(2010) 04 GUJ CK 0083

In the Gujarat High Court

Case No : First Appeal No. 2638 of 2003 and Civil Application No. 3005 of 2010 in First Appeal No. 2638 of 2003

State Bank of India and Another — APPELLANT

Vs

P.K. Thakkar Construction Co. Pvt. Ltd. — RESPONDENT

Date of Decision : 26-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Gujarat Town Planning and Urban Development Act, 1976 — Section 26, 28, 35, 35(2), 36
Specific Relief Act, 1963 — Section 20(2)

Citation : (2010) 04 GUJ CK 0083

Hon'ble Judges : J.C. Upadhyaya, J;Bhagwati Prasad, J

Bench : Division Bench

Advocate : S.N. Shelat and Pranav G. Desai, Nos. 1-2, for the Appellant; Nandlal Thakkar, for Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Upadhyaya, J.—Being aggrieved and dissatisfied with the judgment and decree rendered by learned 3rd Joint Civil Judge (S.D.), Ahmedabad (Rural) on 16.10.2003 in Special Civil Suit No. 168 of 1997, the original defendants preferred this appeal. The appellants are, therefore, original defendants, namely, appellant - defendant No. 1 - State Bank of India, HRD Department, Ahmedabad and appellant - defendant No. 2 - State Bank of India, Polytechnic Branch, Ahmedabad. The respondent is original plaintiff, namely, P.K. Thakkar Construction Co. Pvt. Ltd., Ahmedabad. For the sake of convenience, therefore, the appellants and respondent shall be hereinafter referred to as the defendant - bank and the plaintiff - Company respectively.

2. The learned 3rd Joint Civil Judge (S.D.), Ahmedabad (Rural) (hereinafter referred to as the ''trial Court'') by judgment and decree dated 6.10.2003 passed the final order as under:

Suit of the plaintiff is decreed with cost. Defendants are liable to pay Rs. 2,53,750/- per month towards the lease rent to the plaintiff w.e.f. 12.7.1995. Defendant are ordered to pay the amount of difference per month after deducting Rs. 1,79,190/- per month towards monthly installment of loan for a period of five years and thereafter, they should pay the amount of difference after giving 15% rise in the lease rent as per Condition No. 2 mentioned in Exh.33 and after deducting Rs. 1,79,190/- towards the amount of monthly installment of loan every month till the completion of lease period which is of ten years with interest thereon @ 15.5%, amount of compensation payable is ordered to paid witin two months from the date of this order. Accordingly, an amount of Rs. 5000/- be paid towards security and maintenance per month with interest thereon @ 15.5%. Further, it is ordered that the Bank shall have to make calculation of interest in the same manner, in which, the Bank is calculating the interest on the amount of loan. If the aforesaid amount is not paid by the defendant, then, the plaintiff is entitled to get it recovered from the person and property of the defendants and defendants do pay their own cost.

Decree be drawn accordingly.

The order is read over and pronounced in the open Court today this 16th Day of October, 2003.

2. The facts leading to the suit in brief are as under:

3.1 The plaintiff - Company was holding two plots of land bearing plot No. 212, admeasuring about 850 sq. mtrs. and plot No. 211, admeasuring about 852 sq. mtrs. in the area called Vastrapur, Ahmedabad. The defendant - bank issued one public advertisement for Residential Staff Training Centre for the bank in local newspaper. The plaintiff - Company was interested in it and submitted the details of its plots to the concerned Officers of the defendant - bank. Meetings were held between the Officers of the defendant - bank and the office-bearers of plaintiff company. It is the case of the plaintiff - Company that the defendant - bank would advance loan to the plaintiff - Company for the construction of building of the training centre on its plots of land. Accordingly, the loan transaction was entered into between them and certain letter correspondence took place between them. The loan which was sanctioned was of Rs. 99 Lacs, and as per the plaintiff - Company, the loan was to be disbursed as per the stage of progress of the construction work. It is further the case of the plaintiff that the amount of loan together with interest was to be repaid to the defendant - bank by monthly instalments. However, the defendant - bank had agreed to pay monthly rent to the plaintiff - Company and the monthly installment of loan was to be given set-off as against the amount of loan which was to be paid by the defendant - bank to the plaintiff - Company. According to the plaintiff, the entire construction work was over and, therefore, on 12.7.1995 a letter was addressed to the defendant - bank to take possession of the building. Since no attempt was made by the defendant - bank to take possession of the building and, therefore, the plaintiff - Company had to incur expenditure for maintenance of the building and other miscellaneous expenditure. Thereafter, time and again plaintiff - Company informed the defendant - bank to take possession of the building, but such requests were in vain. It is the case of the plaintiff - Company that the plaintiff - Company was and is ready and willing to give possession of the building to the defendant - bank. Ultimately, the defendant - bank issued a false notice and had given totally go-by to the contract entered into between the parties and in that way the defendant - bank rescinded from the contract. The plaintiff replied the notice of the defendant - bank. However, the defendant - bank illegally and unilaterally terminated the contract. It is further the case of the plaintiff - Company that the plaintiff - Company sustained huge loss of rental income and maintenance charges of the building etc. and thus, claimed Rs. 3,08,48,322/- by way of damages from the defendant - bank with running interest @ 21% p.a. from the date of the suit till its realisation.

