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

Reserved on: 25.07.2024
Pronounced on: 20.08.2024

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

\+ EX.P. 128/2012

M/S HOTEL MARINA & ANR .....Decree Holders

Through: Mr.S.K.Maniktala, Mr.Udit Maniktala, Mr.Mohit Sharma, Mr.Kritik, Advs.

versus

VIBHA MEHTA .....Judgement Debtor

Through: Ms.Manali Singhal, Ms.Meenakshi Sood, Mr.Santosh Sachi, Ms.Aanchal Kapoor, Mr.Deepak Singh Rawat, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

EX.APPL.(OS) 101/2023

1. As the Judgment Debtor (in short, 'JD') is represented through a counsel, the present application has been rendered infructuous and is disposed of accordingly.

EA 386/2017

2. This case reflects the old saying which is that '*it is easier to obtain a decree from a Court than to execute it'*. In a Suit which was filed in the year 2005 praying for a decree of dissolution of a partnership firm named M/s Hotel Marina, and which Suit was

decreed in terms of the Settlement Agreement dated 03.03.2006, the parties have spent next 18 years trying to execute the said decree.

Background of the dispute:

3. As a brief background to the present petition, the Decree Holder no. 2 and the Judgment Debtor are related to each other as father-in-law and daughter-in-law. They both had 8% each share in the partnership firm M/s Hotel Marina- Decree Holder no. 1 (hereinafter referred to as 'Partnership Firm').

4. The JD herein filed a Suit bearing No. CS(OS) 1703/2005 titled as ***Mrs. Vibha Mehta v. M/s Hotel Marina,*** before this Court, praying for dissolution of the Partnership Firm and rendition of its accounts.

5. The said Suit was settled between the parties and in pursuance of the said settlement, they moved a joint application dated 03.03.2006 under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 (in short, 'CPC'), praying for the Court to pass a decree in terms of the said Settlement Agreement. The terms of the said settlement are relevant and are reproduced herein below:

> *"1. The parties have amicably, by their free will and consent compromised the present suit on the following terms:*
>
> *(i) The Defendant No. 8 shall pay to the Plaintiff a sum of Rs.2,00,00,000/- (Rupees Two Crores only) on or before 30th March, 2006.*
>
> *(ii) The said payment shall be in full and final settlement and adjustment of any and all rights, title or interest of the Plaintiff in the Defendant No. 1 Firm and the assets, properties, belongings, tenancy and business*

and affairs of the said Firm including Plaintiff's 8% share in the said Firm.

(iii) Upon the said payment,

(a) The Plaintiff shall cease to have any share in the Defendant No. 1 Firm and shall also have no claim or demand upon the said Firm.

(b) The plaintiff shall have retired from the Defendant No.1 firm with effect from 1st April 2006 or earlier when payment is made.

(c) The plaintiff shall have no subsisting dispute or difference with any of the defendants firms and all its partners all disputes and differences same shall be deemed to to be fully and finally, unconditionally and absolutely satisfied.

(d) The share of the plaintiff shall stand transferred to the Defendant No.8 automatically and without requirement of doing of any act of omission or commission on the part of any of the parties hereto. The defendant No.8 shall be the sole and absolute owner of the 8% share held by the plaintiff in the Defendant No.1 firm until now.

(e) The rights of the plaintiff in tenancy of the Defendant No.1 firm in respect of Hotel Marina at premises No.G- 9, Connaught Place, New Delhi shall stand surrendered to the surviving partners of the Defendant No.1 firm and the plaintiff shall have no subsisting right or interest in the tenancy. It shall be open for the surviving partners of the Defendant No.1 firm to apply to the landlord for deletion of the plaintiff as a co-tenant in respect of the said premises.

(f) In the event, the landlord for the said premises does not consent to the said deletion, the plaintiff shall authorized and keep authorized Defendant No.8 or his nominee to

act for the plaintiff, in her name and on her behalf on all matters concerning the said tenancy. The said authorization shall be irrevocable and shall be and shall be executed as per the draft enclosed herewith and marked as Annexure-1. The plaintiff undertakes not to revoke the said authorization at any time and for any reason.

(g) The plaintiff undertakes to this Hon'ble Court that from time to time she shall at the request of Defendant No.8 sign and execute any and all documents, papers and deeds required to give effect to the terms of this Agreement including the Dissolution Deed.

