Supreme Court on a Development Contract: an Analysis based on Principles of Contract and Specific Relief

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In contract law, certainty and predictability is more important than resolving perceived injustice in individual cases. A principle or even a casual observation in a judgment can affect directly the manner in which parties negotiate and make contracts, unsettle established contracting practices or upset expectations of parties. This article examines in this light the judgment of the Supreme Court in *Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel*[1] and suggests that it runs contrary to established principles of laws of contract and specific relief, and sets an undesirable precedent.

This is a suit for specific performance and injunction arising out of a contract between an owner of land (the defendant, hereafter 'owner') and a building contractor (the plaintiff, hereafter 'developer') for construction of a building scheme under section 21 of the Urban Land Ceiling Act (hereafter 'ULC Act') for weaker sections of society. The suit filed in April 1980 was decreed in 1992 by the Civil Court of Baroda. The Gujarat High Court confirmed the decree with modifications in 1998.[2] The Supreme Court refused specific performance after setting aside concurrent judgments granting relief.

After first narrating facts and progress of proceedings, Part I of the article emphasises that the judgment wrongly and too casually interprets an express term, and implies a right to terminate the contract unilaterally *at will*. Part II discusses that the judgment fails to recognise the two distinct phases in a case involving contract remedies: the first establishing existence of a contractual obligation, and the second deciding the entitlement to the remedy sought. Part III emphasizes that the judgment overly generalises contractual obligations while applying S. 10 and S. 14 of the Specific Relief Act (hereafter 'the SRA'), and fails to identify and analyse them with the precision required for applying tests prescribed by these provisions. Part IV stresses that the factors considered by the court for exercising discretion to refuse injunction were not relevant and reasonable; especially that recognising 'public interest' as one such factor sets an undesirable precedent. Part V questions the propriety and desirability of allowing a party to make an offer during proceedings linked to the outcome of litigation, and its acceptance by the court. Lastly, in Part VI, it is submitted that considering all circumstances, and especially that the offer in the undertaking obligated the owner in the same manner as under his contract, it was possible to enforce the contract by an order of injunction and by moulding an appropriate decree of specific performance. In conclusion it is submitted that the judgment and the principles it pronounces, deserve reconsideration.

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The following abbreviations are used in this article: ACD: Affidavit-cum-Declaration, ICA: Indian Contract Act, MOA: Memorandum of Understanding, POA: Power-of-Attorney, SRA: Specific Relief Act, ULC: Urban Land Ceiling.

[1] AIR 2001 SC 1462, in appeal from a judgment of a Division Bench of the Gujarat High Court reported in *Her Highness Shantadevi Pratapsinh Rao Gaikwad v Savjibhai H Patel* (1998) 2 Guj LR 1521.

[2] The Appeal involved 66 volumes of paper books of 13752 pages, and was heard by a Division Bench three days a week for six weeks with, as stated in the judgment - 'inexhaustible patience'.

Facts and contract provisions

The facts: On 15 March 1977, the owner Fatehsinh Gaekwad submitted a scheme under S. 21 of the ULC Act for construction of 64,306 dwelling units for weaker sections of society at a cost of 89 crores. On 24 March 1977 he made with Savjibhai Haribhai Patel (the developer), a contract styled as Memorandum of Agreement (MOA), and an 'irrevocable' Power-of-Attorney (POA). The government issued guidelines and the developer revised the scheme (Scheme II) reducing number of units. The town-plan changed and he submitted yet another scheme (Scheme III). In response to a notice of appearance from the competent authority under the ULC Act, the owner appeared with a lawyer on 10 February 1978 and gave an affidavit-cum-declaration (ACD) confirming Scheme III.

In April 1978 the Gujarat Government issued guidelines that a scheme shall comply with the master plan under town-planning law. The developer revised the scheme (Scheme IV) now proposing 25483 units. In January 1979, he submitted another scheme (Scheme V), reducing the number to 4358 units at cost of 12 crores. The authority specified by the Government under S. 21 approved Scheme V in November 1979. In the meantime, in May 1979, a draft development plan under the Gujarat Town-Planning and Urban Development Act 1976 was published, in which land under the scheme was stood reserved for other uses and not now available for residential use. The scheme apparently violated the new master plan. In 1980, departmental correspondence ensued between the competent authority and Government departments, and the competent authority was directed to approve the scheme.

On 23 February 1980, the owner terminated the contract. The developer filed the present suit, initially against the owner, later adding as parties the competent authority and the government. The original owner (Fatehsinh Gaekwad) died pending suit, and his legal representatives were substituted.

The contract and parties' obligations: The contract came in three documents which both Courts read together: the Memorandum of Agreement (MOA) and irrevocable Power of Attorney (POA), both made on the same day, and the unilateral affidavit-cum-declaration (ACD) of the owner.

The MOA containing 19 terms described the owner as Owner and the developer as Licensee. It provided that the developer shall prepare a scheme under S. 21 at his cost entirely, and file declaration under S. 21(1). The owner shall make the developer his attorney under an irrevocable Power of Attorney; shall deliver possession of property for execution of the scheme; cooperate with and assist the developer in complying with all terms and conditions imposed by the competent authority for the scheme; and give papers for investigation of title. The developer could make allotments of dwelling units to purchasers and recover price from them and retain it, including price component for the land, without any liability to make it over to the owner. The land component of the price shall be used for land development levelling. The developer shall 'in consideration' execute the housing scheme after the competent authority made the declaration and granted permission; construct after possession of land was delivered; and pay to the owner by 31st March every year an amount of Re 1 per sq.m. from profits earned from sales. He shall have possession of the land and own the building; receive deposits from members, obtain loans from banks without rendering the owner liable, but shall not be entitled to transfer, sell or mortgage the property. The contract shall not be unilaterally rescinded by either party once the developer has been put in possession of the said property. Some clauses made provisions for contingency of amendment, modification to scheme or *even repeal of the ULC Act*.

The POA contained 13 powers and stated that the power was *irrevocable* and that the owner shall not revoke it till the scheme was executed.

