

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present:-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

I.A. No. G.A. 1 OF 2021

with

C.S. 45 OF 2021

The All India Tea and Trading Company Limited

Vs.

The Loobah Company Limited

For the Petitioner : Mr. Surajit Nath Mitra, Sr. Adv.
Mr. D.N. Sharma, Adv.
Mr. Kumar Gupta, Adv.
Ms. Shivangi Thard, Adv.

For the Respondent : Mr. Jishnu Chowdhury, Adv.
Mr. Aritra Basu, Adv.
Mr. Souradeep Banerjee, Adv.
Ms. Sanjana Sinha, Adv.

Reserved for Judgment on : 08.10.2021.

Delivered on : 10.11.2021.

Moushumi Bhattacharya, J.

1. The issue to be decided in the present application is whether specific performance of an agreement, including a negative covenant contained therein, is mandatory under the amended provisions of the Specific Relief Act, 1963.

2. The petitioner seeks an injunction restraining the respondents from selling tea leaves grown in the Kallaincherra Tea Estate in the district of Cachar, Assam owned by the respondent and for a direction on the respondent to sell the entire quantity of tea leaves grown in the said garden to the petitioner. The petitioner relies on a negative covenant in the agreement executed between the parties on 14th December, 2017 which operates against the respondent from transferring or creating any third party interest in respect of the assets of the respondent including the green tea leaves grown in the Tea Estate of the respondent.

3. The contentions made on behalf of the parties would be clear from a brief statement of the factual background leading to the suit filed by the plaintiff/petitioner and the present application in the said suit.

The facts in brief:

4. The petitioner agreed to provide financial assistance to the respondent for liquidating the dues towards the Provident Fund authority in relation to the tea garden owned by the respondent in exchange of the respondent letting out the tea factory in the respondent's tea garden at Cachar, Assam, for a period of

4 years. The terms of the agreement were crystallized by way of a Term Sheet executed on 2nd December, 2017 and a formal agreement between the parties dated 14th December, 2017. The said Agreement provided for leasing of the factory premises by the respondent to the petitioner and for sale of the entirety of the green tea leaves produced in the said Tea Estate exclusively to the petitioner at the rates contained in the Agreement.

5. Clause 20 of the said Agreement incorporates a negative covenant under which the respondent was not to alienate or create any third party interest in respect of its assets including the green tea leaves and was to hold the said Tea Estate and the factory in trust and for the benefit of the petitioner. The tea factory was handed over to the petitioner on 1st January, 2018. The petitioner made certain investments in managing the tea factory and green tea leaves were supplied by the respondent to the petitioner without any complaint as to the quality thereof till June, 2018.

6. A Supplementary Agreement was entered into between the parties on 16th October, 2019 which also dealt with sale of green tea leaves and for the intervention of the Tea Research Authority (TRA) for ascertaining the fine count of tea leaves by way of the standard method of Balometer fine count. Clause (4) of the Supplementary Agreement provides for the respondent supplying all the green leaves procured at the Tea Estate only to the petitioner in terms of the Agreement dated 14th December, 2017 and not to divert the same to any third party. The petitioner thereafter raised a dispute with regard to the respondent

being in breach of the Agreement and for the consequential loss suffered by the petitioner by reason of inferior quality of green leaves and short supply by the respondent.

7. The petitioner claims specific performance of the Agreements entered into between the parties in relation to sale of green tea leaves grown in the respondent's Tea Estate to the petitioner.

Contentions of the parties:

8. Mr. Surajit Nath Mitra, learned senior counsel appearing on behalf of the petitioner relies on the negative covenants in the Agreement to urge that the respondent was and is obliged to supply the entire green tea leaves produced in its garden to the petitioner and that the respondent has not been able to make out any breach on the part of the petitioner for not carrying out its part of the bargain.

9. Mr. Jishnu Chowdhury, learned counsel appearing for the respondent points to the breaches committed by the petitioner including failure to make payment in terms of the Agreement as well as the payment against the supply of green tea leaves. Counsel draws a "fine" distinction (in teas as well) between fine count and coarse leaves which entail a different method of calculation as certified by the Tea Research Authority. Counsel submits that the petitioner has not made payment for the coarse leaves contrary to the terms of the Agreement. The other allegations include delay on the part of the petitioner in

making payment of advance amounts in terms of the Agreement. It is submitted that a negative covenant does not entail an automatic injunction and that the petitioner is not entitled to specific performance having regard to the nature of the contract since the petitioner is in breach. Counsel cites several provisions of the Specific Relief Act, 1963 in this connection.

