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IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Sugato Majumdar

CS/124/2011
UMADEVI AGARWALLA & ORS.
VS
NIRMAL KANODIA & ORS.

CS/264/2012
SRI NIRMAL KANODIA & ORS.
VS
UMADEVI AGARWALLA & ANR.

For the Plaintiff in CS/124/2011 and for the Defendants in CS/264/2012	:	Mr. Sabyasachi Chowdhury, Sr. Adv. Ms. Urmila Chakarborty, Adv. Mr. Amit Meharia, Adv. Ms. Paramita Banerjee, Adv. Mr. Sayan Dey, Adv.
For the Plaintiff in CS/264/2012 and for the Defendants in CS/124/2011	:	Mr. Jishnu Saha, Sr. Adv. Mr. Shiv Ratan Kakrania, Adv. Mr. Sukrit Mukherjee, Adv. Mr. Tanuj Kakrania, Adv. Ms. Jiya Bose, Adv. Ms. Shreya Goenka, Adv.
Hearing concluded on	:	25/03/2026
Judgment on	**:**	**12/05/2026**

Sugato Majumdar, J.:

Both the suits are taken up together since both are based on the same array of facts but on different cause of actions. Both were heard together and disposed of by this common judgment.

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C.S. 124 of 2011:

Original Plaintiff of this suit was one Basudeo Agarwalla, since deceased and his son Suresh Agarwalla. On death of the original Plaintiff no. 1 his wife Uma Devi Agarwalla, his two daughters Kiran Buddhia and Usha Agarwalla and his another son Deepak Agarwalla were substituted as Plaintiff no. 1A to 1D respectively.

Defendants of this suit are Nirmal Kanodia, Rajendra Kumar Singhania, Mahendra Kumar Padia and M/s Bhoomi Minerals Ltd., the later being a company registered under the Companies' Act 1956, having its registered office at 40B, Vivekananda Road, Kolkata – 700007 within jurisdiction of this Court. The later company being the Defendant no. 4 is pro forma Defendant.

Plaint case in nutshell:

a) The original Plaintiff no. 1 & 2 are father and son. They floated a company named as M/s Bhoomi Minerals Ltd., registered under the Companies' Act, 1956, having registered office at 40B, Vivekananda Road, Kolkata-700007 (hereinafter referred to as "M/s Bhoomi"). M/s Bhoomi is the pro-forma Defendant no. 4. The original Plaintiffs were the directors of M/s Bhoomi and owned the controlling block of shares either by themselves or through the family members. Among other assets of M/s Bhoomi, the primary asset was a sponge iron unit with installed capacity of 100 m.t. per day. The business of M/s Bhoomi was hugely capital intensive and demanded massive investment of fund. M/s Bhoomi borrowed money from various banks and financial institutions including the Indian Overseas Bank. Repayment of loan from this Indian Overseas Bank was secured by personal guarantees of the original Plaintiff no. 1 and the Plaintiff no. 2 as well as by pledging collateral and corporate securities.

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b) M/s Bhoomi could not pay debt in time to the Indian Overseas Bank, as a result of which the bank had been contemplating legal actions under the SARFAESI Act to recover dues. At this juncture, the Defendants approached the original Plaintiffs in the month of July, 2010 and evinced their interest to purchase M/s Bhoomi and take over the management for a lump sum consideration. Several rounds of discussions followed. The Defendants inspected the books and accounts of M/s Bhoomi along with bank accounts maintained in different branches of different banks; they also inspected the fixed assets, debts and liabilities. Thereafter, the original Plaintiffs agreed to acquire M/s Bhoomi on "as is where is" basis. A lump sum consideration was agreed as Rs.28.01 crores. The consideration amount was not the true value of M/s Bhoomi. But under compelling circumstances being financial hurdle the original Plaintiffs agreed to that consideration amount. The Defendants had full knowledge of the financial condition of M/s Bhoomi and that the account may be classified as non-performing asset. The Defendants were aware of impending proceeding under the SARFESI Act against M/s Bhoomi.

c) In furtherance of the modalities of transfer, the parties executed a Memorandum of Understanding dated 20/09/2010. Time was considered as essence of the contract. The M.O.U envisaged that an amount of Rs. 28.01 crores was to be paid by the Defendants to the original Plaintiffs towards total consideration for share transfer as well as satisfaction of loan advanced by Indian Overseas Bank. Upon receipt of the payments from the Defendants, the original Plaintiffs, in turn, would apportion the same towards satisfaction of loans advanced by Indian Overseas Bank and simultaneously would carry out

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necessary share transfer in the name of the Defendants. It was further agreed that out of the total consideration, the Defendants would pay immediately to the original Plaintiffs a sum of Rs.50,00,000/- as earnest money and the balance consideration would be paid within 30/11/2010. Simultaneously, with payment of the entire consideration, the original Plaintiffs would be obliged to transfer not less than 51% of their total shareholdings to the Defendants and/or would resign from the Board of Directors, inducting the Defendants or nominees in the Board of Directors. In terms of the said M.O.U, the Defendants undertook the entire responsibility of repayment of bank loan, as on 21/09/2010. Apart from this consideration of Rs.28.01 crores, the Defendants undertook pay Rs.13 lakhs for two dumpers and an additional sum of Rs.13.5 lakhs in case the Government of Jharkhand consented to transfer the title of 7 acres of land in the name of M/s Bhoomi. An application in this regard was made by the original Plaintiffs and the same was pending. The Defendants also agreed to pay a sum of Rs.43,80,000/- on account of iron ores which the original Plaintiffs had obtained from a third party. The Defendants assured to get release of all the collateral securities and the personal guarantees given by the original Plaintiffs. The Defendants assured the original Plaintiffs that they would get the pledged collateral securities and personal guarantees of the original Plaintiffs released from Indian Overseas Bank within 31/06/2011. It was agreed that the original Plaintiffs would not retain more than 49% shareholding as security unless the Defendants obtain release of the securities from Indian Overseas Bank. In the event the Defendants fail to obtain release of guarantees and securities furnished by the original Plaintiffs within 31/03/2011, the Defendants would be liable to pay the balance

