invalidate a contract, because of the fact that the true intention of the parties to make their agreement conditional on the existence of some state of facts turns out not to have existed at the date of the agreement as per decision Landmark Developers V. Government of Andhra Pradesh, reported in (2013) 1 ALD 338.

19.Indeed, a mutual mistake takes place where the respective parties take a divergent stand based on misunderstanding and there being no 'Consensus Ad Idem' and in such an event, there is no agreement and the said contract is a void one, as per decision of the Hon'ble Supreme Court in ITC Limited V. George Joseph Fernandes, AIR 1989 SC 839.

20.It is to be pointed out that an 'Agreement made without consideration' is void. The aspect of 'Consideration' is very much essential to the formation of a contract whether it is oral or written. A promise made without consideration viz., an undertaking to do work for another gratuitously cannot be sued, because of the reason that it amounts to 'Nudum Pactum Ex Quo Nan Oritur Actio' as per decision Rann V. Hughes (1778) VII Term Req 250 n. H.L.

21.Section 65 of the Contract Act enjoins that when a contract becomes void, any individual who had procured any advantage under such contract is bound to restore it, to a person from whom he received it. The reason as to why the Law enforces only a promise which made for consideration is that a voluntary or gratuitous promise and more often than not made under them proper deliberation and also in a rash way. If a promise is made without consideration is an unenforceable one, then, there will be a peril of a person who will bind himself without any person deliberate intention on his part to do so.

22.In order to attract the application of Section 25(1) of the Indian Contract Act, 1872, it is not sufficient that the respective parties stood stand in a near relation between them. Besides this, the agreement should have been entered into between them on account of natural 'Love' and 'Affection'.

23.It is remembered that in respect of a contract which is divisible in two parts, then, the one which is supported by consideration can be enforced in Law and the other one being without consideration is void and the same cannot be enforced.

24.It is to be pointed out that whether there is a concluded Contract, whether contract was cancelled or varied with consent of parties or inconclusive in this regard, the conduct of parties and the entire gamut of communications/letters that exchanged between the parties are to be looked into.

25.Further, as per Section 23 of the Indian Contract Act, 1872, if the consideration or object of agreement is unlawful, then, the agreement becomes void as per decision Nazir Maricor V. M/s.Marshalls Sons and Company (India) Limited, reported in 2005-1-L.W.634 at special page 636. Also that, a Contract without consideration is a void one, as per decision Praghlad V. Laddevi, AIR 2007 Rajesthan 166, 167.

26.At this juncture, this Court worth recalls and recollects the decision Wood V. Benson, 1831 (2) Cr.J. 94 where a guarantee was given to pay for all Gas to be supplied to a 'Theatre' and also to pay for all 'Arrears' which might to be then due the agreement was held to be a divisible one and valid as to the gas consume after the date of guarantee. However, it is void as to the Arrears for want of consideration.

27.Section 25 of the Indian Contract Act, 1872 pertains to issue of promises made without consideration, as per decision Elvira Rodrigues Siqueria V. Godnicalo Hypolito Constancio Noronha, reported in AIR 1934 Privy Council 144. It is to be noted that no consideration is contemplated to pass from one party to another.

28.No wonder, Section 25 of the Contract Act, 1872, when agreement without consideration is void, as per decision Awanti counting officials-operative Housing Society Limited V. Manohar and others reported in AIR 2012 Chhattisgarh 146, 147, 148.

29.It cannot be gainsaid that the definition of 'Valuable Consideration' is mentioned in Currie V. Misa, (1875) 10 Ex. 153 at page 162 which reads as under:

> A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given suffered or undertaken by the other.

30.Besides the above, Section 2(d) of the Indian Contract Act, 1872 defines consideration thus:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to

abstains from doing, to promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

31.In regard to the plea of 'Lack of Consideration', it must be proved by an individual who alleges it, as per decision Ranganayakamma V. K.S.Prakash, AIR 2009 SC (Supp) 1218. Apart from that, a consideration is to be real and not illusory one, although the adequacy of consideration being an issue for the respective contracting parties to agree in this regard.