The ACD stated that the owner approved all terms in paras 1-19 of the MOA, that he had executed the MOA voluntarily in sound state of mind and consciousness and it was in no circumstances liable to be cancelled; and that he had executed an irrevocable POA authorising the developer to administer the property, to put the housing scheme on the property, to make necessary additions and alterations in the scheme, and to modify the same consistent with the ULC Act and guidelines issued.

Important relevant rights, powers, obligations and disabilities of parties which emerge are:

1. The developer shall construct dwelling units as may be sanctioned, implying that all decisions relating to construction shall be of the developer. The developer shall amend or modify the scheme from time to time as may be required by amendments, modifications or changes in guidelines. The developer shall have the right and liberty of fixing price of dwelling units (as approved by the scheme), and of collecting and retaining it. *It is implied that the owner shall not interfere.*
2. To facilitate the above, the owner has given a power-of-attorney to the developer.
3. As regards the owner's power to rescind / terminate the arrangement,
   a. The owner cannot revoke the contract after he has given possession of the land to the developer under express provisions of clause 17 of the MOA,
   b. The power of attorney cannot be revoked under express terms of the MOA and the POA,
   c. The owner assures in the ACD that he shall not cancel the contract under any circumstances.
4. The owner shall assist and cooperate with the developer for complying the scheme. The owner shall give possession after the scheme is approved. The owner shall not claim price of the land, revoke the agreement, or interfere in the implementation of the scheme.

The proceedings

Parties' case and reliefs sought: The developer challenged the termination of contract and sought specific performance and injunction restraining the owner from dealing or parting with possession of property. He *did not* seek damages or reimbursement of expenses, nor mandatory injunction against the government authorities (also defendants in the suit) that the scheme be sanctioned. The owner contended that he was entitled to terminate the contract unilaterally, and to revoke the 'irrevocable' POA; that the scheme could not be implemented after the new town-plan; that later schemes did not have his consent; that he had signed on the ACD without applying his mind; and that specific performance could not be granted. The case of other defendants, i.e. competent authority, specified authority and the government, is not clear from the judgments.

Trial court: The trial court held that the MOA, POA and ACD were valid and subsisting, and granted specific performance on terms, and multiple permanent injunctions.

High Court: In the owner's appeal, the High Court framed three issues: (i) whether the contract was validly rescinded, (ii) if not, whether the plaintiff was entitled to specific performance, and (iii) if yes, subject to what conditions. After deciding that any change in master plan did not affect the contract, it held that the developer had not committed any breach to justify the termination. The POA was irrevocable under S. 202 of the Indian Contract Act (hereafter 'the ICA'). The owner was not entitled to terminate the contract under its terms. The developer had established his readiness and willingness; compensation would not be adequate relief, and supervision, if any, required for implementing the

scheme could be done by the competent authority. It granted specific performance subject to condition that a final declaration under S. 21 would be issued.

The owner appealed to the Supreme Court.

Scheme approved: The competent authority approved the scheme after the High Court order. The owner challenged this order, which was heard in the Supreme Court with the appeal in the suit.

Repeal of the ULC Act: Pending appeal in the Supreme Court, the Parliament repealed the Urban Land Ceiling Act. The Gujarat Legislature adopted the repeal in March 1999.

Supreme Court: The Supreme Court framed only one issue (para 23): *Is the plaintiff entitled to seek specific performance of the agreement or is he entitled to sue for only damages* ?

It held that specific performance could not be granted for two reasons: (i) construction was not possible on land reserved for open space after change of master-plan,[3] and (ii) ULC Act stood repealed and there would be no authority to supervise any scheme. The Supreme Court proceeded to raise and decide many other questions. It held:

1. clause 17 gave to parties a right to terminate the contract unilaterally at will before delivery of possession, and hence the termination by the owner was correct,
2. specific performance could not be granted because the contract was determinable under S. 14(1)(c) of the SRA, and involved constant supervision under S. 14(1)(d), and
3. It was equitable not to exercise discretion in granting specific performance under S. 20 of the SRA.

It observed that the developer may have spent a large amount, but did not award it because damages were not claimed. It accepted an undertaking given by the owner and allowed the appeal.

The Owner's undertaking

A peculiar feature of the judgment is an undertaking by the owner that *if the appeal was allowed*, he will offer the same land for housing for weaker sections. The Supreme Court accepted it.

The owner's undertaking provides that an area of land of 66 acres is unencroached and unencumbered and marked on a plan attached and he offers it unconditionally to the Government of Gujarat by gift or at token price of Re 1 for the specific purpose of constructing residential dwelling units for low-income groups. The units shall be constructed at the cost of the Government. If the government does not accept the offer within four months, the owner will utilise the land for constructing on no-profit-no-loss basis dwelling units for housing persons in the low-income group or letting or selling them to such persons; and cost of the project will be got certified by a reputed Chartered Accountant. The owner will construct these if permitted under the relevant Town-Planning Laws.

Part-I – The contract was not terminable *at will*

Clause 17[4] of the MOA contained an express and unambiguous term that neither party could end the contract after the developer was put in possession. The MOA specifically provided that the owner shall

[3] But see Part V below: the Supreme Court accepted the owner's undertaking to construct on the same land.

[4] Clause 17 of the MOA provided: "This agreement shall not be unilaterally rescinded by either party after the Licensee of the Second Part has been put in possession of the said property".

give an irrevocable power-of-attorney to the developer, and the POA was stated as irrevocable.[5] In the ACD, the owner acknowledged that the contract was in no circumstances liable to be cancelled. The owner had terminated the contract on 23 Feb 1980 stating that he had the right of rescission until possession of land was given to the developer, and alleging breach by the developer. The judgment upholds this termination as valid on the ground that the contract was terminable *at will*.

The Supreme Court has read the MOA, POA and ACD together. It held (i) S. 202 of the Indian Contract did not apply to the POA as there was no interest in the subject matter of agency; (ii) the owner's statement in the ACD that the agreement was not liable to be cancelled was a mere interpretative statement incapable of giving any more rights to the owner than the MOA, (iii) the POA and ACD were subordinate to the MOA. It upheld the owner's contention that clause 17 when read with clauses 4[6] and 13[7] was "in the nature of an express stipulation that before delivery of possession, the contract could be unilaterally terminated." It observed: "where there is no ambiguity in the clause, the question of intendment is immaterial.", and, "the intention is clear from the plain language of clause (17) of the agreement". It held that clause 17 gave a power to terminate the agreement unilaterally[8] before possession was handed over to the developer, and the contract had been validly terminated.