(h) That the other defendants other than defendant No.8 are having no objection to the purchase of defendant No.8 above purchasing the share of plaintiff.

2. The parties stated the Agreement arrived at between them, as aforesaid, is lawful and fully and finally settles the subject matter of the present suit and in any manner relating to the Defendant No.1 firm. With the abovesaid settlement, nothing with respect to the Defendant No.1 firm remains to be adjudicated."

6. The said Suit was decreed by this Court *vide* its Order dated 03.03.2006 based on the above settlement.

7. In terms of the said Settlement Agreement, the Decree Holder (in short, 'DH') called upon the JD to execute certain documents including a Retirement Deed; General Power of Attorney (Irrevocable); Receipt in acknowledgement of consideration amount; Affidavit regarding surrender of tenancy rights; Memorandum of

Understanding; and Letter of Surrender of tenancy in favour of all the remaining partners.

8. The DH, on 20.03.2006, also prepared a Demand Draft for an amount of Rs.2 crores.

9. On 29.03.2006, however, the learned counsel for the JD called upon the learned counsel for the DH to carry out certain changes in the documents that had been circulated by him, primarily to reflect that the documents have been executed in terms of the Settlement Agreement arrived at before the Court. The JD also objected to clauses that would normally be found in the Retirement Deed, like the settlement of all accounts, including the share of profit in the partnership firm and the amount standing to her credit in the accounts of the firm. The change that was suggested by the JD primarily was on her claim that the JD has settled the Suit for a lump sum amount of Rs.2 crores which was excluding the profits and the capital standing in her name in the accounts of the firm.

10. The DH filed an application before this Court on 29.03.2006, being I.A. 4079/2006, praying for a direction to the JD to execute the documents that had been circulated by the DH to the JD.

11. The DH, *vide* its letter dated 31.03.2006, addressed through the counsel, also informed the learned counsel for the JD that the changes that were suggested by the JD were not acceptable to the DH. In this letter, it is further mentioned that the changes that were earlier suggested by the counsel for the JD had been carried out in the documents, but the JD had raised new objections which were not acceptable to the DH. It was further mentioned that the DH had got

prepared the demand draft for Rs. 2 crores which was shown to the JD on 29.03.2006 when the parties met in the High Court to execute the required documents.

12. On 29.04.2006, the DH filed another application, being I.A.5215/2006, seeking permission of this Court to deposit in the Court the demand draft dated 20.03.2006 of Rs.2 crores.

13. As far as the I.A. 5215/2006 is concerned, this Court by its Order dated 08.05.2006, permitted the DH to deposit the amount of Rs.2 crores in a fixed deposit with the Registry of this Court. The DH duly complied with the said Order, and deposited the said amount on 16.05.2006. The said amount continues to be deposited with this Court in a form of a Fixed Deposit Receipt.

14. This Court by its subsequent Order dated 02.06.2006 decided the aforementioned applications, that are, I.A. 4079/2006 and I.A. 5215/2006, in favour of the DH, and found no justifiable reason for the JD not to execute the documents circulated by the DH. The Court allowed the I.A.4079/2006. The Court further directed that as far as the amount of Rs.2 crores lying deposited with the Registry of this Court is concerned, the JD shall be free to withdraw the same after executing the documents, the text whereof had been filed by the DH with the application, that is, I.A.4079/2006.

15. The JD, feeling aggrieved of the said order, filed an appeal, being FAO(OS) 492/2006 titled as ***'Vibha Mehta v. M/s Hotel Marina & Ors.***'. The said appeal was allowed by the Division Bench of this Court vide its Judgment dated 03.01.2012, holding that after the decree was passed, in case the JD was backing out of the said

undertaking/settlement and was not signing the documents, proper course of action for the DH was to file execution petition seeking execution of the decree that had been passed in the Suit. It was held that it is only in the said execution that the Court could have gone into the issue as to whether the documents which were sought to be got executed by the DH from the JD were in terms of the decree or not.

16. In the said order, the Division Bench of the Court also recorded the submission of the learned counsel appearing for the DH that the amount of Rs. 2 crores, directed by the learned Single Judge to be released to the JD, be not released to the JD as the JD was not willing to sign the documents. The Court held that it will be open to the DH to either withdraw the said amount or to let it remain the Court.

17. The JD then filed an application, being I.A. 11371/2012, in the Suit praying for recalling of the Judgment dated 03.03.2006.

