**(2011) 02 MAD CK 0009**

**In the Madras High Court**

**Case No :** CS No. 558 of 1998

Unit Trust of India APPELLANT

Vs

Hill Country Holiday Resorts India Ltd. RESPONDENT

**Date of Decision :** 08-02-2011

**Acts Referred:**

Companies Act, 1956 — Section 292(2), 4A
Contract Act, 1872 — Section 10, 2, 37
General Clauses Act, 1897 — Section 27
Specific Relief Act, 1963 — Section 39
Unit Trust of India Act, 1963 — Section 21

**Citation :** (2011) 163 CompCas 323 : (2011) 3 CompLJ 119

**Hon'ble Judges :** T. Mathivanan, J

**Bench :** Single Bench

**Advocate :** Murali, Rangarajan and Prabhakaran, for the Appellant; R. Gandhi and R. Gowri, for the Respondent

# Judgement

T. Mathivanan, J.—Originally, this suit has been instituted by the Plaintiff, viz., the Unit Trust of India, through its duly constituted attorney,

TDICI Ltd., a public limited company and subsequently an application in OA No. 3941 of 2007 was filed by the Plaintiff with a prayer to permit

to amend the cause title in respect of change of the name of TDICI Ltd., into ICICI Venture Funds Management Company Ltd., representing the

Unit Trust of India in the above suit. This application was allowed on 4 August, 2008, and, in pursuant to the above said order, the Plaintiff was

permitted to amend the cause title changing the name of constituted attorney of the Plaintiff from TDICI Ltd., to ICICI Ltd. Accordingly, the cause

title was suitably amended by the registry on 11 August, 2008.

2. The facts, which are absolutely necessary for the disposal of the suit, are recapitulated as under:

 

2.1 The Plaintiff, the Unit Trust of India, a body corporate incorporated under the provisions of the Unit Trust of India Act, 1963, has filed the suit

through its duly constituted attorney ICICI Venture Funds Management Company Ltd., a limited company registered under the Companies Act,

1956 and notified u/s 4A of the Companies Act, 1956, as a public financial institution.

3. The Defendant, Hill Country Holiday Resorts India Ltd., is a public limited liability company incorporated under the provisions of the

Companies Act, 1956.

4. The Unit Trust of India (hereinafter referred to as ''UTI'') made a scheme known as ''Venture Capital Unit Scheme 1989-VECAUS)''

(hereinafter referred to as VECAUS-I) u/s 21 of the Unit Trust of India Act, 1963. The funds under the VECAUS-I were proposed to be

advanced to certain concerns with the main objective of providing finance more particularly in the form of venture capital assistance. To achieve the

said objectives, the UTI, pursuant to an agreement dated 20 March, 1989, had appointed Technology Development and Information Company of

India Ltd. (hereinafter referred to as ''TDICI'') as the manager of VECAUS-I for the time being to be vested with all the necessary powers to

deploy the funds in pursuance of the objectives of VECAUS-I. By a general power dated 27 October, 1994, the UTI had appointed TDICI as a

lawful attorney to do all or any of the acts authorised by the UTI as the manager of VECAUS-I.

5. The Defendant-company, which is engaged in the business of holiday resorts, was desirous of expanding its operations by constructing

additional resorts at Lovedale, Yercaud and Mahabalipuram in the State of Tamil Nadu (hereinafter referred to as the ''project''), and had

approached the Plaintiff for financing the project.

6. The Plaintiff had also agreed to finance a part of the cost of the project in the form of:

(a) subscription to 3,50,000 equity shares of the Defendant-company at a price of Rs. 15 per share aggregating to Rs. 52.5 lakhs;

(b) 3,75,000 cumulative convertible preference shares (CCPS) of Rs. 10 each aggregating to Rs. 37.5 lakhs; and

(c) to extend a normal loan of Rs. 25,00,000 to the Defendant on various terms and conditions as per the sanction letter (exhibit P2) dated 4 April,

1995.

7. As per the sanction letter (exhibit P2), the promoters of the Defendant company had to, inter alia, subscribe to Rs. 50,00,000 of equity shares

of the company at par for the project.

8. Pursuant to the above sanction, the parties had entered into (exhibit P3) an equity/ cumulative convertible preference shares subscription

agreement dated 5 May, 1995, in which the project proposed to be financed has been described in Schedule I and the financing plan has been

described in Schedule II.

9. Under Article III, the Defendant has undertaken to use the subscription amount solely for the said purposes and to meet a part of the cost of the

project and not for any other purpose. The Defendant has further undertaken that all the goods purchased with the proceeds of the subscription

amount shall be used exclusively for implementing the project. It is also stipulated that if for any reason the Defendant found itself unable to comply

with this condition, it would immediately inform the Plaintiff in writing and the reasons therefor.

10. Article VI of the said agreement deals with the conditions applicable during the currency of this agreement. Clause 6.1.1 provides that the

CCPS would be entitled to 8 per cent dividend every year, payable on a cumulative basis before any dividend is declared for the equity shares.

11. Article 6.1.2 provides that the CCPS would be converted into equity shares of the Defendant-company either in full or in part, at the option of

the Plaintiff at a price which would be five times the earnings per share of the Defendant-company (diluted) subject to a maximum price of Rs. 40

per share any time before an initial public offering is made by the Defendant but not later than 31 December, 1997.

12. Article 6.1.3 provides that in the event the Plaintiff chooses not to exercise its option to convert the CCPS into equity shares, the CCPS would

be redeemed in two equal instalments on 31 March, 1998 and 31 March, 1999, with a 25 per cent, redemption premium.

13. Article 6.4 provides for the Plaintiff to have a right of nomination of directors on the board of directors of the Defendant. Article 6.5

contemplates that the Defendant shall not recognise or register any transfer of shares in the Defendant''s capital made or to be made by the

promoters, their friends, associates as may be specified by the Plaintiff.

14. In respect of the equity shares, the Plaintiff had subscribed to the equity shares at a premium of Rs. 5 per share only on the Defendant''s

projected performance for the future years. Since the EPS was only Rs. 0.32 per share for the year ended 31 March, 1997, the Plaintiff was

entitled to convert the said CCPS into equity shares of the Defendant at par, which would reduce the average cost of acquisition of equity shares

to Rs. 12.40 per share, which would be better than the price of Rs. 15 per share subscribed earlier by the Plaintiff. Further, the Defendant has not

paid any dividend both on the equity capital and on the preference capital to the Plaintiff as on date. The Plaintiff has not made any returns on the

investment since the date of disbursement.

15. In the above circumstances, the Plaintiff had exercised its option of converting the CCPS into equity shares, vide its letter dated 22 December,

1997, as per the terms of the said agreement. However, the Plaintiff was shocked to receive a letter dated 6 January, 1998, from the Defendant,

wherein the Defendant had contended that the Plaintiff had No. right to exercise its option of conversion since it failed to disburse the normal loan

of Rs. 25,00,000 and that the conversion letter converting the CCPS into equity shares was communicated to it only on 1 January, 1998.

16. The said normal loan of Rs. 25,00,000 sanctioned to the company was not disbursed to the Defendant on the following reasons:

(a) The Defendant had failed to obtain the necessary approval from the Hill Area Conservative Authority (HACA), Government of Tamil Nadu,

for the construction of the resorts.

(b) The promoters of the Defendant failed to bring in their balance part of equity participation of Rs. 25,00,000 as per the terms and conditions of

the Plaintiffs sanction letter.

(c) The utilisation of funds by the Defendant for implementation of the project underwent a change compared to those identified by the Plaintiff

while appraising the project.

(d) The financing by the Plaintiff was for the Defendant to meet a part of the requirement of funds for the proposed project. However, the funds were not utilised for the same. The term loan of Rs. 50,00,000 from UCO Bank, which was to be repaid as part of the proposed project, was not

repaid.

(e) There was substantial delay in implementation of the project.

(f) The Defendant promised commencement of construction activity on three additional resorts by April, 1996. However, as on date construction

has commenced on only one resort.

(g) The Defendant''s financial performance was poor in terms of collections and sales of resorts.

17. Further, the Plaintiff has an option not to disburse the normal loan in the event of misrepresentation of facts and non performance of terms of

sanction.

18. The Plaintiff has not committed any breach of its obligation under the said agreement and has the right to seek for the conversion of CCPS into

equity-shares. Regarding the receipt of the notice of conversion only on 1 January, 1998, it was specifically clarified by the Plaintiff that the

conversion notice dated 22 December, 1997, had been sent through one ELBEE Courier on 23 December, 1997, under consignment note No.