It is submitted that (i) the express termination clause in the MOA was unambiguous and cannot be read to confer a right of unilateral termination *at will* as has been done in the judgment; (ii) the Supreme Court's interpretation (although the Court does not consider this as an exercise of interpretation) was actually implying of a term, and was not warranted by the express terms of the contract as seen in the three documents, or the other circumstances; and (iii) the judgment purports to recognise too wide a power of termination. This interpretation deserves immediate reconsideration.

The term 'unilateral termination' literally means termination by one party. This can happen (i) under the ICA,[9] (ii) upon minor breaches by the other party, and (iii) *at will* without need to have any reason for terminating. It is submitted that if by the term 'unilateral termination' the Supreme Court means termination under the ICA, there is no need for further comment. However, by the term, the Supreme Court clearly means 'termination by any party *at will*', because the judgment does not refer to any breach by the developer, it refers to case-law[10] concerning termination *at will*, and also since it later holds that the clause renders the contract 'determinable' by one party.

Power of termination: A contracting party cannot terminate the contract unilaterally *at will*, nor simply because the other party has committed breach. The ICA gives power to rescind (put an end to) the

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[5] Clause 13 of the POA provided: "This power is irrevocable. And I declare that the power hereby created shall be irrevocable till the scheme is finalised, carried out and executed as agreed in the agreement dated 24th March 1977 …"

[6] Clause 4 of the MOA provided: "On the Competent Authority making a declaration that the land of the said property is not in excess of the ceiling area and on his granting permission to the owner to continue to hold the land of the said property for purpose of the scheme above referred to be prepared by the Licensee of the Second Part, the owner of the First Part shall deliver possession of the said property to the licensee of the Second Part for the execution of the said scheme and construction of the buildings under the said scheme."

[7] Clause 13 of the MOA provided: "On the delivery of possession of the said property to him as stated in clause (4) above, the Licensee of the Second Part shall be entitled to construct dwelling units and other building in accordance with the scheme."

[8] Meaning by that term – 'unilaterally *at will*".

[9] Under ss. 39, 54 and 55 of the ICA

[10] *National Fertilizers v Puran Chand Nangia* AIR 2001 SC 53; *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288

contract only in three situations: (i) where the other party has refused to perform or disabled himself from performing his obligations,[11] (ii) where the other party has prevented performance,[12] and (iii) where the other party has failed to perform his part of the contract at time specified, time being of essence of contract.[13] This power can be restricted or extended by contract, express or implied. Thus a party can also terminate a contract for breach of condition.

Parties can modify this power in their contract in different ways:

1. that either or all parties shall not terminate at all, generally, or after specified events or time. This restricts the right of rescission given by the ICA. In case of breach, the aggrieved party can claim damages only, but cannot end the contract. Clause 17 of MOA in the present case is an example.
2. that either or all parties shall have the right to terminate on specified breaches, or minor breaches other than those given in the ICA, - this extends the right given by the ICA.
3. that either or all parties shall have the right to terminate at will, i.e. without any reason or without need to justify the termination, with immediate effect,[14] or after a specified notice period,[15] - this enlarges the right given by the ICA. One finds such powers in contracts of licences / private employment, entitling the parties to terminate by giving notice of a specified period.
4. Combination of any of above.

Parties can also provide the effect of such unilateral termination. They may exclude liability, or provide for payment of expenses incurred or investments made by the other party, or compensation; and that any such amount shall be determined by an independent person. Such payment might be a precondition to termination. Provision for such adjustment of rights is a just solution to harsh termination clauses. In the absence of any provision for consequences, the party terminating will be bound by performance rendered till termination, viz. payment for supplies made till then, or services rendered.[16]

Rescission or termination will discharge those obligations upon which the termination operates, often the entire contract. The Court or arbitral tribunal can decide whether such rescission or termination is valid, viz whether the circumstances giving that power in fact existed, or whether the procedure for its exercise was properly followed. If so, there remains no claim for specific performance or injunction.

Question of construction or of implying a term: The purpose of construction of contract terms is to discover the intention of contracting parties. After disputes have arisen, their statements about actual intention may not be reliable. The Court therefore attempts to find the presumed intention of parties by assuming what the parties as reasonable persons would have agreed had they given thought to that question. This requires primarily looking at the document itself, and also surrounding circumstances,[17]

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[11] S. 39 of the ICA
[12] S. 54 of the ICA
[13] S. 55 of the ICA
[14] See *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288
[15] Such clauses have been upheld as valid in *Peico Electronics and Electricals v Union of India* AIR 2004 SC 2669, See also observations in *CSIR v Dr Ajay Kumar Jain* AIR 2000 SC 2710, *Gujarat Bottling Co Ltd v* Coca *Cola Co* AIR 1995 SC 2372, *S Chandra Sekharan v Govt of Tamil Nadu* AIR 1974 SC 1543.
[16] *Union of India v Maddala Thanthaiah* AIR 1966 SC 1724.
[17] *Govindram Mihamal v Chetumal Villardas* AIR 1970 Bom 251.

including how parties acted under it[18] viz., conduct in rendering or receiving performance and subsequent interpreting statements. [19]

The task of implying terms is different. The need for implying terms arises only when the contract does not make an express provision and apparently does not provide for the question in hand. It involves 'filling a blank', i.e. adding a term to what has been expressly agreed. For this purpose, the Court will consider express terms of the contract, and all surrounding facts and circumstances. One might need to construe one term in order to imply another term. A term will not be implied where it is inconsistent with an express term, or where the contract is effective on mere construction of express terms.[20]

The judgment construes clause 17 in the MOA and implies a term into the contract that the parties had a right to terminate the contract unilaterally *at will* before delivery of possession.