18. In the said application, the plea taken by the JD was that the payment of Rs.2 crores had to be made by the DH on or before 30.03.2006, which he failed to do, and that the settlement between the parties was only with regard to the dispute raised in the plaint concerning the plaintiff's 8% share in the partnership firm. It was contended by the JD that there were some other amounts which the JD had given either as a loan to the firm or which were otherwise due to the JD from the Partnership Firm and were not the subject matter of the said Suit, and accordingly were also not the subject matter of the settlement *inter se* between the parties.

19. The said application were, however, rejected by this Court *vide* its Judgment dated 08.10.2012. In the judgment, the Court rejected the

submission of the JD that certain other amounts, apart from Rs. 2 crores, were also to be paid by the DH and that those were not part of the settlement. The Court observed as under:

> *"14. In terms of the settlement between the parties, the plaintiff was to retire from the firm with effect from 01.04.2006 or earlier when payment was made. Therefore, it cannot be said that defendant No. 8 had agreed to pay to the plaintiff her share in the profits till 31.03.2006. In the event of payment of Rs 2 crore being made to the plaintiff at any time prior to 30.03.2006, she would have retired from the firm from that very date and there would be no question of paying to her any share in the profits which the firm earned after that payment. It is true that ordinarily a partner would get his/her share in the profits of the firm till the date he/she actually retires from the firm. But, nothing prevents him/her from accepting a flat amount instead of insisting upon settling of the accounts till the date of her retirement. Even if the plaintiff was to retire from the firm only with effect from 01.04.2006, nothing prevented her from agreeing to accept a flat sum instead of insisting upon payments of profits which accrued to her share till the date of her retirement.*
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> *15. Since there was no linkage between the amount of Rs 2 crore which defendant No. 8 agreed to pay to the plaintiff and the share of the plaintiff in the profits of the partnership firm as on 3.3.2006 or 31.3.2006, no obligation was cast on defendant No. 8 to disclose to the plaintiff the profits which the partnership firm had earned till 03.03.2006.*
>
> *xxx*
>
> *18. The plaintiff herself has placed on record details of the amount payment to her as on 31.12.2005. This, according to her, was the statement shown to her at the time she entered into settlement with defendant No. 8. This is*

not the case of the plaintiff that the partnership firm earned any substantial profit between 31.12.2005 and 03.03.2006. The case of defendant No. 8 in his reply is that there was no transaction by the firm between 31.12.2005 to 03.03.2006. If no profits were earned by the firm between 31.12.2005 to 03.03.2006, non-disclosure of the accounts as on 03.03.2005 becomes absolutely immaterial and it cannot be said that had those accounts been disclosed to the plaintiff, she would not have agreed to accept Rs 2 crore from defendant No. 8.

19. As regards profits earned between 03.03.2006 to 31.03.2006, as noted earlier, there was no agreement between the parties that the plaintiff was entitled to a share in the profits that were to be earned by the partnership firm till 31.03.2006 or till the date she retired from the firm. As noted earlier, the plaintiff would have retired from the firm at any time on or after 03.03.2006 in case the agreed amount of Rs.2 crore was paid to her. The accounts till 31.03.2006 could have been prepared only after the close of the financial year. Therefore, there was no question of the profits of the firm for the whole of the Financial Year 2005-06 being disclosed to the plaintiff on or before 03.03.2006. Even if it is presumed that defendant No. 8 had, in his contemplation, the profit which the firm could be earning between 03.03.2006 to 31.03.2006, that would make no difference to the merits of the case since there was no agreement between the parties that the plaintiff was necessarily entitled to a share in the profits earned by firm during the whole of the Financial Year 2005-06. Defendant No. 8 had agreed to pay a lump sum amount of Rs 2 crore to the plaintiff. Had there been losses in the firm between 03.03.2006 to 31.03.2006, he would still be liable to pay that much amount to the plaintiff for the simple reason that the amount which he had agreed to pay to the plaintiff was not made dependent upon the

> *profits to be earned by the firm during the Financial Year 2005-06. If the losses of the firm could not have been effected the amount payable to the plaintiff in her settlement with defendant No. 4, it can hardly be accepted that profits earned by the firm between 03.03.2006 to 31.03.2006 would affect the amount payable to her under the settlement. Once, the plaintiff had agreed to accept a lump sum amount of Rs 2 crore from defendant No. 8, the profits or losses of the firm became insignificant and she was entitled to nothing more or less than that particular amount, irrespective of the profits earned by the firm and her share in the profits of the firm."*

