

(1999) 05 MAD CK 0008

In the Madras High Court

Case No : Original Side Appeal No's. 24 and 25 of 1999 and Civil Miscellaneous Petition No's. 2580 and 2581 of 1999

Dinesh Dalmia

APPELLANT

Vs

Comon Wealth Development Corporation, II, Colf Links, New
Delhi-110003 and DSQ Software Limited, G.R. Complex,
407408, Mount Road, Nandanam, Chennai - 600035

RESPONDENT

Date of Decision : 12-05-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92, Order 39 Rule 3, 104, 140

Securities Contracts (Regulation) Act, 1956 — Section 13, 14, 15, 16, 20

Citation : (1999) 05 MAD CK 0008

Hon'ble Judges : R. Jayasimha Babu, J;A. Subbulakshmy, J

Bench : Division Bench

Advocate : A.K. Mysamy and P. Sivaprakasam, for the Appellant; A.L. Somayajee Senior Counsel for M/s. Mohan Associates, for the Respondent

Final Decision : Dismissed

Judgement

R. Jayasimha Babu, J.—The appellant before us is the plaintiff in C.S.438/1998 which was instituted on the Original Side of this Court for

specific performance of an agreement titled ""Put and Call agreement"" under which the plaintiff asserted a right to purchase from the defendant

Common Wealth Development Corporation (CDC), a statutory corporation incorporated in England and owned by the Government of the United

Kingdom, 38 lakh equity shares in DSQ Software Limited, a public limited company incorporated in 1992 and having its registered office at

Chennai. The agreed purchase price allegedly determined in terms of that agreement for 19 lakh shares covered by the call option was said to

Rs.3,73,67,763/-. Similar sum of Rs.3,73,67,763/- was claimed to be the

amount payable for the other 19 lakh shares covered by the put option, though no such option had admittedly been exercised by the respondent. It was alleged that though that agreement had been drawn up in March 1993 before the public issue and contemporaneously with the shareholder subscription agreement under which CDC had agreed to subscribe for the 38 lakh equity shares of Rs. 10/- each, the same had not been executed as at that point of time such an agreement would have contravened Section 20 of the Securities Contract (Regulation) Act, and that after the repeal of that statutory provision in 1995, parties had agreed to abide by the terms of that unexecuted agreement. It was the stand of the CDC in the affidavit filed on its behalf in support of its application to vacate the ex parte injunction that the plaintiff had obtained, that the plaintiff had not exercised a valid call option at any time: and the defendants not having exercised the put option, an option which defendants alone were competent to exercise, the plaintiff had no claim over any of the shares held by it. It was also the stand of the CDC that the plaintiff had fabricated documents and suppressed material documents which would show that the plaintiff at no time was in a position to raise necessary funds for the purchase of shares in respect of which he could have exercised the call option within the period within which call option could have been validly exercised viz., within a period of five years commencing from the date of execution of the share subscription Agreement which agreement was executed on 28th March, 1993. It was also the stand of the CDC the jumbo share certificate for 38 lakh shares which it had deposited with DSQ Software for being split up into marketable lots of 100, had been retained by the company and the split share certificates had not been issued to it at the instance of the plaintiff who was the Managing Director, and that such action was wholly illegal.

2. After the application to vacate the ex parte injunction was argued and the court had reserved orders, the parties entered into a compromise in

October, 1998 and at their instance, the court recorded the compromise and made a decree in terms of the compromise on 24th October, 1998.

CDC agreed to sell to the plaintiff or his nominee its 38 lakh equity shares in DSQ Software Limited at a price of US\$ 3.80 per equity share

equivalent to Rs. 161 per share at the then prevailing rates of exchange that

price being subject to an upward adjustment, if the price of the shares in the National Stock Exchange on the trading day immediately preceding the completion date was in excess of Rs.300/- amounts in excess of Rs.320/-being ignored. The agreed consideration which aggregated approximately to Rs.61 crores was to be paid by the plaintiff irrevocably at completion on the completion date by a banker's demand draft drawn in favour of the respondents and payable at Mumbai. The plaintiff was to deposit with the Escrow Agent appointed by the parties under the compromise memo, a sum of rupees five crores within a period of seven days from the date the consent terms were recorded by the High Court. DSQ Software Limited which was also a defendant in the suit and party to the compromise, was to deposit with the Escrow Agent the share certificates in marketable lots of 100 equity shares. The Escrow Agent was to deposit the sum of Rs.5 crores in the bank so that interest could be earned on the deposit, such interest being payable to the plaintiff in the event of the plaintiff complying with the terms of compromise. In the event of the plaintiff's failure to complete the transaction, the sum of Rs.5.00 crores and the interest thereon were to be forfeited to CDC. The plaintiff was required to obtain all necessary approvals for acquiring those shares. The plaintiff was to give notice to the respondent and Escrow Agent the likely completion dated which was not to be less than 24 hours from the time the notice was received by the Escrow Agent and the respondent and in any case not later than 30.11.1998.

3. At completion, the plaintiff was to deliver to the Escrow Agent demand draft of an aggregate amount equivalent to the consideration set out in the compromise memo for the sale of the 38 lakh shares, and the respondent was required to deposit with the Escrow Agent 100 blank share transfer forms duly executed by it together with the calculation of the consideration to be received from the plaintiff. Within 24 hours after the receipt of the price from the plaintiff and the transfer deeds from the respondent, the Escrow Agent was to release to the plaintiff the Original share scrips deposited with it by the company together with the transfer forms duly executed by the respondent and deposited by it, as also a cheque for an amount of equal to the interest accrued on the sum of Rs.5.00 crores. The Escrow Agent was to release to the respondent the demand draft

which the plaintiff was required to deposit with the Escrow Agent together with the cheque for Rs.5.00 crores being the amount of the earnest money which sum was to be adjusted towards consideration for the sale of the shares.

