



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL SUMMARY SUIT NO.57 OF 2022

Special Situation Advisors (India) Pvt. Ltd.
1030, J-Block, Akshar Business Park,
Plot No.03, Vashi-Koparkhairne Road,
Sector 25, Vashi, Navi Mumbai – 400 703 Plaintiff

V/S

Bank of India
Star House, C-5, G-Block,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051. Defendant

Mr. Rahul Narichania, Senior Advocate, *a/w Mr. Karl Tamboli, Mr. Aadil Parsurampur, Mr. Akash Menon & Mr. Kalash Bakliwal, for the Plaintiff.*

Mr. S.U. Kamdar, Senior Advocate, *a/w Mr. Yashesh Kamdar, Ms. Bindu Parekh Adv. Mr. Nahur Shah, Ms. Komal Bhoir, Ms. Kirti Singh, i/b Mr. Ankur Kumar, for Defendant.*

Mr. Madhvendra & Mr. Ramkumar, representatives of Defendant - Bank of India are present in Court.

**CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 11 FEBRUARY 2025.
PRONOUNCED ON : 25 FEBRUARY 2025.**

J U D G M E N T :

1. Plaintiff has filed the present Suit seeking a money decree against the Defendant in the sum of Rs.7,55,96,767/- together with interest.

A. FACTS

2. Plaintiff is a Company registered under the Companies Act, 1956 and is engaged in the business *inter alia* of providing financial advice and other consultation to banks and financial institutions. Defendant is a Nationalised Bank engaged in the business of providing banking services in India. On 21 June 2017, Defendant-Bank issued an advertisement/Expression of Interest (**EOI**) inviting applications for empanelment as Financial Advisor for sale of its Non-Performing Assets (**NPA**). Under the EOI issued by Defendant-Bank, the bidders were supposed to submit their commercial bids in Format in Annexure-E by providing separate quotes for “*success based fee on cash received from the bidder (excluding Bank SRs)*” and “*success based fee for sale amount received from the bidder (including Bank SRs)*”. The advertisement was titled “expression of interest” for empanelment as Financial Advisor (FA) for sale of NPAs to Asset Reconstruction Companies (**ARCs**), Banks, Financial Institutions, NBFCs, etc.

3. Plaintiff applied in pursuance of the advertisement dated 21 June 2017. Its bid was accepted by the Defendant-Bank and Mandate Letter dated 1 July 2017 was issued to the Plaintiff engaging it as Financial Advisor for carrying out the activities relating to the preparation of portfolio of NPAs such as due diligence, evaluation and related matters for bank’s proposed sale of NPA to ARCs and others. The empanelment was valid for one year from the date of approval. The Mandate Letter reflected the commercial bid quoted by the Plaintiff and accepted by Defendant-Bank, under which Plaintiff was to be paid 0.50% success based fee on cash received from the bidder

(excluding Bank SRs) and 0.0749% success based fee on sale amount received from the bidder (including Bank SRs).

4. Plaintiff accordingly provided its services as Financial Advisor for sale of Defendant-Bank's NPAs from July 2017 onwards. The tenure of the empanelment was extended by email dated 2 January 2019. This is how Plaintiff provided services as Financial Advisor to the Defendant-Bank from July 2017 to March 2019.

5. It is Plaintiff's case that it raised invoices to the Defendant-Bank at the rate of 0.0749% in respect of 'cash plus SR bids' during the period from June 2017 to March 2018. That after March 2018 till about February 2019, the Defendant-Bank chose to accept only '100% cash bids' and towards performance of its services as Financial Advisor, Plaintiff raised invoices at the rate of 0.50% in respect of '100% cash bids'. Accordingly, Plaintiff raised four invoices on 2 April 2019 in respect of 100% cash bids by demanding its fees @ 0.50% of cash amount as under:

Tranche	Invoice Number	Invoice Amount
I	FY 19-20/BOI/0001	16,613,810
II	FY 19-20/BOI/0002	61,814,890
III	FY 19-20/BOI/0003	5,046,270
IV	FY 19-20/BOI/0004	3,876,300

6. Plaintiff addressed email dated 3 April 2019 explaining to the Defendant as to why the sale amounts were invoiced at 0.50%. Plaintiff received reply dated 5 April 2019 from the Defendant-Bank stating that raising of invoices by Plaintiff at 0.50% was erroneous and called upon the Plaintiff to raise invoices at the rate of 0.0749% as per option (a) of the Mandate Letter dated 1 July 2017. Plaintiff

sent email dated 8 April 2019 justifying its action in raising the invoices by demanding fees at the rate of 0.50% of the cash sales. Defendant once again requested Plaintiff to raise fresh invoices at the rate of 0.0749% vide email dated 12 April 2019. According to Plaintiff, a meeting took place with the General Manager of the Defendant-Bank for justifying charging of fees at 0.50% on 23 April 2019, which was followed by email dated 25 April 2019 of the Plaintiff. Plaintiff thereafter escalated the matter by addressing email dated 25 May 2019 to the Managing Director and Chief Executive Officer of the Defendant-Bank seeking resolution of invoices raised by it. Plaintiff however received email dated 31 May 2019 from the Defendant-Bank stating that remittance of the professional fees to it was already done. Plaintiff accordingly received an amount of Rs. 1,17,54,518/- @ 0.0749% of cash sales as against the invoice amount of Rs.8,73,51,270/-. Plaintiff sent email dated 4 June 2019 protesting about non-payment of its fees as per the invoices. The Defendant however sent letter dated 10 June 2019 stating that discretion was available to it to pick either option (a) or option (b) for successful bids. Several correspondences thereafter took place between the parties. Plaintiff thereafter filed online application/complaint with MSME Facilitation Council on 31 October 2019. It however subsequently withdrew the said application/complaint and has thereafter filed the present suit seeking a decree in the sum of Rs.7,55,96,767/- from the Defendant.

7. Defendant was served with suit summons and appeared in the Suit. Plaintiff took out Summons for Judgment (L) No.31548 of 2022. Defendant filed its Reply to the Summons for Judgment. This Court passed order dated 28 November 2022 granting conditional leave to

the Defendant to defend the suit on condition of deposit of sum of Rs.7,55,96,767/- or on furnishing a bank guarantee in the said sum. Defendant filed Commercial Appeal No.1334 of 2023 in this Court challenging the order dated 28 November 2022, which came to be dismissed by the Division Bench on 17 January 2023 as not maintainable. Defendant thereafter filed Special Leave Petition No.3679 of 2023 before the Supreme Court challenging order dated 24 February 2023. During pendency of the SLP, operation of the order dated 28 November 2022 was stayed but proceedings in the suit were directed to be continued by permitting Defendant to file its Written Statement. This Court accordingly permitted Defendant to file Written Statement by order dated 1 March 2023. Defendant accordingly filed its Written Statement on 9 March 2023.