890693860. The said courier had confirmed orally on 30 December, 1997, as well as in writing vide its letter dated 2 January, 1998, that the

Defendant had refused to accept the said letter. Therefore the copies of the conversion notice were sent by speed post and by registered post on

30 December, 1997, and an additional copy was also sent under certificate of posting on 31 December, 1997. The conversion option was

exercised as per the terms of the agreement.

19. The Defendant has wilfully and wantonly committed breach of the express terms of the said agreement despite having received benefits and

having acted upon the said agreement. There is absolutely No. justification on the part of the Defendant to refuse to convert and issue the shares as

demanded by the Plaintiff, as per the agreement. The Defendant is bound to act as per the terms of the agreement. The option of conversion is

exclusively with that of the Plaintiff. Despite exchange of correspondences, the Defendant had failed to convert and issue the equity shares of the

Defendant in favour of the Plaintiff to which the Plaintiff is legally entitled.

 

20. The case of the Defendant is that the suit is liable to be dismissed in limine as the same has been filed by the Plaintiff, the Unit Trust of India,

which is not a party to the subscription agreement dated 5 May, 1995. The subscription agreement dated 5 May, 1995, is in respect of financial

facility to be given by TDICI Ltd., to the Defendant in respect of its projects and consisting of clauses for the investment by TDICI Ltd., in the

share capital of the Defendant. In this circumstance, the subscription agreement, which is sought to be enforced pertains to movable property,

cannot be enforced by way of specific performance. Instead, the TDICI Ltd., can only institute an action for damages in the event of the breach of

any of the terms of the subscription agreement. Since, the Plaintiff has the option of seeking redemption on the shares or to sue for damages, the

Plaintiff cannot maintain the present suit, where alternative remedies are available.

21. The Plaintiff had wilfully breached its contractual obligations and hence the suit, on this ground, is also liable to be dismissed.

22. Since the agreement dated 5 May, 1995, was entered into between the Defendant and the TDICI Ltd., the said agreement can be enforced

only by TDICI Ltd., which has not even been made a party to the present suit.

23. Admittedly, the terms and conditions in the sanction letter dated 4 April, 1995, which comprises the package deal and the loan of Rs.

25,00,000 and the subscription agreement are composite and integral. As per Clause 9 of the agreement, which provides for suspension or

cancellation of the agreement, where the circumstances set out in Clause 9.1 are occasioned by the Defendant, TDICI is only entitled to terminate

the right of the Defendant to call upon the TDICI to pay the subscription amount and Sub-clause 9.3 provides that notwithstanding the above, all

the provisions of the agreement would continue in fullforce.

24. Under Schedule II, the caption ''source of funds'' covered the loan of Rs. 25,00,000 to be extended by TDICI to the Defendant. Under

Clause 5(3), the Defendant was required to comply with the special conditions stipulated in Schedule III to the agreement. Clause 7 of the

Schedule III required the Defendant not to declare any dividend during the currency of the loan unless all the principal instalments and interest

payments, preference dividends and other money due to TDICI were paid. The above clauses go to show that the normal loan to be extended by

TDICI was part of the transaction agreed to by the parties.

25. TDICI has described the financing plan in Schedule II to the normal loan agreement and under the head ''sources of fund'' the sum of Rs.

25,00,000 being the normal loan is to be extended by TDICI as a part of the funding pattern. TDICI having miserably failed in complying with the

terms of the contract, are not entitled to seek conversion of their shares.

26. Pursuant to the sanction letter dated 4 April, 1995, the Defendant convened an extraordinary general meeting on 24 April, 1995, in order to

fulfil the requirements laid down by TDICI in its sanction letter dated 4 April, 1995. The Defendant thereafter obtained the signatures from the

managing director and other directors, as stipulated under the normal loan agreement, CCPS agreement and deeds of personal guarantee, demand

promissory note and shortfall undertakings were also obtained. The same were then given to'' TDICI. TDICI however, failed to disburse the loan

of Rs. 25,00,000 despite the compliance of all the terms by the Defendant in this regard.

27. That on 19 November, 1997, a meeting was held at Bangalore at the office of TDICI, wherein'' some of the officers from TDICI had

participated. At this meeting, the officers, who had participated, had categorically stated that they did not want to participate in the project of the

Defendant and wanted to redeem the preference share capital. It was further stated that the option of conversion would not be exercised by

TDICI. Since the loan of Rs. 25,00,000 was not disbursed by TDICI consequent to these representations, the Defendant was forced to make

alternative arrangements with other nationalised banks for their financial requirements.

28. Since the TDICI failed to fulfil its obligation of extending the normal loan of Rs. 25,00,000 the Plaintiff or TDICI could not exercise its option

of conversion of the CCPS into equity shares. The letter dated 22 December, 1997, which is said to have been sent to the Plaintiff before 31

December, 1997, is absolutely wrong. In fact, the letter dated 22 December, 1997, was received by the Plaintiff only on 1 January, 1998.

29. When the Defendant responded to the letter dated 22 December, 1997, refusing conversion, inter alia, on the ground that TDICI had not

 

disbursed the loan, TDICI did not raise the issue of non-disbursement as being on account of the grounds raised in the paragraph under reply. The

Plaintiff has also not filed any document to substantiate their contentions.

30. As per Clauses 9.1 and 9.2 of the agreement, TDICI is required to issue a notice in writing setting out the default and if, despite the issuance of

the notice, the Defendant continues in its default, TDICI can only terminate the right of the Defendant to call upon TDICI to pay the subscription

amount. Further Clause 9.3 states that any cancellation or suspension or termination on account of the events set out in Clause 9.1 would not affect

the other provisions of the agreement and the same shall continue in full force. TDICI ought to have put the Defendant on notice as to the alleged

reasons for the non disbursement of the sanctioned loan. Hence, the Plaintiff and TDICI are estopped from raising these belated pleas in the

present proceedings.

31. The grounds raised in sub-paragraphs (a) to (g) of paragraph 16 are wrong and misleading. TDICI had sought to raise the ground of non-

obtaining of necessary approvals vide its letter dated 6 September, 1995, upon the request of the Defendant to make its subscription to the

cumulative convertible preference shares. However, when the Defendant, vide letter dated 3 October, 1995, pointed out that Synergy Finance

Exchange Ltd., was willing to step into the shoes of TDICI but out its stake in the Defendant, TDICI had by letter dated 26 October, 1995,

enclosed the subscription cheque for the cumulative convertible preference shares. It is thus evident that TDICI and the Plaintiff are raising these

grounds merely as excuses to evade disbursement of the loan of Rs. 25,00,000.

32. Both the Plaintiff and TDICI were aware that the approval from HACA was awaited and only after the Defendant informed TDICI that

Synergy were willing to step into its shoes, did TDICI release the subscription cheque for the CCPS.

33. It is not correct to say that the conversion notice dated 22 December, 1997, was refused by the Defendant. In this connection, the Defendant

states that its office is under standing instructions to accept any letter or courier addressed to it. In any event, TDICI could have served the notice

on or before 31 December, 1997, through fax, speed post or by personal delivery at the registered office of the Defendant. It is relevant to state that the Defendant-company held its board meeting on 29 December, 1997, and the nominee director representing TDICI could very well have

placed the letter dated 22 December, 1997, before the board of directors. But it was not done so. Under this circumstance, the Defendant is

entitled to refuse to convert the preference shares into equity shares on account of the failure on the part of the applicant to fulfil its obligations

under the contract. As per the terms of the agreement, TDICI requires notice to convert on or before 31 December, 1997, but the same was not

done. In this circumstance, the Defendant is well within its rights to refuse the same.

34. The Plaintiff, while denying the averments of the written statement of the Defendant by way of reply statement, has contended that even in the

agreement the nomenclature of the Plaintiff has been clearly mentioned and, equally, it has been clearly described that the Plaintiff is a duly

constituted attorney of UTI and that this suit has also been filed in the same capacity and, hence, there is No. inconsistency in the description of the

Plaintiff.

35. The Plaintiff being dominus litus has the legal right to enforce contractual obligations under the subscription agreement. Having committed

breach of the various covenants of the subscription agreement and having retracted from various promises made to the Plaintiff, the Defendant is

estopped from raising such contentions. It is an admitted proposition of law that the person committing breach of contract cannot raise such

defence.

36. It is totally not correct to state that the Plaintiff had in any manner wilfully suppressed the fact that it had breached its obligations under the

contract and even a prima facie case reading of the plaint would clearly prove that full and complete disclosure have been made by the Plaintiff with

regard to reasons why the normal loan of Rs. 25 lakhs was not disbursed. Individual and separate document has been executed for the CCPS

assistance. However, defaults of any individual liability are individually enforceable. The entire subscription agreement would have to be referred to

in entirety for a proper understanding of the mutual contractual obligations between the parties.