4. Clause 2(g) of the terms of compromise provided that

In the event completion does not occur by 12.00 noon on November, 30, 1998 for any reason whatsoever the Earnest money, together with all

interest accrued thereon shall stand forfeited to CDC and DD shall have no rights, claims against and/or recourse to CDC whether under these

consent terms or otherwise howsoever and CDC shall be entitled to deal with the said shares in any manner whatsoever without any interference

from DD to reiterate DSQ and DD recognises and confirm that the said shares shall remain freely transferable and neither DSQ nor DD shall take

any action to restrain and/or restrict and/or prevent the transfer thereof by CDC to any person, thereafter. Accordingly, in the event completion

does not occur as aforesaid, the Escrow Agent shall forthwith and without any reference to DD, release to CDC the original share scrips for the

said shares and a cheque in favour of CDC for an amount of Rs.5.00 crores plus the interest accrued thereon, being the forfeiture by DD of the

Earnest money and interest thereon in favour of CDC.

It was provided in clause 2(1) of the compromise memo that:

upon filing of the application for recording the compromise memo in court, the plaintiff company. DSQ Software and the respondent mutually

release each other from all obligations whether such rights/claims are under the letter dated March 25, 1993 from CDC to DD and his associates

and/or under the draft put and Cal option agreement annexed thereto and/or under any other understanding/agreement ""document that may have

been made/executed/exchanged between CDC, DD and/or the sponsors and/or whether under contract, tort or otherwise at law "shall cease"

5. The parties had agreed under the terms of compromise that they would issue irrevocable instructions to the Escrow Agent in the form which was

attached to the compromise memo. In these instructions, in para 7(vii) it was provided that ""In the event, the completion does not occur by 12.00

noon on November, 30, 1998 for any reason whatsoever Escrow Agent shall forthwith and without any reference to DD, release to CDC the

original Share scrips for the said shares and Cheque in favour of CDC for an amount of Rs.5.00 crores plus the interest accrued therein, if any,

being the forfeiture of earnest money and the interest if any thereto in favour of CDC by DD.

6. CDC referred in the compromise memo is the respondent. DD is the plaintiff. DSQ is the company whose shares were the subject matter of the

suit. The "sponsors" are the plaintiff, his wife, his two minor children, three companies apparently controlled by him and a firm which apparently

was also controlled by him - all of them together having been described as the sponsors in the draft Put and Call agreement.

7. The "Put and Call" agreement was in respect of "CDC shares which expression was defined in the draft agreement in clause 1.2.5 to mean "upto

one half of the total number of shares which, between the date of this agreement and the end of the option period, shall have been subscribed for

by CDC pursuant to the share subscription agreement..... The option period was defined in clause 1.2.10 as meaning the period, "commencing on

the third anniversary of the signature of the share Agreement and ending five years after such, except that with respect to delivery of a put notice by

CDC the option period shall not end until one month after all amounts falling due under the IDBI loan agreement have been paid and repaid". "Call

notice" was defined in clause I.2.2 as meaning a notice given by the sponsored to CDC indicating the number of CDC shares proposed to be

purchased by the sponsors and other details. "Put notice" as defined in clause 1.2.11 as meaning the notice to be given by CDC specifying the

number of CDC shares to be sold by CDC and to be purchased by the sponsors.

8. The Shares Subscription Agreement was signed on 26.3.1993 and that fact is not in dispute. Under that subscription agreement it had been

agreed that the Sponsors would hold 29.6% of the issued and paid up equity shares in the company by subscribing to 60 lakhs shares, that CDC

would subscribe for 38 lakhs shares which amounted to 18.8% to the total equity, that the Electronic Corporation of Tamil Nadu Limited would

subscribe for two lakhs shares amounting to 1% of the equity and that 10.25 lakh shares would be issued allotting to the public which amounted to

Rs.50.6% of the equity. The public issue was made in April 1993. The issued and paid up capital of the company DSQ Software Limited after the

allotments made pursuant to the public issues is Rs. 20.25 crore of which the respondent now holds 18.8%, sponsors 29.6% The public about 50.6%.

9. Under the "Put and Call agreement", in the event of the option whether call option and put option being exercised, the price at which the shares

covered by such option when properly exercised was to be calculated as the face value of the shares plus 14% compounded annual return, less

dividend received till the date of sale. In the plaint, the plaintiff had calculated the price of 38 lakh shares on that basis and had asserted a right to

buy not only the shares in respect of which he could have given a call notice and which he claimed to have given but also the shares in respect of

which CDC alone had the right to give a put notice and which notice admittedly at no point of time had been given by CDC.

10. As a result of the compromise, the plaintiff acquired the right to buy 38 lakh shares but not at price which he had asserted as the price properly

payable therefor by him. The price agreed upon under the compromise in the sum about Rs.61 crores was over eight times the price mentioned by

the plaintiff in this plaint. The plaintiff had asserted a right to buy the shares solely on the strength of the "Put and Call" agreement. That agreement,

as noticed did not confer any right on the plaintiff to purchase any share held by CDC in respect of which it alone had the right to give put notice

and which notice had not been given by it. Had the plaintiffs suit proceeded to trial, the best that the plaintiff could have hoped for was the

purchase of shares in respect of which the plaintiff had a right to give a call option, at the price determined in accordance with "Put and Call

agreement. By reason of the compromise, the plaintiff acquired a right to purchase not only 19 lakh shares - that being the maximum number of

shares in respect of which he could have given a call notice - but also a further 19 lakhs shares which the respondent was at all times free to sell

even during the currency of the "Put and call" agreement. The put and call agreement also provided that CDC would have the freedom to sell

shares held in the company. If such shares were not covered by any subsisting call or put notice. That agreement did not give a right to the

plaintiff to compel the respondent to make first offer of all the shares held by it in the company.

11. After the compromise was made into the decree of the court, the plaintiff deposited the sum of Rs.5.00 crores. The company deposited the share certificates with the Escrow Agent. However, the plaintiff failed to deposit the full consideration with the Escrow Agent before 12.00 noon on 30.11.1998. Consequently, the Escrow Agent handed over to the respondent the share certificates, along with the cheque for Rs.5.00 crores with interest accrued thereon the 22nd December, 1998.