8. Based on pleadings filed by parties, this Court framed issues on 11 July 2023. On 13 July 2023, both the parties jointly submitted before this Court that they would not lead evidence in the suit and hence the suit was directed to be placed for final hearing. On 11 September 2023 the Special Leave Petition filed by the Defendant came to be dismissed and by consent, order dated 24 February 2023 was made absolute under which it was directed that Defendant shall file an Affidavit expressing willingness to deposit the decretal amount in the Court within one month, in the event of it failing in the suit, without prejudice to its right to Appeal.

9. It appears that arguments in the suit were concluded on 4 November 2023 and the judgment was reserved by the coordinate bench of this Court. It appears that the judgment in the suit was pronounced on 25 January 2024 and the Suit was decreed in terms of

prayer clause (a). However, the reasons/judgment could not be uploaded. Noting the ratio of the judgment of Supreme Court in ***Ratilal Jhaverbhai Parmar and others vs. State of Gujarat and others***¹, the coordinate bench listed the Suit on 14 November 2024 and recalled the verbal pronounced order of having decreed the Suit. The Registry was directed to place the Suit before the Hon'ble Chief Justice for assigning it to another Judge for fresh consideration. Accordingly, by administrative order dated 21 November 2024, the Hon'ble the Chief Justice has assigned the Suit to me.

10. Accordingly, I have heard the learned counsel appearing for rival parties, who have also tendered their written submissions.

B. SUBMISSIONS

11. Mr. Narichania, the learned senior advocate appearing for the Plaintiff would submit that Plaintiff is entitled for payment of fees at the rate of 0.50% of the cash sales effected by the Defendant-Bank in accordance with option 'a' quoted by the Plaintiff and as accepted by the Defendant-Bank in the Mandate Letter. He would submit that Defendant-Bank had a discretion of exercising either option 'a' or option 'b' while putting any portfolio for sale. He would submit that the Defendant-Bank accordingly exercised option of "100% cash basis sale" after March 2018 and none of the sale transactions had composite elements of cash and SR. He would submit that SRs are quasi equity instruments predominantly backed by impaired assets, which get redeemed only at the time of recovery and only to the

1. 2024 SCC OnLine SC 2985

extent of recovery after deduction of management expenses. He would therefore submit that Banks usually prefer cash sales over SR sales. In this regard, he would rely upon guidelines issued by Reserve Bank of India (**RBI**) dated 28 July 2007 as well as RBI Regulatory framework for SCs/ARCs dated 5 August 2014. He would therefore submit that 100% cash sales bring higher cash realisation to the Bank in comparison to combination of cash plus SRs. That therefore success of cash bids requires more efforts as compared to cash plus SR bids thereby warranting higher commission to the Financial Advisor for cash bids. That acknowledging this position, the Defendant-Bank invited two separate quotes for 100% cash bids in option 'a' and cash plus SR bids in option 'b' respectively. That the terms of mandate issued to the Plaintiff required the Defendant-Bank to make a declaration at the outset, during the initial portfolio stage, about the exact nature of bids invited by it. That such declaration made by the Defendant-Bank at the outset gave clarity to the Plaintiff about the efforts it was required to invest in securing either 100% cash bids or cash plus SR bids. That the terms and conditions of the Mandate Letter did not invest any discretion in favour of the Defendant-Bank to subsequently exercise the choice of option 'a' or option 'b' depending on success of the bids. That the interpretation suggested by the Defendant-Bank about choice available to it to choose lower of the two options in every case would defeat the very purpose behind inviting separate quotations and the Defendant-Bank would always go for the lower quotation. That the quotation of substantially lower fees at the rate of 0.0749% for cash plus SR bids was made by the Plaintiff keeping in view lesser realisation by the Defendant-Bank from sale of NPAs from cash plus SR modes. That since Defendant-Bank can realise 100% of the sale consideration through the mode of only cash sale, Plaintiff quoted higher fees at the

rate of 0.50% as fructification of cash sales involving higher efforts for Financial Advisors. That the contemporaneous conduct of parties would also indicate that the Defendant-Bank also accepted the position of payment of fees at the rate of 0.0749% only in respect of cash plus SR bids as the first tranche of NPAs was sold by the Defendant-Bank through that mode comprising of 15% cash and 85% SR. That cash plus SR sales continued till February 2018 and the Defendant-Bank decided to opt for only 100% cash bids after March 2018 by exercising the discretion as provided for in the Mandate Letter.

12. Mr. Narichania would submit that the pleaded case of the Plaintiff has virtually been admitted by the Defendant-Bank in its Written Statement. He would rely upon judgment of the Apex Court in ***Nagindas Ramdas vs. Dalpatram Iccharam alias Brijram & Ors.***², in support of his contention that admissions made in pleadings stand on higher footing than evidentiary admissions and that the same are binding on the party making them and constituting a waiver of proof. That Defendant-Bank has admitted that it has made payment to the Plaintiff in respect of the four invoices by applying option 'b'. He would invite my attention to paragraph 3 of the Written Statement to demonstrate that Defendant-Bank has paid fees to the Plaintiff as per “cash cum SR basis” despite admission that the sale consideration was “100% cash basis”. He would submit that the above admission on the part of the Defendant-Bank would relieve the Plaintiff of requirement of leading evidence.

13. Mr. Narichania would submit that the Defendant-Bank has attempted to misguide this Court by misreading and misquoting the

2. 1974 (1) SCC 242

alleged discretion vested in it to choose one of the two options. That the discretion vested in the Defendant-Bank is to choose the exact nature of bids it desires for sale of its NPA viz. 100% cash based bids or cash plus SR bids and that such discretion is not for choosing quotations. That once a particular type of bid is chosen in option 'a' or option 'b', Defendant-Bank's discretion ends and that the fees as per quotation against respective chosen options becomes payable on success. That the Defendant-Bank does not have discretion to decide the rate of fees, where the bids are 100% cash based. That the Defendant-Bank is contractually bound to pay success based fee at 0.50% of the sale consideration.

14. Mr. Narichania would submit that if Defendant-Bank had the alleged discretion to pay lower rate of fees at 0.0749% even in case of 100% cash bids, the advertisement for empanelment of Financial Adviser and the Mandate Letter would not have identified two different fees rates for the two options. That there would have been just one rate of 0.0749% prescribed for both types of the bids. That therefore the logical interpretation of the Mandate Letter would show that if the Defendant-Bank chose to receive bids as per option 'a' (cash bids), the Defendant-Bank would have to pay the fees prescribed against option 'a' only. That the Defendant-Bank's interpretation of the Mandate Letter would render the fees prescribed under option 'a' as otiose and nugatory.