3. The defendant - bank resisted the suit by filing written statement inter-alia contending that as a matter of fact it was the plaintiff - Company which did not comply with required terms and conditions of the contract and relevant provisions of law regarding obtaining building use permission (''BU permission'', for short) and occupancy certificate for the building from the competent authority. Other defences have been raised regarding the jurisdiction of the civil Court to hear and decide the suit and construction work not in accordance with the terms and conditions agreed between the parties etc. Ultimately, it was contended that the suit be dismissed.

4. In the suit, both the sides adduced its oral and voluminous documentary evidence, mainly the letter correspondence. After considering the evidence on record and the submissions made on behalf of both the sides, the learned trial Court allowed and decreed the suit in toto by impugned judgment and order dated 16.10.2003.

5. The trial Court upon appreciation of oral and documentary evidence on record came to the conclusion that the plaintiff - Company was entitled to recover security and maintenance charges from the defendant - bank for ten years. It was further held that the plaintiff - Company successfully proved that it was ready and willing to handover the possession of the building to the defendant - bank on 12.7.1995. The trial Court came to the conclusion that the plaintiff - Company successfully proved that the loan amount was for construction of staff training centre to be used by the defendant - bank and the loan amount was to be recovered by the defendant - bank from the monthly rent of the lease of the building. The trial Court held that the plaintiff proved its claim and was entitled to recover Rs. 3,08,48,322/- together with running interest @ 15.5% from the defendant - bank. However, the trial Court held that the defendant - bank failed to prove that the Civil Court had no jurisdiction to try the suit. According to the trial Court, the defendant - bank failed to prove its defence that the letter dated 25.2.1994 allegedly written by the plaintiff - Company and addressed to the defendant - bank was fabricated and concocted as alleged by it in its written

statement. The defendant - bank also failed to prove that it was not obligatory on it to take possession unless the terms of the letter dated 1.2.1994 written by the defendant - bank addressed to the plaintiff - Company were complied with. The trial Court held that the defendant - bank was not justified in rescinding the contract. The defence of the defendant - bank that the plaintiff - Company acknowledged the acceptance of the offer of defendant - bank vide letter dated 7.2.1994 and not vide letter dated 25.2.1994, was not proved by the bank. The defence raised by the defendant - bank that the building can be useful for any other purpose than bank''s training centre, was not established. Ultimately, the trial Court allowed and decreed the suit, as seen above in this judgment which has given rise to the present appeal.

6. We have heard learned senior counsel Mr. S.N. Shelat for learned advocate Mr. Pranav Desai for the appellant (original defendant - bank) and learned advocate Mr. N.K. Thakkar for the respondent (original plaintiff - Company).

7. Learned senior counsel Mr. Shelat for the defendant - bank mainly submitted that the entire suit depends upon a letter, Exh.33 dated 1.2.1994 addressed to the plaintiff - Company by the defendant - bank. It is specifically submitted that the defendant - bank intended to have a building to be used for its staff training centre and, therefore, floated an advertisement in a local newspaper and the plaintiff - Company was interested in the work and, therefore, it placed proposal before the defendant - bank for the same, and said proposal was accepted by the defendant - bank on the basis of certain terms and conditions vide its letter dated 1.2.1994, Exh.33. Amongst other conditions, one of the important condition incorporated in the letter, Exh.33 dated 1.2.1994 was to the effect that it was obligatory on the part of the plaintiff - Company to obtain BU permission and occupancy certificate from the competent authority before handing over the possession of the building to the defendant - bank. Learned sr. counsel Mr. Shelat submitted that apart from the dispute raised by the defendant - bank that even the building which was constructed by the plaintiff - Company was not in accordance with the specifications and requirements of the defendant - bank, but the plaintiff - Company neither applied to the competent authority for BU permission and occupancy certificate nor obtained such certificate and permission. It is submitted that the defendant - bank is a responsible banking institution falling within the ambit of ''State'' and, therefore, the defendant - bank rightly insisted the legal formalities to be undergone by the plaintiff - Company before handing over the possession of the building to the defendant - bank.

8.1 Learned sr. counsel, Mr. Shelat, for the appellant - defendant - bank further submitted that in the suit, the plaintiff - Company mainly placed emphasis upon a letter, Exh.36 dated 25.2.1994 allegedly written by the plaintiff - Company and addressed to the defendant - bank stating that generally it was not necessary to obtain BU permission and neither such permissions were obtained by anybody nor such permissions were generally required by Ahmedabad Urban Development