32.One has to bear in mind that an adequate consideration would not include 'Love', 'Affection' or 'Spiritual Benefit' as involved in a gift, as per decision of the Hon'ble Supreme Court in Sonia Bhatia V. State of U.P., (1981) 2 SCC 585. An agreement without consideration is a 'Gratuitous Promise' and such a promise is an unenforceable one, unless it comes within the first clause described in Section 25(1) of the Indian Contract Act.

33.Coming to the aspect of Section 70 'Obligation of person enjoying benefit of non-gratuitous act' of the Indian Contract Act, 1872 is concerned, it is to be mentioned that a Liability will arise where a person voluntarily accepts a thing or enjoys the work done. Really speaking, Section 70 of the Act prevents an unjust enrichment. A claim for compensation by an individual against another as per Section 70 of the Indian Contract Act is not rested on any existing contract between the parties. Per contra, the basis is that something was performed by one party for the other which the other side had voluntarily accepted.

34.To put it succinctly, the ingredients of Section 70 and part 3 of Section 73 of the Indian Contract Act, 1872 are based on the plea of 'Restitution' which logically prevents an 'Unjust Enrichment' by retaining anything received by a party which does not belong to him and he should return it to the person from whom he received it and if action is not possible, then, monetary compensation is to be paid, as per decision Great Eastern Shipping Company Limited V. Union of India reported in AIR 1971 Calcutta 150 at page 155.

35.The three Salient Features for the invocation of Section 70 of the Contract Act, 1872 are: (1) the goods are to be delivered lawfully or something has to be done for another person lawfully; (2) the thing done or the goods delivered must be done or delivered without intention to do so gratuitously; (3) the person to whom goods are delivered enjoys the benefit thereto, as per decision Damodara Mudaliar V. Secretary for State in India (1894) 18 Madras page 88, special pages 91-93. In short, Section 70 of the Contract Act can be pressed into service when only all the aforestated ingredients are proved, as opined by this Court. Even if any one of the aforestated conditions are not fulfilled, then, the said Section will not apply.

36.In the instant case, the Appellants had issued Ex.P6 Advocate Notice dated 05.09.2009 addressed to the Respondents/ Defendants wherein it was mentioned that they held 27,50,100 shares in the 2nd Respondent/2nd Defendant Company and pursuant to the two agreements entered into between the Appellants and the Respondents, the Appellants had agreed to transfer their aforestated shares in the 2nd Respondent/2nd Defendant Company to the 1st Respondent/1st Defendant for a total consideration of Rs.10 Crores of which 1.75 Crores was payable as cash

consideration and the balance by way of allotment of built up space in the project being commenced by the 2nd Respondent/2nd Defendant in pursuant to the agreement entered into with the Tamil Nadu Congress Committee Charitable Trust. Further, in Ex.P6 Notice, it was mentioned that such built up space was to be provided to the Appellants on or before 15.02.2007. But they failed to provide any built up area thus far and therefore, the Appellants are entitled to receive from the 1st Respondent/1st Defendant, the balance monetary consideration specified in the agreement amounting to Rs.8,25,00,000/-, but the same was neglected to be paid. Therefore, the Appellants through Ex.P6 had called upon the Respondents/Defendants to pay a sum of Rs.8,25,00,000/- together with interest at 15% p.a. from 15.02.2007 till date of payment within three days of this notice.

37.It is to be pointed out that Ex.P1 Xerox Copy of the Agreement dated 28.05.1996 was entered into by the 1st Appellant/ 1st Plaintiff, represented by the 2nd Appellant/2nd Plaintiff in his capacity as Managing Director and another Company called Sky High Builders represented by its Managing Director B.K.Ranga, to develop very vast extent of land viz., the Congress Grounds, Mount Road, Chennai 6. The Tamil Nadu Congress Committee Charitable Trust was the owner of the said land called the Congress Grounds and Schedule A consisting of item (1) consisted of 101 grounds and item (2) consisted of one Kani 11 grounds 686 sq.ft. In Ex.P1 Agreement, TNCC Charitable Trust was represented by the Trustees.