20. The JD, feeling aggrieved of the said judgment of the learned Single Judge, challenged the same by way of an appeal, being FAO(OS) 15/2013 titled as '***Mrs. Vibha Mehta v. M/s. Hotel Marina & Ors.***', which came to be dismissed by the Division Bench of this Court *vide* its Judgment dated 31.03.2014. In the said judgment, again the JD sought to contend that the settlement between the parties did not relate to the amount standing to the credit of the JD in her capital account of the firm. The Court, on this submission, framed the following issue for its consideration:

> *"21. The Court has considered the submissions of the parties. The two questions that arise are (a) whether the entire settlement is vitiated under any provision of the Contract Act, in terms of the explanation to Order XXIII, Rule 3, CPC; and (b) whether the settlement, if valid, relates only to the plaintiff's 8% share in the partnership firm, or to all dues between them, including the capital account."*
>
> (Emphasis supplied)

21. The Court answered the said issue by holding as under:

> *"33. On the second question that arises in this case, the issue is whether the settlement extended only to the plaintiff's 8% share in the firm (excluding her capital account and other dues from the firm), or to the entire gamut of rights and interests. The answer to this question is made clear by the text of the compromise agreement itself. It records that the payment of Rs.2 crore "shall be in full and final settlement and adjustment of any and all right, title and interest of the Plaintiff". (emphasis supplied). It further records that this also exhausts the plaintiff's claims to "the assets, properties belongings, tenancy and business and affairs of the said Firm including plaintiff's 8% share in the said Firm." The argument that the compromise extended only to the 8% share is thus clearly specious. The wording is broad, without exceptions or limitations. In fact, the agreement clearly contemplates more than just the 8% share as it only forms a sub-set ("includes") of the compromise. The fact that the plaintiff intended to settle only the 8% share, whether correct or not, cannot wash away the clear and express terms of the bilateral agreement of the parties. The terms "any and all" put to rest any vestigial interest that may remain, reaffirming this in clause 3(a), which categorically records that "shall also have no claim or demand upon the said Firm." This flies in the face of the plaintiff's claim. The intention of the parties is important in construing this document, but the 'intention' that the Court must consider is that which emanates from the words used by the parties bilaterally, rather than the meaning sought to be intended by one. Thus, the compromise in this case includes both the 8% share of the plaintiff and her capital account in the firm, as also any other money due (as a loan or otherwise) from the firm at the time of the settlement. In short, any cause of action*

between the plaintiff and Defendant No. 8, in their character as partners of the firm, is exhausted."

22. Still feeling aggrieved of the same, the JD challenged the same by way of a petition under Article 136 of the Constitution of India, being SLP(C) 20124/2014 titled as '***Vibha Mehta v. M/s Hotel Marina & Ors.***'. The same was dismissed by the Supreme Court *vide* Order dated 19.08.2014.

23. This, however, still could not bring an end to the disputes between the parties, and the present execution petition was kept pending before this Court with certain orders being passed therein and appeals of the respective parties, which are referred herein below.

24. A learned Single Judge of this Court, passed an Order dated 17.01.2017, recording the submission of the learned counsel for the DH, that the DH would be satisfied if the JD were to agree and sign on the communication to the landlords, thereby, withdrawing herself from the tenancy rights in the premises in use of the DH firm as a pre-condition to withdrawing the amount deposited before this Court. The Court, therefore, directed that a draft of such communication shall be circulated by way of a formal notice by the DH in terms of Order XXI Rule 34 of the CPC, whereafter the JD shall respond in the Court by submitting her written objections, if any. The Court further clarified that though the present Execution Petition has been filed praying for certain other documents to be executed by the JD as well, but presently, the DH feels that there may not be any need for such further

documents to be executed and he would take a fresh call on such request on the next date of hearing.

25. The JD feeling aggrieved of the said order, challenged the same by way of appeal, being EFA(OS) 09/2017 titled as '***Vibha Mehta v. M/s Hotel Marina & Ors.***', which was disposed of by the Division Bench of this Court *vide* its Order dated 06.03.2017, directing the learned Single Judge to decide EA No.574/2016, that is, the objection filed by the JD.

26. Subsequent to the above, by an order dated 09.03.2018, a learned Single Judge of this Court, *prima facie* found that the DH are abusing the process of this Court by keeping this proceeding pending, thereby depriving the JD of the monies which she was to get as far back as on 30.03.2006, that is, when the Suit was originally decreed by this Court.