37. The financing plan broadly describes as to how the project is likely to be

 

funded. It also depicts the requirement of funds for the year 1995-96

and can undergo changes depending on the circumstances. Merely because the normal loan of Rs. 25 lakhs is mentioned in the financing plan does

not impose any obligation on the Plaintiff to disburse the normal loan of Rs. 25 lakhs as mentioned in the financing plan. Disbursement is subject to

a separate normal loan agreement that has been entered into with the Defendant. It is pertinent to note that the Defendant has not utilised the funds

as stated in the cost of the project. The term loan of Rs. 50 lakhs availed from UCO Bank, which was to be repaid as part of the proposed

project, was not repaid.

38. It is to be noted that mere execution of loan agreement does not mean that the loan has to be disbursed. The disbursement of normal loan is

No. way connected with the Plaintiff''s right to convert the CCPS into equity shares. Further, out of the total project cost of Rs. 695.81 lakhs the

normal loan component forms a minor portion, i.e., 3.6 per cent of the project cost. That cannot be held as a reason or justification for not

converting the CCPS into equity shares.

39. In the meeting held on 19 November, 1997, the Plaintiff had never stated that they would not exercise the option of conversion. In fact vide its

letter dated 20 January, 1998, the Plaintiff has clearly clarified the distorted version of the minutes of the meeting made out by the Defendant. The

said meeting has No. bearing on the issue of conversion of CCPS into equity shares and as such has not been highlighted in the plaint. In fact the

Plaintiff had taken all steps to serve the notice before 31 December, 1997, by fax, registered post with acknowledgment due, etc. But the

Defendant had mala fide refused to receive the notice seeking conversion into equity shares.

40. It is reiterated that the Plaintiff being a public financial institution is bound to consider the matters in public interest. Admittedly, the Defendant

not having obtained approval from HACA and not having commenced work in some of its resorts etc., are all important factors to be considered

by the Plaintiff. The company''s financial performance as compared to projections given are far lower:

(Projected) (Rs. in lakhs)

1995-96 1996-97 1997-98

Gross Revenue 272 385 1,105

PAT 58 92 270

(Actuals) (Rs. in lakhs'')

1995-96 1996-97 1997-98

Gross Revenue 266 175 188

PAT 34 3 4

41. Operationally, there has been a major slow down in resort construction and operations. The above figures are clearly self explanatory.

42. The Defendant is merely raising technical objection with the intention of delay in making payments and dues to the Plaintiff.

43. Based on the pleadings of the parties to the suit, the following issues have been formulated for the better adjudication of the suit:

(i) Whether the Plaintiff is entitled for a declaration that the Plaintiff has the right to exercise the option of conversion of the 3,75,000 cumulative

convertible preference shares of Rs. 10 each aggregating Rs. 37.5 lakhs into 3,75,000 fully paid equity shares of Rs. 10 each of the Defendant-

company aggregating to Rs. 37.5 lakhs by specifically enforcing Clause 2 of Article 6.1 of the agreement dated 5 May, 1995, entered into

between the Plaintiff and the Defendant?

(ii) Whether the Plaintiff is entitled for a mandatory injunction directing the Defendant to issue 3,75,000 fully paid-up equity shares of Rs. 10 each

at a par after such conversion to the Plaintiff in the name of Unit Trust of India (A/c VECAUS-I) as per letter dated 22 December, 1997?

(iii) Whether the Plaintiff has locus standi to seek enforcement of the subscription agreement dated 5 May, 1995, in the absence of any privity of

contract between the Plaintiff and the Defendant?

(iv) Whether TDICI is entitled to seek for conversion of share of the Defendant-company?

(v) Whether TDICI wanted to exit from the project when the Defendant requested for disbursement of the loan of Rs. 25 lakhs as per the terms of

the contract?

(vi) Whether the right of TDICI to convert the preference shares of the Defendant stood forfeited on account of the breach of the obligations under

the agreement?

 

(vii) Whether it was the responsibility of TDICI to communicate the letter dated 22 December, 1997, in the board meeting held on 29 December,

1997, which was attended by the nominee of TDICI?

(viii) Whether adverse inference could be drawn against the Plaintiff and TDICI has not communicated the alleged letter dated 22 December,

1997, prior to the cut of date in the manner known to law?

44. By way of finding answer for the above formulated issues, the parties to the suit in order to establish their respective cases went on trial.

45. One Mr. Vinod Kumar Menon, who is the associate vice-president-legal of the Plaintiff''s company, was examined as PW1. During the course

of his examination, exhibits P1 to P11 were marked.

46. On the other hand, Mr. George Koshy, who is the managing director of the Defendant''s company was examined as DW1 and during the

course of his examination, exhibits D1 to D4 were marked.

47. Even though, as nearly as eight issues have been formulated as specified above, for determination of the suit, issue No. 3 appears to be

preliminary in nature. Apart from this, out of seven other issues, those which are identical in nature with the other one have been clubbed together

for proper settlement.

Issue No. 3 48. In the written statement filed by the Defendant-company, a preliminary objection was raised in respect of non-existence of privity

of contract between the Defendant and the Plaintiff, Unit Trust of India, and, hence, the Plaintiff has No. locus standi to file the present suit seeking

to enforce the clause in the subscription agreement.

49. In this connection, Mr. R. Gandhi, learned senior counsel appearing for the Defendant''s company, while advancing his argument, has

submitted that the role of the Plaintiff-UTI as per the subscription agreement (exhibit P3), is to subscribe for the shares Defendant-company as

adverted therein and the shares are to be issued in the name of UTI. The object of the subscription agreement is to extend financial facility to the

Defendant company by TDICI and, accordingly, a subscription agreement was entered into between the Defendant-company and TDICI. Hence,

any cause of action arising out of the subscription agreement, gives rise to a claim to be filed only by TDICI against the Defendant-company and the Plaintiff/UTI cannot maintain the present suit as there is No. privity of contract between UTI and the Defendant-company.

50. Learned senior counsel has also laid emphasis on exhibit P3 and submitted that the subscription agreement is also not a tripartite agreement

between the Defendant, TDICI and UTI.

51. On the contrary, Mr. Murali, learned Counsel, who is appearing for the Plaintiff, has submitted that the contention of the Defendant-company

that the suit is liable to be dismissed in limine, as the Plaintiff UTI, is not a party to the subscription agreement is clearly a specious one.

52. He has also added that even in the subscription agreement (exhibit P3), the normal clutches of the Plaintiff has been clearly mentioned and

equally, it has also been clearly described that the TDICI is a duly constituted attorney of UTI and that the suit has been filed in the same capacity

and, hence, there is No. inconsistency in the description of the plaint.

53. On coming to exhibit P3, it reveals that the caption of the agreement is equity/cumulative convertible preference shares subscription agreement,

dated 5 May, 1995. It also appears that the agreement under exhibit P3 seems to have been entered into between TDICI and Hill Country

Holiday Resorts India Ltd.

54. It is pertinent to note here that the averments made in paragraphs 2, 3 and 4, in page 2 of the above subscription agreement, are having

relevancy to this preliminary issue, to determine as to whether, UTI is having competency to maintain the suit against the Defendant''s company

through TDICI.

55. Paragraphs 2, 3 and 4 of the subscription agreement are extracted hereunder:

Whereas Unit Trust of India, a body corporate, incorporated under the provisions of Unit Trust of India Act, 1963 (hereinafter referred to as

''UTI'', which expression shall, unless it be repugnant to the subject or context thereof, include its successors and assigns) has formulated a scheme

called ''Venture Capital Unit Scheme-1989'' (hereinafter briefly referred to as ''VECAUS'') for the purposes of venture capital financing through

TDICI;

Whereas UTI has appointed TDICI as its manager and agent to manage, invest and realise and recover on behalf of UTI the unit capital of

 

VECAUS;

Whereas TDICI, as the manager and agent of UTI, manage and invest in respect of unit capital of VECAUS as aforesaid has the necessary

powers to subscribe to the shares of the company for and on behalf of UTI and for the purpose enter into this agreement as agent of UTI.

56. On this line, PW1 in his proof affidavit, in paragraphs 3 and 4, he has ratified the factum that UTI has appointed TDICI as its manager, agent

and constituted attorney to manage, invest and realise and recover on behalf of UTI, the unit capital of VECAUS-I.