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consideration to the Plaintiffs immediately without insisting on any transfer of share. It was also agreed that time would be the essence of the contract.

d) The Defendants paid a sum of Rs.1 crore by different installments to the original Plaintiffs. This amount was utilized in part payment of the debt of the Indian Overseas Bank to avoid proceedings under the SARFAESI Act, 2002. But the Defendants neglected and failed to pay the balance amount of consideration. They were obliged to pay the entire consideration money by 30/11/2010 and to obtain release of the pledged collateral securities and personal guarantees by 31/03/2011, but they neglected and failed to do so. In the meantime the Indian Overseas Bank sent a notice to the original Plaintiffs on 06/11/2010 demanding repayment of loan within 15 days. Again on 30/12/2010, the Bank issued a separate demand notice under Section 13 of the SARFAESI Act, 2002.

e) The Defendant no. 2, in terms of a letter dated 24/09/2010 declared intention to withdraw from the M.O.U and also to treat the M.O.U as cancelled. There was also a demand for refund of the earnest money.

f) Facing this situation, the original Plaintiffs, being debt trapped, were compelled to sell their entire shareholdings to a third party for a consideration of Rs.22.5 crores. But for this sale at a lower value, the original Plaintiffs suffered loss of Rs.5.51 crores. It is pleaded that the original Plaintiffs are entitled to forfeiture of the earnest money of Rs.1 crore, paid by the Defendants to them.

g) The instant suit was filed by the original Plaintiffs praying for,

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1) Loss and damages – Rs.5.51 crores.

2) Interest on Rs.28.01 crores – Rs.1,10,50,520/- calculated from November, 2010 to 31/03/2011 @ 12 % per annum.

3) Further interest *pendent lite* @ 12 % per annum from the date of institution of the suit till realization.

4) Enquiry into loss and damages, alternatively, and to pass decree, as may be found due and payable.

Written Statement:

The Defendants contested the suit by filing written statements. Three written statements were filed by the Defendant no. 1, 2 & 3.

Written Statement on behalf of the Defendant No.1:

The written statement may be summarized as followed:

a) The suit is not maintainable; barred by the principles of waiver, estoppel and acquiescence; the suit does not disclose any cause of action and that the suit should be dismissed as it suffers from suppression of material facts.

b) The original memorandum of understanding dated 20/09/2010 was executed in the District of Dhanbad, outside the jurisdiction of this Court. Therefore, this Court has no jurisdiction to entertain the suit and leave granted under Clause 12 of the Letters Patent should be revoked.

c) Next it is contended that before execution of the original M.O.U dated 20/09/2010, the Defendant no. 1 showed, along with the other

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Defendants, *bona fide*, intentions, solvency and willingness by making payment of a sum of Rs.75 lakhs to the original Plaintiffs. Particulars are given in the written statement. In terms of Clause 6 the purchaser being the Defendant no. 1 should pay the vendor a sum of Rs.50 lakhs on execution of the M.O.U as earnest money and the balance should be paid within 30/11/2010 positively. Between 06/09/2010 and 20/11/2010, the Defendants paid a sum of Rs.1 crore to the original Plaintiffs in far excess of their obligation. At the time of execution of the M.O.U dated 20/09/2010, the original Plaintiffs expressly represented that the sponge iron unit, in question was not secured, hypothecated, mortgaged or charged in favour of the bank. In the Paragraph 8 of the M.O.U dated 20/09/2010 it was recorded that possession of the Sponge Iron Unit had been made over to the Defendant no. 1 jointly with the other Defendants.

d) After execution of the M.O.U when the Defendants went to the sponge iron unit to take possession, they were surprised to learn that the same had been mortgaged to the bank. It is contention of the Defendant no. 1 that the M.O.U had been executed on false representations, incorrect and untrue statements. Therefore, the original M.O.U dated 20/09/2010 is void and not binding on the Defendants. The Original Plaintiffs sought to renege, cancel and rescind and also tried to back out from their commitment of transferring 51% shareholding of M/s Bhoomi. For this, an amendment of the original M.O.U was sought. The said amended M.O.U dated 21/09/2010 was signed by the original Plaintiffs and forwarded to the Defendant no. 1 and other Defendants for joint signatures. The Defendants refused to sign the amended M.O.U. The Plaint suppressed the fact of this amended M.O.U dated

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21/09/2010. In terms of the amended M.O.U, the original Plaintiffs refused to transfer 51% shareholdings of M/s Bhoomi. The Defendants terminated the original M.O.U. on 24/09/2010 and called upon the original Plaintiffs to refund the earnest money of Rs.1 crore. For abundant precaution, the Defendants confirmed the earlier termination, in terms of a letter dated 30/04/2011.

e) The original Plaintiffs replied the letter dated 30/04/2011, sent by the Defendants. From the reply letter dated 09/06/2011 the Defendants came to learn that the sponge iron unit had already been sold to the third parties for a sum of Rs.22.5 crores. Prior to selling to third party, the original Plaintiffs did not send any notice to the Defendants. It is further pleaded that time was not essence of the contract.

f) The original Plaintiffs never informed the Defendant no. 1 or any of the other Defendants about any alleged action being taken by the Indian Overseas Bank under the SARFAESI Act, 2002.

g) It was denied along with others that the original M.O.U. was executed after due inspection of all the relevant books and accounts of M/s Bhoomi.

h) It was also averred that the suit is barred by law of limitation.

i) In the premises of the pleadings in the written statement, the Defendant no. 1 denied all the allegations made in the plaint and stated that the suit is liable to be dismissed.