12. These appeals arise from the order of the learned trial Judge dismissing two applications filed by the applicant - plaintiff on the 21st December

1998. The application No.4372 of 1998 was filed under Sections 148 read with 151 of the CPC and Order 14, Rule 8 of the Original Side Rules of

this Court with the prayer that the court be pleased to "fix a reasonable time for payment by the applicant or his nominee to CDC the consideration

of 38 lakh shares of the second respondent belonging to the CDC". The prayer in the other application No. 4373 of 1998 was for an order of

status quo till the disposal of the application for extension of time.

13. In the affidavit filed by the plaintiff Dinesh Dalmia, in support of both the applications, it was inter alia, averred that after the compromise was

entered into and the same was made into the decree of the court, he had deposited Rs.5.00 crores as earnest money with the Jardins Fleming India

Limited who had been appointed as Escrow Agent, on 3.11.1998; that the company DSQ Software Limited had split up the respondent's jumbo

share certificate into marketable lots and the same had been deposited by it with the Escrow Agent on 6.11.1998 that the dividend of Rs.76.00

lakh payable to CDC for the year ending 31.3.1998 had been paid on 10.11.1998; and that he had given notice of completion on 27.11.1998. He

also averred as per the order of this court on the compromise he had to deposit a sum of Rs.61.00 crores towards the value of the shares on or

about 30.11.1998 with the Escrow Agent but could not do so for the reasons set out by him in the affidavit.

14. It was averred by him in the affidavit that he had nominated DSQ Industries Limited a company controlled by him to acquire 38 lakh equity

shares from CDC, that DSQ Industries Limited had approached two financial institutions and each of them had sanctioned a short term loan of

Rs.30 crores and that they were ready and willing to disburse these amounts. He

further averred that a sum of Rs.61 crores was required to be raised ""within a short span of time fixed by this Honourable Court"". He also averred in paragraph 9 of the affidavit that ""I submit that the practical difficulty in raising funds to the tune of Rs.61 crores was not anticipated at the time when the memo of compromise was signed. The financial market is presently very tight"".

15. The plaintiff stated in the affidavit that he was unable to complete the transaction by completion-date on account of certain unforeseen acts of

the third Parties which acts prevented him from performing his obligations. These acts, according to the plaintiff, were (1) the institution of a suit

O.S.No.8053 of 1998 by one of the share holders of DSO Software Limited in the City Civil Court, Chennai in which an ex parte order of interim

injunction was issued by the court on 27.11.1998 restraining the appellant and the respondent in a manner which prevented them from carrying out

their respective obligations under the compromise decree, which ex parte injunction was stayed by this Court on 1.12.1998 in C.R.P.No.3553 of

1998 filed by the CDC: (ii) suit moved in the Calcutta High Court by another share holder of DSQ Software who, it was stated, obtained an

"order of status quo" regarding these shares on 27.11.1998. It was averred by him that CDC had filed an appeal before the Division Bench of the

Calcutta High Court against that order and that the Division Bench on 17.12.1998 had set aside the order of that learned single Judge. In

Paragraph 7 on the plaintiff's affidavit he stated that after the order of the Division Bench of the Calcutta High Court, he was advised to approach

this Court for extension of time. He asserted in his affidavit that there was no default on his part or on the part of the nominee in implementing the

arrangement and it has become necessary for this Court to extend the time and fix a fresh time by which the arrangement can be implemented by

both the parties.

16. The affidavit is significantly silent about the efforts, if at all made by the plaintiff to overcome the allegedly unexpected obstacles created by the

"third parties". The affidavit is also silent as to the readiness of the plaintiff to pay over the moneys forthwith. The affidavit merely sets out a prayer

to refix the date of payment by taking into account the amount involved and the facts and circumstances set out in the affidavit.

17. A copy of the plaint filed in O.S.No.9052 of 1998 by one R. Sampath in the City Civil Court at Madras was placed before us in the course of

the hearing of the appeal. The first two defendants in the suit are the respondents and the Escrow Agent. The other two defendants are the plaintiff

Dinesh Dalmia and DSQ Software limited who are arrayed as defendants 3 and 4. In the plaint, details have been given about the capital structure

of the company, the prospectus issued at the time the public issues was made, the fact that the company is listed in the Stock Exchanges, some of

the provisions of the listing agreement and the fact that the plaintiff had become aware from reading several newspapers - as many as eight of them

were among the documents filed along with the plaint about the proposed sale of CDC holdings in DSQ Software to the plaintiff or his nominee. It

was averred that the plaintiff in that suit would be put to irreparable loss if that sale was allowed to go through. Significantly, the plaint does not

state that a compromise decree has been passed by this Court and that the arrangement referred to by the plaintiff in the plaint is the one which

was set out in the compromise memo in terms of which a decree had been made by the High Court. Nevertheless, the Escrow Agent was made a

party and its address is set out in full.

18. The prayer made in that suit in the City Civil Court was for a ""permanent injunction"" to restrain the first and the second defendants from

executing any transfer deed, transferring or receiving any consideration for the whole or any part of the shares held by the first defendant in the

fourth defendant company either in favour of the third defendant or nominee or nominees or any other third parties and ""... consequently, restrain

the third defendant nominees from acquiring any shares or paying any consideration to defendants 1 and 2 or their nominees: The 14th Asst. Judge

City Civil Court Sri. A. Rajasekharen made an order on the same day the suit was filed, in rather curious terms: ""Heard petitioner's counsel.

Documents 1 to 10 perused. Document No.9 perused and the Honorable High Court passed an order and A.P. High Courts order is also

perused, ended in compromise. On the point of jurisdiction, I find prima facie in this case at this stage, Ad interim injunction till 9.12.1998 Order

39""", Rule 3 Code of Civil Procedure to be complied with. Notice by then."" The order conveys the impression that the court was aware of the fact

that a compromise had been recorded by the High Court. The Assistant Judge of the City Civil Court nevertheless had proceeded to prevent the

implementation of the decree made by the High Court without assigning any tenable reason whatsoever.