57. PW1 has also stated that in pursuant to an agreement, dated 20 March, 1989, entered into between TDICI and UTI, the said TDICI was

appointed as the manager of VECAUS-I for the time being to be vested with all the necessary powers to deploy the funds in pursuance of the

objectives of VECAUS-I.

58. Learned Counsel for the Plaintiff has also added that by a general power dated 27 October, 1994, as well as by an agreement dated 20

March, 1989, the UTI appointed TDICI as its lawful attorney and that, the non-marking of the agreement dated 20 March, 1989, and the general

power dated 27 October, 1994, will not in anyway come to be a hurdle preventing the Plaintiff from instituting the suit.

59. It appears from the records that the Plaintiff has brought out an application in A. No. 3941 of 2007 seeking permission to amend the cause title

in respect of change of the name of TDICI to the present ICICI Venture Funds Management Company Ltd., representing for UTI in the above

suit. In the affidavit filed in support of the application, the Plaintiff has stated that at the time when the suit was filed, the Unit Trust of India, was

represented by its duly constituted attorney TDICI and as per Section 21 of the Companies Act, the name of the said company, viz., TDICI has

been changed as ICICI Venture Funds India Ltd., and hence, the Plaintiff has approached this Court for amending the cause title.

60. After hearing both sides, this Court on 4 August, 2008, has allowed the application permitting the Plaintiff to amend the cause title as prayed

for. In pursuant to the order dated August 4, 2008 and made in A. No. 3941 of 2007, the cause title has been suitably amended in the following

manner:

 

The Unit Trust of India, represented by its duly constituted attorney, ICICI Venture Funds Management Company Ltd.

61. From the above context, it is made clear that for the purpose of venturing financial facility, the Unit Trust of India, has appointed the TDICI as

its manager and agent to manage, invest, release and recover on behalf of UTI. The TDICI as the manager and agent of UTI, is empowered not

only to subscribe to the shares of the Defendant''s company for and on behalf of UTI, but also it is empowered to file the suit on behalf of UTI in

the capacity of UTI''s constituted attorney.

62. Learned senior counsel Mr. R. Gandhi, appearing for the Defendant company after making reference to the cross-examination of PW1, has

submitted that PW1 has specifically admitted that there was No. separate agreement between the TDICI and the ICICI Venture Funds regarding

the original agreement between the TDICI and the Defendant and that there was No. privity of contract between the UTI and the Defendant.

63. He has also submitted that PW1 has also stated in his cross-examination that after the change of the name as ICICI Venture Funds, the

Defendant never entered into any agreement with ICICI Venture Funds and, therefore, he has reiterated his demand that the suit has to be

dismissed as there is No. privity of contract between the Defendant and Plaintiff. He has also canvassed that even for changing the name as ICICI

Venture Funds that should be done by means of resolution passed at meetings of the board of the company as contemplated u/s 292(2) of the

Companies Act. In support of his argument, he has placed reliance upon the decision in I.T. Cube India (P) Ltd. v. I.T. Cube Inc. (2006) 69 SCL

319 (Karn) : (2006) TLKAR 259.

64. This Court has considered the rival submission. This Court has also carefully perused exhibit P3 subscription agreement and other materials

available on record.

65. It is obvious to note here that PW1 is not an employee of UTI. This has been agreed by PW1. On the basis of the resolution passed by the

board of directors of ICICI Venture Funds, on 23 July, 2003, he has been authorised to give evidence on behalf of the Plaintiff. When such being

the case, the mere admission made by PW1 that there was No. direct agreement between the UTI and the Defendant-company will not give strength to the case of the Defendant to say that the Plaintiff/UTI is not having competency or locus standi to maintain the suit.

66. Accordingly, issue No. 3, which is preliminary in nature, is answered in favour of the Plaintiff.

Issue No. 5 67. Exhibits P2 and P3 are the vital and important documents and, as such, playing a pivotal role. The Defendant-company proposed

to establish resorts in various places, for which financial facility was sought from TDICI. Exhibit P2, is the offer letter dated 4 April, 1995 and

thereby, the TDICI offered to extend the financial facility to the Defendant''s company in the following manner:

To subscribe to Rs. 3,50,000 equity shares of Hill Country Holiday Resorts India Ltd., at a price of Rs. 15 per share aggregating to Rs. 52.5

lakhs;

To subscribe 3,75,000 cumulative convertible preference shares of Rs. 10 each aggregating to Rs. 37.5 lakhs;

To extend a normal loan of Rs. 25 lakhs to the company.

68. Exhibit P3 is the equity/cumulative convertible preference shares subscription agreement dated 5 May, 1995, entered into between the Plaintiff

and the Defendant.

69. In exhibit P3, the TDICI has agreed to finance a part of the cost of project in the form of subscription to equity shares, aggregating to Rs. 52.5

lakhs and cumulative convertible preference shares (CCPS) of Rs. 37.50 lakhs on the terms and conditions specified therein.

70. Schedule I of exhibit P3 contains project, whereas Schedule II contains financial plan.

71. It is clearly stated in Schedule II, financial plan that the requirement of funds for the Defendant''s company is Rs. 695.81, which would be

funded as follows:

Equity (Rs. lakhs)

Promoters (at par) 50.00

TDICI (face value) 35.00

TDICI (Premium) 17.50

Preference Equity TDICI 37.50

Normal loan TDICI 25.00

 

VTS collections 530.81

Total 695.81

72. From the above context, it is thus made clear that the Plaintiff has specifically agreed to finance the Defendant''s company including the normal

loan of Rs. 25 lakhs. Apart from this, in Clause 6 of the subscription agreement (exhibit P3), the conditions which are applicable during the

currency of the agreement have been covenanted:

1. The CCP shares shall be entitled to 8 per cent dividend every year payable on a cumulative basis before any dividend is declared for the equity

shares.

2. The CCP shares shall be convertible into equity shares, in full or in part, at the option of TDICI, at a price which would be 5 times the earnings

per share of the company (diluted) subject to a maximum price of Rs. 40 per share anytime before the initial public offering is made by the

company but not later than 31 December, 1997.

3. In the event TDICI chooses not to exercise its option to convert the CCP shares into equity shares the CCP shares would be redeemed in two

equal instalments on 31 March, 1998 and 31 March, 1999, with a 25 per cent redemption premium.

73. The Plaintiff by way of this suit has been trying to enforce Clause 6.1(2) of the subscription agreement, to convert CCP shares into equity

shares.

74. In this regard, learned Counsel appearing for the Plaintiff would submit that the entire cause of action for this suit arose based on the

subscription agreement dated 5 May, 1995 (exhibit P3) entered into between the Plaintiff and the Defendant and that the Defendant failed to keep

up the spirit of the agreement and failed to pay any dividend to the Plaintiff as contemplated in the agreement, either on the equity capital or on the

preference capital to the Plaintiff, which prompt the Plaintiff to seek the conversion of CCPS into equity shares, vide their letter dated 22

December, 1997.

75. It is pertinent to note here that the Plaintiff has admitted that the normal loan of Rs. 25 lakhs was proposed to be sanctioned to the Defendant

by the Plaintiff, but it was not able to be disbursed to the Defendant only on account of the conduct of the Defendant.

76. On the other hand, the prime contention of the Defendant is that the subscription agreement (exhibit P3) was entered into between the

Defendant and the TDICI solely for the purpose of extending financial facility to the Defendant-company by TDICI. While so, the main object of

the subscription agreement has not been fulfilled by the TDICI by not extending the normal loan of Rs. 25 lakhs to the Defendant.

77. It is categorically and emphatically admitted by TDICI in the text of the plaint as well as the reply statement that they have not extended Rs. 25

lakhs to the Defendant. However, the TDICI has projected certain grounds to justify their stand for not extending Rs. 25 lakhs to the Defendant.

78. It is also the contention of the Defendant that admittedly the TDICI by not extending Rs. 25 lakhs to the Defendant has failed to perform their

part of the obligation as per the agreement and, consequently, seek for conversion of shares and, hence, according to the Defendant, the suit is

devoid of merits and that the Plaintiff has lost their eligibility to seek for conversion of the shares.

79. It is also contended on behalf of the Defendant that TDICI has not even subscribed and purchased the 3,75,000 cumulative convertible

preference shares of the Defendant at a price of Rs. 10 each aggregating to Rs. 3,75,00,000 immediately and the said subscription and purchase

of shares, were done by the Plaintiff only after a lapse of six months.

80. It is also contended that by this time, the market price of land had escalated and once again, the Defendant was put to financial crunch due to

inordinate delay on the part of the TDICI to perform their part of the contract to subscribe and purchase the 3,75,000 cumulative convertible

preference shares of the Defendant.