Authority (''AUDA'', for short) and merely for want of such permission, the task of taking of possession would not be held-up. It is submitted that such a letter dated 25.2.1994 was never received by the defendant - bank and the letter was fabricated and concocted by the plaintiff - Company only with a view to avoid obtaining the BU permission. Learned sr. counsel, Mr. Shelat, for the appellant defendant - bank submitted that in response to the advertisement issued by the defendant - bank, the plaintiff had put proposal and the same came to be accepted by the defendant - bank vide its letter, Exh.33 dated 1.2.1994 and thereby the contract was concluded. Though the defendant - bank had adduced ample evidence to show that the letter, Exh.36 dated 25.2.1994 was false and fabricated and concocted by the plaintiff and in fact the same was never received by the defendant - bank, yet there is nothing that the counter proposal envisaged in the letter dated 25.2.1994 was ever accepted by the defendant - bank. Moreover, it is further submitted that it was and it is a statutory requirement to obtain BU permission and occupancy certificate before any newly constructed building is to be actually used. Under such circumstances, though the defendant - bank established on record that said letter dated 25.2.1994 was never received by it, yet even if it is believed that said letter was received by the defendant - bank and even impliedly accepted the counter proposal made in said letter, yet there cannot be any agreement to commit breach of any statutory requirement. Learned senior counsel Mr. Shelat submitted that, therefore, even if the parties agreed to commit breach of any statutory requirement or to give go-by to any statutory requirement, then such contract perse becomes illegal contract which cannot be enforced.

8.2 Learned senior counsel Mr. Shelat drew our attention to the relevant provisions contained under the Gujarat Town Planning and Urban Development Act, 1976 and the other relevant provisions of the AUDA regulations and submitted that this is a statutory requirement to apply and obtain BU permission and occupancy certificate, and in the instant case, the plaintiff - Company neither applied to the concerned authority for such permission and certificate nor produced such certificate and permission even till date.

8.3 However, learned senior counsel Mr. Shelat for the appellant - defendant - bank submitted that pursuant to the loan transaction between the parties, only the Debt Recovery Tribunal (''DRT'', for short) has jurisdiction to decide such dispute and an application to that effect was filed by the defendant - bank in the suit and the trial Court had allowed such application and the matter was ordered to be referred to the DRT. However, said order was challenged by the plaintiff - Company before this Court and this Court set-aside said order of the trial Court and directed the trial Court to dispose of the suit expeditiously. However, the said order passed by learned Single Judge has been challenged by the defendant - bank before this Court by preferring Letters Patent Appeal. However, learned senior counsel Mr. Shelat for the appellant defendant - bank submitted that since the defendant - bank did not commit breach of the contract in refusing to recover possession of the building and, therefore, the appellant defendant in this appeal does not press the issue regarding the jurisdiction so far as the present suit is concerned, as on merits, the suit was not maintainable. Ultimately, it is submitted that the appeal may be allowed and the impugned judgment and decree rendered by the trial Court be set-aside with cost.

8.4 Learned senior counsel, Mr. Shelat, for the appellant defendant - bank submitted that in this first appeal, the appellant defendant - bank is desirous to produce certain record and for that purpose an application under Order 41 Rule 27 of the CPC is preferred bearing Civil Application No. 3005 of 2010 in First Appeal No. 2638 of 2003 by the appellant defendant - bank and the said application may be allowed and thus the documents and record may be considered.

8. Learned advocate, Mr. N.K. Thakkar, for the respondent - plaintiff - Company, during the course of his submission supported the impugned judgment and decree rendered by the trial Court. It is submitted that the trial Court rightly appreciated the evidence on record and rightly came to the conclusion that the defendant - bank has committed breach of the agreement and the defendant is liable to pay damages to the plaintiff - Company. The trial Court appreciating the evidence on record, rightly came to the conclusion that the plaintiff - Company accepted the offer of the defendant - bank vide letter Exh.36 dated 25.2.1994. Learned advocate Mr. Thakkar further submitted that it is very painful that institution like State Bank of India took unhealthy defence regarding letter, Exh.36 dated 25.2.1994 that the same was never received by it. It has come in evidence that the plaintiff - Company forwarded the letter to the defendant - bank and the defendant State Bank of India in fact received said letter.

9.1 Learned advocate, Mr. Thakkar, submitted that the letter, Exh.36 dated 25.2.1994 is important in the sense that the entire controversy centers round the issue pertaining to BU permission and occupation certificate to be obtained from AUDA. In the aforesaid letter, vide condition No. 14 (E), the plaintiff - Company clearly stated that generally there was no need to obtain BU permission in the area falling under AUDA and neither such permission was obtained nor permission was generally required to by AUDA and, therefore, merely for this, taking of possession may not be held up. It is submitted that the defendant - bank comes out with the defence that since the plaintiff did not obtain BU permission and occupation certificate from AUDA and, therefore, the bank will not take possession of the building. The defendant - bank had received the letter Exh.36 dated 25.2.1994 and the said fact is proved, if the subsequent correspondence entered into between both the parties is considered. Learned advocate, Mr. Thakkar, submitted that considering the subsequent letter correspondence, it is crystal clear that the reference of the letter, Exh.36 dated 25.2.1994 was made. That, therefore, the defendant - bank accepted the proposal of the plaintiff - Company that while taking possession of the building, the defendant - bank would not insist for BU permission and occupation certificate. That, therefore, the defence raised by the defendant - bank that the contract was rescinded by it because of non-procuring of such permission from AUDA falls to the ground, and the trial Court in the impugned judgment assigning cogent and convincing reasons arrived at correct conclusion that the contract was wrongfully broken by the bank.