19. According to the plaintiff, he was served with a copy of the order made by the City Civil Court on the 28th November, 1998. It is not his case

that he took any positive steps to have that order vacated. The plaintiff did not move any petition in that court or the High Court immediately. The

plaintiff, on the other hand, was content to write on 28th December, 1998 to the respondent informing the respondent about that order and left it to

the respondent to move the High Court on the first of December, and secure the suspension of the order of City Civil Court. It is not the case of

the plaintiff that pursuant to the arrangement which he claims to have made with two non-banking finance companies, he was ready with the funds

which were required to be deposited and that he took any steps to tender the amount to the Escrow Agent. Even after the order of City Civil

Court was suspended by this Court in Civil Revision Petition No.3553 of 1998, the plaintiff/appellant did not tender the amount. Plaintiff had not

even bothered either to approach the City Civil Court for vacating the order forthwith by moving an application nor did he approach the High

Court for vacating or suspending the order. He was merely an onlooker to the proceedings which the respondent initiated on the first day of

December 1998. Plaintiff found it very convenient to claim that the interim order came in the way of his making the deposit and took no steps to

have it vacated as that order was a convenient cloak to mask his inability to deposit to amount with the Escrow Agent before noon on the 30th

November, 1998.

20. It is useful at this stage itself to refer to the subsequent proceedings in that suit. That suit ostensibly filed by one referred to by the plaintiff as the

"third parties", Subsequently came up before the Court of City Civil Judge on 15.3.1999 and 17.3.1999. The certified copy of the proceedings on

these dates were placed before us during the course of hearing of these appeals. The High Court had, in the Civil Revision Petition filed by the

respondent, directed the City Civil Court to hear the application for injunction afresh. When the matter came up on 15.3.1999 the plaintiff in that

suit and his counsel were absent. The matter was adjourned to 17.3.1999. On that date there was no representation for the plaintiff therein. The matter was passed over. It was only the counsel for the respondent before us who was present in the City Civil Court. The appellant before us had taken no interest whatsoever in that suit as a defendant. The Assistant City Civil Judge on the 17th of March, 1999 dismissed the application for interim injunction in that suit, for default.

21. The manner in which that suit was filed, its timing, the way in which it was conducted, the conduct of the appellant before us in relation to that suit and the terms of the ex parte order made in that suit raise sufficiently grave doubts regarding the plaintiff in that suit being a so called "third party" truly independent of the plaintiff. The appellant's claim that he had nothing to do with that action rings very hollow. That suit was obviously intended for the sole benefit of the appellant herein and after its purpose was served by creating an ostensible hurdle in the way of the plaintiff complying with the terms of the compromise decree made by this Court. The application for injunction in that suit was abandoned. The only reasonable inference possible in the circumstances is that suit was filed at the instance and for the benefit of the appellant. The plea of the plaintiff based on that suit and the order made therein is clearly not bonafide.

22. The other circumstance set forth by the appellant as having prevented him from performing his obligations in terms of the compromise memo is an action initiated by another share holder of DSQ Software Limited, Riocochet Commercial Private Limited, in the High Court at Calcutta in C.S.No. 478 of 1998. In that suit the parties arrayed as defendants were DSQ Software Limited, Dinesh Dalmia, and the Commonwealth Development Corporation. That suit again refers to newspaper reports but does not disclose the fact that the compromise decree has been passed by this Court pursuant to which the Commonwealth Development Corporation has agreed to sell the shares held by it to Dinesh Dalmia at the price and subject to the terms set out in the decree.

23. That suit again, interestingly, was moved in the Calcutta High Court on 27.11.1998, the very day on which the suit was filed by the ostensible independent share holder of the company in the City Civil Judge at Madras, and the day on which the plaintiff gave his notice of readiness to the

defendant. The address of Dinesh Dalmia as set out in the plaint before the Calcutta High Court is an address at Calcutta No.5, Jagadish Chandra

Bose Road, Calcutta. He was shown as residing within the jurisdiction of the Calcutta High Court. Two of the companies apparently controlled by

Dinesh Dalmis and who are also the sponsors under the Put and Call agreement have their registered office at Calcutta. In the suit, the prayer was

to declare that any settlement/arrangement or agreement arrived at by and between CDC and Dalmia for acquisition of the entire share holding of

CDC is illegal, null and void.

24. On 27.11.1998, the plaintiff in that suit obtained an order directing status quo with regard to the share holding of the CDC in DSQ Software.

The fact that such an order has been made by the Calcutta High Court was made known to the CDC by none other than the counsel for Dalmia

who wrote to the Escrow Agent on the third of December, 1998 in response to a letter sent by the Escrow Agent on the second of December,

1998, from Bombay and addressed to Dalmia at Madras. Thereafter, the excuse given by the appellant to the Escrow Agent and to the CDC was

that the order of the High Court at Calcutta directing status quo had the effect of disabling the appellant before us from proceeding with the

transaction. The order of the Calcutta High Court, even according to the appellant, had not been communicated to CDC or Escrow Agent at any

time before the 3rd December 1998.

25. True to form, Dalmia chose to sit with folded hands to watch what CDC would do. He did nothing whatsoever to move the Calcutta High

Court to vacate that order if in his view that order was a stumbling block in fulfilling his obligations under the compromise decree. It was left to

CDC to mention to the learned single Judge, Calcutta High Court on the 8th day of December, 1998 to vacate the order. That prayer not having

been acceded to, CDC filed an appeal to the Division Bench. The Division Bench of the Calcutta High Court by its judgment dated 17.12.1998

held that prima facie the suit filed by the share holder in the High Court at Calcutta was not maintainable and that no case has been made out for

interfering with the performance of the obligations undertaken by the parties to the compromise memo. Though the appellant before us was a

respondent in the appeal filed before the Calcutta High Court by CDC, even at

that stage it was not his stand that he was ready with the amount required to be paid as per the compromise decree nor did he make any attempt to make the payment immediately after the appeal was allowed,

by the Division Bench. On the other hand, his submission before that court was that he be given additional two weeks' time to make the payment.