27. Aggrieved of such observation, the DH challenged the same by way of an appeal, being EFA(OS) 6/2018, titled as '***M/s Hotel Marina & Anr. v. Mrs.Vibha Mehta***'. The Division Bench of this Court *vide* its Judgment dated 01.08.2019, held that the Execution Petition and the applications be heard and all the grounds urged by both the parties should be considered and any observation made in the impugned order dated 09.03.2018 would not stand in the way of either of the parties.

Submissions of the learned counsel for the JD:

28. The learned counsel for the JD submits that the present Execution Petition is liable to be dismissed as the DH was to pay a sum of Rs.2 crores to the JD on or before 30.03.2006. The DH has admittedly failed to do so. She submits that it is only on 29.04.2006,

that is after the date of payment had already passed, that the DH filed an application before this Court seeking permission of this court to deposit the said amount of Rs.2 crores in Court. She submits that therefore, the DH having not made the payment within the time stipulated in the Decree, is not entitled to seek the execution thereof.

29. She submits that the execution of the documents by the JD was not a pre-condition for the DH to pay the requisite amount to the JD. Placing reliance on Section 52 of the Indian Contract Act, 1872 (in short, 'Contract Act'), she submits that where an order of performance of reciprocal promise has been stipulated, they must be performed in that order. She submits that in the present case, the Compromise Deed clearly stipulated that first the payment would be made by the DH and only thereafter the JD will sign the documents. Merely on the pretext that the JD was not signing the documents, DH could not have refused to pay the amount to the JD, and having not paid the same, cannot now seek enforcement of the decree.

30. She submits that the payment of the amount of Rs.2 crores on or before 30.03.2006 was of essence to the Settlement Agreement/Contract between the parties, and having failed to perform the same in time stipulated therefor, in terms of Section 55 of the Contract Act, the compromise becomes voidable.

31. She further submits that even otherwise, the JD had raised valid objection on the documents that were circulated by the DH for her execution. She submits that the Compromise Agreement was only with respect to the 8% share of the JD in the Partnership firm. JD never settled the amount standing to her credit in the capital account

of the firm, which was almost at Rs.1.69 crores as on 31.03.2006. She submits that this amount was never settled in the Settlement Agreement that was entered into between the parties and basis whereof the decree was passed by this Court in CS(OS) 1703/2005. She submits that the JD in terms of the compromise was transferring her share in the Partnership Firm to another partner, therefore, the consideration of Rs.2 crores was only with respect to the value of the share of the JD and not towards her capital account. She submits that the settlement was only with respect to the "subject matter of the suit" which was the share, that is, the value of 8% shares of the JD in the Partnership Firm, and not the amount standing to the credit of the JD in the capital account in the firm.

32. She has placed reliance on the following judgments in support of her arguments:

a) ***Chen Shen Ling v. Nand Kishore Jhajharia,*** (1973) 3 SCC 376;

b) ***Arosan Enterprises Ltd. v. Union of India & Anr.,*** (1999) 9 SCC 449;

c) ***GM Northern Railways & Anr. v. Sarvesh Chopra,*** (2002) 4 SCC 45;

d) ***Jagdish Mani Tripathi v. Braj Bhooshan Tiwari & Anr.,*** 2021 SCC OnLine All 1224;

e) ***Pioneer Engineering Co. v. D.H. Machine Tools,*** 1985 SCC OnLine Del 176;

f) ***Pyari Mohan Das v. Durga Sankar Das & Anr.,*** 1958 SCC OnLine Ori 8; and,

g) Kanhaiya Lal K. v. Union of India & Anr., 1981 SCC OnLine Raj 101.

Submissions of the learned counsel for the DH:

33. On the other hand, the learned counsel for the DH submits that the DH was always ready and willing to perform his obligation under the Settlement Agreement. The DH had prepared a demand draft of Rs.2 crores to be handed over to the JD, as early as on 20.03.2006, that is, much prior to the stipulated date. He had also circulated the documents that were required to be signed by the JD in order to give effect to the transfer of her share in the Partnership Firm. The JD, however, raised frivolous objections against the said documents. These objections were found to be frivolous right up to the Supreme Court, as is evident from the dismissal of the Special Leave Petition, being SLP(C) 20124/2014.