9.2 Learned advocate, Mr. Thakkar, further submitted that the loan in favour of the plaintiff - Company was sanctioned subsequent to dated 25.2.1994. That, therefore, the very fact that the loan was sanctioned clearly suggest that not only the defendant - bank received the letter Exh.36 dated 25.2.1994, but the same was acted upon by it. Therefore, it is submitted that in fact contract between both parties came to be concluded as soon as the defendant - bank vide letter dated 1.2.1994, Exh.33 addressed to the plaintiff - Company placed its proposal and the plaintiff - Company vide letter, Exh.36 dated 25.2.1994 accepted the proposal, subject to certain terms and conditions mentioned in its letter and especially condition No. 14(E) stated in the letter, Exh.36.

9.3 Learned advocate, Mr. Thakkar, took us through the impugned judgment rendered by the trial Court and submitted that the trial Court evaluating the oral and documentary evidence on record, rightly replied essential issues raised by the trial Court in favour of the plaintiff - Company. The trial Court rightly came to the conclusion that the defendant - bank miserably failed to prove that the letter dated 25.2.1994 was fabricated and concocted by the plaintiff - Company. That, thus, the very defence raised by the defendant - bank for not taking possession of the building and for rescinding the contract entered into between both the parties, falls to the ground and consequently, the trial Court rightly held that it was the defendant - bank, who committed the breach of the contract and was, therefore, liable to pay damages to the plaintiff - Company and rightly passed the money decree.

9.4 Learned advocate, Mr. Thakkar, submitted that the arguments advanced by the appellant - defendant bank that the letter, Exh.36 dated 25.2.1994 is a counter proposal made by the plaintiff - Company cannot be accepted for the simple reason that as a matter of fact, the letter, Exh.33 dated 1.2.1994 sent by the defendant - bank to the plaintiff - Company is a proposal by the bank and the letter, Exh.36 dated 25.2.1994 is not a counter proposal, but the acceptance of the proposal by the plaintiff - Company.

9.5 Learned advocate, Mr. Thakkar, further submitted that there is a letter of Architect dated 12.12.1995, Exh.56, wherein it is clearly opined by Architect that there was no need to obtain BU permission in the area falling under AUDA, as per the prevailing norms. That the trial Court, therefore, dealing with the issue regarding the BU permission rightly placed reliance upon the letter of the Architect, Exh.56.

9.6 Learned advocate, Mr. Thakkar, further submitted that the trial Court raised an issue and regarding the jurisdiction of the civil Court to hear and decide the suit and by assigning cogent and convincing reasons, has rightly come to the conclusion that the civil Court has jurisdiction. It is submitted that initially the defendant - bank had filed an application challenging jurisdiction of the civil Court and to transfer the suit to Debt Recovery Tribunal and said application was allowed. However, plaintiff - Company challenged said order before this Court in Special Civil Application No. 9129 of 1998 and this Court allowed the said application and further directed the trial Court to expedite the hearing of the suit. That, therefore, the issue regarding the jurisdiction came to be concluded by this Court. Learned advocate, Mr. Thakkar, submitted that during the course of this appeal, on behalf of the appellant - defendant - bank, so far as the appeal is concerned, the issue regarding jurisdiction decided by the trial Court is not seriously pressed, and, therefore, the conclusion arrived at by the trial Court that the civil Court has jurisdiction may not be required to be disturbed.

9.7 ultimately, learned advocate, Mr. Thakkar, for the respondent - plaintiff - Company submitted that the appeal may be dismissed and consequently, Civil Application No. 3005 of 2010 preferred by the bank seeking permission of this Court to produce fresh evidence in form of documentary evidence deserves rejection.

9. We have examined the record and proceedings of Special Civil Suit No. 168 of 1997 in context with the submissions made by the rival sides.

10. Examining the record of the suit as well as considering the arguments advanced on behalf of both the sides, we are of the opinion that the two letters, Exh.33 dated 1.2.1994 and Exh.36 dated 25.2.1994 are requried to be considered because the entire controversy between the parties centers round the issue of BU permission and occupancy certificate. The other aspects of the matter, namely, publishing advertisement by the defendant - bank in the local newspaper regarding availability of training centre and the fact that the plaintiff - Company expressed its interest in it and consequently, the plaintiff - Company offered its land for the construction of the training centre for the defendant - bank by availing loan for the purpose of construction of building from the defendant - bank did not appear to be much in dispute.

11. Through the letter, Exh.33 dated 1.2.1994 addressed to the plaintiff - Company by the defendant - bank, it clearly transpires that the said letter was forwarded in response to the letter dated 20.7.1993, Exh.30 addressed to the defendant - bank by the plaintiff - Company. Considering the letter dated 1.2.1994, Exh.33, it transpires that pursuant to the advertisement published by the defendant - bank in the local newspaper, the plaintiff - Company vide letter, Exh.30 dated 20.7.1993 put its proposal before the defendant - bank to construct training centre on the land of the plaintiff - Company stating that the plaintiff - Company would construct training centre as per the requirement of the defendant - bank. In response to the letter, Exh.30 dated 20.7.1993, in turn the defendant - bank vide letter, Exh.33 dated 1.2.1994 accepted the proposal of offering the land of the plaintiff - Company for using the residential staff training centre of the defendant - bank. Further perusal of the letter, Exh.33 dated

1.2.1994 would suggest that the proposal made by the plaintiff - Company vide its letter Exh.30 dated 20.7.1993 came to be accepted by plaintiff - Company subject to certain terms and conditions. Condition No. 2 runs as under:

2. The construction work of the entire premises as per approved plans and as described above, will be completed in all respects by you alongwith water supply and drainage connections, electric power supply, compound walls and building use permission and occupation certificate from A.M.C./AUDA within a period of 12 months i.e. on or before 31st January 1995.