Such implication inconsistent with clause 17: This implication is inconsistent with and contradicts the express terms of the contract. Clause 17 can mean two things:

1. Clause 17 merely restricted the power of termination parties had under the ICA, once possession was given. The natural interpretation is that the parties could terminate for breaches falling under Ss. 39, 54 and 55, or for breach of any condition before possession was handed over. The owner also alleged breach by the developer while terminating the contract.
2. If read with the POA and ACD (which is what both courts did), the parties intended that they would not terminate the contract at all. The POA was expressed as irrevocable, by the terms of the MOA and by its own terms. The ACD, a subsequent interpreting statement,[21] stated that the contract was liable to be cancelled at any time. The ACD is made deliberately and seriously, in response to a notice from the competent authority, and acted upon by it. Both documents contain statements of the owner made when there was no controversy about the extent of power of termination.

The terms of the contract show an intention not to terminate, rather than the converse. Since the words of clause 17 are clear in the context of surrounding circumstances, contrary intention cannot be attributed to the parties,[22] and the Court must give effect to the plain meaning of the words, however it may dislike the result.[23] Whichever way the clause is construed, the owner's termination is invalid.

The irrevocable power-of-attorney: It is significant that the powers under the POA were irrevocable.[24] In observing that S. 202 did not apply in the instant case because this was not an agency coupled with interest, the judgment fails to recognise that a principal can create an irrevocable agency.

The POA was one of a set of documents which made one contract. The MOA, the main document from the set, required that the powers required for pursuing the scheme before ULC authorities shall be irrevocable, for which purpose the owner shall give an irrevocable POA to the developer. The nature of the transaction required giving irrevocable powers. The developer was to pursue proceedings under the

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[18] *Raja Ram Jaiswal v Ganesh Prasad* AIR 1959 All 29; *Union of India v Nand Kishore* AIR 1966 HP 54.
[19] *Godhra Electricity Co Ltd v State of Gujarat* AIR 1975 SC 32.
[20] *Re Nott and Cardiff Corp*[1918] 2 KB 146, CA.
[21] *Godhra Electricity Co Ltd v State of Gujarat* (1975) 2 SCR 42, AIR 1975 SC 32, considered by the Supreme Court but not applied on the ground that the principle applied only when the document was ambiguous, and that in the present case clause 17 was unambiguous.
[22] *Kamla Devi v Takhatmal* AIR 1964 SC 859 at 863; see also S. 93 of the Indian Evidence Act.
[23] *Central Bank of India Ltd v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 at 1290
[24] See note 5 above for text of clause 13 of the POA

ULC Act at his own expense and responsibility, and such powers gave him a facility and an assurance that he could do all acts required for seeing the scheme completed without interference from the owner; and later to obtain possession of land once the scheme was approved. After this the contract could not be terminated. S. 202 of the ICA did not apply in the present case because the irrevocability was governed, not by the agency contained in the POA, but guaranteed in the contract as a whole, particularly the MOA.[25]

The ICA does not take away parties' freedom of making an agency irrevocable. S. 202 merely implies a term by law into the specified agency ('coupled with interest') that it shall be irrevocable, and that it shall not be revoked unless such power of revocation is expressly given. Parties can create an agency with the agent *not having interest* in the property forming subject matter of agency. Ordinary principles of contract law should apply to such an agency. If revoked, it should be liable to specific performance or injunction like any other contract in appropriate cases which satisfy conditions for grant of those reliefs. Its connection with another contract (in the instant case the MOA) can support grant of such reliefs.

Other facts and circumstances: The construction of the clause or the implication of term is also not supported by other facts and circumstances.

1. Considering the status and position of parties, it could be assumed that what was not provided was deliberately left blank in the formal document.[26] One was an "ex-Ruler turned politician", and the other a person in building and development business. Both were educated, experienced and worldly-wise, and having benefit of advice.
2. As argued on behalf of the developer, it could never be intended that agreement can be terminated when the developer had to take various steps and spend amounts for preparing plans, submitting and pursuing applications, obtaining permissions and approval to the scheme before he got possession, after which clause 17 would operate and prevent termination. If parties as reasonable persons would have discussed the matter, the developer would never have agreed to such a term.
3. The developer had the discretion and freedom to take all decisions about the scheme, and was given powers to do so. Hence there would have been no occasion for the owner to terminate the contract.
4. If reasonable persons attempting to write their contract were to provide for unilateral termination *at will*, they would provide so expressly in their contract.
5. A clause enabling unilateral termination *at will* ought not to be lightly implied. It makes the continuation of contract uncertain for the party against whom it will be exercised. When parties would negotiate on an equal basis, one party will not normally be inclined to have such a clause against him; he would at least have a provision protecting the investment made by him until termination. No reasonable developer would have agreed / consented to incorporate into the contract a term allowing the other party to terminate the contract unilaterally, especially without provision for adjustment of rights in terms of reimbursement of expenses incurred by him.

[25] See *Barses A D'Douza v Municipal Corporation of Greater Brihan Mumbai* 2003 (4) Mah LJ 451, which recognises that an irrevocable POA is subordinate to the main agreement governing relationship between parties.

[26] See Proviso (2) to S. 92 of the Indian Evidence Act, which requires the court to consider the degree of formality of the document.

6. Even the purported termination was not exercised as one '*at will*', i.e., termination without reasons. The owner made serious allegations of breach of contract by the developer, rather than simply terminating the contract. The notice was issued when the clause was not in controversy.

Effect of judgment: In implying into clause 17 a term entitling either party the power of unilateral termination *at will*, the Supreme Court has not only ignored the (presumed) intention of parties, but also upset settled expectations of parties to the contract in the case. Since the principle binds courts, and will be applied by lawyers advising clients and by parties when making contracts, it has also upset expectations in all contracts made with similar terms of termination.

When it has been usual for parties to expressly state a power of unilateral termination *at will*, it now requires parties to expressly state that there is no power of termination. Many persons contract without aid or assistance of lawyers. If they fail to provide for any termination clause, absence of termination clause might be interpreted to give power of unilateral termination.

The interpretation therefore needs to be reconsidered, and until then restricted to the facts of this case.