34. He submits that as the JD was refusing to perform her reciprocal promise, the DH was within his right to not pay the amount of Rs.2 crores. In fact, the DH had even prior to the said date, filed an application seeking a direction from this Court to the JD to execute documents. The DH also filed an application to show his *bona fide* and to deposit a sum of Rs.2 crores in this Court. Later, in terms of the permission granted, the said amount was duly deposited in this Court and same is lying deposited with this Court till date.

35. He placed reliance on the judgment of the Supreme Court in ***Rangnath Haridas v. Dr. Shrikant B. Hegde,*** (2006) 7 SCC 513, to submit that in a consent decree where reciprocal obligations are cast on the parties, they should be performed simultaneously.

36. On the objection of the JD that the JD had not settled the amount standing to the credit of her capital account, the learned counsel for the DH submits that in view of the Judgment dated 31.03.2014 of the Division Bench of this Court in FAO(OS) 15/2013, the JD can no longer be heard to agitate the same. He submits that even otherwise, the Compromise Deed/Joint Application very clearly records that it had settled all the claims of the JD in the Partnership Firm and expressly states that she will have no further claim in the Partnership Firm. He submits that the claim of the JD on the capital account is therefore merely an afterthought and an excuse for not performing her part as per the Decree.

Analysis and findings:

37. I have considered the submissions of the learned counsels for the parties.

38. As is evident from the above, there are two-fold objections of the JD against the present execution petition filed by the DH:

a) That the DH has failed to pay the amount of Rs.2 crores to the JD on or before 30.03.2006, and is therefore not entitled to seek execution of the decree; and,

b) That the JD had agreed to receive the amount of Rs.2 crores only as against the value of her 8% share held in the Partnership Firm and not towards the amount standing to the credit of the JD in her capital account maintained by the Partnership Firm.

39. As far as the objection of the JD that the DH is not entitled to seek the execution of the decree as he failed to pay the sum of Rs.2 crores to the JD on or before 30.03.2006, it is not disputed that the DH had prepared a demand draft of Rs.2 crores in the name of the JD on 20.03.2006. It is also not disputed that the DH had circulated a set of documents for the execution thereof by the JD. The JD, however, by its letter dated 29.03.2006 raised certain objections to these documents. The DH, at this stage, not only filed an application, being I.A. 4079/2006 praying for a direction to the JD to execute the documents, but also, later, on 29.04.2006, filed an application, being I.A.5215/2006, seeking permission of this Court to deposit the sum of Rs.2 crores in this Court.

40. From the said sequence of events, it is evident that the DH was always ready and willing to perform his obligation under the Settlement Agreement/Decree. It was only the JD who was refusing to perform her obligation under the Decree, which, as has been discussed herein later, was for unjustified reason. The JD, therefore, cannot claim that the DH failed to perform his obligation in terms of the Settlement Agreement/Decree within time or has made himself disentitled to seek execution of the decree in question.

41. Section 51 of the Contract Act prescribes that where a contract consists of a reciprocal promise to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Section 52 of the Contract Act further provides that where the order in which the reciprocal promises are to be performed is expressly fixed by the

contract, they shall be performed in that very order. Sections 51 and 52 of the Contract Act are reproduced hereinbelow:

> *"51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform. - When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.*
>
> *52. Order of performance of reciprocal promises. - Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires."*

42. Applying the above provisions to the facts of the present case, it is to be noted that the Settlement Agreement/Decree contained a reciprocal promise, wherein the DH was obliged to pay a sum of Rs.2 crores to the JD on or before 30.03.2006 and upon the said payment, the JD was *inter alia* to sign and execute any and all documents/papers and deed required for giving effect to the terms of the agreement, including the Dissolution Deed. While the DH was, as noted hereinabove, ready and willing to perform his obligation of making the payment of Rs.2 crores to the JD, the JD was not ready and willing to perform her obligation even upon receiving the said amount of Rs.2 crores, even if it had been paid by the DH within time. The JD, therefore, cannot claim that the DH should still have continued and made payment of Rs.2 crores to her, knowing fully well that the JD was not ready and willing to perform her reciprocal

promise. The DH rightly acted in such a situation (though in a wrong proceedings) by first filing an application before this Court seeking a direction to the JD to perform her obligation under the contract and, thereafter, to show his *bona fide*, also filing an application to deposit the sum of Rs.2 crores before this Court. It cannot, therefore, be said that the DH has disentitled himself from claiming execution of the decree due to non-payment of Rs.2 crores to the JD on or before 30.03.2006.