12. It is pertinent to note that the plaintiff - Company does not dispute the contents of the letter, Exh.33 dated 1.2.1994 nor it is resisted. Perusing the record of the case, it clearly transpires that the plaintiff - Company accepted not only the receipt of the letter, Exh.33 dated 1.2.1994 addrssed to it by the defendant - bank, but even the terms and conditions mentioned in the aforesaid letter, and if the letter, Exh.114 dated 7.2.1994 addressed to the defendant - bank by the plaintiff - Company is considered, it clearly transpires that the plaintiff acknowledged the receipt of the letter dated 1.2.1994, Exh.33 and requested preliminary sanction of loan to the extent of Rs. 25 Lacs for purchase of materials etc. for the purpose of construction of the building. It is pertinent to note that in the letter dated 7.2.1994, the plaintiff - Company nowhere raised any objection about obtaining BU permission and occupancy certificate. It transpires that subsequently by disputed letter, Exh.36 dated 25.2.1994, the plaintiff - Company came forward with a case that the contract shall be subject to the terms and conditions mentioned in the letter, Exh.36. About BU permission, in condition No. 14(E), it is referred as under:

14(E). Generally there is no need to obtain building use permission in the area falling under AUDA. Neither such permissions are obtained nor such permission is generally required by AUDA. Hence, merely because for this, taking of possession will not be held up.

13. Now, as seen earlier, the defendant - bank insisted vide its letter dated 1.2.1994 that the BU permission and occupancy certificate were necessary. While acknowledging the receipt of the letter dated 1.2.1994, the plaintiff - Company in its letter, Exh.114 dated 7.2.1994 did not raise any dispute about obtaining such permission, but vide letter, Exh.36 dated 25.2.1994, the plaintiff - Company came forward with the case that such permission was not ''generally'' required. We will consider as to whether as per the prevailing law, at the time when the contract was entered into and the building was constructed, whether BU permission and occupation certificate were legally required or not later on in this judgment, but about the letter, Exh.36 dated 25.2.1994, the defendant - bank raised dispute that the letter was never received by the bank. On behalf of the plaintiff - Company, contention raised was to the effect that in the subsequent letter correspondence between the parties, the letter dated 25.2.1994 came to be referred and, therefore, impliedly the defendant - bank not only admitted the receipt of this letter, but also admitted the terms and conditions mentioned in the

letter. Now, in this respect, first of all there is no direct evidence adduced by the plaintiff as to the mode in which the letter, Exh.36 dated 25.2.1994 was forwarded to the defendant - bank i.e. either by simple post or by UPC or by registered post AD. To put it differently, there is no direct evidence whatsoever on record to come to the conclusion that the defendant - bank had received the letter. The plaintiff relies upon subsequent letter correspondence, wherein the reference was made by the plaintiff about the letter dated 25.2.1994. We are of the considered opinion that merely because in the subsequent letter correspondence the plaintiff - Company referred the letter dated 25.2.1994 cannot be said to be a proof that the defendant - bank had received the said letter.

14.1 Moreover, pursuant to the advertisement published by the defendant - bank in the local newspaper vide letter, Exh.30 dated 20.7.1993, the plaintiff - Company put proposal before the bank and same came to be accepted by the bank by letter, Exh.33 dated 1.2.1994. As stated above, the plaintiff - Company vide letter, Exh.114 dated 7.2.1994 clearly acknowledged the receipt of the letter dated 1.2.1994. According to the plaintiff - Company thereafter on 25.2.1994, stating certain terms and conditions forwarded a letter, Exh.36 dated 25.2.1994 to the defendant - bank. As stated above, the very receipt of the letter by the defendant - bank cannot be said to have been duly proved. Alternatively, for the sake of arguments even if it is believed that the defendant - bank had received a letter, Exh.36 dated 25.2.1994, sent to it by the plaintiff - Company, then there is no evidence on record to come to the conclusion that the additional conditions mentioned in said letter, Exh.36 by way of counter proposal came to be accepted or acknowledged by the defendant - bank. About the BU permission, the defendant - bank in its letter, Exh.33 dated 1.2.1994, clearly expressed its mind that the BU permission was sine qua non for taking over the possession of the building. The requirement of such permission was clearly insisted upon by the defendant - bank. Vide letter, Exh.36 dated 25.2.1994, the plaintiff - Company intended to dilute the requirement regarding the BU permission, by stating that generally the same was not required and never obtained from AUDA. There is nothing on record to come to the conclusion that the defendant-bank ever relaxed its condition, regarding the BU permission and accepted the counter proposal of the plaintiff - Company that the defendant - bank will not insist for BU permission and the recovery of possession will not be held up for want of such permission.