Part-II – The contract could be terminated or determinable, but not both

The judgment fails to discern the two distinct and consecutive phases in a case for enforcing a contract: (i) a valid contract with outstanding obligations of which performance is sought, and (ii) entitlement to specific performance or injunction. On the one hand, when the Supreme Court frames an issue whether the plaintiff is entitled to seek specific performance or damages, it assumes that the contract is in force; yet it holds that the contract was validly terminated. On the other hand it finds that the contract has been terminated (para 58 of AIR)[27], and yet proceeds to decide that the contract is unenforceable under S. 14, especially S. 14(1)(c) which bars enforcement of a contract that is determinable.[28]

Valid and subsisting contract capable of enforcement: A plaintiff seeking specific performance or injunction concerning a contract seeks to enforce against the defendant obligations under a contract which subsists. A defendant in such a case can plead any ground of defence available to him under the law of contract.[29] If the defendant succeeds in any of these defences, there exists no obligation for the plaintiff to enforce. The plaintiff fails whether his suit is for specific relief or damages.[30]

Remedies: If the defendant fails to establish his defence, the plaintiff becomes entitled to compensation for loss suffered by him.[31] Where the plaintiff seeks specific performance or injunction, there are further conditions. Is the contract of such a nature that damage cannot be ascertained, or compensation in money is inadequate ?[32] Is specific performance barred because the contract cannot be effectively

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[27] See also para 49 of AIR: It was the owner's case that the contract had been terminated.

[28] As discussed in Part I above, the contract did not give a right to terminate unilaterally. Hence it was not determinable. The question of applying S. 14 of the SRA did not arise at all.

[29] S. 9 of the SRA. Thus he can show that the agreement is void for mutual mistake, uncertainty, illegality, wagers etc; or that he is entitled to avoid the contract because his consent is not free. He may plead material alteration, failure of consideration;, or discharge by subsequent impossibility, remission, novation, alteration, or under the terms of the contract. He may set up a defence of non-performance, i.e. that he need not perform because the plaintiff has failed to perform, or of valid rescission for breach either under his right under ss. 39, 54 and 55 of the ICA or under the terms of the contract.

[30] The plaintiff might still have a claim under the restitutionary principles of Ss. 64, 65 or 72 of the ICA.

[31] S. 73 of the ICA governs the grant of damages.

[32] S. 10 of the SRA

enforced ?[33] Does the plaintiff's conduct disentitle him from relief ?[34] Do any circumstances affect discretion for granting relief ?[35] An injunction is subject to same conditions.[36]

Two distinct stages: The existence of valid outstanding contractual obligations for enforcement, and the entitlement to remedies of specific relief are two entirely different stages, operating in succession. Therefore if a defendant is able to show that his termination of the contract is valid, there remains no obligation to enforce, whether the suit is for damages or for specific relief.

The contract was not 'determinable': S. 14(1)(c) refers to a contract which is determinable. It applies only when the contract is alive and has obligations remaining to be performed, yet one of the parties can end it. Once it was held that the contract had been correctly terminated,[37] it ended before the suit, and there remained nothing to specifically enforce. There was no occasion to apply S. 14(1)(c).

Part-III – The contract was capable of enforcement by specific performance and injunction

The judgment observes in a general statement that development contracts or contracts for construction are not specifically enforceable. It does not ascertain and identify the exact promises and obligations of which performance was sought in reference to principles and tests required by ss. 10 and 14 of the SRA. It is submitted that the obligations sought to be enforced in the present case were properly deserving of specific performance or injunction, and that since parties had made provision for repeal of the ULC Act in their contract, the fact of repeal ought not to have affected decision on the remedy.

Exceptional remedies: Specific performance and injunction[38] are secondary and exceptional remedies, granted not as a matter of right but in the discretion of court. In a contract, there may be some acts requiring specific performance, and others properly enforced by injunction. An injunction will restrain a defendant from committing a breach of a negative obligation, or from interfering with the plaintiff's exercise of rights under his contract. An order of specific performance will compel a defendant to perform his positive obligation. An injunction can put pressure on a defendant to perform his part of the contract which the court might not enforce directly by specific performance.[39]

An act capable of specific performance: It is common to speak of the remedy of specific performance with reference the contract as a whole, rather than particular promises in the contract which the plaintiff seeks to enforce. But the term 'contract' means 'a promise',[40] also referred in S. 10 of the SRA by the phrase: "the act agreed to be done".

Specific performance will be sought of those acts which remain to be performed. The promisor may have already performed some promises when the contract comes for specific enforcement. Hence the test of ss. 10 or 14 of the SRA must be judged not with reference to the whole contract, but with respect

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[33] S. 14 of the SRA
[34] S. 16 of the SRA
[35] S. 20 of the SRA
[36] S. 38(2) of the SRA
[37] See however Part I above that the terms of contract did not warrant a finding that the owner had rightfully terminated it.
[38] S. 38(2) of the SRA: Where a party seeks injunction in respect of a contract, the same principles apply as they do for specific performance.
[39] Halsbury's Laws of England, 4th ed, Reissue, Vol 44(1), para 803
[40] Under S. 2 clauses (h) and (e), a contract is an agreement enforceable by law; and every promise … is an agreement.

to that act of which specific performance is sought (or in case of injunction, that act which is sought to be restrained by injunction). A general statement that a contract to paint a portrait or a building contract cannot be specifically enforced is therefore inaccurate. Whether specific performance is available depends on the precise act sought to be enforced. This will require a detail examination of the acts already performed, and the acts remaining, as set out in pleadings by the plaintiff. Identifying the act capable of specific performance also depends upon which party to the contract is seeking the remedy.

The inadequacy test: S. 10 deals with the question whether compensation for non-performance of the act cannot be ascertained, or is inadequate. The section itself gives a test for this purpose in cls. (i) and (ii)(a) of the Explanation to S. 10. Where the promised act cannot be obtained from other sources ("not available or easily obtainable in the market" or "not an ordinary article of commerce") or is of special value or interest to the plaintiff, specific performance must follow. The test of inadequacy might be an objective one when the enquiry relates to an available alternative. It has to be subjective where the enquiry is about special value or interest of the act to the plaintiff.

For example, *P* promises to sell to *Q* a specific used and worn garment, but fails to deliver it. Seen objectively, compensation for non-performance is ascertainable and adequate, and might be equal to price of the garment. If the garment once belonged to a well-known personality, it is not easily obtainable in the market, and hence compensation is not ascertainable. If it once belonged to an ancestor of *Q*, it is of special value to *Q*, and compensation, even if ascertainable, will not be adequate.