81. It is also the case of the Defendant that since time is the essence for the performance of the contract, more particularly when there is escalation

in the market price of the shares, having been failed to perform their part of contractual obligation, the Plaintiff cannot maintain the suit to exercise

the option of conversion.

82. Learned senior counsel appearing for the Defendant-company, while advancing his argument, has adverted to that whenever the Defendant

requested the Plaintiff for extension of the loan of Rs. 25 lakhs, as per the terms of the contract, the Plaintiff-company, TDICI, would express its

willingness to exit from the project.

83. He has also maintained that despite the compliance of all the terms of the contract by the Defendant and even after several reminders, viz.,

exhibit D1 dated 21 March, 1997 and exhibit D2, 13 August, 1997, the Plaintiff TDICI had deliberately failed to disburse the normal loan of Rs.

25 lakhs.

84. He has also maintained that when the Defendant-company had sought for the disbursement of the normal loan of Rs. 25 lakhs, it was informed

by the TDICI that they were going to exit from the project and were No. longer interested in extending the above said normal loan to the

Defendant.

85. Learned senior counsel has also argued that on 19 November, 1997, a meeting was held at Bangalore at the office of TDICI wherein the

following persons had attended the meeting on behalf of the TDICI:

(a) Mr. A.J.V. Jayachander President

(b) Mr. Nitin Deshmukh Vice-President

(c) Mr. K. Chandrasekar Asst. Vice-President

(d) Mr. Dinesh Tiwari Deputy Manager (TDICI nominee on the

Defendant board)

86. On behalf of the Defendant''s company, following persons had attended the meeting:

(a) Mr. George Koshy CMD

(b) Mr. Muneem Atthar Director

(c) Mr. J.R.K. Rao Business Consultant

87. At this meeting, the representatives of TDICI had categorically stated that they did not want to participate in the project of the Defendant and

wanted to redeem the preference share capital.

88. It is further contented that the option of conversion would not be exercised by TDICI and subsequent to these representations the Defendant

was forced to make alternative arrangements with other nationalised banks for their financial requirements.

89. Learned senior counsel has also canvassed that the Plaintiff has however

 

wilfully suppressed these facts in the present case. During the course

of his argument, he has also made reference to exhibits P7, P8 and P9. Exhibit D1, is the letter dated 21 March, 1997 and this letter seems to have

been sent through fax to TDICI by the Defendant''s company.

90. It further reveals that one George Koshy had addressed this letter to Mr. Dinesh Tiwari, wherein he has stated:

That we have finalised a suitable property for our next resort-at Munnar.

The property of 3 acres in extent and the price negotiated is Rs. 10 lakhs per acre. Please send us the loan amount of Rs. 25 lakhs at the earliest

since we will be signing the agreement with the land owners and paying the consideration in a few days'' time. The balance amount will be met

through additional equity from the promoters. Mr. George Koshy has also requested Mr. Dinesh Tiwari, to treat this as most urgent and release the

funds immediately.

91. Exhibit D2 is the agreement of sale dated 13 August, 1997, as referred to in exhibit D1, in respect of the lands measuring 3 acres specified in

exhibit B1.

92. Exhibit P5 is the letter dated 22 December, 1997, seems to have been addressed to the Defendant''s company by TDICI, in which the TDICI

has stated that it came to know from audited balance-sheet of the company as at 31 March, 1997, the company had a total revenue of Rs. 175.3

lakhs and a profit after tax of Rs. 3.6 lakhs. On the equity base of Rs. 113.75 lakhs of the company, the earning per share works out to Rs. 0.32

per share. We are therefore entitled to convert the CCPS into equity shares of the company at par.

93. Exhibit P7 is reply, dated January 6, 1998, issued by the Defendant''s company to TDICI. In this letter, while expressing shock to note from

the letter of the Plaintiff, which purports to exercise the option of convertibility, the Defendant''s company has stated that the participation of TDICI

was part of a package deal for which complementary contracts were entered into with our company. The financing pattern was part of a package

deal to be provided by TDICI was as follows:

(Rs. in lakhs)

Equity shares (face value) 35.00

 

Equity shares (Premium) 17.50

Preference equity 37.50

Normal loan 25.00

94. The Defendant has stated further in their reply that unfortunately the sanctioned normal loan was never disbursed to us despite repeated

requests from our side and in this connection we were informed that TDICI was not inclined to disburse the sum of Rs. 25 lakhs as it wanted to

exit from the project.

95. It is also stated in paragraph 3 of the letter that we have been advised that the rights of TDICI to convert preference shares would arise only if

they had fulfilled their part of the contract and disbursed the normal loan as well. The normal loan was an important part of the financial package

and the non-payment of this amount was a serious lapse on the apart of TDICI. It is not open to TDICI to commit itself breach of its obligation

and then insist on exercising its option of conversion. We are also sorry to note that a public sector undertaking going back on its word at the last

minute without advise to us.

96. The Defendant has also made reference to the meeting held at Bangalore on 19 November, 1997 and the officers, who had attended the said

meeting on behalf of the TDICI. In this connection, it was argued that the Defendant had once again raised the issue of disbursement of normal

loan and the TDICI officials had clearly stated that they did not want to participate in the project and wanted to redeem their preference capital

and exit from the project.

97. It is also adverted to that since TDICI had not performed their part of the contract/package they have No. right to exercise their option of

conversion.

98. Exhibit P8 is another letter dated 16 January, 1998, addressed to the Defendant''s company by TDICI and thereby, the Defendant was put

under notice that TDICI had exercised its option of conversion in terms of Clause 6.1(2) of the subscription agreement dated 5 May, 1995 (exhibit

P3).

99. Exhibit P9 and exhibit B3, are the same letter dated 29 January, 1998, addressed to the Defendant''s company to TDICI Limited., which

 

appears to be a reply to exhibit P8. In this letter also, the Defendant''s company had reiterated the contents of the earlier letter and stated that

since, TDICI Limited had failed to exercise their contractual obligation, they are not ready to insist upon the conversion of shares.

100. It may also be relevant to refer another letter, exhibit B4 dated 6 September, 1995, addressed by TDICI to George Koshy, chairman and

managing director of the Defendant''s company. This letter is written with reference to the earlier letter of the Defendant''s company requesting to

disburse Rs. 3.75 lakhs towards cumulative convertible preference shares (CCPS) to meet the financial requirement of the company. In this letter,

it has also been stated that in order to put up a resort in the hilly area, HACA approval is very much essential and it would be inadvisable to

proceed with a resort without HACA approval.

101. It is also stated that for the abovesaid reasons, the TDICI has proposed to put up the matter to their management shortly for obtaining a

directive on further disbursements and regret for their inability to consider further disbursement till the management gives a directive.

102. On coming to the evidence of the PW1, in paragraph 6 of his proof affidavit, he has fairly admitted that the Plaintiff had agreed to finance a

part of the cost of the project of the Defendant''s company.

103. PW1 has also admitted that the Plaintiff had also agreed the terms and conditions as per the sanction letter (exhibit P2), dated 4 April, 1995.

PW1 has also stated in his proof affidavit that the said normal loan of Rs. 25 lakhs sanctioned to the company was not disbursed on account of the

reasons assigned in the plaint as well as in reply statement under Clauses (a) to (g).

104. In his cross-examination, he would depose that TDICI had agreed to pay Rs. 25 lakhs subject to the terms and conditions mentioned in the

agreement.

105. He has also specifically admitted that the terms and conditions of the sanction letter, issued by the TDICI and the subscription agreement

(exhibits P2 and P3) are composite and integral. It is also his candid admission that TDICI had expressed its inability to disburse the loan of Rs. 25

lakhs to the Defendant''s company.

106. Further, he has also admitted that it is not the case of the Plaintiff that the

 

Defendant had not complied with the terms of subscription

agreement.

107. Further, PW1 in his cross-examination has deposed that there is No. knowledge of TDICI that it is an unconditional obligation of TDICI as

per the subscription agreement to disburse the loan to the Defendant-company.

108. He has also stated that he was not aware of the fact as to when and through whom the Defendant had brought the balance of part of equity

participation of Rs. 25 lakhs. Further, he has stated in his cross-examination that he did not know as to whether the HACA had granted approval

and further admitted that after exhibit P4, the Plaintiff had not given any disbursement to the Defendant.

109. In this connection, learned senior counsel appearing for the Defendant has submitted that the Plaintiff had wilfully suppressed the fact that it

had breached its obligations under the contract and since it had expressed its intention to exit from the project it had not disbursed the loan of Rs.