14. We would examine this aspect with one more dimension. It is pertinent to note that neither in the letter, Exh.36 dated 25.2.1994 the plaintiff - Company has come forward with defence that BU permission and occupation certificate were never required under any law. What is stated is that generally such permissions are not required. The trial Court in the impugned judgment has dealt with this aspect of the matter and perusing the impugned judgment rendered by the trial Court and especially paragraph 21 of the impugned judgment, it transpires that even the trial Court appears to be shaky and indecisive regarding

the legal requirement of BU permission and occupation certificate. Considering the discussion made by the trial Court in paragraph 21 of the impugned judgment, at one place, the trial Court considering the relevant regulations of AUDA and considering certain provisions contained under Town Planning and Urban Development Act, 1976 came to the conclusion that it was not mandatory to obtain such permission. The trial Court further observed that non-obtaining of such permission does not amount to any criminal offence and at the most the violation may be subject to some meagre amount of penalty. Thus, in the aforesaid paragraph, trial Court came to the conclusion that the non-receipt of BU permission by the plaintiff company from AUDA can be said to be error of law, but there is nothing that it was intentional error on the part of the plaintiff company. However, in the later part in paragraph 21 of the impugned judgment the trial Court observed as under:

Further, it is also the fact that when any rule or provision has been made in relation to public safety, security etc., then, same cannot be overlooked and if it is administrative, then, it could be excused.

16. Ultimately, in paragraph 21 of the impugned judgment though the trial Court came to the conclusion that by relevant regulation framed by AUDA and as per the Town Planning and Urban Development Act, 1976, BU permission and occupation certificate are required, but considering the facts and circumstances of this case, the BU permission may not be required. The trial Court observed as under:

But, in this case, the breach of law in respect of construction is legal. Only in respect of the subject matter of agreement or construction work, on the issue of BU permission dispute has been raised. Of course, the circumstances of the present case and the decisions cited are different and, therefore, in that reference, same cannot be applied. Looking to this, BU permission is necessary. However, as per the aforesaid discussion and appreciation of evidence in this case and looking to the facts and circumstances, same is excusable and same is held accordingly.

17. Now, in this respect, if the law is considered and especially referring to Section 26 of the Gujarat Town Planning and Urban Development Act, 1976, it is clearly provided that ''no person shall carry on any development in any building or in or over any land, within the limits of the said area without the permission in writing of the appropriate authority and without obtaining certificate from the appropriate authority to that effect. Section 28 of the Town Planning and Urban Development Act, 1976 prescribes provisions regarding ''permission for retention or continuance of use of building or work or any use of land''. Sub-section 5 of Section 29 of the Town Planning and Urban Development Act, 1976 clearly prescribes that ''if any person carries on any development work or retains the use of any building in contravention of the provisions contained in the Act and especially Section 28 of the Act, the appropriate authority may direct discontinuance of use of the building and may after making an inquiry in the

prescribed manner, remove or pull down any building or work''. Section 35 of the Town Planning and Urban Development Act, 1976 makes provisions regarding the ''penalty for unauthorised development or use or continuance or retention of the use without permission'' and the penalty prescribed is, on conviction, fine which may extend to five thousand rupees and in the case of continuing offence with a further fine which may extend to one hundred rupees for every day during which the offence continues after conviction for the first offence. It is further provided in Sub-section 2 of Section 35 to the effect that ''any person who continues to use or allows the use of any land or building without being allowed to do so, on conviction, be punished with fine which may extend to one thousand rupees, and in the case of a continuing offence, with a further fine which may extend to one hundred rupees for every day during which such offence continues after conviction for the first offence.'' Section 36 of the Town Planning and Urban Development Act, 1976 empowers appropriate authority to direct removal of unauthorised development or use and in case of unauthorised use of land or building, amounting to the offence as provided u/s 35 of this Act, ''the appropriate authority is empowered to remove unauthorised development, including the demolition and to direct the discontinuance of use of such building''.

18. Considering the AUDA regulations and especially regulation No. 7, it pertains to ''application for occupancy certificate whereby after completion of the construction work, application is required to be made for obtaining occupancy certificate''. In regulation No. 6, it is provided that ''it shall be incumbent on every person whose plans have been approved, to submit a completion report in Form No. 7''. The prescribed proforma of Form No. 7 has been given in the regulations. Regulation 30 prescribes about penalties and ''in case of violation of any of the regulations, the penalty shall be as provided in the Gujarat Town Planning and Urban Development Act, 1976''.

19. Thus, it becomes crystal clear that after the completion of the construction work, it was incumbent upon the plaintiff - Company to apply to AUDA for BU permission and occupancy certificate. There is no dispute therefore that the requirement is a statutory requirement. As stated above, even the trial Court referring to relevant provisions of the law came to the conclusion that the requirement of such permission was a legal requirement. The plaintiff - Company neither in the plaint of its suit nor in the letter, Exh.36 dated 25.2.1994 clearly came forward with the case that such certificate or permission was not legally required. On the contrary considering the relevant provisions of the law, such permission and certificate was legally required.