43. As far as the argument of the JD that the payment of Rs.2 crores, which was to be made by the DH to JD, was a 'pre-condition' to the execution of the documents by the JD and, therefore, in the order of sequence had to be performed first by the DH before calling upon the JD to perform her obligation under the Agreement/Decree, the same cannot be sustained.

44. No doubt the Settlement Agreement between the parties states that it is '*Upon the said payment'* that the JD shall '*sign and execute any and all documents, papers and deeds required to give effect to the terms of this Agreement including the Dissolution Deed*', the terms of the Settlement Agreement are not to be read as a statue. The intention of the parties is to be gathered from the terms of the Agreement as a whole. It was the intent of the parties that the DH shall pay Rs. 2 crores to the JD and JD shall walk out of the partnership. The JD was also to sign all documents that may be required by the DH to give effect to the Settlement terms and to safeguard his interest. There were therefore, reciprocal promises, with each to be performed simultaneously and by the JD even in future.

45. In ***Ragunath Haridas*** (supra), the Supreme Court, while considering a case where similar submissions were made in regard to a settlement agreement, held that the reciprocal promises of the parties in such cases should be directed to be acted upon simultaneously. In fact, in one of the changes suggested by the JD herself in the Deed of Retirement drafted by the DH for her signatures, the JD suggested that the amount be paid "*simultaneously*" upon the execution of the said document. This itself belies the objection now raised by the JD.

46. In ***Amteshwar Anand v. Virender Mohan Singh & Ors.***, (2006) 1 SCC 148, the Supreme Court held that mere use of the words "subject to" in the context of the agreements therein would not be a precondition and give a right to the party to rescind the agreement. I may quote from the judgment as under:

> *"**24.** We are of the view that the findings of fact arrived at concurrently by the courts below do not require interference by this Court. It cannot be said that the conclusions were unsupported by or were contrary to the evidence on record. On the legal issues also there has been no disagreement. The first issue is whether the two agreements between the appellants and VMS were conditional. Both the courts below have construed the agreements and answered the issue in the negative. As we have already said, each of the first two agreements recorded the relinquishment of rights by AA, KK and Guneeta in the suit properties and assignment of such rights to VMS. This was recorded in the agreements as already having taken place. As far as the first agreement was concerned, the relinquishment of VMS' rights in the Bhopal house was effected by clause (e). Clause d of the second agreement recorded that AA had already received the*

> *consideration in respect of the properties mentioned, from VMS. The further payments to be made by VMS to the three appellants were, on the other hand, to be made in future. The phrase "subject to the payments being made" in clause (d) of the first agreement and clause f of the second agreement does not operate as a precondition to the relinquishment of the rights of KK, Guneeta and AA in the suit properties. According to these clauses of the agreements, vesting had already taken place or was to take place with the execution of the agreements. In this context, to construe the phrase "subject to" as amounting to a precondition would be contrary to the body of the clauses in which the phrase appears. The only meaning we can give to the phrase consistently with the other terms of the agreement, is that it imposed a personal obligation on VMS to make the payments [See Lester, Re, 1942 Ch 324, 326 : (1942) 1 All ER 646] . By the agreement, as has been rightly held by the courts below, the parties had finally resolved disputes with regard to their shares in the suit properties. Therefore, even if VMS had defaulted in making payment to the appellants of the amounts as specified in the agreements that would not give the appellants a ground to rescind the agreements."*

47. In ***Chen Shen Ling*** (supra), the Supreme Court held that where the decree imposes mutual obligations on both the parties in such a way that the performance of one is conditional on the performance by the other, no execution can be ordered unless the party seeking execution not only offers to perform his part but when objection was taken, satisfy the executing court that he was in a position to do so. In the present case, the DH has satisfied both the conditions; not only was he willing to perform his part of the decree, but also satisfied the executing court of his position to do so by depositing the sum of Rs. 2

crores in this Court. The said judgment therefore, does not support the case of the JD.

48. In ***Arosan Enterprises Ltd.*** (supra), the Supreme Court held that mere fixation of a period of delivery or a time in regard thereto does not itself make the time of the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein; the agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the present case, when the Settlement Agreement is so read, the only finding can be that subject to the JD agreeing to sign the documents in terms of the Settlement Agreement, the DH was to make the payment of Rs. 2 crores to her on or before 30.03.2006. As the JD, even prior to 30.03.2006, had expressed her unwillingness to sign the documents, the DH was under no obligation to still pay the amount of Rs. 2 crores to her.