Decision :-

10. Whether the restrictions contained in the negative covenants contained in the main and the supplementary agreements can operate against the respondent will have to be tested against the relevant provisions of the Specific Relief Act, 1963, as amended in October, 2018. Under the amended Section 10 of the Act, the performance of a contract shall be enforced by the court subject to Sections 11(2), 14 and 16 (underlined for emphasis). The word “shall” is a significant alteration compared to Section 10 as it stood before the amendment of 2018. The unamended Section 10 left space for exercise of discretion by the court at the time of considering whether an order for specific performance can be passed. The change brought in by the amendment to Section 10 was lucidly explained by the Supreme Court in *B. Santoshamma vs. D. Sarala*; 2020 SCC Online SC 756, wherein it was held that relief of Specific Performance of a contract is no longer discretionary after the amendment. Reference may also be made to *Sughar Singh vs Hari Singh*, a recent decision of the Supreme Court in CA 5110 of 2021- decided on 26th October, 2021, where the implication of the amended Section 10 was emphasized. In *Richard Wheeler Doherty vs. James*

Clagston Allman; L.R. 3 App. Cas. 709, the House of Lords opined that a Court of Equity would have no discretion in the matter of a negative covenant and if parties contract for valuable consideration with their eyes open, that a particular thing shall not be done. The House of Lords proceeded to hold that in cases of a negative covenant, the injunction does nothing more than give the sanction of the Court to the contract already existing between the parties. A Division Bench of this Court in *Board of Acting Governor of the La Martienere vs. National Engineering Industries Ltd.; (2005) 2 CHN 207*, considered the import of Section 42 of the Specific Relief Act to hold that the Court shall restrain breach of the restricted covenant even where it cannot enforce the affirmative covenant.

11. Specific performance of contracts and enforcement of negative covenants are woven into the fabric of the Specific Relief Act and included in the amended provisions. Although Section 10 has done away with the discretionary powers of a court in the matter of specific performance of a contract, the mandatory nature thereof is diluted by Sections 11(2), 14 and 16 of the Act. This indicates that specific performance in respect of contracts is not absolute, as explained by the Supreme Court in *B. Santoshamma*, wherein the exceptions to an absolute grant were discussed. Further, Section 42 of the Act which empowers the court to grant an injunction for performing a negative agreement is also subject to the proviso to Section 42 which casts an obligation on the plaintiff to perform the contract as far as it is binding on the plaintiff. The effect of the proviso was clearly brought out in *Gujarat Bottling Co. Ltd. vs. Coca Cola Co.*;

(1995) 5 SCC 545, where the Supreme Court held that the court is not bound to grant an injunction in every case and can refuse an injunction for enforcing a negative covenant on the existence of certain conditions. The conditions which would persuade a court to refuse performance of a negative covenant were also stated in *Percept D' Mark (India) (P) Ltd. vs. Zaheer Khan.*; (2006) 4 SCC 227. The view of the Supreme Court in *Gujarat Bottling* was followed in a Single Bench decision of this Court in *Farinni vs. Dream Food Products*; (2008) 2 CHN 689. Although *Gujarat Bottling* was decided before the amendment of 2018, the principles enunciated therein have now been incorporated in the proviso to Section 10 of the Act. Besides the situations where a contract cannot specifically be enforced (Section 14), Section 16 disentitles a person from claiming specific performance of a contract if that person becomes incapable of performing or violates any essential term of the contract or willfully acts at variance with the relation intended to be established by the contract (Section 16 (b)). Section 16(c) further requires the person seeking specific performance to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. *Explanation* (ii) to Section 16 has been amended to the effect that the plaintiff must aver performance of, or readiness and willingness to perform the contract according to its true construction.

12. The conclusion, as would be evident from a combined reading of the provisions, is that Specific Performance of a contract, even in the diminished landscape of Section 10 post-amendment, must segue into Sections 11, 14 and

16 of the Act, without discordance, for the '*shall be enforced*' in Section 10 to be in harmonious sync with the import of the amendment.

13. The question whether the petitioner would be entitled to Specific Performance of the Agreement, including the negative covenant therein, would hence turn on the petitioner's obligations in respect of the Agreement.

- i) Failure on the part of the petitioner to perform the contract and its part of the bargain:

14. The Clauses in the Agreement dated 14th December, 2017 indicate the obligations of the parties in terms of their performance as well as continuing obligations in that regard. Clause 4 of the Agreement relates to the obligations on the part of the petitioner to make payment towards Provident Fund dues within specific time frames outlined under the said Clause. The fact that the petitioner failed in its obligations of payment within 90 days i.e. 31st March, 2018 as stipulated under Clause 4.2 would appear from the petitioner's averments in the affidavit-in-reply which clearly shows that the petitioner made occasional payments towards Provident Fund dues but defaulted thereafter. The delayed payments made by the petitioner from Season 2018 to Season 2021 have been tabulated by the respondent in its affidavit-in-opposition and have not been refuted by the petitioner. The Supplementary Agreement entered into between the parties on 16th October, 2019 also makes it evident that such Agreement was necessary to extend the time for making payments as provided in the Agreement dated 14th December, 2017.