The written statements field on behalf of the Defendant nos. 2 & 3 contain the same pleading and should not be repeated, for the sake of brevity.

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C.S. 264 of 2012:

Plaint case, in nutshell, is as follow:

a) Plaintiff no. 4 is a private limited company registered under Companies Act, 1956 having registered office at 2A, Ganesh Chandra Avenue, Kolkata-700013. Plaintiff nos. 1 & 2 are directors of Plaintiff no. 4. Plaintiff nos. 1, 2 & 3 are business associates and have common business ventures, dealings and transactions.

b) Defendant nos. 1 & 2 represented themselves to be directors and principal shareholders of the pro-forma Defendant no. 3 which is a company registered under Companies Act, 1956 having registered office at 40B, Vivekananda Road, Kolkata-700007, now represented by the official liquidator.

c) In the month of August 2010, the original Defendant nos. 1 & 2 approached the Plaintiff nos. 1, 2 & 3 with the following proposals:

   i) The original Defendant nos. 1 & 2 were the directors and principal shareholders of the Defendant no. 3.

   ii) Defendant no. 3, namely, M/s Bhoomi was the owner of a Sponge Iron Unit situated in the District of Dhanbad, Jharkhand.

   iii) The Defendant nos. 1 & 2 were interested and desirous of selling their majority shareholding of 51% or more in M/s Bhoomi.

   iv) The said sponge iron unit had not been hypothecated, mortgaged or charged to any bank or official institution.

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v) On purchase of the shares of the original Defendant nos. 1 & 2 in M/s Bhoomi, the Plaintiff nos. 1, 2 & 3 would get control and physical possession of the Sponge Iron Unit.

d) Relying on the representations, the Plaintiff nos. 1, 2 & 3 agreed to purchase 51% of the shares of the original Defendant nos. 1 & 2 in M/s Bhoomi. In order to show their readiness and willingness to buy majority shares of the original Defendant nos. 1 & 2 in M/s Bhoomi, the Plaintiff nos. 1, 2 & 3 paid a sum of Rs.75 lakhs to the Defendant nos. 1 & 2 through the Plaintiff no. 4 by cheque as well as by RTGS bank transfer. The original Defendant nos. 1 & 2 duly received the amount of Rs.75 lakhs.

e) On 20th September, 2010, a memorandum of understanding (hereinafter called original M.O.U) was executed between the Plaintiff nos. 1, 2 & 3 as the purchasers and the original Defendant nos. 1 & 2 as Vendors.

f) On execution of the original M.O.U on 20/09/2010 of a further sum of Rs.25 lakhs were paid. Between 06/09/2010 and 20/09/2010 the Plaintiff nos. 1, 2 & 3 through Plaintiff no. 4 made a payment of Rs.1 crore to the original Defendant nos. 1 & 2.

g) After execution of the original M.O.U dated 20/09/2010 when the Plaintiff nos. 1, 2 & 3 went to the sponge iron unit to take possession thereof, they are surprised to know that the sponge iron unit had also been mortgaged to the bank. It was falsely represented in the M.O.U that the Sponge Iron Unit had not been secured, hypothecated, mortgaged or charged in favour of any bank.

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h) Although the original M.O.U clearly provided that the original Defendant nos. 1 & 2 would transfer 51% of the shareholding of M/s Bhoomi to the Plaintiff nos. 1, 2 & 3, turning them to a majority shareholder, the original Defendant nos. 1 & 2 on 22/09/2010 sought to renege, cancel, rescind and/or sought to back out from their commitment and forwarded one amended memorandum of understanding bearing a date of 21/09/2010. One of the proposed amended clause said that, out of the agreed sale amount, the purchasers should pay to the vendors a sum of Rs.50 lakhs on execution of the presence and the balance would be paid on 30th November, 2010 positively, however, subject to the proportion of shares transferred by the vendors. In case, the purchasers failed to pay the vendors the due amount within the due date the purchasers would be liable to pay interest. The quantum of shares transferred should remain restricted so as to allow the purchasers to hold 49% of the total issue and subscribe share capital and the purchasers shall be entitled to hold proportionate payment until transfer of balance share. There was another clause whereby and assurance was sought to be procured for the purchasers to get the pledged collateral securities and personal guarantees of the vendors released from the Indian Overseas Bank within 31st March and the vendors should retain not more than 51% of the shares as security until release of the securities from the bank. The vendors assured that on release of guarantee, the vendors would transfer the balance share to the purchasers. Another amendment that was sought to be imposed was that share capitals of M/s Bhoomi, if raised in future shall be done subject to prior written consent of the vendors and shareholding structures of 49% with the purchasers and

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51% with the vendors should be maintained until release of the collateral securities and personal guarantees.