49. For reasons discussed above, the judgment in ***Sarvesh Chopra*** (supra) would also not be of any assistance to the JD.

50. In ***Jagdish Mani Tripathi*** (supra), the High Court of Allahabad held that Section 55 of the Contract Act would also apply to a decree of the Court founded on compromise in the same manner as any other contract. While there can be no caveat to this proposition, the said judgment, in the facts of the present case, would not come to the aid of the JD.

51. In ***Pioneer Engineering Co.*** (supra), this Court, while holding that in compromise decree where the time was of essence of the

compromise, the Court has no jurisdiction to extend the time, on the facts therein found that the parties had stipulated in their compromise, the consequences of not performing their respective obligations within the stipulated period. The Court therefore, held that the time was of essence and was the basis of the compromise decree. The same cannot be said in the present case.

52. In ***Pyari Mohan Das*** (supra), the Court held that where a person who is to perform a promise is ready and willing to perform and has also offered to perform his promise at the proper time and proper place, the contract is discharged. In the present case, as held hereinabove, the DH was ready and willing to perform his part of the bargain within the stipulated period, therefore, he cannot be said to be in breach of the terms of the compromise.

53. Similarly, the judgment in ***Kanhaiya Lal*** (supra) cannot come to the aid of the JD in the facts of the present case.

54. On the second objection, it is only to be noticed that the JD had raised a similar objection in an application filed in the Suit, that is, I.A. 11371/2012, while seeking recall of the Decree. The Division Bench of this Court, vide its Judgment dated 03.01.2012 passed in FAO(OS) 492/2006, considered the said objection and found no merit in the same. The relevant observations and findings of the Division Bench of this Court have been reproduced hereinabove. Therefore, the objection of the JD that under the decree the consideration of Rs.2 crores was only for her 8% share in the Partnership Firm and not as a full and final settlement even to her claim against the amount standing to her credit in the capital account of the firm, also cannot be

sustained. By raising the objections in spite of the judgment of the Division Bench of this Court referred to hereinabove, the JD, in fact, seeks a review of the judgment of the Division Bench and to re-open the decree that has been passed, which is not permissible in law.

55. Even otherwise, I find absolutely no merit in the said contentions. The terms of the Settlement Agreement are clear and unambiguous. The payment of Rs.2 crores was to be "in full and final settlement and adjustment of any and all right, title or interest" of the JD in the firm and the assets, properties, belongings, tenancy and business and affairs of the firm "including" JD's 8% shares in the said firm. Therefore, all claims of the JD in the firm or against the firm stood settled and the JD was only entitled to a lump sum amount of Rs.2 crores in full and final settlement against all her claims in or against the firm.

56. I, therefore, find that the refusal of the JD to sign the documents that were drafted and placed before her by the DH for giving effect to the terms of the settlement/decree was malafide and without any justified reason.

Conclusion:

57. For the above reasons, I find no merit in the objections raised by the JD to the present Execution Petition.

58. The application is accordingly dismissed.

59. The JD shall pay costs of Rs.1,00,000/- (Rupees One lakh) to the DH within a period of four weeks of this judgment.

EX.P. 128/2012

60. As the objections against the present execution petition have been found to have no merit and have been dismissed, following directions are passed:

a) The learned counsel for the DH submits that during the pendency of the present petition, some of the parties have unfortunately passed away. He has also submitted that certain changes may have to be made to the documents annexed as Annexure-A/5 to the present execution petition in order to show the current status. Accordingly, the DH shall, within a period of two weeks from today, supply to the learned counsel for the JD the modified version of Annexure-A/5;

b) The JD shall execute the documents so supplied, within a period of three weeks thereafter;

c) In case of failure or refusal of the JD to sign and execute these documents, the DH shall be entitled to move an application before this Court in terms of the Order XXI Rule 34(4) of the CPC; and,

d) On the execution of the documents, referred to hereinabove, either by the JD or by an Officer appointed on an application moved by the DH, the amount of Rs.2 crores alongwith interest accrued thereon, lying deposited with this Court, shall be released to the JD.

61. The execution petition is disposed of in the above terms.

NAVIN CHAWLA, J.

AUGUST 20, 2024/Arya/*VS/am*