15. The defaults on the part of the petitioner would also appear from the letters written to the petitioner by the Provident Fund Authorities whereby the parties were directed to appear before the Authorities on 20th September, 2021 and an order was passed by the PF Authorities on the same date. These documents form part of the supplementary affidavit of the petitioner.

16. Under Clause 7 of the Agreement, the petitioner was also to make payment for the green leaves produced in the Tea Estate and sold by the respondent to the petitioner at the rates specified in Clause 7.1. The allegation that the petitioner has failed to make payment as provided under Clause 7 has not been controverted by the petitioner in evidence. The dispute with regard to the segregation of fine count and coarse tea would appear from the method of calculation prescribed by the Tea Research Authority which forms part of the pleadings of both the parties. The alleged discrepancy in relation to the method, raised by the petitioner, is not acceptable since there is no deviation in the relevant part of the prescribed methodology.

17. The dispute raised by the respondent of the petitioner failing to make payments for purchase of green leaves at the rates agreed by the parties would dilute the case for specific performance of the Agreement by reason of the fact that an order directing specific performance is premised on a clean slate where the party seeking relief must establish on irrefutable facts, complete performance of its part of the bargain. A grainy picture consisting of unresolved charges of non-performance does not commend to an order of specific

performance. Section 10 read with Section 16 of the Specific Relief Act lends to this view as the onus of disproving the sequence of failure and non-performance rests on the person who seeks specific performance. The construction which emerges from these provisions is that a petitioner who seeks such relief must prove and aver that none of the personal bars to relief under Section 16 will operate against it for denying the relief sought for. The failure on the part of the petitioner to perform its part of the bargain would result in a bar to the relief claimed under sub-sections (b) and (c) of Section 16 which involve incapacity to perform or violation of an essential term of a contract as well as a failure to prove and aver readiness and willingness by the party who seeks specific performance of the contract.

- ii) The petitioner is not entitled to specific performance of the agreement, even otherwise:

18. Since the contract also relates to segregating and differentiating between fine and coarse leaves and supply of tea from the respondent to the petitioner, the performance thereof would involve a continuous duty as contemplated under Section 14(b) of the Specific Relief Act. The difficulty in enforcing a contract of this nature may also attract the consequent inability of a court to enforce specific performance of the material terms of the contract under Section 14(c) as it would be dependent on various factors which would be beyond the monitoring mechanism of the Court.

19. Besides, relief at the interlocutory stage would require a petitioner to establish a prima-facie case and show that the balance of convenience is in its favour and that irretrievable injury would be caused to the petitioner if injunction is not granted. Moreover, since accounts are being filed by the respondent, the invasion is not such that compensation in money would not afford adequate relief to the petitioner.

ii) The Alternative Case- the respondent is otherwise entitled to terminate the contract:

20. Clauses 7.8 and 19.2 allow breathing space to the respondent in terms of providing an exit from the negative covenant contained in the Agreement. Clause 7.8 entitles the respondent to sell green leaves to a third party on the failure of the petitioner to make payments for the same. Clause 19.2 is on a similar vein whereof the period of default on the part of the petitioner to make payments for the green leaves is capped at 16 weeks after which the respondent shall be entitled to terminate the Agreement and refund the amounts payable to the petitioner with interest.

21. Although there is nothing on record to show that the respondent opted to terminate the Agreement, it may be said that the respondent is entitled to do so by way of a common law right and the continued breach on the part of the petitioner. The Court of Appeal in *Stocznia Gdynia SA vs. Gearbulk Holdings Ltd; (2009) 3 WLR 677* placed emphasis on the language of the clause in question in the context of the contract as a whole and in light of the parties' obligations and what they intended to achieve. The Court discussed the

implication of the right to terminate as embodied in the agreement to treat the contract as repudiated under the common law. In *Air India Ltd. vs Gati Ltd;* 2015 SCC Online Del 10220 a Single Bench of the Delhi High Court held that the respondent before the court was permitted to terminate the contract without having regard to the particular clause in the contract in the event of a repudiatory breach. Section 39 of the Indian Contract Act, 1872 also supports the contention of the respondent in this context.

22. In view of the reasons as stated above and having found that the petitioner has breached the material and fundamental terms of the agreement, this court is not inclined to hold in favour of the petitioner in the matter of specific performance of the contract or restrain the respondent in terms of the negative covenant contained in the Agreement.

23. G.A.1 of 2021 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)