26. The further development that took place in the proceedings initiated in the Calcutta High Court may also be noticed here at this stage for sake

of completion. Against the order of the Division Bench of the Calcutta High Court, the Plaintiff in that court filed a SLP before the Supreme Court

of India,. The SLP was withdrawn on 8/3/1999. While dismissing the SLP as withdrawn, the Supreme Court recorded the submission that was

made by the counsel for CDC that the plaintiff in the Calcutta High Court can be permitted to take up the contentions regarding Sections 13 to

16 of the Securities Contracts (Regulation) Act, 1956. The Court also observed that the opinion expressed by the Division Bench regarding the

maintainability of the suit is only a prima facie opinion and that the parties are not prevented in respect of taking up rival contentions as regards

jurisdiction and the locus standi. Thereafter, a fresh application appears to have been moved once again before the learned Single Judge of the

Calcutta High Court by the plaintiff in C.S.No 478 of 1998 on 7/4/99. On that date, the Court passed an order in the following terms:

There will be an ad interim order of status quo with regard to the transfer of the subject shares until further orders.

We are informed by counsel that that order continues to subsist and that the application filed by CDC to vacate that order is pending.

27. The timing and the manner in which the proceedings were initiated in the City Civil Court at Chennai, the High Court at Calcutta, and the date

on which the plaintiff chose to give notice of his residence all seem to have been orchestrated. The appellant's notice of readiness given on 27/

11/98 appears to have been given with the full knowledge and confidence that orders of injunction were being sought on the same day by his, to

say the least, ""Well wishers"" in the Courts at Chennai and Calcutta, the two cities in which the appellant had a base having not only residences but

also being in control of substantial business. The order made by the City Civil Court at Chennai, as already noticed, was gladly suffered by the

appellant, who did not lift his little finger to have that order modified in any manner either by that court or by the High Court. The appellant again equally gladly suffered the order made ex parte by the Calcutta High Court which order to the knowledge of the appellant had been obtained without disclosing materially relevant facts to the court. The appellant was obviously seeking to lay the foundation for the application which he subsequently came up with on the 21st day of December. This conduct of the appellant certainly does not entitle him to any of equitable reliefs at the hands of this court.

28. The fact that the plaintiff was at all material times unable to raise the necessary finance for purchasing the shares from the CDC is also evidenced from the documents produced by the parties, more particularly by the appellant himself.. Even before the suit CS No. 438 of 1998 was filed by the appellant in this court, the appellant had repeatedly informed CDC of his desire to purchase the shares, but had been unable to pay the consideration therefor. On as many as three occasions, he informed CDC of his desire to buy the shares furnishing them with the memo of calculation, but did not follow through. On more than one occasion, he wrote to the CDC stating his inability to what he termed as "allot" the necessary funds for the purchase of the shares.

29. After the compromise was entered into the plaintiff by himself did not make any effort to raise moneys required for the purchase of the shares.

The company nominated by him to purchase the shares DSQ Industries Limited even according to the appellant had sought finance from two non-

banking financial institutions at Chennai. Before - the trial Judge, the appellant produced two letters - one from SHIFS Capital Marketing Limited

in November 1990, and the other from Lloyds Finance Ltd., dated November 21, 1998 under which each of them agreed to lend Rs. 30 crores

on the security of shares to be purchased from CDC in terms of the compromise memo. The willingness of these institutions was subject to the

fulfilment by the appellant as also by his nominee of certain conditions which, inter alia included the execution of loan agreement, agreement for

pledge of shares, and personal guarantee by the appellant and his wife. No document was produced before the trial Judge to show that these

conditions had been complied with by the Appellant.

30. In these appeals, the appellant has filed a petition seeking leave to produce certain documents. Those documents are letters written by DSQ

Industries Limited on November 23, 1998 to these two non-banking financial companies. These letters do not enclose that any of the agreements

and guarantees required by those two non-banking financial companies had been executed and that these DSQ Industries Limited was in a position

to secure from them the sum of Rs. 60/- crores on the 27th November, or subsequently before 12.00 noon on 30th November 1998. It may be

noticed here that 28th of November, was a Saturday and 29th a Sunday and the money was required to be deposited by way of bankers drafts in

favour of Escrow agent at 12.00 noon at Bombay on the Monday the thirtieth November.

31. The replies from those non-banking financial companies, copies of which are also sought to be produced before us show that so far as the

Lloyds Finance Limited was concerned, the loan agreement and the guarantee form had been sent to DSQ Industries on the 25th November

1998. It is not even the case of the appellant that he had executed those documents and had submitted the same to those non-banking financial

companies. In the counter affidavit filed by the respondent, the genuineness of those letters have been disputed very seriously. It is averred that

these documents have been got up only to get over or fill the lacuna which existed in the appellant's case. Even if we take on record, which we do,

these documents and even assuming that these documents are genuine, they do not in any way advance the case put forth by the appellant that the

appellant was ready with the funds and was in a position to deposit the same with the Escrow agent on 30th of November 1998.

32. We have already adverted to the conduct of the plaintiff on and after the 27th November, which clearly shows, not only his willingness, but

eagerness to continue to suffer the order of injunction issued by the City Civil Court, Madras and the order of status quo issued by the Calcutta

High Court. The plaintiff was obviously unable to raise the necessary funds and it is only on that account the two "friendly actions" if we may use

that expression, were initiated for the benefit of the appellant. The inescapable inference from consideration of all the circumstances is that it is the

appellant who was at the back of these two actions.

33. In the affidavit filed in support of the application filed on 21st December 1998, the plaintiff has quite plainly stated that the magnitude of the payment was large and the time allowed to raise the same was short warranting the grant of petitioner's prayer for further time. Petitioner has also stated that the money market was tight, and that the difficulty in raising the large sum of Rs. 61 crores was not anticipated when the compromise was entered into. These facts however cannot afford a justification for extending the time as the plaintiff was no innocent illiterate under any legal disability but an experienced and successful businessman who had voluntarily bargained and accepted the obligation to make the payment of Rs.61 crores before noon on 30th November, 1998. The compromise memo expressly sets out the fact that it was voluntarily entered into, that plaintiff fully recognised and realised the extent of obligations undertaken and that the compromise put an end to all the claims made in the suit.