i) The proposed amendments were signed by the Defendant nos. 1 & 2 only and forwarded to the Plaintiff nos. 1, 2 & 3 for signature. However, the Plaintiff nos. 1, 2 & 3 did not accept the amendment and did not sign the same. It is contended that by way of amendment the original Defendant nos. 1 & 2 refused to transfer 51% shareholding of the Plaintiff nos. 1, 2 & 3 and sought to retain control of the company in breach of their primary obligations under the original memorandum of understanding dated 20th September, 2010. Since the proposed amendments were not acceptable the Plaintiff nos. 1, 2 & 3, on 24/09/2010 terminated the original MOU and called upon the original Defendant nos. 1 & 2 to refund and return the amount of Rs.1 crore which had already been paid to the Defendant nos. 1 & 2.

j) As a measure of abundant precaution, the Plaintiff nos. 1, 2 & 3 sent a letter dated 30/04/2011 confirming the termination of the original M.O.U on 24/09/2010. In reply, the original Defendant nos. 1, 2 & 3 intimated by a letter dated 09/06/2011 that M/s Bhoomi had already been sold to the third parties for a sum of Rs.22.5 crores these two persons at the third parties.

k) The Plaintiff, therefore, instituted the instant suit praying for recovery of Rs.1 crore along with interest and particulars of which are given below:

PARTICULARS

Principle Amount Due Interest @ 18% per	Rs.1,00,00,000/-
Interest @ 18% per annum on and from the date receipt of payment calculated till 1st July 2012.	Rs.32,05,480/-
Total	Rs.1,32,05,480/-

Written Statement:

a) Defendant nos. 1 & 2 who were the directors of M/s Bhoomi filed a common written statement contending that the suit is not maintainable, does not disclose any cause of action, barred by the principles of estoppel, waiver, acquiescence and principles analogous thereto.

b) It is positive case of the Defendant Nos. 1 & 2 that they were directors of M/s Bhoomi and owned the controlling block of the shares therein either by themselves or through their family members and other entities under their control. The Defendant nos. 1 & 2 were in complete control and management of the Defendant no. 3. Among other assets of the Defendant no.3, namely, M/s Bhoomi, the primary asset is a sponge iron manufacturing unit situated at Village-Beliad, P.O.-Chirkunda, District-Dhanbad, Jharkhand. The promoters made huge investment towards installation and running of the said unit.

c) The business of M/s Bhoomi is capital intensive for which the promoters availed huge loan from bank and financial institutions, one of the prime lenders being Indian Overseas Bank. Repayment of loan and advances taken from the Indian Overseas Bank were secured by

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way of personal guarantees of Defendant nos. 1 & 2 and by pledging collateral and corporate securities. The sponge iron unit too was mortgaged with the Indian Overseas Bank for securing the credit facility availed by the Defendant no.3.

d) M/s Bhoomi, being Defendant no. 3 was unable to timely service its accounts with the Indian Overseas Bank and/or maintain the prescribed limits of the bank as a reason of which the bank was in contemplation to take steps against M/s Bhoomi in terms of the SARFAESI Act, 2002 to recover dues. In such circumstances in the month of July 2010, the Plaintiff nos. 1, 2 & 3 approached the Defendants and showed their interest to purchase M/s Bhoomi and take over the management at a lump sum consideration.

e) Several rounds of discussions, analysis, inspection of books and accounts of M/s Bhoomi, inspection of bank accounts of M/s Bhoomi maintained with different branches, inspection of fixed assets of M/s Bhoomi and checking the debts and liabilities of M/s Bhoomi were done. After exercising due-diligence the Plaintiff nos. 1 & 3 were fully satisfied about the prospect of M/s Bhoomi and agreed to acquire the management and control as a going concern, “as is where is basis” on agreed terms for a lump sum consideration of Rs.28.01 crores. Though that consideration amount did not reflect the true value of the M/s Bhoomi, yet considering the financial condition of M/s Bhoomi and apprehending that assets of the company may be classified as non-performing asset the Defendant nos. 1 & 2 agreed to the proposal. Execution of one memorandum of understanding was also conceived and the same was subsequently executed on 20/09/2010. It was contained in the memorandum of understanding that an amount of

Rs.28.01 crores would be paid by the Plaintiffs to the Defendants towards total consideration for share transfer as well as satisfaction of loan advanced by the Indian Overseas Bank. On receipt of the payment from the Plaintiffs, the Defendants would apply the same towards satisfaction of loans, advanced by Indian Overseas Bank and also would simultaneously carry out the share transfer in the name of the Plaintiffs. It is contended that on execution of the memorandum of understanding the Plaintiffs had taken over the entire responsibility of repayment of loans advanced by Indian Overseas Bank on 21/09/2010 a sum of Rs.50 lakhs was to be paid immediately on execution of the memorandum of understanding as the earnest money and balance was to be paid within 30/11/2010.

f) Apart from consideration money to be paid for share transfer, the Plaintiffs agreed to pay Rs.13 lakhs to the Defendants for acquiring two dumpers. The Plaintiffs also agreed to pay an additional sum of Rs.13.5 lakhs to the Defendants in case Government of Jharkhand consented to transfer of title of 7 (5+2) acres of land in the name of M/s Bhoomi application in respect of which had been pending before the Deputy Commissioner, Dhanbad. The Plaintiffs also agreed to pay a sum of Rs.43,80,000/- for and on account of price of 1460 tons of iron ores which the Defendants had obtained on behalf of M/s Bhoomi. It is contended in the written statement that the Plaintiffs assured the Defendants to get the pledged collateral securities and personal guarantees of the Defendants release from the Indian Overseas Bank within 31st March 2011. It was also agreed that Defendants would not retain more than 49% of the shareholding as security until the Plaintiffs obtain release of the securities from Indian Overseas Bank.