15. Mr. Narichania would invoke the doctrine of business efficacy in support of his contention that the terms and conditions of the Mandate Letter must be interpreted in such a manner that it makes a business sense between two contracting parties. He would rely on judgment of Apex Court in ***Satya Jain (Dead) through LRs & Ors.***

vs. Anis Ahmed Rushdie (Dead) through Lrs and Ors.³ He would also rely upon judgment of the Apex Court in ***The Union of India vs. M/s. D.N. Revri & Co. and Others***⁴ in support of his contention that a contract, being commercial document, the same must be interpreted in such a manner so as to lead efficacy in the contract rather than to invalidate it. He would submit that meaning of the contract must be gathered by adopting a common sense approach and the same must not be allowed to be thwarted by a narrow, pedantic or legalistic interpretation. He would rely upon judgment in ***Rainy Sky S.A. and others vs. Kookmin Bank***⁵, in support of his contention that if there are two possible constructions of a contract, the Court must accept the one which advances business common sense and reject the other. In support of the same contention he would rely upon judgment of the Apex Court in ***Radha Sundar Datta vs. Mohd. Jahadur Rahim and others***,⁶.

16. Mr. Narichania would lastly submit that rendering of services by the Plaintiff or the value of sales effected for the Defendant-Bank is not disputed. That the only dispute between the parties is about the rate at which fees are payable to the Plaintiff. He would therefore submit that the interpretation of the Mandate Letter as placed by the Plaintiff be accepted and its claim for payment of the balance fees of Rs.7,55,96,767/- be accepted by decreeing the suit.

17. Mr. Kamdar, the learned senior advocate appearing for the Defendant-Bank would submit that Plaintiff's suit is based on deliberate misinterpretation and misreading of the terms and

3. (2013) 8 SCC 131

4. (1976) 4 SCC 147

5. [2011] UKSC 50

6. AIR 1959 SC 24

conditions of the Mandate Letter. That Plaintiff has erroneously mixed together the two separate concepts of Defendant-Bank's activity of sale of its NPAs in the market with its engagement as Financial Advisor to provide assistance in the matter of such sale. That the contract executed between Plaintiff and Defendant-Bank does not govern the rights and obligations of Defendant-Bank in the matter of sale of its NPAs in the market. That therefore nothing provided in the Mandate Letter would govern Bank's entitlement to opt for particular method of sale of its NPAs. That the manner in which Defendant-Bank could sale its NPAs in the market is completely outside the purview of contract executed with the Defendant-Bank. That it was for the Defendant to decide, at its sole discretion, how to effect sale of its NPAs and Plaintiff had absolutely no say in the same. That therefore the word "discretion" used in the relevant covenant of the Mandate Letter refers to the discretion for choosing either option 'a' or option 'b' for payment of fees to the Plaintiff. That the word 'discretion' used in the Mandate Letter has absolutely nothing to do with the choice to be made by Defendant-Bank to opt for particular method for sale of its NPAs. That thus plain reading of the terms and conditions of Mandate Letter would clearly imply vesting of discretion to pay fees to the Defendant-Bank either in option 'a' or in option 'b' depending on the nature of realisation on the conclusion of sale. Taking me through the scope of the work to be performed by Plaintiff, he would submit that the nature of work performed by Plaintiff was same for all types of sale transactions. That the Mandate Letter did not make any distinction between the nature of job to be performed by the Plaintiff *qua* a particular nature of transaction. He would submit that even otherwise, there is neither any pleading nor evidence to show that Plaintiff actually put in any extra efforts for securing cash sales for the Defendant-Bank.

18. Mr. Kamdar would take me through the contents of paragraphs- 4 (h) and (i) of the Plaint in support of his contention that the Plaintiff himself has admitted that in case of cash plus SR sale, the Defendant-Bank had discretion to opt for either option 'a' or option 'b' by paying either 0.50% on cash received (without SRs) or 0.0749% for entire sale amount received (with SR). That the said admission is clearly contrary to the case argued before the Court that the Bank had to declare option 'a' or option 'b' at the outset and did not have the discretion of choosing the said options after realisation of sale. Mr. Kamdar would further submit that the Defendant-Bank otherwise had full discretion of changing the sale structure under the bids and that therefore there was no question of making any declaration to the Plaintiff about any particular mode being adopted for a particular sale transaction. That the Defendant-Bank had the necessary flexibility to alter the sale structure to suit its convenience and the Plaintiff did not have any say in the same. That such flexibility available to the Defendant-Bank to change the sale structure in respect of a particular bid at any point of time clearly cuts across the argument of the Plaintiff about prior declaration of option 'a' or option 'b'. He would submit that if Plaintiff's case is accepted to be correct, there was no need of use of the word 'discretion' in the Mandate Letter which would otherwise be rendered otiose and negatory. The Defendant-Bank in such case would have simply provided for different rates of payment of fees for cash only and cash plus SR transactions.

19. Mr. Kamdar would submit that it is well settled law that if two interpretations of a tender document are possible, the one made by the employer would prevail. In support of this contention, he would

rely upon judgment of the Apex Court in ***Silppi Constructions Contractors vs. Union of India and another***⁷. He would therefore submit that the interpretation placed by the Defendant-Bank would prevail over the interpretation suggested by the Plaintiff. He would submit that Plaintiff's interpretation is otherwise absurd and based on skewed and myopic reading of terms and conditions of the Mandate Letter.

20. Mr. Kamdar would submit that "business efficacy" doctrine applies only when a particular term or condition in the contract is expressly not present, but which is otherwise in the mind of contracting parties. That Plaintiff has not made out a case that there is a missing clause or a term or condition in the contract which was in the mind of the contracting parties. That there is neither pleading nor evidence to suggest any implied clause in the contract. He would submit that doctrine of business efficacy can be invoked only in a case where refusal to imply a term of contract would lead to failure of consideration for the contract. That in the present case, interpretation placed by the Defendant-Bank does not result in a situation where Plaintiff would not receive any fees for the services rendered by it. That thus this is not a case of total failure of consideration for the contract. That therefore the doctrine of business efficacy cannot be invoked in the present case and to that extent, reliance by Plaintiff on judgment of the Apex Court in ***Satya Jain*** (supra) is misplaced. He would rely upon judgment of the Apex Court in ***Nabha Power Limited (NPL) vs. Punjab State Power Corporation Ltd. (PSPCL) and Another***⁸ in support of his contention that five conditions test is required to be fulfilled for presuming an implied

7. 2020 (16) SCC 489.