34. Even assuming for a moment that the two actions initiated in the courts at Chennai and Calcutta were independent actions with which the appellant was in no way connected we would still decline the prayer of the plaintiff for fixation of a fresh date for completion, for the reason referred to in the proceeding paragraph and the reason that any such fresh fixation of time having regard to the subject matter of dispute would cause gross injustice to the respondent who is wholly guiltless. It is not the case of the appellant that the respondent had done anything or omitted to do anything which it was required to do as a consequence of which the appellant had been prevented from fulfilling his obligations under the compromise memo. Any hardship that the appellant may plead must be balanced against the hardship and injustice that would befall the respondent which has at all time acted honourably.

35. The respondent CDC is a statutory Corporation established in 1949 and owned by the Government of United Kingdom. In the report and accounts of that Corporation for the year 1998 placed before us the mandate of the Corporation is stated to be creating and growing long-time viable business in developing economies, achieving the targeted returns for share holders and implementing ethical best practices. The focus of its businesses is that of active investors in emerging and pre-emerging market economies. What it provides, as set out by it in that report is risk capital

directly and through funds under management, Management in financial and technical expertise to the companies in which it invests, and for its

funds and the syndication of senior debt and risk capital. Over 60% of its new investments in 1998 were in risk capital of the total investment of

₹ 227 million in 1998, ₹ 144 million was invested in risk capital.

36. The list of investments made by it in the Indian companies filed along with the affidavit of its constituted attorney shows that it has from the year

1989 onwards and upto 31/3/99 invested over ₹ 100 millions in equities and has provided loans in the aggregate of about ₹ 70 Millions. The

number of Indian Companies to which it had either lent or made investments number about 34. Between 1/1/98 and 31/3/99 it has invested in six

Indian companies, the aggregate value of the investments being about ₹ 41 million. It has been stated before us by counsel for CDC that the

corporation is not engaged in the trading shares in the Stock Exchange in India as a regular activity, and that it only disposes of the shares held by it

in the companies in which it has invested, such investment being in conformity with its overall policy of encouraging business in developing

economies, and further that such disinvestment is made only after securing the approval of the Reserve Bank of India and in accordance with the

terms of such approval.

37. The Corporation had obtained the permission of the Reserve Bank of India as early as in April, 1998 for the disposal of the shares held by-it in

DSQ Software Limited at a time when the market value of shares in the Stock Exchange was about Rs. 200/- and had reached a peak of Rs.

300/- earlier. After it entered into the compromise with the appellant it agreed to the appellant securing the permission from the Reserve Bank of

India for the sale of all the shares of the Corporation in this company to the appellant. The market as on the trading date on which the compromise

decree was made by this Court for the shares of DSQ Software was Rs. 258.60. The respondent CDC had agreed to sell the shares at a price of

Rs. 161 to the appellant which price was substantially below the ruling market price as on that date.

38. The shares of DSQ Software Limited are listed for trading on all major Stock Exchanges in India as also in the National Stock Exchange. The

price of these shares as on 30th November 1998, the date on which the

transaction should have been completed was Rs. 227/- The price had come down when compared to the price that prevailed as on the date of compromise. The price as on 17/12/ 1998 when the Division Bench of Calcutta High court vacated the ex parte order of the learned single Judge was Rs 291/-. The price as on 22/12/98 when the application for fixation of fresh completion date was moved in this court was Rs. 208.50. There has been a dramatic increase in the price of the shares of this company. On and after December 1998, it had touched a peak of Rs.598/-on 29/1/99 and on the date the applications were dismissed by the learned single Judge on 9/2/1999, the price was Rs. 470.75.

39. We may at this point advert to the fact that during the course of hearing of these appeals we had permitted the appellant to demonstrate before

us his ability to make the payment by producing demand drafts covering a sum of Rs. 70 crores. That sum was offered by the appellant in response

to our query as to whether he was prepared to pay a higher price now having regard to the spurt in the price of the company's shares from

January 1999. That offer was in addition to the sum Rs.5.00 crores deposited in November 1998 with the Escrow agent. The appellant did

produce before us on 8/3/1999 bankers' cheque and drafts for an aggregate sum of Rs. 70.00 crores which were returned on the same day to the

appellant. The price of the shares of DSQ Software on the date of issue of drafts, in the Stock Exchange was 503/- per share. The value of 38

lakh shares calculated at that price would be in about Rs. 190 crores. It is not surprising that the appellant or his nominee was able to secure Rs.

70.00 crores from their bankers on the sixth March 1999 when that sum represented less than 1/3rd of the market value of these shares. Nothing,

therefore really turns upon the fact that the appellant was able to produce Banker's cheque and drafts for Rs. 70.00 crores on 8/3/1999.

40. The price of the shares has risen steadily in the months of February and March 1999. On the 23rd March 1999 it reached a peak of Rs. 646.5

though at the end of the month the price had come down to Rs. 460/-.

41. We have referred to the fluctuation in the price of the shares on the Stock Exchanges only to emphasise the fact that for determining the market

value of the listed shares, every day matters. The terms of the compromise clearly specified the latest completion date which was about five weeks

from the date of decree. The price fixed then cannot be the price at which CDC should be compelled to sell its shares, several months thereafter, when the market price is more than twice the market price of November 1998. As and when CDC offers to sell all or part of its holdings on the Stock Exchange it can be purchased by any buyer including the appellant at the price then prevailing. The failure on the part of the plaintiff/appellant to complete the transaction on 30th of November, 1998 has irrevocably relieved the respondents of its obligation to sell its shares to the appellant at the rate of ₹ 3.80 per share. The Reserve Bank of India had even in April 1998 informed CDC that it has no objection to the sale of the shares held by CDC in DSQ Software on the floor of the Stock Exchange to residents. The fact that the respondent which is blameless will be able to secure a much higher price for the shares held by it in this company is not a factor to be put against it. While deciding as to whether the time fixed for completion of the transaction that was contemplated in the compromise memo should be extended despite the opposition of the respondent, there is no reason whatsoever for the court to deprive the respondent of a possible substantial swell over 100 crores of rupees and place the same in the pocket of the appellant as the reward for all his machinations in seeking to get over his own inability to pay the price within the time agreed.