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In the event, the Plaintiffs failed to obtain release of the guarantees and securities furnished by the Defendants within 31st March, 2011 the Plaintiffs would be liable to pay the balance consideration to the Defendants immediately without insisting on share transfer time in respect of payment was agreed to the essence of the agreement.

g) The Plaintiffs, it is pleaded, neglected and failed to make payments to the Defendants in terms of the memorandum of understanding though the Plaintiffs paid a sum of Rs.1 crore in different installments as earnest money to M/s Bhoomi. This was used had appropriated for part payment of overdue amount in order to avoid consequences under SARFAESI Act, 2002.

h) Since, in terms of M.O.U funds were guaranteed, M/s Bhoomi did not look out for any other source of funding on 06/11/2010. A letter was issued on behalf of Indian Overseas Bank classifying the assets as non-performing assets. It was also intimated that outstanding amount, if not paid within 15 days, Indian Overseas Bank would take legal proceedings under SARFAESI Act, 2002. On 30/12/2010, another demand notice under Section 13(2) of the SARFAESI Act, 2002 was issued to the Defendant nos. 1 & 2 stating that the guarantee would be invoked barring the Defendants from dealing with the secured assets in case the amounts stated therein had not been paid within 60 days. Although the Defendants informed the Plaintiffs about this scenario, the Plaintiffs refused to perform in terms of M.O.U or pay any further amount.

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i) By a communication dated 24/09/2010, the Plaintiff no. 2 declared his intention to withdraw from M.O.U and treated the same as cancelled and also asked for refund of earnest money.

j) Because of compelling circumstances, the Defendants were forced to sell the shareholdings of M/s Bhoomi to a third party at Rs.22.5 crores in order to avoid legal action under SARFAESI Act, 2002. As a result, the Defendants suffered damages to the tune of Rs.5.51 crores, the loss being attributable to refusal of performance as well as repudiation of the M.O.U by the Plaintiffs. The Defendants are also entitled to forfeiture of earnest money. Therefore, the Defendants filed CS 124 of 2011.

k) Among others the Defendant nos. 1 & 2 denied that at the time of executing of the memorandum of understanding on 20/09/2010 they represented to the Plaintiffs that the sponge iron unit had not been secured, hypothecated, mortgaged or charged. The Plaintiffs visited the sponge iron unit on number of occasions before entering into the M.O.U and were aware of the fact of mortgage. It was also denied that Defendant nos. 1 & 2 on 22nd September, 2010 sought to renege or cancel or rescind or back out from their commitment or forwarded to the Plaintiffs the alleged memorandum of understanding dated 21st September, 2010. It was denied that such document was sent to the Plaintiffs; the Defendants did not admit the contents of the said M.O.U; in fact, the subsequent M.O.U dated 21st September, 2010 was a result of concoction by the Plaintiffs. It was further stated that by a letter dated 30/04/2011 i.e. after a lapse of more than 7 months from the date of execution of the memorandum of understanding, the

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Defendants had purported to terminate the MOU from the first time; as such the question of confirmation of termination does not arrive.

All other allegations were denied.

On the basis of rival pleadings in the suits, the following common issues were framed:

1. *Is the suit maintainable in law and on facts?*
2. *Is the suit barred by the law of limitation?*
3. *Has the Court jurisdiction to try the suit and as to whether the cause of action arose at a place within the jurisdiction of this Court?*
4. *Is the suit bad for non-joinder of necessary parties?*
5. *Whether the Defendants are in breach of the memorandum of understanding dated September 28, 2010?*
6. *Whether the Defendants are liable to pay damages to the Plaintiffs as prayed for?*
7. *Is the Plaintiffs entitled to the decree for a sum of Rs.6.61,500/- together with interest at the rate of 15% per annum as claimed by the Plaintiffs?*
8. *Is the agreement dated September 28, 2010 legal, valid or binding upon the parties?*
9. *To what other reliefs the Plaintiffs are entitled?*

For the sake of convenience, the Plaintiffs in C.S. 124 of 2011 who are the Defendants in C.S. 264 of 2012 shall be mentioned as “Agarwallas” and the Defendants of C.S. 124 of 2011 who are the Plaintiffs in C.S. 264 of 2012 as “Kanodias”.

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Argument on behalf of Nirmal Kanodia & Ors.:

(Defendant in CS/124 of 2011 & Plaintiff in CS/264 of 2012)

1. The claim of the Kanodias was refund of the earnest money, paid to the Agarwallas pursuant to the M.O.U. dated 20/09/2010 with interest @ 18% per annum.

2. M.O.U. was executed on 20/09/2010. In terms of the M.O.U. earnest money to be paid by the Kanodias was Rs.50,00,000/-; in return 51% shares of the Defendant No. 3 was to be transferred to the Kanodias. The Kanodias paid Rs.1 crore. On the very next day of execution of the M.O.U., an amended M.O.U. was sent by the Agarwallas, modifying Clause 6 whereunder, instead of 51% share they would transfer 49% share only. It was argued that by this proposed amendment of the M.O.U., the Agarwallas clearly manifested intention not to perform the agreement as recorded in the M.O.U. Immediately thereafter, the Kanodias terminated the agreement, by an SMS dated 24/09/2010; and also asked for refund of the earnest money with interest.