8. (2018) 11 SCC 508

condition in a contract, one of the tests being officious bystander test. That in the present case, it cannot be contended that the contracting parties always intended that Plaintiff would be paid 0.50% fees in respect of 100% cash bids by applying the bystander test. He would rely upon judgment of the Apex Court in ***Caretel Infotech Limited vs. Hindustan Petroleum Corporation Ltd. and others***,⁹ in support of his contention that business efficacy test can be applied only to avoid failure of the contract and that if the contract makes business sense, without implication of terms, the Courts will not imply the same.

21. Mr. Kamdar would therefore submit that the true and correct interpretation of the Mandate Letter issued to the Plaintiff would mean that the fee payable to it is to be computed as a percentage of cash received from the bidder i.e. a percentage of cash component of the total sale consideration by excluding the value of the security receipts (option 'a') and second as percentage of sale amount received from the bidder i.e. percentage of total sale consideration including the value of security receipts (option 'b'). That discretion is vested in the Defendant-Bank to choose whether to make payment to the Plaintiff as a percentage of cash received from the bidder by opting for option 'a' or to pay fees as a percentage of sale amount received from the bidder under option 'b'. Mr. Kamdar would submit that Plaintiff has already been paid due amount of fees by the Defendant-Bank in accordance with the bid submitted by it and that nothing is due and payable to the Plaintiff in respect of services rendered by it to the Defendant-Bank as Financial Advisor. Mr. Kamdar would accordingly pray for dismissal of the Suit.

9. 2019 (14) SCC 81

22. In Rejoinder, Mr. Narichchania would submit that there are sufficient pleadings in the Plaint to reflect efforts taken by the Plaintiff about securing cash sales for the Defendant-Bank. That Plaintiff's assertion of the Defendant-Bank preferring cash bids in paragraph 4(f) of the plaint has been admitted by the Defendant-Bank. That the Defendant-Bank has further admitted that payment as per option 'b' was made only in respect of cash plus SR sales in the written statement. He would submit that Defendant-Bank's reliance on clause 29 of the bid in support of contention of flexibility is misplaced as the sale structure was not changed in respect of any of the portfolios. So far as the pleadings in paragraphs 4 (h) and (i) of the Plaint are concerned, Mr. Narichchania would clarify that the Defendant-Bank has deliberately misread the same as the Plaintiff has merely discussed option 'b' for payment of fees and that the said pleadings cannot be misread to mean that the Defendant-Bank would have discretion of segregating cash component in option 'a' for payment of fees to the Plaintiff. So far as reliance of Defendant on judgment in ***Silppi Constructions Contractors*** is concerned, he would submit that the principles enunciated therein apply essentially for interpretation of terms and conditions of tender notice and the same cannot be invoked for interpreting terms of contract. That the judgment is rendered in a writ petition filed challenging the tender process, which would have no applicability for decision of a suit by this Court. That it is well settled that a judgment is an authority for what it decides and not what may even logically be deduced therefrom. He would therefore submit that the judgment in ***Silppi Constructions Contractors*** has no application to the present Suit. Mr. Narichchania would accordingly pray for decree of the Suit.

C. ISSUES

23. By order dated 11 July 2023, this Court has framed following issues:

- i) Whether the Defendant has the option/discretion to pay success based fee @ 0.0749% even in respect of transactions which were 100% cash based, as per clause III (2) of the Mandate Letter dated 1st July 2017?
- ii) If answer to issue No. 1 is in the negative, whether the Plaintiff is entitled to a decree? If yes, in what sum, at what rate of interest and since when?
- iii) What order, including as to costs?

D. REASONS AND ANALYSIS

24. Thus, the main and solitary issue that arises for consideration is whether the Defendant had the option/discretion to pay success-based fee @ 0.0749% even in respect of 100% cash-based transactions as per Clause III (2) of Mandate Letter dated 1 July 2017. If the issue is answered in the affirmative, Plaintiff's Suit will have to be necessarily decreed in entirety as there is no dispute amongst the parties about services rendered by the Plaintiff in respect of the concerned invoices or about the value of said invoices. The Defendant-Bank has admitted in its written statement that the total value of the sales effected in respect of the concerned portfolios (about which there is dispute about payment of commission) is Rs. 1480.53 crores. The only dispute is about the percentage at which fees of the Plaintiff are payable in respect of such sales. The Defendant has admitted in paragraph 3 of the written statement that the total outstanding

amount to the Defendant-Bank in respect of the concerned NPA Accounts was Rs. 4080.40 crores, for which market value of securities at the time of the same was Rs.3085.88 crores. Through the sale of the concerned NPA Accounts effected on 100% cash basis, Defendant Bank was able to recover only Rs.1480.53 crores. According to Plaintiff, it is entitled for fee @ 0.50% as per option 'a' of Rs. 8.74 crores whereas according to the Defendant-Bank, Plaintiff is entitled to fees @ 0.0749% of Rs.1480.53 crores as per Option 'b' which works out to Rs.1,17,54,518.04/-.

25. Thus, the short issue that arises for consideration in the present Suit is about the entitlement of the Plaintiff to its fees based on particular percentage of the sale amount of Rs.1480.53 crores, either under option 'a' or option 'b' of the Mandate Letter.

26. Defendant had issued advertisement for EOI for empanelment of Financial Advisor for sale of its financial assets to Asset Reconstruction Companies, Banks, Financial Institutions, Non-Banking Financial Companies, etc. As per the advertisement, the broad scope of service of Financial Advisor was as under:

Broad Scope of Services of Financial Advisor

1. Phase 1-Sale Preparation

(i) Information and Data room preparation

- a) This would Involve putting together identifying, collating and pooling together Information required for setting up the data room. Typically data room information would include:

- A financial checklist carrying information on key characteristics of every loan account including NPA portfolio. This checklist also provides information available on every loan account.

-A legal checklist carrying on legal status of each loan account.

-Relevant documentation and case files.

- b) Financial Advisor (FA) shall provide the checklist formats and assist the Bank in Identifying the Information to be pooled together for Investor due diligence. Financial Advisor's team shall work closely with the bank team in completion of financial checklists and in identifying Information required from the case files. Bank's legal team/legal advisor will prepare the legal check list. F.A. shall validate the legal checklists and information provided by the bank and revert with comments within 3 working days. This timeline assumes that Information would be provided in the corporate office of the bank or the office/place decided by the bank for the specific portfolio of NPA for sale.

(ii)Valuation

Financial Advisor (FA) shall provide guidance to Bank on the estimated realizable value of the Individual asset/portfolio. This could serve as a basis for the bank for settling the reserve price.