42. It is the case of the appellant in the affidavit filed by him in support of the applications that the time was indeed of the essence of the arrangements between the parties. Having regard to the subject matter of the compromise viz., equity shares which are traded on Stock Exchanges, the court would be most reluctant to compel a party to accept a price lower than that, which it would be in position to secure for its shares by sale on the Stock Exchange.

43. The grounds sought to be made out by the appellant for seeking the fixation of a fresh date of completion are, therefore, found to be without any merit whatsoever. The applications filed by the appellant were rightly dismissed by the learned trial Judge. We have, on independent examination, of all the materials that had been placed before us and also after looking into the additional materials placed before us, come to the same conclusion.

44. While this conclusion of ours would be sufficient to dismiss the appeals, we consider it necessary before doing so, to advert to the legal

submissions made before us by the learned counsel for the respondent CDC as those issues are issues of significance. We also record the fact that

the court was ably assisted by the learned senior counsel for the parties Mr. C. A. Sundaram for the appellant and Mr. P. Chidambaram and Mr.

A.L. Somayajee for the respondent.

45. It was submitted by the learned counsel for the respondent that this appeal is not maintainable in law, as under the CPC no appeal lies against

an order made u/s 148 of the Code or u/s 151 of the Code. Orders made under Sections 148 and 151 of the CPC are clearly not appealable under

Sec. 96 or Section 104 of the Code or under Order 43 of the Code. Had these been appeals from the orders made by a Subordinate Court, we

would have accepted the respondent's submission. What is before us, however, are not appeals preferred under the provisions of the Code of

Civil Procedure, but appeals which have been preferred under clause 15 of the Letters Patents, 1865 issued under the Indian High Courts Act,

1862 which provides for appeals against judgments rendered by the learned Single Judges of this Court exercising the Ordinary Original Civil

Jurisdiction of this Court.

46. As to what constitutes a "Judgment" for the purpose of Letters Patent has been explained by the Supreme Court in the case of Shah Babulal

Khimji Vs. Jayaben D. Kania and Another, the court therein observed that "whenever trial Judge decides a controversy which affects the valuable

rights of any one of the parties, it must be treated as a Judgment within the meaning of Letters Patent.

47. There can be no doubt that the order appealed against is one which affects the valuable rights of the parties. The simplest way of demonstrating

its effect is to visualise for a moment as to what the consequence would have been had the application been allowed instead of being dismissed.

Had it been allowed, the valuable right of the respondent to sell its shares at the prevailing market rate would have been adversely affected.

According to the appellant his valuable rights to obtain shares at the price agreed to in the compromise is affected by the dismissal of the

application by the learned Judge. The impugned order is a "Judgment"

contemplated in clause 15 of the Letters Patent and appeal is clearly maintainable. The mere fact that the order came to be passed on an application filed u/s 148 read with sec. 151 of the CPC does not, in any way, prevent an appeal being entertained from that "Judgment" by way of internal appeal under clause 15 of the Letters Patent. Such a view would promote the larger ends of Justice and would not render any portion of clause 15 less meaningful than what was meant to be.

48. Learned counsel for the respondent forcefully contended that the court has no jurisdiction to entertain an application under Sections 148 and 151 of the CPC for the purpose of extending the time stipulated by the parties in a compromise decree. It was submitted that the compromise decree is one which is the result of consensus ad idem between the parties and under the provisions of Order 23, Rule 3 of the Code of Civil Procedure. Once it is found that the compromise was lawful, the court has no alternative but make a decree in terms of compromise even where the subject matter of compromise is not identical with the subject matter of the suit in which the compromise was reached. Counsel also submitted that Section 140 of the CPC would have application only in respect of proceedings which are still pending and once a final decree is drawn up, the court would cease to have session over the matter and section 148 of the CPC cannot be invoked. It was also submitted that Section 151 of the CPC would have no application as that provision cannot be invoked to circumvent the other provisions of the Code to do something which was prohibited impliedly or expressly by any of other provisions in the Code of Civil Procedure.

49. Reliance was placed by counsel on the decision of the Supreme Court in the case of Hukamchand Vs. Bansilal and Others, . It was held therein that the court was statutorily bound to confirm the sale under Order 21, Rule 92 of the CPC after the dismissal of the applications under Order 21, Rule 90 and the confirmation of the sale could not be postponed except with the consent of parties. It was held that Section 148 of the CPC would not apply in those circumstances.

50. That decision of the Supreme Court has been explained by the Apex Court itself in a later decision in the case of Periyakkal v.. Dakshayani (AIR 1983 SC 428 = 96 L.W. 110 J.S. Full Report). After setting out the material

facts in Hukumchand's case (AIR 1968 SC 86), the law

considered in that case, as also the ratio of that case, the court observed that in the case of Hukumchand, there was a statutory compulsion to

confirm the sale on the dismissal of the application under Order 21, Rule 90 of the CPC and therefore, the postponement and further postponement

of the confirmation of the sale would only be by consent of parties. The court further held that where such statutory compulsion was absent, there

was no obstacle to the Court invoking Section 148 of the CPC and extending the time even in case where the parties had agreed to an order by

consent with the further agreement that time be treated as of the essence.

51. In that case of Smt. Periyakkal and Others Vs. Smt. Dakshyani, J.S. Full Report) the compromise had been entered into during the pendency

of the Second Appeal which arose out of the proceedings under Order 21, Rule 90 of the Code of Civil Procedure. The amount which the

appellant before the Apex Court was required to pay under the terms of compromise had not been paid in time and the respondent was unwilling

to consent to the extension of time. The High Court had dismissed the prayer for extension of time on the ground that it had no power to extend

time in cases of compromise. The Apex Court reversing the decision of the High Court held that where the parties had entered into a compromise

and invited the court to make an order in terms of the compromise, the time for deposit stipulated by the parties, would become the time allowed

by the court in appropriate case. The court cautioned that the time should not be extended ordinarily nor for the mere asking, but would be granted

in only rare cases to prevent manifest injustice. It was further observed that the court would not rewrite the contract between the parties and the

court will relieve against the forfeiture clause, and where the contract of parties has merged in the order of the court, the court's freedom to act to

further the ends of justice would surely not stand curtailed. The Court then observed "nothing said in Hukumchand's case militates against this

view

52. Learned counsel for the respondent invited our attention to two later decisions of Apex Court -- the case of Suvaran Rajaram Bandekar and

Others Vs. Narayan R. Bandekar and Others, and Gupta Steel Industries Vs. Jolly Steel Industries Pvt. Ltd. and Another, In the first of these

cases, it was observed that in a consent decree compromise, the court would be loathe to interfere with the terms thereof by way of modification

unless both parties give consent thereto". In the latter case, it was observed that" as principle of law, the High Court was obviously incorrect in

interfering with and modifying the consent decree unless parties agree for the same.