The test of effective enforcement: S. 14 deals with the question of whether enforcement is possible and practical. Thus specific performance will not be enforced:

i) if compensation is adequate relief. Here, substitute performance is possible. If the promisee gets work done from another, he can have the work done to his satisfaction, rather than having enforcing specific performance against a recalcitrant defendant.
ii) if the court will not be able to enforce specific performance because "although the threat of committal might induce some sort of performance, the court could not control imperfections of performance or judge whether they were natural or self-induced".[41] Thus an act involving personal skill or volition will not be enforced.
iii) if enforcing performance involves a continuous duty which the court cannot supervise, because it would involve constant and possibly ineffective supervision by the court.[42] If courts were to make such orders, there would be no end to the litigation. The test is of reasonableness and practicality.
iv) yet, S. 14(3)(c) makes an exception about an act to build a work on land, where the plaintiff has substantial interest in performance of the contract, and the interest cannot be compensated, and the defendant is in possession of the land. The reason is that the defendant being in possession, plaintiff cannot employ another builder, and hence the plaintiff is deserving of specific performance despite the enforcement requiring constant supervision.

Is specific performance of material terms possible: An important condition for specific performance is found in S. 14(1)(b): "a contract … from its nature is such, that the court cannot enforce specific performance of its material terms", an important condition for specific performance. Thus where a

[41] *Snell's Principles of Equity*, Megary and Baker (ed), 28th ed, Sweet and Maxwell, p 580.
[42] *Ibid*.

promisor has agreed to sign papers from time to time as may be required by the promisee, or a promisor has agreed to execute the sale deed of his property, his act depends on his personal volition, yet can be enforced by appointing another person to do the act in place of the promisor.[43] But a promise to paint or to sing in a programme cannot be enforced in this manner.

Therefore, specific performance ought to be granted where it is possible that the act of which performance has been sought can be effectively completed by the promisor, or by the promisee or by any person appointed for the purpose.

Example 1: a contract to paint a portrait: In a contract by A to paint B's portrait in return for B paying Rs 10000, a general statement that a contract to paint a portrait is or is not specifically enforceable will be inaccurate. A's promise to paint a portrait will be specifically enforceable under S. 10, but not B's promise to pay. Hence if A has completed the portrait, and B does not pay, A's remedy is not for the price, but for damages, which might be equal to or more than Rs 10000.

A's promise to paint involves two acts – painting the portrait, and delivering it to B. Applying the test of S. 14, A cannot be compelled to paint, it being an act involving personal skill. But if the painting is completed, A can be compelled to deliver the painting after it is completed.[44]

Example 2 : a contract to construct a building: In a contract where X agrees to build the bungalow of Y upon payments to be made by Y from time to time, Y has special interest in the performance of the promise by X, and hence the contract will satisfy S. 10. Whether the contract also satisfies S. 14 depends on the stage of X's performance, viz. the progress of construction.

If X does not commence construction at all, Y might decide to terminate the contract for breach. At that stage, it is also possible for Y to get the work done from another contractor, and claim any difference in construction cost as damages from X.

If X has commenced construction as a contractor, and is not in possession, compelling X will involve constant supervision, in that if the construction is not properly done, parties may resort to the court again and again, and the court would not find it appropriate to supervise whether the construction is according to the contract. In any case Y being in possession, can get the work done from another person, and claim damages.

However, if under the terms of contract, X is in possession, Y cannot get the work done unless he commits trespass. This is a proper case for specific performance, and hence an exception under S. 14(3)(c) of the SRA.

If the construction is almost complete, but X refuses to hand it over, granting specific performance becomes simple and smooth, and does not involve any supervision.

Analysis of obligations in the present contract: When the owner terminated the contract, and a claim for specific performance arose, the specified authority had approved Scheme V. The developer had full discretion to revise, modify or make changes in the schemes. The owner had had no occasion to object to the developer's decisions. The owner was not required to do anything until possession was given, except sign documents. He promised to assist and cooperate with the plaintiff in complying with the

[43] See O. 21, rr. 32(5) and 34 of the Code of Civil Procedure 1908

[44] See fourth illustration to cl. (c) s 12 of the repealed Specific Relief Act 1877

terms and conditions imposed under S. 21 by the competent authority. He was not required to make any payments or undertake any onerous obligations. Once the scheme was sanctioned, he was to hand over possession to the developer. The developer then had the liberty and discretion to construct according to sanctioned plans, at his own cost and risk, and subject to all rules and regulations. He could choose purchasers within the requirements of the scheme, collect amounts from them and appropriate the amounts. Writ within these is an obligation of the owner to cooperate, in any case not to interfere, except, it is expected, if the developer committed breach.

Thus the developer was the judge of his own performance. His performance did not require any supervision by the owner, and hence the court. Implementation of conditions of scheme, and not the agreement, would be supervised by the competent authority.

The owner's promises and obligations remaining for enforcement at the time of filing the suit were: (i) not to revoke the power-of-attorney, (ii) to hand over possession of land after the scheme was sanctioned, (iii) to sign all relevant papers, applications, plans, drawings, and (iv) to assist and cooperate in the complying with the terms and conditions of the scheme, and therefore (v) an implied obligation not to interfere in the implementation of the scheme.

Owner's obligations satisfied S. 10 of the Sp Rel Act: The interest of the developer (and corresponding owner's obligation) in completing the scheme satisfied the requirements of S. 10. *Firstly*, the land which the owner promised to give for the scheme, and the scheme itself of such magnitude cannot have a substitute nor can be available easily elsewhere. *Secondly*, the developer's interest lay not in earning profit but in completing this huge scheme for weaker sections of society where units would be sold at a price considerably lower than the market price. This contract differed from other contracts for development of land and promotion of building schemes. *Thirdly*, the scheme was of immense magnitude.[45] Completing the scheme would give the developer much more than mere profit, -- "reputation, goodwill, job satisfaction or of exhibiting a distinguished professional skill and consequential status" (para 43 of GLR). The High Court held that damages were not an adequate remedy. The Supreme Court held that reputation was not of relevance because the contract had been terminated (para 61 of AIR). Neither court has rejected relevancy of the factor of reputation in applying the test of inadequacy of damages.[46] *Fourthly*, the act sought to be enforced was of special value or interest to plaintiff, as dear and special as a "rare china vase" or a "painting",[47] a factor to be subjectively perceived and assessed. Even objectively, any contractor would have special interest in a building scheme of such magnitude.