However, the valuation of the under lying securities/ collateral shall be arranged by the bank through its approved valuers wherever needed.

iii) Design the due diligence process and data room management. Financial Advisor shall cover the following aspects in discussion with the Bank:

- Appropriate communication channels for the dissemination of Information
- The type of data room-web based data room/physical data room-to be used.
- The extent and nature of Information to be provided in the data room. and
- Timing and length of the diligence.
- The FA. will assist the bank in managing the due diligence process from preparation to scheduling, making policing and managing the data room.

iv) Data Room Management

- a) To co-ordinate with the bank in setting up the data room. While the bank personnel will be primarily responsible for collecting the relevant information, Financial Advisor (F.A.) would validate all information before it is place in the data room. In case a web based data room is used, the bank would provide the F.A. with soft copies of the relevant account/case documents for uploading on to the website.
- b) To advise the bank as to the effective format, contents and presentation of the Preliminary Information Memorandum (PIM)

and will draft the final document for the Bank's approval. However Bank's team will be mainly responsible for the collection of information to be included in the PIM. The Bank recognizes that an efficient and effective Data Room management is key to the success of Sale of Assets.

v) **Marketing**

To initiate formal contact, solicit, follow-up, and engage for bidding, an appropriate number of qualified buyers. This will be done through a range of media, Including, direct telephone, written and email contact, through the use of our website for the sale and through one-on-one meetings with prospective buyers.

The FA shall act as a market maker for the assets that are proposed to be sold and shall ensure that proper marketing is done for these assets.

2. **Phase 2-Execution**

The entrusted party will manage the overall sale execution, from, transaction staging to process co-ordination. The details are as under

i) Develop a complete and thorough transaction(s) timeline(s) that outlines all contemplated steps, identifying key milestone dates, and work with the Bank team to identify who will be responsible for each of the tasks.

ii) Recommend a set of criteria on the acceptability or otherwise of bid/s received for the NPA pool that will be sold.

iii) Design a process and means of communication with bidders, including initial contact, provision of general information, accumulating and organizing all bidder correspondence and questions, and relaying them to the appropriate bank personnel. Financial Advisor (FA) will also organize and integrate all correspondence from Bank to the bidders in the transaction.

iv) FA shall be responsible for coordinating, receiving and communicating the receipt, secure transfer, and ultimately bank's decision as to a winning bidder, between the bidders and the Bank.

vi) Lead negotiations and discussions with bidders on behalf of the bank, if and to the extent required. The bank will be responsible for any decision taken as to the acceptability of any offer received.

(vi) Work together with the bank's counsels to ensure the timely delivery, negotiation and drafting of all necessary documentation relating to the transaction/s. However, Bank will provide assistance to F.A. in sale preparation and execution phases for following key roles:

- a) Conduct legal due diligence - Involves checking of loan agreements, security documents and where necessary, advising the bank to obtain updates or missing Information to the extent possible.
 - b) Assessing recovery strategies and determining likely timings and outcomes of legal action (e.g. Foreclosure processes). This is important so as to understand when cash will be received as part of the recovery process.
 - c) The FA will advise the Bank in finalizing the Tender document along with standard terms and conditions of Cash / Cash + SR transactions, pooling of accounts in tranches / baskets based on location of assets/stamp duty implications etc, management fee structure, upside sharing ratio etc in line with the prevailing structures of transactions for sale of NPAs by Banks to ARCs/Banks/FIs/NBFCs. The FA will facilitate timely delivery, negotiation and drafting of all necessary documentation relating to the transactions & processes including the Offer Document, Trust Deed, all legal documentation like Confidentiality Agreements, Sale & Purchase Agreements, Bid letters, Bid bonds, etc so that the bank can derive maximum possible recovery through the sale. FA shall provide information on acquisition status by ARCS in consortium/ multiple finances accounts.
- (vii) Work along with the bank personnel and counsels to ensure timely, efficient and complete closing the transaction/s.
 - viii) FA to ensure that Trust Deed Offer document/Assignment Deed are prepared and all the process of sale is conducted in conformity with RBI/CVC/BA guidelines.

27. Thus, under the scope of services of a Financial Advisor, no distinction was made in respect of 100% cash sale or sale comprising of cash plus SR.

28. It would now be necessary to understand the difference between the concepts '100% cash sale' and sale comprising 'cash plus SR' components. When NPA account of a bank is sold to either ARCs, Banks, FIs/NBFCs, etc., the purchaser may choose to offer the consideration either in the form of 100% cash or in a given case, purchaser may offer part cash and part Security Receipts (**SR**). A Security Receipt broadly means a receipt or other security, issued by

an ARC to any Qualified Buyers (QBs) pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation. Section 7(1) and (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) provides for issue of Security Receipts after acquisition of financial assets under Section 5(1) to the qualified institutional buyers (QIBs) and raising of fund from QIBs for formulating scheme for acquiring financial assets. The scheme for the purpose of acquiring security receipts under Section 5(1) can be in the nature of a Trust to be managed by the securitisation company or reconstruction company. Such Trust issues Security Receipts to QIBs and hold and administer the financial assets for the benefit of QIBs. The special features of Security Receipts are that the security receipts issued by the securitisation company or reconstruction company are predominantly backed by impaired assets as the same cannot be strictly characterized as debt instruments since they combine the features of both equity and debt. The cash flows from the underlying assets of Security Receipts cannot be protected in terms of value and intervals.

29. For the purpose of present dispute, it is not necessary to delve deeper into the concept of Security Receipt and suffice it to observe that Security Receipts issued by the securitisation company or reconstruction company are particularly considered as impaired assets, the cash flows out of which cannot be protected in terms of value and intervals. On this count, 100% cash sale is a preferred option by the Banks selling NPAs over SRs as SRs do not guarantee recovery of the entire amount reflected in the SR. Also, there is management expenditure involved in respect of a SR, which are

deducted while encashing it. However, it all depends upon market conditions and the choice made by and risk to be adopted by the Bank considering sale potential of a particular NPA. In respect of a particular NPA, if the Bank is not very sure about receipt of 100% cash consideration, it may opt for consideration in the combined form of cash plus SR. On the other hand, in respect of another NPA, the Bank may opt for 100% cash consideration, if there are sufficient buyers available in the market in respect of that NPA. Thus, it is a matter of choice for each Bank to decide the manner in which consideration is to be received for sale of a particular NPA.

30. It is the case of the Plaintiff that Banks prefer 100% cash sales of NPAs over sale through combined components of Cash +SR. It is further contended by the Plaintiff that the efforts to be taken by a Financial advisor for selling NPA on 100 % cash basis are much higher than the one required for Cash+SR transaction. The pleadings of Plaintiff about involvement of extra efforts by FA for fructification of 100% cash sale transaction are to be found in Para 4(p) of the Plaint, which are denied by the Defendant in Para 37 of its written statement. As observed above, Plaintiff has chosen not to lead evidence. Thus, in the light of denial of Plaintiff's assertion about involvement of extra efforts by the Financial Advisor for 100% cash sale transaction, there is no evidence on record to infer that Plaintiff actually took any additional efforts for 100% cash sale of NPAs justifying additional fees.