38.It cannot be gainsaid that the 2nd Respondent/2nd Defendant Company was established as a special purpose vehicle for the specific purpose of implementing the projecting question. The 2nd Appellant/2nd Plaintiff, the 3rd Respondent/3rd Defendant and B.K.Ranka, the Partner of Sky High Builders, were the subscribers of the memorandum of its Association and each of them subscribed 100 shares in the 2nd Respondent's Company. The 1st Respondent/ 1st Defendant on 01.06.2006 purchased the entire shares of the 2nd Respondent/2nd Defendant's Company belonging to the Sky High Group. The Trustees, who signed in Ex.P1, had died by 2006 and later, new persons came in and resultantly fresh agreements, new negotiations, further developments will have to be entered into. During this time, the 2nd Appellant/2nd Plaintiff had decided to come out of the agreement, leaving the whole management to the control of the 3rd Respondent/3rd Defendant.

39.In this backdrop, Ex.P3 Agreement dated 16.08.2006 was entered into between the parties. The 3rd Respondent/3rd Defendant comes from the Branch of the brother of the 2nd Respondent/2nd Plaintiff. P.W.2 is the son of the 2nd Appellant/2nd Plaintiff. As per Ex.P3 Share Purchase Agreement dated 16.08.2006 entered into between the Appellants and the Respondents 1 and 2 and the consideration for the sale of shares was Rs.5 Crores and on the date of signing of the agreement, the buyers was paid Rs.1.50 Crores through Cheque dated 16.08.2006 and the balance sum of Rs.3.50 Crores would be allotted in the form of built up space.

40.One cannot ignore a pivotal fact that in so far as the transfer of shares was concerned, it was over by 16.08.2006. In respect of the transfer of 27,50,100 shares, the consideration was fixed at Rs.5 Crores. At the time of entering into the second agreement undated August 2006, the respective parties had in mind to increase the value of shares at a market value of more than Rs.10. But they had not increased the consideration in respect of sale of shares of 27,50,100. In fact, 1st

Respondent/1st Defendant had agreed to pay a consideration of Rs.5 Crores in regard to the shares purchased on 16.08.2006 and the consideration of Rs.1.50 Crores was by a cheque and allotment of built up space of Rs.3.50 Crores. Although this consideration was increased by the Undated August 2006 Second Agreement, there is no 'Offer' and also 'Acceptance' in this regard. Apart from that, in so far as Ex.P4 Undated August 2006 Second Agreement in respect of the additional consideration of Rs.5 Crores by means of an allotment of built up space, on the side of the Appellants/Plaintiffs, no offer or corresponding consideration was paid.

41.In this connection, it is not out of place for this Court to make a significant mention that notwithstanding the fact that in Ex.P4 Second Agreement, a reference was made with regard to the First Agreement Ex.P3 dated 16.08.2006, yet, in the considered opinion of this Court, the Undated August 2006 Second Agreement Ex.P4 is a distinct and separate one. Also that, Ex.P3 Agreement dated 16.08.2006 (1st Agreement) pertains to the transfer of shares and the receipt of cheque for Rs.1.50 Crores and the remaining consideration of Rs.3.50 Crores by means of Ex.D1 Letter dated 15.01.2007 of allotment of built up space.

42.It is to be noted that when Ex.P4 Undated August 2006 |Second Agreement is not supported by consideration and also that there was no increase in sale consideration, but since the said agreement was only among the relatives of the Appellants/Plaintiffs, then, the offer made in the said agreement is to be characterised only as a 'Gratuitous Offer' by the Respondents/Defendants to and in favour of the Appellants/Plaintiffs and accordingly, it is held so by this Court based on the facts and circumstances of the case which float on the surface.