Owner's obligations satisfied S. 14 of the Sp Rel Act: Each obligation of the owner mentioned could be enforced by way of specific relief.

1. The promise not to revoke the power-of-attorney, was could be enforced by an injunction;

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[45] Of 64,306 dwelling units costing 89 crore (in 1976) on lands surrounding a palace and owned by an ex-Ruler Shrimant Fatehsinh Gaekwad, construction to stretch across 10 years.

[46] See *Suresh Jindal v Rizsoli Corriere Della Sera Prodzioni TVSpa* AIR 1991 SC 2092: gain by way of reputation as well as goodwill is not one which could be adequately be expressed in terms of money; *K Narendra v Riviera Apartments (P) Ltd* AIR 1999 SC 2309 does not reject reputation as a factor for consideration.

[47] First illustration to cl. (c) of s 12 of the repealed Act 1877.

2. The promise to hand over possession of land after the scheme was sanctioned, was capable of enforcement by taking possession from the owner and handing it to the developer;
3. The promise to sign all relevant papers, applications, plans, drawings,
   a. was capable of being done by the developer under the POA,
   b. in any case, could be enforced by appointing another person to sign on behalf of the owner.
4. The promise to assist and cooperate and not to interfere in the implementation of the scheme, could be enforced by an injunction restraining the owner from doing any acts interfering with the construction and implementation of the scheme.

Effect of repeal of ULC Act: The possibility of repeal was contemplated and provided for by the parties in the contract (para 49 of AIR, para 7 of GLR).[48] The judgment does ***not*** find that the repeal rendered performance impossible to discharge the contract. But it decides without much discussion that because of the repeal, the contract was not capable of specific enforcement, on the ground that the contract involved continuous supervision, and there did not exist any competent authority to supervise after the repeal of the ULC Act. This view of the Supreme Court can be tenable,[49] only if one assumes that the entire government department dealing with ULC matters was disbanded immediately after repeal.[50]

Under the MOA the developer was entitled to hold the land despite repeal of the ULC Act. Neither party pleaded uncertainty of this provision. As submitted later,[51] it was possible for the Supreme Court to mould an appropriate relief despite the repeal by implying a few terms.

Part-IV – Factors affecting exercise of discretion were irrelevant

The question of considering factors affecting discretion[52] in granting specific relief ought to arise only after the contract is found deserving of specific performance. Factors affecting discretion, therefore, must be distinct from requirements of ss. 10-19 of the Specific Relief Act. Having first held that the contract could not be enforced for three reasons: (i) repeal of the ULC Act, (ii) contract being terminated / determinable, and (iii) the contract involved a continuous duty which could not be supervised, the Supreme Court continued further and observed that it was refusing to exercise discretion because of six factors mentioned below.[53]

Moreover, the factors affecting discretion enumerated in the judgment considered for refusing specific performance are inappropriate.

Factors affecting discretion: S. 20(2) describes factors which a court can consider not to exercise its discretion, viz, (i) the terms of the contract or conduct of parties gives an unfair advantage to the plaintiff, (ii) the performance would involve some unforeseen hardship on the defendant, and (iii) the defendant made the contract under circumstances which makes it inequitable to enforce specific performance. This requires examination of terms, conduct, state of mind or circumstances *at the time of*

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[48] *Satyabrata Ghose v Mugneeram Bangur and Co* AIR 1954 SC 44: There is no discharge where the event is contemplated.
[49] See Parts V and VI below.
[50] See for example *Shyam Singh v Daryao Singh* AIR 2004 SC 348: where the Supreme Court remanded the matter to determine the effect of law relating to consolidation of land enacted pending litigation which affected enforcement of contract, holding that the effect of that enactment raised issues of fact and law.
[51] See Part-VI – Maharaja's contract possible of specific performance and injunction
[52] S. 20 of the SRA.
[53] Observations of the Court about exercise of discretion followed in later cases without reference to the reasons and situation to which applied*: Raghubir Singh v Sher Singh* AIR 2004 All 320; *V Muthusami v Angammal* AIR 2002 SC 1279

making the contract. Circumstance arising after making the contract will not ordinarily excuse a party. Thus if A has agreed to sell his land to B after one year for Rs 20 lakhs, and there is an unprecedented fall in prices within the year, B is bound by the contract even though completing it involves hardship which he did not foresee. If prices rise exceptionally, A cannot be relieved from the bargain either.[54]

As regards factors arising *after the contract is made*, a court can properly exercise discretion under S. 20(3) to decree specific performance where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

The court may refuse to exercise discretion in *other circumstances*, viz., where on account of delay in filing the suit,[55] the defendant will be prejudiced having changed his position or acquired rights, or third parties have acquired rights; or where granting the relief will increase litigation. Mere possibility of injury to interest of third parties does not by itself disentitle the plaintiff from specific performance.[56] Interest of public, of effect of enforcement on the public ought not to and cannot affect the decision to order specific performance, unless the contract itself is challenged as void being against public policy.

Discretion in the present case: The Supreme Court mentions six factors affecting discretion because of which, it was *inequitable* to enforce specific performance. These factors are given below in *italics*.

i. *That the agreement does not contemplate transfer of 600 acres of land in favour of P for construction of 4356 units for which land required is about 65 acres.*
ii. *That no law or authority to determine excess vacant land after construction of 4356 dwelling units*
iii. *That it was difficult, if not impossible, to supervise and monitor the construction and allotment.*
   All above factors concern the practicality of ordering specific performance under S. 14 of the SRA, and not exercise of discretion under S. 20.
iv. *That the object of S. 21 was to benefit weaker sections of society and not owners, and none of these objects can be achieved in fact, thus making it inequitable to give decree. No benefit to society – because residential houses for weaker sections of the society cannot be constructed.*
   Here the judgment looks beyond parties' concerns to consider public interest. It is submitted that such consideration of public benefit, or interests of public or outsiders in a suit of specific performance gives too wide a discretion to courts in such cases. Such observation suggests that any civil court seized of a similar matter can consider the effect of enforcement or non-enforcement on persons not parties, or on the public. Such discretion is too wide. For example, a suit for specific performance for agreement to sell land filed by a developer-purchaser against an owner-seller may be contested on the ground that development might aggravate the traffic problem in the locality. Moreover, having accepted an undertaking from the owner about construction of houses for weaker sections of society, the Supreme Court contradicts itself.
v. *Decree likely to result in uncalled for bonanza for developer.*
   It is submitted that this observation is totally unsupported by reasons. This was a commercial contract. If the developer had the benefit of the contract at the stipulated time, he would have