25 lakhs.

110. He has also maintained that admittedly the terms and conditions in the sanction letter dated April 4, 1995 (exhibit P2) comprised the package

deal and the loan of Rs. 25 lakhs and the subscription agreement were composite and integral. He has also added that this fact has been admitted

by PW1 in his evidence.

111. He has also made stress to Clause 9 of the subscription agreement, which provided for suspension or cancellation of agreement and in this

regard he has submitted that where the circumstances set out in Clause 9.1 were occasioned by the Defendant, TDICI was only entitled to

terminate the right of the Defendant to call upon TDICI to pay the subscription amount and Sub-clause 9.3 envisaged that notwithstanding the

above, all the provisions of the agreement would continue in full force.

112. Learned Counsel has also referred to the earlier letter and submitted that under the head ''source of fund'' the sum of Rs. 25,00,000 being the

normal loan was to be extended by TDICI as part of the funding pattern and since the TDICI having miserably failed in complying with the terms

of the contract, are not entitled to seek conversion of their shares.

113. The averments of the pleadings, the evidence of PW1 and other

 

documentary evidences, viz., exhibits P7, 8, 9 and exhibits D1 and 2 would

go to establish the fact that the conduct of the Plaintiff in not performing their part of the contractual obligation would lead the court to take the

inference that the TDICI wanted to exit from the project, when the Defendant requested to disburse a sum of Rs. 25 lakhs as per the terms of the

contract.

114. Keeping in view of the above observations, issue No. 5 is answered in favour of the Defendant.

115. Issues Nos. 7 and 8: Learned Counsel appearing for the Plaintiff has laid more emphasis on Clause 6.1(2) of exhibit P3, subscription

agreement. In Clause 6.1(2) and (3) of exhibit P3, it has been stipulated as under:

2. The CCP shares shall be convertible into equity shares, in full or in part, at the option of TDICI, at a price which would be 5 times the earning

per share of the company (diluted) subject to a maximum price of Rs. 40 per share anytime before an initial public offering is made by the company

but not later than 31 December, 1997.

116. Clause 6.1(3) reads as follows:

In the event TDICI chooses not to exercise its option to convert the CCP shares into equity shares the CCP shares would be redeemed in two

equal instalments on 31 March, 1998 and 31 March, 1999 with a 25 per cent. redemption premium.

117. Clause 6, in exhibit P3 is captioned as ''Conditions applicable during the currency of this agreement''.

118. Clause 6.1 is captioned as ''terms of CCP share subscription''.

119. Under Clause 6.1 three conditions are stipulated of which, conditions Nos. 2 and 3 are more important.'' 120. As stated above, under Clause

6.1(2) if at all the Plaintiff wants to exercise their option of conversion into equity shares, it shall have to be done not later than 31 December,

1997.

121. It is the specific case of the Plaintiff that the Defendant had failed to keep up the spirit of the agreement and failed to pay any dividend of 8

per cent every year payable on a cumulative basis before any dividend is declared for the equity shares, either on the equity capital or on the preference capital and therefore, the conduct of the Defendant had prompted the Plaintiff to seek for conversion of converting CCPS into equity

shares, vide their letter dated 22 December, 1997.

122. Exhibit P5, is the letter dated 22 December, 1997, appears to have been addressed to the Defendant''s company by the TDICI Limited. In

this letter, the Plaintiff TDICI Limited has stated that, in terms of exhibit P3, subscription agreement dated 5 May, 1995, the TDICI Limited is

entitled to convert the CCPS into equity shares of the company at any time before an initial public offering is made by the company, but not later

than 31 December, 1997.

123. In respect of exhibit P5, a prime question is arisen as to whether this letter dated 22 December, 1997, was communicated to the Defendant''s

company on or before 31 December, 1997. On this core line, issue Nos. 7 and 8 have been formulated to be answered.

124. In this connection, PW1 has deposed that the Plaintiff on 16 January, 1998 and 4 February, 1998, had given appropriate reply to the letter of

the Defendant under exhibits P8 and 9, in which it was pointed out that the conversion option had been exercised by the Plaintiff squarely as per

the express terms of the agreement. With regard to the contention regarding the receipt of the notice of conversion only on 1 January, 1998, it was

specifically clarified by the Plaintiff that the conversion notice, dated 22 December, 1997, had been sent through one ELBEE Courier on 23

December, 1997, under Consignment Note No. 890693860. It was also clearly mentioned that the courier had confirmed orally on 30 December,

1997 and in writing, vide its letter 2 January, 1998, that the Defendant had refused to accept and therefore, copies of conversion notice were sent

by speed post as well as by registered post on 30 December, 1997 and an additional copy was also sent under certificate of posting'' on 31

December, 1997.

125. PW1 has further stated that the conversion option was exercised as per the terms of the agreement and that the conversion notice which was

communicated to the Defendant''s company on 22 December, 1997, through ELBEE Courier on 23 December, 1997, under consignment note

No. 890693860, dated 23 December, 1997, addressed to Hill Country Holiday Resorts India Limited, was refused to be accepted during the period 24 December, 1997 to 29 December, 1997, stating that the company secretary was not available and hence, the consignment was returned

back to the consignor on 1 January, 1998.

126. Learned Counsel appearing for the Plaintiff has submitted that under exhibit P5 letter dated 22 December, 1997, the Plaintiff had informed his

intention of converting their shares within date (31 December, 1997) fixed to exercise the option and that communication through ELBEE Courier

has been established, through exhibit P6 and since the Defendant-company had refused to accept the notice, an inference could be drawn u/s 27 of

the General Clauses Act, 1897 that the conversion letter dated 22 December, 1997 (exhibit P5) was duly served on the Defendant''s company.

127. In order to substantiate his argument, learned Counsel for the Plaintiff has placed reliance upon the decision in Jagdish Singh Vs. Natthu

Singh, . In this case, two notices, dated 23 March, 1974 and 6 May, 1975, were issued by the Respondent to the Appellant before the suit

contained the averments that he was ready and willing to perform the contract. The notices were, No. doubt, not actually served on the Appellant

as they had come back unserved upon the alleged refusal by the Appellant to accept them. The High Court relied upon the averments in the notices

which could be treated as a part of the plaint having been referred to and relied upon therein. Under these circumstances, the apex court has held

that the High Court was right in its view and the notices must be presumed to have been served as contemplated by Section 27 of the General

Clauses Act, 1897.

128. Another decision in Mst. Bhabia Devi v. Permanand Pd. Yadav AIR 1997 SC 1919, is also on the same line.

129. While vehemently objecting the argument advanced on behalf of the Plaintiff saying that the Plaintiff had communicated its intention of

conversion of equity shares through exhibit P5, learned senior counsel appearing for the Defendant has submitted that the Plaintiff had in fact

miserably failed to exercise the option of conversion before the fixed time on 31 December, 1997.

130. He has also submitted that the Plaintiff or TDICI could not exercise its option of conversion of CCPS into equity shares, since it has been

committed breach of its part of obligation by not extending Rs. 25 lakhs to the

 

Defendants. Even assuming that the said option to be exercised, it

ought to have been exercised before 31 December, 1997, but however the letter dated 22 December, 1997, said to have been issued by TDICI

expressing its intention for conversion was not delivered to the Defendant before 31 December, 1997 and the same was received by the

Defendant only on 1 January, 1998. He has also added that even on this score, the relief sought for by the Plaintiff for conversion is not

maintainable as the said option is not exercised by TDICI before the fixed period of time limit.

131. Learned Counsel, while advancing his argument, has also drawn the attention of this Court, to exhibit D3 letter dated 29 January, 1998, to

establish and corroborate that the letter dated 22 December, 1997, alleged to have been sent by TDICI was received by the Defendant only on 1

January, 1998. In this letter dated 29 January, 1998 (exhibit D3), the Defendant''s company at paragraph No. 2, has stated that:

We strongly deny the allegations that our company had refused to accept any letter from ELBEE Courier. Please note that we have not received

any letter, packet, etc., from Elbee Couriers. We have received several letters/ parcels from different courier companies and our standing

instruction is that No. courier packet should be refused. Therefore, it is also stated that in any event, there is No. reason as to why we have to

refuse any courier and our stand will be justified by our earlier conduct in receiving all letters, couriers, fax, etc., from you.