31. In the advertisement issued by the Defendant-Bank, the commercial bid was required to be submitted by the bidders in Annexure-E, the format for which was as under:

FORMAT FOR COMMERCIAL BIDS

Sr. No.	Particulars	Quotation
a)	Success based fee on cash received from the bidder (excluding Bank SRs)	
b)	Success based fee on sale amount received from the bidder (including Bank SRs)	
The quote should be given for both options. The bank, at its discretion, may choose option 'a' or 'b' payable on successful bids. The option will be exercised by the Bank initially for the portfolio.		

32. Thus, under the format prescribed for submission of commercial bids, the bidders were expected to quote their fees under two options viz., option 'a'- success based fee on cash received from the bidder (excluding Bank SRs) and option 'b'- success based fee on sale amount received from the bidder (including bank SRs). Plaintiff quoted the figure of 0.50 % for option 'a' and 0.0749% for option 'b'. Plaintiff's offer was accepted by the Defendant-Bank and letter dated 1 July 2017 was issued engaging Plaintiff to act as Financial Advisor for carrying out the activities relating to the preparation of portfolios of NPAs for Bank's proposed sale of NPAs to ARCs, etc. The broad scope of work in the Mandate Letter dated 1 July 2017 is the same as reflected in the advertisement. The empanelment was valid for one year from the date of approval of empanelment by the Bank. In Clause III(2) of the Mandate Letter, it was stated that the Bank may engage the Plaintiff from time to time for all or any one of the identified accounts on negotiated fees mentioned in the table. There was no compulsion for the Bank to avail Plaintiff's services as FA and the Bank was free to sell by itself any of the NPAs and no right was created in Plaintiff's favour that it must be entrusted with the Bank's work. Clause III of the Mandate Letter reads thus:-

III. Conditions

- 1) Empanelment will be valid for one year from the date of approval of your empanelment by the bank.
- 2) Bank may engage you from time to time for all or anyone or more of the identified accounts on negotiated fee mentioned below. Further Bank may entrust any such work to any of the Financial Advisor in the panel or otherwise sell by themselves and no right exists to engage Financial Advisor to claim that he/she alone should be entrusted with Bank's work.

Sr. No.	Particulars	Quotation
a)	Success based fee on cash received from the bidder (excluding Bank SRs)	0.50%
b)	Success based fee on sale amount received from the bidder (including Bank SRs)	0.0749%
The bank, at is discretion, may choose option 'a' or 'b' payable on successful bids. The option will be exercised by the Bank initially for the portfolio		

- 3) Engagement does not entitle you of job or contract and inclusion of your name in the approved panel does not entitle you to be an appointment.
- 4) Items enlisted under the head 'Phase2-Execution' of is not exhaustive and is only indicative. Bank may add or delete or modify the said item/s. The said items are to be executed in consultation with Bank's personnel identified for the purpose/connected with the activity.
- 5) Bank may amend/alter any of the items of empanelment of FA without giving prior notice.
- 6) You should try to complete the sale process as early as possible.
- 7) You shall execute Non-Disclosure Agreement and Service Level Agreement in Bank's format and to the satisfaction of the Bank.

33. It is the interpretation of the table in Clause III (2) of the Mandate Letter, which is the hotbed of controversy between the rival parties. According to Plaintiff, 'option a' applied to every transaction in which the sale is effected on 100% cash basis without any element

of Bank SR and that 'option b' applied to a case where the sale is on composite consideration of Cash plus SRs.

34. At the foot of the table, a condition was incorporated that *'the bank, at its discretion, may choose option 'a' or 'b' payable on successful bids. The option will be exercised by the Bank initially for the portfolio'*. According to Plaintiff, the discretion that the Bank was supposed to exercise in terms of the condition at the foot of the table was to opt for either 100% cash sale or sale through combined consideration of cash plus SR. Plaintiff thus interprets the condition vesting discretion in the Bank to mean that the said discretion had nothing to do with regard to fees payable to the Plaintiff but essentially governed the choice to be made by the Defendant-Bank at the initial stage when the NPAs were put for sale.

35. Plaintiff has relied upon one of the tender documents issued by the Defendant-Bank for sale of NPAs in June, 2018. By that tender, 21 individual accounts were put up for sale on 'as is where is and whatever there is basis' for recovery of principal outstanding of Rs.446.12 crores. In clause (II) of the tender, it was declared that bid structure was '100% cash basis'. The relevant portion of clause (II) of the tender is as under:

II INVITATION FOR PARTICIPATION IN BIDDING PROCESS

Bank of India invites bids for the purchase of Non-performing Assets Portfolio of 21 accounts with principal outstanding of approximately Rs.446.12 crores, on **'As is where is and whatever there is' basis & without recourse basis**. The bids may be submitted for individual account wise on following basis:

Particulars	Individual/Portfolio	Bid Structure
21 Individual Accounts	Individual	100% Cash basis

36. The condition of submission of offer on 100% cash basis was repeated in clause 4 of the tender, which reads thus:

Bids for individual /Tranche accounts shall be submitted on **OFFER on 100% CASH BASIS* as under:**

Particulars	Individual/Portfolio	Bid Structure
21 Individual Accounts	Individual	100% Cash basis

37. Plaintiff has admittedly rendered its services as Financial Advisor for sale of NPAs of the said 21 individual accounts. According to the Plaintiff, the Bank exercised its discretion as per the right vested in it under condition appearing at the foot of the table in Clause III(2) of the Mandate Letter by declaring that the sale would be on 100% cash basis alone without involving any element of SR.

38. In my view, there is a fundamental error in the above belief of Plaintiff that the right vested in the Defendant-Bank to exercise the discretion for choosing option 'a' or 'b' is with respect to the manner in which Bank's NPAs are to be sold. Plaintiff has erroneously mixed its contract for rendering services as Financial Advisor and receipt of fees therefor with the Bank's right to sale its NPAs in the open market. The contract entered into with the Plaintiff cannot determine the manner in which the Bank would sell its NPAs. It would be absurd to expect that the Bank would take upon itself any obligation in respect of sale of its NPAs while entering into contract with Financial Advisor whose role is restricted to assist the Bank in effecting of such sale. It would be like to expect a contract with a broker for payment of brokerage fee governing the manner in which the owner would sell his property. In my view, condition appearing at the foot of the table in Clause III(2) of the Mandate Letter '*The bank, at its discretion, may choose option 'a' or 'b' payable on successful bids.*'

is essentially referable to the manner in which the fees are to be paid to the Plaintiff-financial advisor. It has nothing to do with the way in which Defendant-Bank was to sell its assets in the open market. Thus, the contract executed with the Plaintiff cannot govern the right of the Defendant-Bank to sell its assets in a particular manner in the market. For the purpose of securing assistance of a Financial Advisor, it was not necessary for the Defendant-Bank to make known to the Financial Advisor the manner in which it would sell its NPAs. This position is further clear from the Clause 29 of the tender document, which reads thus:-

29. Bank of India reserves the right to add or delete accounts or modify the composition of the Financial Assets Portfolio/Tranches or the single accounts offered for sale and the sale structure at any stage without assigning any reason.