20. In light of the entire above discussions, it becomes clear that the defendant - bank was absolutely right when it insisted for BU permission and occupancy certificate to be obtained by the plaintiff - Company from AUDA. There is no dispute that not only the plaintiff - Company failed to obtain such permission and certificate from AUDA, but the plaintiff - Company never applied for the same to AUDA. Our attention was drawn by the learned sr. counsel, Mr. Shelat, for the

appellant - defendant bank to a letter, Exh.329 (its copy produced at Exh.356). The letter is dated 12.12.1996 addressed to the defendant - bank by competent authority of AUDA. In the letter AUDA clearly stated that the owner of the land (the plaintiff - Company) did not obtain any development permission in accordance with Rules of AUDA. It is further stated in the letter by AUDA that after the completion of the construction work and before putting any building under actual use, occupancy certificate as per Regulation No. 7 of the GDCR was required to be obtained from AUDA. Thus, considering the letter of AUDA, not only it clearly transpires that the development permission was not obtained in accordance with Rules, but the requirement of obtaining BU permission and occupancy certificate after the completion of the building and before putting the building in actual use was statutorily required. Under such circumstances, mere certificate of Architect relied upon by the plaintiff'' Company, Exh.56 to the effect that such permission or certificate is not necessary and that neither such permission is obtained nor it is ''generally'' required by the AUDA, cannot be accepted because considering the relevant provisions of the law discussed above, and as per the letter of the AUDA itself, such permission and certificate was legally required. Under such circumstances, even if for the sake of arguments, it is believed that the defendant - bank had received letter, Exh.36 dated 25.2.1994 and impliedly acknowledged the receipt as per the case of the plaintiff - Company, yet, any agreement in violation of any statutory provision cannot be termed as lawful agreement. As stated above, not only the non-compliance of the statutory requirement and the regulations framed by AUDA amounts to offence and the offender is liable to pay fine, but appropriate authority may discontinue the use of such building if the use is made without obtaining required permission and in some cases even removal or demolished of building can be ordered. In the aforesaid background, when the statutory body like the defendant - bank insisted for such permission and certificate, it cannot said that thereby the defendant - bank committed breach of any contract. As stated above, the plaintiff - Company never applied to AUDA for such permission. Under such circumstances, the defendant - bank had no option, but to send the notice, Exh.79 dated 28.8.1997 to the plaintiff - Company wherein it is clearly stated that the plaintiff - Company failed to produce required building use permission and/or occupancy certificate from AUDA. It is further clearly stated that the plaintiff - Company falsely represented that BU permission was not required and attempted to produce a certificate to that effect from an architect. In the notice, the defendant - bank also referred the letter dated 12.12.1996 of AUDA to the effect that the plaintiff - Company had not obtained the permission for development from AUDA as per the rules, regulations and bylaws and informed the defendant - bank that the occupancy certificate from AUDA was statutorily required. Under the aforesaid circumstances, the act on the part of the defendant - bank to rescind the contract cannot be termed as illegal breach of contract committed by the defendant bank. When such is the situation, the defendant - bank cannot be saddled with the liability to pay damages.

21. Thus, examining the oral and documentary evidence on record, it is clear that the trial Court erred in allowing and decreeing the suit in favuor of the plaintiff - Company. When the plaintiff - Company failed to comply with the legal requirements, the refusal on the part of defendant - bank to take possession of the building cannot be termed as wrongful refusal. It is crystal clear that any agreement in breach of law cannot be enforced. When such is the situation, even for the sake of arguments, it is believed that the defendant - bank had received the disputed letter, Exh.36 dated 25.2.1994, wherein the plaintiff - Company had relaxed the requirement regarding obtaining BU permission and occupancy certificate and even if it is believed that the defendant - bank impliedly accepted the situation, yet, the fact remains that the said action amounts to breach of mandatory requirements laid down under the law. Even considering Sub-clause(b) of Sub-section (2) of Section 20 of the Specific Relief Act, it is clearly provided that where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the Court may exercise its discretion not to decree specific performance. In the instant case, as discussed above, without obtaining BU permission and occupancy certificate, if any person commences use of a newly constructed building, not only it amounts to an offence, but as discussed above in this judgment, the competent authority is empowered to evict such person from the building and to order discontinuance of the user of the building and in appropriate cases, even demolition can be ordered. Under such circumstances, the defendant - bank was justified in insisting for BU permission and the completion certificate, but the plaintiff - Company never applied for the same to AUDA. Moreover, as stated above, any agreement amounting to breach of any requirements laid down under the law can be termed as void agreement, which cannot be enforced. As stated above, in absence of such permission and certificate, if the defendant- bank would have possession of the building, that would have caused hardship on the defendant - bank. Therefore, in every respect, the action on the part of the defendant - bank in refusing to take possession cannot be termed as wrongful act, enabling the plaintiff - Company to recover damages from the defendant - bank.