53. It was submitted for the appellant that if it is not possible to reconcile the decision of the Supreme Court in Col. D.D. Joshi and Others Vs.

Union of India (UOI) and Others, (Periyakkal 's Case) with that in Gupta Steel (1966 (11) SCC 678=96 L.W.110 S.N.) it is the later of the two

decisions which must be regarded as correctly laying down the law as those decisions were rendered by Benches of equal strength. Counsel in this

context relied upon a full bench decision of the Karnataka High Court in the case of Govinda Halk v. West Patent Press (AIR 1980 Kar 82) a

Special Bench of five judges who heard that matter differed in their views on the question. The majority held without setting out any reason in

support of that view that it is the later decision that would prevail while the minority of two judges speaking through Jagannath Shetty, J. as he then

was, held that it is not the point of time that is material, but the soundness of the decisions. The learned Judge observed that "... High Court would

be well advised to consider which of the two conflicting decisions, it will follow in the interest of administration of justice and it ought to follow that

which is better in point of law than in point of time". The learned Judge relied on observation made by Jessel, M.R. in the case of Baker v. White

1877 (5) Ch. D. Page 183 at 190 in like circumstances that he was let with liberty to say which was not sound law.

54. In the cases of Gupta Steel as also in the case of Suvaran Rajaram. Bandekar the Apex Court did not advert to any of the earlier rulings of the

court. Neither the decision in the case of Hukumchand nor the later decision in the case of Periyakkal have been referred to. In the case of

Suvaran Rajaram Bandekar and Others Vs. Narayan R. Bandekar and Others, the court indicated the general unwillingness of the court to invoke

S.148 CPC to interfere with consent decree. In the case of Gupta Steel the proposition that a consent decree cannot be modified without the

consent of the parties, was regarded as axiomatic. However, in both these cases, the modification effected by the High Court to the consent

decree by grant of further time was not interfered with.

55. In the case of Periyakkal the Court did not make a distinction between consent decrees and consent orders made in the course of Execution

proceedings, for purpose of exercise of court's power u/s 148C.P.C. The court held that where time is stipulated by parties by consent and that

time is accepted by the Court and is made a part of its order the time so fixed would be the time allowed by the court.

56. We are therefore, inclined to hold that the court is not powerless in appropriate cases to extend the time stipulated by the parties in a

compromise memo which compromise memo is accepted by the court and is made into a decree of the court. Extension would not be granted

ordinarily or for the mere asking. As to whether the extension of the time will be granted at all would depend upon the subject matter of the

compromise, the terms of compromise, the conduct of the parties, the extent of injury that would be caused to one or the other party by granting or

declining the request and the larger ends of justice having regard to all the facts and circumstances of the case.

57. We are unable to agree with the view expressed by the learned single judges of the High Court at Bombay, Punjab and Delhi in the cases

reported in AIR 1998 Bombay 314 AIR 1984 Punjab and Haryana 342 and AIR 1986 Delhi 165 respectively in all of which the view taken was

that the law laid down in Periakkal "'s case is confined to proceedings in execution and would not apply to consent decrees.

58. The nature of the decree even in case of consent decrees, is material. In a suit for specific performance, time is invariably fixed for the purpose

of doing the act required to be performed by the parties to the action. It is well settled that the courts have the power in appropriate cases to

extend the time fixed in the decree, though it is not done for the asking. In the case of Periyakkal, the Apex Court has laid down that the time

agreed to by the parties becomes the time allowed by the court, when the court proceeds to make an order at the request of the parties, in terms

of the compromise. Time may therefore be extended even in cases of compromise decrees. Though we have rejected the appellant's prayer for

modifying the date stipulated in the memo of compromise for the reasons already given by us, we do not reject the prayer on the ground that the

court is powerless to extend the time.

59. The other decisions relied upon by the counsel those in the cases of Kuppurajammal Vs. Meenakshi Ammal and Others, M.N. Subramania

Mudaliar and Others Vs. Shanmugham Chettiar and Others, Kartik Chandra Bera Vs. Bhusan Chandra Guria, Mooriantakath Ammoo Vs.

Matathankandy Vatakkayil Pokkan, are decisions which were rendered before the decision of the Supreme Court in the case of Periyakkal (AIR

1993 SC 423)..

60. It was lastly contended by counsel for respondent that the impugned order being discretionary, an appeal would lie. Counsel in that context

relied on the observations of the Supreme Court in the case of D. Rani and Others Vs. The Management of Indian Drugs and Pharmaceuticals

Ltd., (Surgical Instruments Plants), The Court therein observed that in appeals against discretionary orders, "".... the appellate court will not

interfere with the exercise of discretion of the court of the first instance and substitute its own discretion except where the discretion has been

shown to have been exercised arbitrarily on capriciously or perversely or where the court had ignored the settled principles of law regulating grant

or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not be

justified in interfering with the discretion under appeal solely on the ground that had it considered the matter at the trial stage it would have come to

a contrary conclusion."".

61. It may well be that the appellate court may, after hearing the appeal reach the conclusion that the discretion exercised by the trial Judge was

reasonable and was based on sound principles. That, however, does not affect the maintainability of the appeal. We have not found the exercise of

discretion by the learned trial Judge on the facts of this case to be erroneous. The appeals are dismissed with Costs. Consequently the connected

C.M.P.s are also dismissed.