39. Thus, though the bids were invited on 100% cash basis, the Defendant-Bank had the discretion of altering the bid structure and opting for 'Cash plus SR' sale in respect of a particular NPA. Thus, the broader right of the Bank to choose the manner in which it would receive the consideration for sale of NPAs cannot be confused with the limited right of Plaintiff to receive fees for services rendered by it under the Mandate Letter. I am therefore of the view that condition at the foot of the table in Clause III (2) of the Mandate Letter does not govern discretion of the Bank to choose the manner in which it would receive consideration for sale of a particular NPA. The said condition governs discretion of the Defendant-Bank about the manner in which fees would be paid to the Plaintiff in either option 'a' or option 'b'. Therefore, it cannot be contended that in every sale transaction where 100% cash element is involved, the fees must be necessarily 0.50% of the entire cash value or that the lesser percentage of fees of 0.0749%

becomes applicable only where the sale transaction involves 'Cash plus SR'.

40. The Defendant-Bank is right in its interpretation that it can consider the sale receipts after sale of a particular NPA and examine whether an element of SR is included therein. The Defendant-Bank would then decide whether option 'a' is more beneficial to it than option 'b' and vice versa. To illustrate, if a particular NPA is sold for Rs.10 crores and the consideration is received by the Defendant-Bank in the form of 10% cash and 90% SR, the fees payable under option 'a' and option 'b' would be as under:-

Option 'a'	0.50% of cash component of 1.00 crores (excluding SR)	50,000
Option 'b'	Fees of 0.0749% of entire value of 10 crores (Cash +SR)	74,900

41. In the above illustration, option 'a' of paying 0.50 % fees on cash component would suit the Bank and though the transaction involves 'Cash+SR' mode, the Bank would still opt for option 'a'. It therefore cannot be contended that option 'a' is to be exercised only when there is no element of SR. The words 'excluding Bank SRs' appearing for option 'a' means the SR component is to be excluded from total value of the transaction and 0.50% fees would be payable only on cash component of the transaction.

42. In the second illustration, if the sale value of Rs. 10 crores involves 60% cash and 40% SR, the fees payable under options 'a' and 'b' would be as under: -

Option 'a'	0.50% of cash component of 6.00 crores (excluding SR)	3,00,000
Option 'b'	Fees of 0.0749% of entire value of 10 crores (Cash +SR)	74,900

In the above illustration, the Bank would choose for option 'b'. Thus the Bank had the discretion of choosing options 'a' or 'b' after analyzing the nature and composition of sale transaction, which is the reason why the condition at the foot of the table specified that '*The bank, at its discretion, may choose option 'a' or 'b' payable on successful bids.*'

43. This, in my view, would present correct interpretation of the terms and conditions of the Mandate Letter. The interpretation sought to be placed by the Plaintiff on Clause III(2) of the Mandate Letter arises out of skewed and myopic reading thereof. Plaintiff admittedly accepted fees @ 0.0749% in respect of sales conducted upto March, 2018 as admitted in Paragraph 4(k) of the Plaint. Merely because the Defendant-Bank opted for 100% cash bids post March-2018, the same did not entitle the Plaintiff to claim 7 times higher fees than the one received by it in respect of past sale transactions. Plaintiff carefully quoted the fees of 0.50% in its commercial bid in respect of cash component of the bid after excluding Bank SR, which is 7 times higher than Option 'b' quote of 0.0749% where the entire sale consideration (Cash plus SR) is taken into consideration. Otherwise, it is illogical for the Bank to pay 7 times higher fees to a Financial Advisor merely because it secures consideration in the form of 100% cash towards sale of a particular NPA. It must be borne in mind that the Bank's immediate need for cash, nature of NPA put up

for sale, prevailing market conditions, interest of buyers in the particular NPA, the choice made by the Bank to sell the NPA at lesser price in 100% cash, etc are also the relevant factors why the Bank may choose to go for 100% cash sale and it is inconceivable that the Plaintiff would have a windfall gain of 7 times higher fees only because the Bank opts for 100% cash sale.

44. In fact, what is argued before me by the Plaintiff is contrary to the admission given by it in paragraph 4(h) of the Plaint, which reads thus:

h. In light of the aforesaid guidelines existing at the time of the Mandate Letter being issued, it is evident from the table above that when a 100% cash bid is received which excludes SRs, the fee payable to the Plaintiff is at 0.50%, whereas when a bid is received which includes SRs, the fee payable to the Plaintiff would be at 0.0749%. **In the latter case [Option (b)], BOI, as per the table, may either exercise its discretion to pay 0.50% for the cash received in the Sale Amount without SRs or 0.0749% for the entire Sale Amount received with SRs”**

(emphasis added)

45. Thus, while asserting in the Plaint that fees would be at 0.50% in respect of every bid involving 100% cash sale under option ‘a’, Plaintiff does not maintain the position that in option ‘b’, the fees have to be 0.0749% in every case where there is ‘Cash + SR’ sale. In respect of option ‘b’, Plaintiff claims that the Bank has an option of segregating the cash component and paying 0.50% on such component or considering the entire sale consideration (cash plus SR) and pay fees @ 0.0749%. Thus, Plaintiff has argued contrary to its pleadings in the plaint. It would be apposite to reproduce Para 3.6 of the written submissions filed by the Plaintiff, which reads thus:-

- 3.6 The Plaintiff submits that the Defendant is attempting to misguide this Hon'ble Court by misreading and misquoting the alleged "discretion" vested in it to choose one of the two options. The "discretion" which the Defendant had is to choose options i.e. which one of the two type of bids it wanted for the sale of its NPA's viz. 100% cash-based bids (excluding bank SRs) or cash + SR based bids (including bank SRs) and not for choosing quotations. **The Plaintiff submits that once the types of bid is chosen i.e. option (a) or option (b), the Defendant's discretion ends and the fees as per quotation against the respective chosen option becomes payable on success.** The Plaintiff submits that the Defendant does not have the discretion to decide the rate of fees, where the bids are 100%cash based, The Defendant is contractually bounds to pay success based fee at 0.50% of the sales consideration.
(emphasis added)

46. The Plaint is thus a confused document. Plaintiff itself is unsure what exactly its case is. In the Plaint, it pleads that option 'a' is static, under which Bank must pay agreed 0.50% fees on entire cash sale value, but within option 'b', the Bank has the discretion of choosing between 0.50% fees on cash component (by deducting SR value) or 0.0749% fees on entire sale amount (by including SR value therein). This is contrary to the argued case that once option 'b' is chosen, the fees must be always 0.0749% of sale amount received.