   It was argued that the M.O.U. was terminated anticipating breach of contract. Section 54 of the Contract Act was referred to. According to Mr. Saha, the Learned Senior Counsel, by sending the amended M.O.U., the Agarwallas expressed intention not to perform their part of the contract which goes to the root of the whole bargain and contract. To substantiate the argument of anticipatory breach, the Learned Senior Counsel referred to:

   a) **Manindra Chandra Nandy & Ors. Vs. Aswini Kumar Acharjya [(1920) SCC OnLine Cal 104]**

b) **Jawarlal Wadhwa & Anr. Vs. Haripada Chakraborty [(1989) 1 SCC 76]**

c) **Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Ltd. & Ors. [(2018) 3 SCC 133]**

3. The next limb of argument of Mr. Saha, the Learned Senior Counsel, was that the Agarwallas refused to refund the earnest money of Rs.1 crore and continued to hold the same illegally. There was no forfeiture clause in the M.O.U. In absence of forfeiture clause, earnest money cannot be forfeited. Therefore, the Agarwallas are bound to refund the earnest money with interest.

4. The next point argued by Mr. Saha was on damages. The Agarwallas contended that because of breach committed by the Kanodias, there are forced to sell the Defendant No. 3 company at Rs.22.5 crores to one Banwari Lal Agarwalla and Gopal Agrwalla. It was argued by Mr. Saha that burden of proof lies on the Plaintiff, in this case Agarwallas, to prove such facts by adducing best evidence. But the Agarwallas failed to prove any actual loss which is in *sine qua non* to maintain a claim for damages. Even the witnesses for the Agarwallas did not give any positive evidence that the purported agreement with the said Banwari Lal Agarwalla and Gopal Agarwalla had been given effect to or had been acted upon. In absence of evidence, actual damages could not be proved and the claim should be dismissed. Mr. Saha referred to **Kailash Nath Associates Vs. DDA [(2015) 4 SCC 136], Maula Bux Vs. Union of India [(1969) Vol II SCC 554], Hindustan Petroleum Corporation Limited Vs. Offshore Infrastructure**

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Limited [(2015) SCC OnLine Bom 4146] and **Sudershan Kumar Bhayana Vs. Vinod Seth [(2023) SCC OnLine Del 6097].**

Argument made by Agarwallas:

Mr. Chowdhury, the Learned Senior Counsel appearing for the Agarwallas submitted firstly that the Kanodias cancelled the M.O.U. as the proposed amendments were not acceptable to them. According to the Mr. Chowdhury, this plea was taken subsequently and is an afterthought purported to justify their breach of contract. In none of the communications made by the Kanodias such plea had been taken. In fact, the amended M.O.U. had never been executed. The plea was taken for the first time in the written statement. Since the amended M.O.U. was not signed, liability under the original M.O.U. still remained and the Kanodias committed breach of the original M.O.U. in not paying the full money and getting the shares transferred or in other words in failure to discharge contractual obligation. According to the Mr. Chowdhury there is no question of anticipatory breach but rather it is the Kanodias who committed breach of the agreement in the form of M.O.U. and are liable to damages.

Secondly, it was argued that the Kanodias tried to wriggle out from their payment obligations by contending that the fact of mortgage of this sponge iron unit to the bank had not been disclosed to them at the time of execution of M.O.U. Such contention is completely false since the Kanodias being future purchasers had recorded their satisfaction on inspection of the company, this factory unit, records, documents and papers. Even it was specifically spelled out in the M.O.U. that the Agarwallas had been facing financial problem in running the Defendant No. 3 company which compelled them to sell out the unit to the Kanodias. Clauses 2, 4, 14 and 15 of the M.O.U. recorded bank loan creation of security interest by such bank.

Knowing fully well of all the facts, the Kanodias agreed to invest Rs.28.01 crores for purchase of the company. They now cannot backtrack and escape their liability for breach of contract.

The third point argued by Mr. Chowdhury was on forfeiture of the earnest money. The earnest money was received. It was argued that the earnest money was rightly forfeited by the Agarwallas. There was no Clause in the M.O.U. for refund of the amount received. In absence of a refund Clause forfeiture clauses implied. The earnest money was paid by Khazana which company did not issue any demand notice or institute any proceeding for refund of the amount. Therefore, according to the Mr. Chowdhury, the earnest money is liable to be forfeited.

Mr. Chowhury referred to in **Entrepreneurs Co-op. Group Housing Society Ltd. v. Schindler India (P) Ltd. [2013 SCC OnLine Del 2514], Naresh Chandra Guha v. Ram Chandra Samanta [1951 SCC OnLine Cal 239]** and **Fateh Chand v. Balkishan Dass [1963 SCC OnLine SC 49**].

Issue No.1:

This issue shall be taken up with other substantive issues.

Issue Nos. 2 & 3:

None of the Counsels argued on the point of limitation. The memorandum of understanding was executed on 20th September, 2010. The alleged breach took place subsequently. Both the suits were filed within a period of three years. Therefore, none of the suits are time barred.

CS 124 of 2011 was filed in this Court on the strength that the Defendant No. 2 resides within jurisdiction of this Court. C.S. 264 of 2012 was filed in this Court on the strength that the Defendants carry on business within jurisdiction of this Court.

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None of the Counsels challenged the territorial jurisdiction of this Court to try the suits.