22. The trial Court in the suit initially upon an application filed by the defendant - bank came to the conclusion that Debt Recovery Tribunal had jurisdiction to hear and decide the dispute. The said order came to be challenged by the plaintiff - Company before this Court in Special Civil Application No. 9129 of 1998 was filed. It further transpires that the defendant - bank had initiated some proceedings before Debt Recovery Tribunal pertaining to recovery of loan amount from the plaintiff - Company. Said proceedings before the Debt Recovery Tribunal was also came to be challenged before this Court. This Court in common order allowed the Special Civil Application and so far as the present civil suit being Special Civil Suit No. 168 of 1997 was concerned, this Court directed the trial Court to hear and decide the suit expeditiously. The trial Court, therefore, in the impugned judgment while dealing with the issue No. 5 regarding the jurisdiction

relying upon the order passed by this Court, came to the conclusion that the civil Court had jurisdiction to hear and decide the present suit. While dealing with issue No. 5, the trial Court held that once the High Court has decided this question regarding the jurisdiction, that decision was binding upon the trial Court. It is true that the defendant - bank challenged the decision of learned Single Judge by preferring Letters Patent Appeal. Considering the submissions made on behalf of both the sides, it is clear that no interim stay was granted in the letters patent appeal, restraining the trial Court from proceeding further with the suit. In other words, no stay was granted pending the letters patent appeal against the further progress of the suit. As stated above, the suit came to be disposed of by the trial Court by impugned judgment and decree on 16.10.2003. The trial Court was, therefore, bound to abide by the order passed and directions issued by learned Single Judge of this Court in the Special Civil Application. Under the aforesaid circumstances, the suit came to be disposed of on merits by the trial Court. When such is the situation, so far as the present appeal is concerned, even on behalf of the appellant - defendant bank, the issue regarding the jurisdiction was not pressed in this appeal.

23. In light of the entire above discussions, we are, therefore, of the considered opinion that the trial Court erred in allowing and decreeing the suit in favour of the plaintiff - Company. Therefore, the present first appeal deserves to be allowed and the impugned judgment and decree rendered by the trial Court deserves to be set-aside and the suit filed by the respondent - plaintiff Company deserves to be dismissed. However, it may be noted that pending this appeal, by order dated 26.12.2003 made in Civil Application No. 9115 of 2003, by way of interim arrangement, it was directed that without prejudice to the rights and contentions in the appeal, the appellant - original defendant bank shall deposit Rs. 1,00,00,000/- within four weeks from the date of said order and on the said condition, the execution and operation of the impugned judgment and decree passed by the trial Court came to be stayed. Pursuant to said direction, the appellant - defendant bank deposited Rs. 1 Crore. It was further directed that there shall not be withdrawal by the plaintiff - Company till further orders. By further order dated 22.03.2004, the said Civil Application No. 9115 of 2003 was finally disposed off as under:

That the respondents shall be permitted to withdraw the sum of Rs. 1.00 Crore (Rupees One Crore) deposited by the appellant pursuant to the earlier interim orders in this application upon the Directors of the respondent filing in this Court an undertaking on oath, stating that they shall personally refund the amount to be withdrawn in case appeal is allowed; that during the pendency of the appeal, the property in question viz. "Niharika" building shall stand continuously mortgaged to the appellant-bank, and that the respondent company and its Directors shall not create in respect thereof any other charge or encumbrance and shall not, in any way, transfer that property or any right or interest thereon except with the permission of the Court....

23.1 The said order was carried in appeal before the Hon''ble Apex Court and Hon''ble the Apex Court disposed of the appeal by order dated 27.9.2004 as under:

The impugned order is varied to the extent that the respondent (plaintiff - Company) will be allowed to withdraw Rs. 1 Crore on furnishing a Bank Guarantee of a Nationalised Bank to return the amounts in the event the Appellants succeed in the Suit.

24. It further transpires that pursuant to the above orders, the respondent - Company furnished bank guarantee and withdrew the amount deposited by the appellant - bank. Now, as discussed above, the first appeal preferred by the appellant - defendant bank deserves to be allowed. Under such circumstances, the respondent - plaintiff Company shall be liable to return the said amount. The respondent - plaintiff Company shall also be made liable to pay running interest @ 6% p.a. on said amount from the date of receipt of said amount till the respondent - plaintiff Company either pays the amount to the appellant - defendant bank or deposits the amount with this Court.

25. So far as the Civil Application No. 3005 of 2010 is concerned, the same is preferred by the appellant - defendant bank under Rule 27 Order 41 of the Civil Procedure Code, requesting production of additional evidence in form of certain documents. Since the appeal is allowed and the material already available on record of the suit is found to be sufficient for appropriate conclusion, the said civil application does not require any consideration. As per the order dated 29.3.2010 passed in Civil Application No. 3005 of 2010, the said application was ordered to be considered along with the main appeal. When such is the situation, Civil Application No. 3005 of 2010, accordingly deserves to be dismissed.

26. For the foregoing reasons, the appeal is allowed. The impugned judgment and decree rendered by learned 3rd Joint Civil Judge (S.D.), Ahmedabad (Rural) on 16.10.2003 in Special Civil Suit No. 168 of 2007 is set-aside. Consequently, the suit preferred by the respondent - plaintiff Company is ordered to be dismissed. The respondent - plaintiff Company shall pay cost of the appeal and of the suit to the appellant - defendant bank and the respondent - plaintiff Company shall bear its own costs.

The respondent - plaintiff Company is directed to return the amount which it has received by virtue of the interim orders passed in this matter and as narrated above in this judgment to the appellant - defendant bank with running interest @ 6% p.a. from the date of actual receipt of the amount till the amount is paid to the appellant - defendant bank or till the amount is deposited with this Court. Four weeks'' time is granted to the respondent - plaintiff Company to comply with this direction.

Civil Application No. 3005 of 2010 stands dismissed.

Appellate Decree to be drawn-up accordingly.