43.It is to be pointed out that Ex.P7 Xerox Copy of Cheque dated 25.10.2006 issued by the 1st Defendant addressed to the 1st Appellant/1st Plaintiff was for Rs.25 Lakhs. Even though the 2nd Appellant/2nd Plaintiff had staked a claim in C.P.No.29 of 2007 before the Company Law Board that he treated the loan amount of Rs.25 lakhs as part consideration for the transfer of shares, no documentary receipt was issued by him to say that the said sum was received in respect of part consideration for the transfer of shares. Consequently, Ex.P7 Xerox Copy of Cheque for a sum of Rs.25 lakhs, cannot be linked with that of Ex.P3 and Ex.P4 the two Agreements entered into between the parties. In fact, the Company Law Board in his Ex.P5 Order dated 07.05.2009 at paragraph 26 had observed as under:

> 6. ... Admittedly, the Petitioners have transferred the shares vide agreement dated 16.8.2006 and subsequently signed the share transfer forms. The only grievance of the Petitioner is that the Respondent has failed to pay the balance consideration as mentioned in the agreement dated 16.8.2006. Having transferred the shares, the Petitioners cannot seek revocation of shares already recorded on the grounds of failure to pay the consideration by the Respondents.

44.Also that, at the risk of repetition, this Court points out that the Company Law Board in its Order (Ex.P5) dated 07.05.2009 in C.P.No.29 of 2007 had opined that the 2nd Appellant/2nd Plaintiff had admitted his signatures on the share transfer forms and the resignation letter dated 16.08.2006 in pursuance of the agreement dated 16.08.2006 and came to the conclusion that the veracity of the

signatures on the reverse side of the share certificates was of no relevance to the share transfer which was effected in pursuance of the agreement.

45.It is to be relevantly pointed out by this Court that even though the Appellants failed before the Company Law Board in C.P.No.29 of 2007 and as per Ex.P3, the total consideration was Rs.5 Crores. The 2nd Appellant/2nd Plaintiff had transferred the entire shares. He had not transferred the shares valued Rs.1.50 Crores for which he received the payment through Cheque. However, on that count, he had not held back the transfer of remaining shares.

46.In Law, when the respective consenting parties had entered into an agreement, the efficacy of the same can be gone into by a Court of Law with a view to find out as to whether the consideration was a real and not an illusory one, yet, want of consideration is to be established by a person, who alleges the same. Therefore, the question whether a particular agreement is a 'Gratuitous one' or there is 'Lack of Consideration' can very well be enquired/gone into by a Court of Law and especially when the agreement in issue is claimed to be an unenforceable one for 'want of consideration'.

47.In so far as the plea of the Appellants that the stand of the Respondents to the effect that nowhere the 3rd Respondent had denied Ex.P4 Agreement is an invalid or void or the same is in contravention of Section 25 of the Indian Contract Act, 1872 and in this regard, the attitude of the Respondents clearly attracts the ingredients of Order 6 Rule 8 of the Civil Procedure Code, it is to be pointed out by this Court that the Respondents/Defendants in the Written Statement at paragraph 27, had specifically pleaded that under the two agreements executed in August 2006, they were not in dues to pay any amounts claimed by the Appellants/Plaintiffs. Only if such matters are not expressly pleaded no evidence thereof, can, as a rule, be let in during trial of the main case.

48.In the present case, on going through the Written Statement filed by the Respondents/Defendants, it cannot be said that there are lack of pleadings to attract the ingredients of Order 6 Rule 8 of the Civil Procedure Code. Viewed in that perspective, the contra plea taken on behalf of the Appellants/Plaintiffs is not acceded to by this Court.