Therefore, this Court is of opinion that neither of the suits is barred by law of limitation or territorial jurisdiction.

These issues are decided in favour of the respective Plaintiffs.

Issue No.4:

Neither of the Counsels praised this issue at the time of arguments.

Issue Nos. 1, 5, 6, 7 & 8:

Issue No. 8 is more foundational in nature, therefore, is taken up *a priori*.

Stand taken by the Kanodias was that the original agreement was void because of suppression of material facts and misrepresentation. But for this ground they did not backtrack. It was only when amendment was sought to be made, they cancelled the agreement. It was averred in Para 15 (l) of the written statement that amendment having not been accepted, the Defendants terminated the M.O.U. It was further averred and alleged in Para. 15 (k) that by the proposed amendment the Defendants committed breach of their basic obligations under the original M.O.U.

Misrepresentation or suppression of material facts makes an agreement voidable. But, from the pleading itself it is manifest that the agreement was "terminated" because of the proposed amendments which, according to the Kanodias, are anticipatory breach of obligations. This pleading tacitly admits and pre-supposes existing efficacy of the M.O.U. Therefore, although alleged as voidable, the M.O.U. was not avoided, and the stood existing till termination by the Kanodias. This stand was confirmed by Mr. Kanodia in examination-in-chief, that the M.O.U., therefore,

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was not void *ab initio*. Conclusion, therefore, is that the M.O.U. is neither void *ab initio* nor avoided, though terminated.

Issue No. 8 is decided in favour of the Agarwalas.

Mr. Saha, the Learned Senior Counsel, appearing for the Kanodias relied heavily on the concept of anticipatory breach of contract. As noted above, it was alleged that the memorandum of M.O.U. dated 20th September, 2010 was terminated anticipating of future breach of contract manifested by the proposed amendments of the said M.O.U.

Before further discussion, it is necessary to look into the provisions of Section 39 of the Indian Contract Act, 1872. Although this provision does not employ the term anticipatory breach, it imports the same concept.

> ***"39. Effect of refusal of party to perform promise wholly.—*** *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."*

The section applies to executory contracts where time of performance is yet to arrive. The principle was discussed in **Manindra Chandra Nandy Vs. Aswini Kumar Acharjya [(1920) SCC OnLine Cal 104]**. It was observed that where there is a breach by an unqualified and positive refusal to perform a contract, though performance thereof is not yet due, the injured party may bring an action at once for recovery of damages. The damages for breach of a contract by renunciation thereof, before performance in due, are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. It was further observed and explained that the doctrine of anticipatory breach takes effect as premature destruction of the contract

rather than failure to perform it in its terms. The damage caused by such premature destruction is, to be sure, due to consequent failure to secure performance; but this is a failure to secure performance according to the original terms, that is performance at the time and place when performance was required, according to the terms of the agreement. This judgment contemplated, for an effective anticipatory breach, complete destruction of the contract which is a matter of paramount importance. In **Jawarlal Wadhwa & Anr. Vs. Haripada Chakraborty [(1989) 1 SCC 76],** three Judges Bench of the Supreme Court of India observed and held that it is settled law that where a party to a contract commits anticipatory breach of the contract, the other party to the contract may treat the breach as putting an end to the contract and sue for damages but cannot ask for specific performance of the contract. The other option open to the other party, namely, the aggrieved party, is that he may choose to keep the contract alive till performance is due and can claim specific performance showing his readiness and willingness to perform.

In an early decision Lord Esher M.R. in **Johnstone Vs. Milling [16 Q.B.D. 460 (1886)]** (considered in **Manindara Chandra Nandy's** case) expressed that a renunciation of a contract, or in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself amounts to a breach of contract but maybe so acted upon and adopted by the other party as a recession of the contract as to give rise to immediate right to action. When one party assumes to renounce the contract, that is by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Repudiation of contract was further considered by the Supreme Court of India in **Claude-Lila-Parulekar Vs. Sakal Papers Pvt. Ltd. [AIR 2005 SC 4074].** Referring to various authorities, it was expressed that to constitute a repudiation of contract, it must be such an act as indicated to refuse to perform the contract and to

set the other party free from performing his part, an act by which the party renounced all intention to perform his part of the contract and thereby set free the other party.

Section 39 of the Indian Contract Act, 1872 does not use the phrase anticipatory breach, but contemplates refusal to perform an executory contract "in its entirety". Illustration (a) suggests and clarifies that the breach alleged must be in totality. Refusal to perform a part of contract will not do. The section contemplates, to borrow the term from **Manindra Chandra Nandy's** decision, destruction of the contract. Factual context is to be looked into in this pretext.

Clause 15 of the M.O.U. contended that the purchaser, meaning thereby the Kanodias shall get the pledged collateral securities and personal guarantees of vendors, namely, the Agarwalas released from Indian Overseas Bank within 31st Day of March 2011. It contained further stipulation that the vendors should retain not more than 49% of shares as security until release of their securities from the bank.