132. In this regard, learned senior counsel for the Defendant has also submitted that it is relevant to state that the Defendant-company held its

board meeting on 29 December, 1997 and the nominee director, representing TDICI could well have placed the letter dated 22 December, 1997,

before the board of directors. The meeting of the Defendant-company held on 29 December, 1997, has also been admitted by PW1 in his cross-

examination. In this regard, he has deposed that the nominee directors of TDICI knew the fact that the Defendant-company held the board

meeting on 29 December, 1997. He has also deposed that the Defendant is within the power to convert the loan and convert the preferential

shares as per the agreement even though the TDICI had refused to pay the loan amount.

 

133. He has also deposed that he has not denied the fact that TDICI was required to service the notice of conversion on or before 31 December,

1997.

134. From the testimony of PW1 as well as from the submission made by learned senior counsel appearing for the Defendant, it is unambiguitively

established that the board meeting of the Defendant-company was held on 29 December, 1997 and that the nominee directors of TDICI, had also

participated in the meeting. But if at all TDICI wanted to serve the notice as stated under exhibit P5, dated 22 December, 1997, it could have very

well placed before the nominee directors of TDICI who had participated in the above said meeting.

135. Keeping in view of the admission made by PW1 and having regard to the submission made on behalf of the Defendant as well as on the basis

of the exhibit D3, this Court is of the view that it was the responsibility of the TDICI to place the letter dated 22 December, 1997, before the

board of directors of TDICI, but this has been omitted to be done by the TDICI.

136. of course, Section 27 of the General Clauses Act would give the presumption that the letter dated 22 December, 1997, could have been duly

served as it is alleged by the Plaintiff through exhibit P6, letter from Elbee Express Service. Since the Plaintiff-company could have very well

placed the above said letter before the board meeting held on 29 December, 1997, this Court is under the necessity to take inference that the

Plaintiff-company had deliberately refrained from placing the letter exhibit P5 before the board meeting held on 29 December, 1997, in which the

nominee of TDICI had attended. Under this circumstance, issue Nos. 7 and 8 are answered in favour of the Defendant.

Issue Nos. 1, 4 and 6

137. As already discussed, the salient features of exhibit P2 the letter of sanction dated 4 April, 1995, are as follows:

TDICI would subscribe to 3,50,000 equity shares of the Defendant at a price of Rs. 15 per share aggregating to Rs. 52.50 lakhs.

TDICI would subscribe to 3,75,000 cumulative convertible preference shares of the Defendant at a price of Rs. 10 each aggregating Rs.

37,50,000. TDICI will extend a normal loan of Rs. 25 lakhs to the Defendant.

138. Exhibit P3, the subscription agreement dated 5 May, 1995, entered into

 

between the Plaintiff and the Defendant also confirms the above

salient features.

Clause 6 of the subscription agreement, stipulates certain conditions with regard to terms of CCPS subscription:

6.1 (1). The CCP shares shall be entitled to 8 per cent. dividend every year payable on a cumulative basis before any dividend is declared for the

equity share.

6.1 (2). The CCP shares shall be convertible into equity shares, in full or in part, at the option of TDICI, at a price which should be 5 times the

earning per share of the company (diluted) subject to a maximum price of Rs. 40 per share any time before an initial public offering is made by the

company but not later than 31 December, 1997.

6.1 (3). In the event TDICI chooses not to exercise its option to convert the CCP shares into equity shares the CCP shares would be redeemed in

two equal instalments on 31 March, 1998 and 31 March, 1999, with a 25 per cent, redemption premium.

139. It is apparent that as agreed by the Plaintiff, the normal loan of Rs. 25 lakhs has not been extended to the Defendant.

140. In this regard, learned senior counsel appearing for the Defendant would submit that admittedly, the subscription agreement (exhibit P3) has

been entered into between the Defendant and the TDICI solely for the purpose of extending financial facility by TDICI. The main object of the

subscription agreement has not been fulfilled by the TDICI in not extending the normal loan of Rs. 25 lakhs to the Defendant.

141. He has also maintained that it is categorically and emphatically admitted by the TDICI in the text of the plaint that they have not extended Rs.

25 lakhs to the Defendant. However, the TDICI has raised frivolous grounds under subparagraphs (a) to (g) of paragraph 16 of the plaint, to

justify their stand for not extending Rs. 25 lakhs to the Defendant.

142. Learned senior counsel appearing for the Defendant has also submitted that since TDICI had failed to perform their part of the obligation, as

per the agreement in not extending the normal loan of Rs. 25 lakhs, the TDICI is not entitled to enforce another part of the agreement and

subsequently, sought for conversion of shares.

 

143. As per exhibits P2 and P3, the Plaintiff is under the obligation to extend the normal loan of Rs. 25 lakhs for which the Plaintiff has given

reasons as stated above for the non-disbursement of the normal loan of Rs. 25 lakhs. But the reasons assigned by the Plaintiff for non-advancing of

Rs. 25 lakhs to the Defendant in sub-paragraph (a) to (g) of paragraph 16 of the plaint is absolutely false and cannot be countenanced.

144. In order to fortify the case of the Defendant, learned senior counsel appearing for the Defendant has adverted to that both the Plaintiff and

TDICI were aware that the approval from HACA was awaited and only after the Defendant had informed TDICI that Synergy were willing to

step into its shoes, did TDICI release the subscription cheque for the CCPS, as evident from exhibit D3, dated 6 September, 1995.

145. He has also submitted that balance part of equity participation of Rs. 25,00,000 was brought in by the promoter of the Defendant on 28

April, 1995. Apart from this, he has also submitted that inordinate delay in the release of subscription by TDICI for the CCPS and failure to

extend the normal loan had delayed the project on account of which the Defendant had to meet the rise in land cost and the cost of construction.

146. He has also maintained that the funds received by the Defendant was used for the project and as per the financial plan, the requirement of Rs.

695.81 lakhs was to be funded by the TDICI only through their preference equity and normal loan, contributions by the promoters and collections

made by the company. The delay at every stage by TDICI and its non-disbursement of the normal loan of Rs. 25 lakhs resulted in the alternation

of the source of funds, which ultimately resulted in further losses. The term loan obtained from UCO Bank is governed by the conditions imposed

by the bank and TDICI having miserably failed to keep up their commitments, the Plaintiff cannot complain about the other financial dealings of this

Defendant.

147. Learned Counsel also canvassed that the contributory factor, for the delay was failure to disburse the money in time by TDICI and also on

account of the fact that the project was in a hilly terrain.

148. He has also submitted that the Defendant was not running under loss, as contended by the Plaintiff and that the Plaintiff was aware of the said

fact that though the balance-sheet and other financial particulars which were furnished to TDICI from time to time.

149. He has also submitted that as revealed from the written statement filed by the Defendant-company, Mr. George Koshy is the main promoter

of the company and that the following statistical details would establish the case of the Defendant:

Fully paid shareholding as on 4.10.1997

George Koshy (including 25,000 shares bought from Maxim A. 4,45,020

Lobo and 50,000 shares to be transferred to Mr. Yusuf)

Maxim A. Lobo 75,010

Muneem Atthar 1,50,010

Mohd. Yusuf 50,010

Mathew Koshy 50,000

M. S.P. Rajesh 10

TDICI 3,50,000

Others 17,500

As per balance-sheet 11,37,560

Promoters 7,70,070

150. Learned senior counsel for the Defendant has also submitted that if, as per the relief sought for by the Plaintiff in the suit, conversion of shares

is allowed, it will result in 7,25,000 shareholdings in the hands of the Plaintiff. In the event, if the Plaintiff buys shares of any one smaller promoter''s

share they will get more than 51 per cent, of the shareholding of the company and the main promoter Mr. George Koshy, the managing director of

the Defendant-company would be put to stake.

151. He has also, submitted that since the TDICI has not extended 25 lakhs of loan amount to the Defendant as per the subscription agreement,

and further consequential mala fide activities of the Plaintiff in filing the above suit, the Defendant thereafter amidst financial crunch on 21 January,

1998, applied for loan from the UCO Bank, Mount Road Branch, Chennai. When the Plaintiff came to know this fact, they had written a letter to

the UCO Bank not to sanction the loan alleging that they are entitled for conversion of shares of the Defendant-company, pursuant to which on 4

September, 1998, the loan was rejected by the UCO Bank.

 

152. Learned senior counsel has also urged before this Court that, on account of the activities of the Plaintiff, which is born out of mala fides, the

Defendant became NPA and therefore, the Defendant out of very much struggle in the market mobilised money through person by person and

sister company ABC on 1 February, 2008. The Defendant-company was also put in lurch for about 10 years by the conduct of the Plaintiff.

153. It is apparent from the case of the Plaintiff that the Defendant had failed to keep up the spirit of the agreement and failed to pay any dividend

to the Plaintiff as contemplated in the agreement either on the equity capital or on the preference capital to the Plaintiff, which prompted the Plaintiff

to seek for conversion of CCPS into equity shares on 22 December, 1997.