[54] *P Dsouza v Shondrilo Naidu* AIR 2004 SC 4472, dissenting from *Nirmala Anand v Advent Corpn (P) Ltd* AIR 2002 SC 2290
[55] *Mademsetty Satyanarayana v G Yellogi Rao* AIR 1965 SC 1405; *Jiwan Lal v Brij Mohan Mehra* AIR 1973 SC 559; *Motilal Jain v Ramdasi Devi* AIR 2000 SC 2408.
[56] *Netyam Venkataramanna v Mahankali Narasimhan* AIR 1994 AP 244

recovered received his benefit or remuneration long ago. The rise in prices in later years ought not to have clouded the view of the court. This could not be a factor against a plaintiff who had diligently performed his obligation, and pursued the suit for specific enforcement.

On the other hand, refusing specific enforcement unduly benefited the owner. The litigation, the events that occurred and the judgment itself, in fact gave a bonanza to the party which had the stamina and resources to keep litigation going for so long, across many proceedings. Just because of time spent in proceedings, the owner ultimately got to keep the land, free from ceiling restrictions, and without having to compensate the developer even for his expenses.

vi. *Order of 1998 of competent authority is illegal.* This factor was already considered when the court decided that the scheme violated the master plan.

Enforcing the contract would have satisfied the contractual expectations of the developer without the owner losing any more, while non-enforcement would leave the developer without compensation for amounts spent by him under the contract and would give the owner a 'bonanza' as described above.

Part-V – The bargain in the undertaking

At hearing, the owner offered that *in the event the appeal was allowed*, the appellant would offer to the government, land admeasuring 66 acres for constructing residential dwelling units for low-income groups, and if the government did not accept this offer, the owner will undertake this responsibility himself.[57] This approach deserves close scrutiny. In making promises in the undertaking the owner does not promise anything different from what was promised under his contract.

i. The owner offered 66 acres of land, which is almost equal to the area of about 65 acres which the Supreme Court considered (para 60 of AIR) as required for construction of 4356 units under Scheme V under the terms of the contract.
ii. The owner offered the land at a nominal price. The contract also provided for payment of a nominal amount as consideration to the owner.
iii. The owner offered to develop land subject to town-planning permission. The original contract was subject to this implied condition.
iv. The owner offered construction of dwelling units for low-income groups, while the contract was to construct for weaker sections of society.
v. The owner offered to construct and sell units on no-profit no-loss basis, at a cost certified by a Chartered Accountant. Under the contract sale was at a price fixed by the competent authority.

It was the owner's case that the scheme could not happen because the land was designated for open space under the master plan. Yet the same owner offered 66 acres of the same land for construction of dwelling units if permitted by town-planning law, and which was accepted by the Supreme Court.

It is submitted that practice of accepting such an undertaking is not a healthy precedent. Any other defendant might be tempted to make such an offer for avoiding an order of specific performance. Any other court or arbitrator might feel it appropriate to allow such offer from a defendant, and deny specific performance to a deserving plaintiff. There lies a considerable risk of uncertainty in enforcement of contracts, reducing faith in contractual obligations. Further, ought a court to allow a party to make before judgment an offer involving a bargain connected with the outcome of litigation ?

[57] See above "The Owner's undertaking"

Possibly this lies within the jurisdiction of the Supreme Court. In that case. a party having the stamina and resources to reach the Supreme Court will have the privilege of making such a bargain. Such approach rewards erring defendants.

Part-VI – An order of specific performance and injunction was possible

Lastly, it is submitted that the Supreme Court ought to have considered grant of specific performance by modifying appropriately the decree to suit the changed circumstances. Conditional specific performance should have been granted for various reasons:

1. Any court must as far as possible attempt to uphold a contract, and enforce it.
2. Two lower courts had after detail consideration of the matter granted specific performance. The Supreme Court ought have been slow to disturb the decree.
3. Since the Court accepted the undertaking with similar obligations as the contract, it can be assumed that the Court considered each of its provision enforceable and supervisable by the Court.
4. Parties had contemplated repeal of the ULC Act (a very vital term made at a time when the Act was new, and its repeal was a remote event), and had agreed that the developer shall hold the land despite repeal.
5. A decree was possible with reference to the 65 acres marked by the owner in his undertaking.
6. When the court accepted the owner's undertaking that he would construct subject to town-planning permission, a conditional decree on the same terms was possible granting relief subject to approval of town-planning authorities.
7. The purpose of providing houses to persons from lower-income group could have been achieved despite repeal particularly in view of the owner's unilateral obligation to do so.
8. An order in favour of the developer incorporating the same terms as stated in the undertaking would have satisfied reasonable expectation of the developer.

The contracting parties and the government authorities were before the Court. A decree could be appropriately moulded where the owner gave land for the scheme, the scheme was constructed by the developer, with an order to the government to fix the price of dwelling units, or an order fixing the price of dwelling units.

Conclusion

When courts uphold contracts, it ensures that parties who have contracted, or those who intend to do so, have and keep faith in contracts. A decision of the Supreme Court decides not only for the parties, but becomes precedent (binding or otherwise) and directs future conduct. Hence analysis of law and conclusions in any judgment must recognise obligations under a contract. Allowing parties an excuse by circumstances arising after the contract is made, other than impossibility, is to allow parties to go back on an difficult bargain. This encourages parties to avoid their bargains, reduces faith in contracts, and increases uncertainty in enforcement of contract obligations.

In the light of this, the observations and findings of the Supreme Court in *Her Highness Maharani Shantidevi P Gaikwad v Savjibhai Haribhai Patel*[58] deserve reconsideration.

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[58] AIR 2001 SC 1462