The M.O.U contemplated transfer of entire shareholding of the vendors to the purchasers. At the initial stage, as contemplated in Clause 15, the vendors should retain the shares not more than 49% as security. By proposed amendment, this 49% was modified to 51%, meaning thereby that the majority share shall be retained by the Agarwals as security until release of their securities from the bank. This proposed amendment never indicated that the Agarwals detracted from transfer of cent percent share. Only at the interregnum period, as a security, they intended to retain the majority share. The proposed amendments did not indicate that the Agarwalas were not in the frame of mind to flout their agreed stipulations, or to repudiate the contract. Rather they sent a proposal. By that proposed amendment the Agarwalas did not express intention of refusal to perform substantial or entirety of M.O.U. They did not deny or refuse to perform their part in transferring the whole shares. Therefore, the provisions of Section 39 of the Indian Contract Act, 1872 is not

attracted and there cannot be said to be any anticipatory breach of contract. The Agarwalas' proposed novation of contract by adding or modifying terms which was refused by the Kanodias, on being refused left the original M.O.U subsisting which Kanodias terminated on 24th September, 2010. It is rather the Kanodias who committed the breach of commitment. After lapse of six months, the kanodias responded and confirmed earlier termination with reasons, which reasons and justifications were absent at the first instance.

As the amendment of the M.O.U. was refused and the original M.O.U. remained subsisting, both the parties were under-contractual obligation to perform their part. Now, the Kanodia suddenly terminated the agreement refusing thereby, to perform their part. This is clearly a breach of contract for which they are liable to damages.

It is the case of the Agarwalas that because of exigency of situation and mounting debts and financial liabilities, they are forced to sell the unit at a lesser price incurring thereby a loss of about six crores. Although, it was agued by Mr. Saha that the actual sale price has not been proved and that the agreement for sale does not discharge the burden of proof, the contention was refuted by Mr. Chowdhury on the ground that neither the Kanodias disprove the sale nor produce any other evidence to rebut the evidentiary burden discharged by the Agarwalas.

Deepak Agarwala deposing on behalf of the Agarwalas stated about the loss suffered. He was subjected to cross-examination where he confirmed about this loss. Let it be assumed for the time being that the Agarwala's failed to prove and establish that they were constrained to sell the unit at Rs.22 crores. In that case, in the conspectus of facts, as discussed above and on established ground that the kanodia's committed breach of contract, the Agarwalas are entitled to damages and are to be put in as good a position as money could do as if the contract had been performed.

This cardinal principle of law was considered in **Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Ltd. & Ors. [(2018) 3 SCC 133, Para. 63].** In that case the Kanodias should be liable to pay the entire consideration money as contemplated in M.O.U. But the Agarwala's renunciated their claim in respect of about Rs.22 crores in view of partial mitigation of loss and claimed the balance amount. The actual consideration amount of Rs.28 crore is not in dispute. Therefore, undisputedly and admittedly, the Kanodias would have been liable for the entire consideration money had not the Agarwalas renounced their claim in respect of Rs.22 crore (app).

Thus one it is established that the Kanodias committed breach of the M.O.U. it is the conclusion that the Agarwalas were entitled to damages to the tune of Rs.5.51 crores.

There is no dispute that Kanodia paid a sum of one crore pursuant to the M.O.U. It was agreed by Deepak Agarwala that there is no provision of clause to forfeit earnest money or deduct any liquidated damages. In **Fateh Chand v. Balkishan Dass [1963 SCC OnLine SC 49]**, relied on by Mr. Chowdhury, the Learned Senior Counsel, referring to Section 74 of the Indian Contract Act, 1872 the Supreme Court of India observed that the expression "the contract contains any other stipulation by way of penalty", occurring in Section 74, comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future or for forfeiture of right to money or other property already delivered. In all cases, therefore, where there is a stipulation in nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract liable to forfeiture. This decision clarifies and reiterates the principle of law that forfeiture of earnest money or advanced payment requires presence of

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forfeiture clause in the contract. Again in **Satish Batra v. Sudhir Rawal [(2013) 1 SCC],** the Supreme Court of India observed:

> **"15.** The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply."

Coming to the case in hand, the said M.O.U. did not contain any forfeiture clause, in absence of which advanced money cannot be forfeited and the Agarwalas are liable to refund the advance payment of one crore rupees.

Conclusions of the discussions abovenamed are that the Agarwalas are entitled to and the Kanodias are liable to damages for breach of contract and the Kanodias are entitled to and the Agarwalas are liable to refund the advanced money with interests in both the cases. In terms of Section 3 of the Interest Act, 1978, damages payable shall attract current rate of interest.

These issues are decided accordingly.

It is now ordered as follow:-

a) The Plaintiffs in C.S 124 of 2011 do get a decree of Rs.5.51 crores which will bear interest at a rate of 7% per annum chargeable from the date of institution of the suit till repayment. The principal amount along with interest shall be paid within 60 days of drawing up the decree in case of failure of which the Defendants of C.S 124 of 2011 shall be liable to pay penal interest at a rate of 5% per annum on the capitalized interest from the 61st day; the Plaintiffs shall also be at liberty to draw up execution proceeding.

b) The Plaintiffs of C.S. 264 of 2012 do get a decree of one crore rupees which will bear interest from the date of institution of the suit, at a rate of 7% per annum till repayment. This amount, the Defendants shall pay within 60 days of drawing up the decree in case of failure of which the Plaintiffs of C.S. 264 of 2012 shall be at liberty to draw up execution proceeding. In case of failure to pay within the stipulated period the Defendants shall be liable to pay additional interest at a rate of 5% per annum from the 61st day onwards on the capitalized interest.

c) The Plaintiffs in C.S. 124 of 2011 will be at liberty to deduct the principal amount of rupees one crore along with accrued interest from the decretal amount of C.S. 124 of 2011.

Let the decree be drawn up. Both the suits are disposed of.

(Sugato Majumdar, J.)