49.Even though on the side of the Respondents/Defendants, a stand is taken before this Court that the Appellants/Plaintiffs had not approached this Court with clean hands because of their prevaricating stands one at the Tribunal and before this Court, since Ex.P5 Order of the Company Law Board dated 07.05.2009 in C.P.No.29 of 2007 was not assailed by the affected parties and also that, for the violation of agreement, the Civil Court is the proper/ competent Forum, this Court is not delving deep into the same, since it is a futile one.

50.As seen from the attendant facts of the present case, when the 2nd Appellant/2nd Plaintiff handed over to the 3rd Respondent/3rd Defendant's family, the aspect of execution of the project at the Congress Grounds, then, this Court unhesitatingly holds that the Respondents/Defendants are liable to pay the sum relating to Ex.P3 First Agreement dated 16.08.2006 i.e., a sum of Rs.3.50 Crores with interest only at the rate of 6% p.a. with effect from 16.08.2006 till the date of payment.

51.In view of the foregoings and in the light of the detailed discussions, it is held by this Court that before a Court of Law the efficacy of business agreement can be assailed by an aggrieved/ affected party that Ex.P4 Undated August 2006 Second Agreement is a distinct and separate one and further that, the Respondents/Defendants are directed to pay a sum of Rs.3.50 Crores with interest at 6% p.a. from 16.08.2006 till date of payment and accordingly, the Point Nos.1, 2 and 4 are so answered.

Point No.3:

52.A reading of Ex.P3 First Agreement dated 16.08.2006 in a crystalline fashion indicates that the same was entered into between the 1st Appellant/1st Plaintiff Company represented by the 2nd Appellant/2nd Plaintiff and the Respondents 1 and 2/Defendants 1 and 2 represented by the 3rd Respondent/3rd Defendant. Furthermore, as per the contents of Ex.P3 Agreement dated 16.08.2006 the Respondents/Defendants do have an obligation to pay an amount of Rs.5 Crores. Admittedly, a sum of Rs.1.50 Crores was paid through cheque on Ex.P3 Agreement dated 16.08.2006. The remaining Rs.3.50 Crores, as per Ex.P3 Agreement, would be allotted in the form of built up space in the proposed construction at the Congress Grounds within a period of six months.

53.On behalf of the Respondents/Defendants, the letter dated 15.01.2007 of the 2nd Respondent/2nd Defendant addressed to the 1st Appellant/1st Plaintiff, which is marked as Ex.D1, in and by which, it was mentioned that as per terms of Agreement dated 16.08.2006 (Ex.P3), the 2nd Respondent/2nd Defendant had allotted 3500 sq.ft. of built up area in the fourth floor of the proposed construction on the western wing facing the lifts inclusive of proportionate share of common areas at Congress Grounds Door No.573 and 574 Anna Salai, Teynampet, Chennai 600 002. Also, the said Ex.D1 categorically points out that the exact location would be demarcated for the benefit of the 1st Appellant/1st Plaintiff, the moment final sanctioned plans are obtained from the CMDA.

54.The Appellants/Plaintiffs filed the Plaint before the Office of the Registry on 17.09.2009. Therefore, one can come to a safe conclusion that the non-performance of Ex.P3 Agreement dated 16.08.2006 was elongated till Ex.D1 Letter dated 15.01.2007 and resultantly, the suit filed by the Appellants/Plaintiffs is well within the period of Limitation and the 3rd Point is answered accordingly.

Conclusion:

55.In fine, the Original Side Appeal is dismissed without costs. Resultantly, the Judgment in C.S.No.875 of 2009 dated 06.01.2017 passed by the Learned Single Judge is affirmed by this Court for the reasons assigned in this Appeal. However, to prevent an aberration of Justice and in furtherance of substantial cause of Justice, this Court grants two months time, to make payment, of course, from the date of receipt of copy of this Judgment.

(M.V., J.) (S.V.N., J.)

Speaking Judgment

Index :Yes

Internet :Yes

Sgl

M.VENUGOPAL, J.
and
S.VAIDYANAHTAN, J.

Sgl

JUDGMENT in

24.04.2018