154. On the other hand, the case of the defence put forth by the Defendant is that TDICI by not extending Rs. 25,00,000 to the Defendant, have

failed to perform their part of the obligation, as per the agreement and hence, cannot seek to enforce any part of the agreement and consequently,

cannot seek conversion of shares.

155. As already discussed in the forgoing paragraphs, PW1 has admitted in his cross examination that subject to terms and conditions, the TDICI

had agreed to lend Rs. 25,00,000 to the Defendant and he has also admitted that the subscription agreement is composite and integral. Further, he

has admitted that prior to 22 December, 1997, the TDICI have expressed their inability to disburse the loan amount of Rs. 25,00,000 to the

Defendant.

156. He has also specifically admitted that it is true to say that it is not our case (Plaintiff case) that the Defendant had not complied with the

condition of subscription agreement and that TDICI had only exercised the claim of conversion of their shares.

157. Clause 9 of the agreement stands for provisions regarding suspension and cancellation of the contract.

158. Clause 9.1 stipulates the access by the company (Defendant-company) to the subscription amount may be suspended or terminated by

TDICI by notice in writing to the company upon the happening of any on the following events, namely:

(i) Default in performance of convenants and conditions: Default has occurred in the performance of any covenant, condition or agreement on the part of the company under this agreement and any other agreement and such default has continued for a period of thirty days after notice in writing

thereof has been given to the company by TDICI.

(ii) Supply of misleading information:

159. Any information given by the company in the application for financial assistance, in the reports and other information furnished by the

company in accordance with the reports system and the warranties given/ deemed to have been given by the company to TDICI is misleading or

incorrect in any material respect.

160. As per the covenants of Clauses 9.1 and 9.2, if there is any default on the part of the Defendant''s company, even TDICI may suspend or

terminate the Defendant from having access to the subscription amount.

161. When PW1 was in the box, he has deposed in his cross-examination that we have not exercised the option mentioned in Clauses 9.1 and 9.2

of the subscription agreement. PW1 has also admitted that he did not know as to whether HACA has granted approval and that after exhibit P4,

the Plaintiff TDICI had not given any disbursement to the Defendant.

162. It is relevant to note here that the mere admission of the PW1 that till this date, the Defendant had not obtained any approval from Hill Area

Conservative Authority, does not mean that TDICI was prevented from disbursing the normal loan of Rs. 25 lakhs. The subscription agreement

under exhibit P3 does not have any provision for this.

163. From the averments of plaint, written statement and reply statement, testimonies of PW1 and PW2 and the documentary evidences marked

on behalf of both sides, it has become crystal clear that the Plaintiff has committed breach of their part of contractual obligation by not extending

the normal loan of Rs. 25 lakhs.

164. It is well-settled that the failure, without legal excuse, to perform an obligation or duty in a contact would amount to breach of contractual

obligation. A party''s failure to perform some contracted for or agreed upon act, or his failure to comply with a duty imposed by law which is owed

to another is also termed as breach of contract.

165. u/s 10 of the Indian Contract Act, 1872, all agreements are contracts if they are made by free consent of parties competent to contract, for a

 

lawful consideration and with a lawful object. A breach of contract occurs where a party to a contract fails to perform precisely and exactly his

obligations under the contract.

166. It is also envisaged u/s 37 of the Indian Contract Act that the parties to a contract must either or offer to perform their respective promises,

unless such performance is dispensed with or excused under the provisions of this Act or any other law.

167. As per Section 2(b) of the Indian Contract Act, when a person to whom the proposal is made signifies his assent thereto, the proposal is said

to be accepted. A proposal, when accepted, becomes a promise.

168. From the language of Section 2(b), it is made clear that when the proposal becomes a promise, the promisor is bound to comply with the

terms of the promise.

169. On coming to the instant case on hand, the Plaintiff has filed the suit for declaration that the Plaintiff is entitled for conversion of 3,75,000

cumulative convertible preference shares at Rs. 10 aggregating Rs. 37.5 lakhs into 3,75,000 fully paid-up equity shares of Rs. 10 each aggregating

to Rs. 37.5 lakhs by specifically enforcing Clause 2 of Article 6.1 of the agreement dated 5 May, 1995, entered into between the Plaintiff and the

Defendant. The question to be answered is as to whether the Plaintiff is entitled for declaratory relief by specifically enforcing Clause 2 of Article

6.1 of the agreement dated 5 May, 1995 (exhibit P3).

170. In this connection, as discussed in the earlier paragraphs, it may be appropriate to extract relevant portions of the written statement filed by

the Defendant-company:

(a) The TDICI, having miserably failed in complying with the terms of the contract, i.e., having failed to extend the normal loan of Rs. 25 lakhs are

not entitled to seek conversion of their shares.

(b) The TDICI, however, failed to disburse the loan of Rs. 25 lakhs, despite the compliance of all the terms by the Defendant in this regard.

(c) Since the loan of Rs. 25,00,000 was not disbursed by TDICI consequent to these representations, the Defendant was forced to make

alternative arrangements with other nationalised banks for their financial requirements.

 

(d) TDICI ought to have put the Defendant on notice as to the alleged reasons for the non-disbursement of the sanctioned loan. Hence, the Plaintiff

and TDICI are estopped from raising these belated pleas in the present suit.

(e) Both the Plaintiff and the TDICI were aware that the approval from HACA was awaited. The TDICI came forward to release the subscription

cheque for the CCPS only after it was informed that Synergy were willing to step into its shoes. Under these circumstance, the right of the TDICI

to convert the preference shares would not arise on account of its breach of their obligations under the agreement.

171. In Regent OHG Aisenstadt und Barig v. Francesco of Jermyn Street Ltd. (1981) 3 All ER 327 (QBD), it is observed that:

A distinction must be drawn between contractual obligations which are divisible, and those which are entire or indivisible. Where one party''s

promise is made conditional on complete and entire performance by the other, the obligation is ''entire'' and the party in default cannot recover

anything if he incompletely performs his side of the contract. The general rule is that No. claim can be made in respect of the partial performance of

a lump sum contract.

172. In Sripatrao Sadashiv Upre Vs. Shankarrao Sarnaik, (declaration that the Defendant is liable to pay the Plaintiff all money which the Plaintiff

as Defendant''s guarantor, was liable to pay), it is observed that: ''A suit for bare declaration about rights arising out of contract is not maintainable,

unless it involves a question of title to some legal character or right to any property.

173. On careful analysation of the evidences available on record and the submissions made on behalf of both sides, and keeping in view of the

relevant proposition of law, this Court is of view that the Plaintiff is not entitled to the relief of declaration as sought for.

Issue No. 2 174. With regard to mandatory injunction, Section 39 of the Specific Relief Act, 1963 contemplates that when, to prevent the breach

of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion

grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

175. In this case, the Plaintiff has sought for a mandatory injunction, directing

 

the Defendant to issue 3,75,000 fully paid-up equity shares of Rs. 10

each at par after such conversion to the Plaintiff in the name of Unit Trust of India (A/c. VECAUS-I) as per letter dated 22 December, 1997.

176. It is pertinent to note here that this Court has concluded in Issue Nos. 1, 4 and 6 that the Plaintiff is not entitled for. In view of the definite

finding of this Court, rejecting the prayer of declaration, the Plaintiff is also not entitled to the relief of mandatory injunction.

177. Accordingly, this issue is also answered in the negative form. Because, the subscription agreement, which is sought to be enforced, pertains to

movable property cannot be enforced by way of specific performance. Instead, the TDICI Limited can only institute an action for damages in the

event of breach of any terms of the subscription agreement. Since, the Plaintiff has the option of seeking redemption on the share or to sue for

damages they cannot maintain the present suit, where alternative remedies are available. It may also be relevant to note here that TDICI ought to

have put the Defendant on notice as to the alleged reason for the non-disbursement of the sanctioned loan as it was part of the transaction agreed

to by the parties. It is pertinent to note here that even as per the contention of the Plaintiff, it is an admitted proposition of law that the person

committing breach of contract cannot raise such defence. Further, the contention of the Plaintiff that mere execution of the loan agreement does not

mean that the loan has been disbursed and that the disbursement of normal loan is No. way connected with the Plaintiff''s right to convert CCPS

into equity shares is not able to be digested.

178. Keeping in view of the findings given for all the issues this Court is of the considered view that the suit is liable to be dismissed.

179. In the result, the suit is dismissed with costs.

 