47. In fact, Plaintiff's pleaded case that when the bid received is composite 'Cash+SR', the Bank can choose between options 'a' or 'b' actually contains an admission that the word 'discretion' used in the condition at the foot of the table is applicable to fees payable and not to the manner in which NPA is to be put for sale. Thus, there is apparent contradiction in pleading and argument *qua* interpretation of the word 'discretion' as well, which is apparent from the following:-

Pleading in Para 4(h) of the Plaint	Arguments in written submissions
In the latter case [Option (b)], BOI, as per the table, may either exercise its discretion to pay 0.50% for the cash received in the Sale Amount without SRs or 0.0749% for the entire Sale Amount received with SRs. <i>(pleaded case is that discretion is applicable qua fees payable)</i>	The " discretion " which the Defendant had is to choose options i.e. which one of the two type of bids it wanted for the sale of its NPA's viz. 100% cash-based bids (excluding bank SRs) or cash + SR based bids (including bank SRs) and not for choosing quotations. The Plaintiff submits that once the types of bid is chosen i.e. option (a) or

	option (b), the Defendant's discretion ends and the fees as per quotation against the respective chosen option becomes payable on success. <i>(argued case is that discretion is qua nature of sale undertaken and not qua payment of fees)</i>
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48. Thus, Plaintiff's pleaded and argued case is full of contradictions and Plaintiff is inconsistent and confused about the exact stand it desires to adopt.

49. Apart from the apparent inconsistencies as noted above, Plaintiff's interpretation of option 'b' in Para 4(h) of the Plaint is totally misplaced as that option does not contemplate segregation of sale value into cash and SR as sought to be suggested by the Plaintiff. Option 'a' uses the words 'cash received' whereas option 'b' uses the word 'sale amount received'. Thus, fees payable under option 'b' must necessarily be in respect of the entire sale amount received from the bidder and there is no question of dividing such sale amount into cash and Bank SR. Plaintiff has thus completely misinterpreted option 'b' in table in Clause III (2) of the Mandate Letter and has pleaded completely contrary to what is argued before me.

50. It is Plaintiff's case that when the Bank exercises its option for 100% cash consideration, Plaintiff is required to put in more efforts to secure buyers with 100% cash flow and that when the Bank exercises the option of sale of NPA through Cash plus SR the efforts put in by the Plaintiff are far lesser. Plaintiff's argued case is thus premised on an assertion that the Defendant-Bank must make it clear to the Plaintiff at the stage of issuance of the tender for sale of NPA as to whether it is desiring cash sale or cash plus SR sale and that the

moment the Bank makes a choice for 100% cash sale, fees under option 'a' @ 0.50% is necessarily payable to the Plaintiff. On the other hand, according to argued case of the Plaintiff, once the Bank desires Cash plus SR sale by exercising option 'b' at the time of issuance of notice for tender, the Financial Advisor is aware about lesser efforts to be put in for securing Cash plus SR bids and therefore can be paid lesser fees @ 0.0749%. This argued case of the Plaintiff, which is inconsistent with the pleadings, is otherwise completely flawed. As observed above, Plaintiff is attempting to mix the limited contract executed with it governing payment of fees payable to it for acting as Financial Advisor with Bank's freedom to sell its NPAs. Plaintiff's limited contract cannot govern or restrict the Bank's broader right to sell its NPAs. There is nothing in the contract executed with Plaintiff which mandates the Bank to inform Plaintiff at the outset as to how it would sell its NPAs. On the contrary, despite Plaintiff's empanelment, the Bank had the discretion of not involving Plaintiff in sale of a NPA and the Bank could undertake the sale by itself even during currency of the contract. Bank had right to alter the manner of sale even during currency of sale process. Therefore, the interpretation by the Plaintiff of the word 'discretion' appearing in the condition at the foot of the table is completely flawed, apart from it being contrary to its own pleaded case.

51. Turning back to issue of fees payable to the Plaintiff, option 'a' uses the word 'cash received from the bidder' and further provides that such cash component is to be computed by 'excluding Bank SRs'. Thus, the percentage of fee under option 'a' is payable only on cash component in respect of a bid. Option 'a' does not therefore apply to the entire sale amount as the said option consciously does not use the

word 'sale amount received from the bidder', which appears in option 'b'. The use of the words 'cash received' and 'excluding Bank SR' would necessarily mean that option 'a' also covers transactions involving composite sale comprising of 'Cash plus SR' and the Defendant-Bank would exclude the SR component and compute 0.50 % fees only on cash component. Thus option 'a' cannot be construed to mean that the same becomes applicable in every case where there is 100% cash sale without involving an element of SR or that option 'b' becomes inapplicable where the sale is on 100% cash basis. In my view, option 'b' will be available to the Bank where the sale occurs on 100% cash basis as well. The words 'including Bank SR' used in option 'b' is only for the purpose of determining the overall value of the sale amount and the said words 'including Bank SR' used in option 'b' cannot be misconstrued to mean as if option 'b' becomes inapplicable when element of Bank SRs is not involved in a particular transaction. Thus, both options 'a' and 'b' are available with the Bank in respect of every sale effected by it. The Bank will evaluate the exact amount it has received through cash component and SR component and then take a call about exercise of option 'a' or option 'b'. It cannot be contended that in every case, where sale is effected on 100% cash basis, the Bank is precluded from exercising option 'b'. Option 'b' is applicable on entire sale amount received from the bidder where such sale amount is through 100% cash basis as well.

52. As observed above, the words 'including Bank SR' are relevant only for the purpose of determining the total value of sale amount for computing percentage of fees payable to Financial Advisor. The said words do not mean that option 'b' gets closed for the Bank in a case where there is no element of Bank SR. This, in my view, is the correct

interpretation of terms and conditions of the Mandate Letter. Correctly understanding this position, Plaintiff had quoted 7 times higher rate of 0.50% for option 'a' knowing it very well that said fees of 0.50% were payable only in respect of cash component of total sale amount under option 'a'. If Plaintiff was to really believe that it was entitled to receive particular percentage of fees on the entire sale amount received from the bidder under option 'a', it would not have quoted 7 times higher fees in option 'a'. It defies logic that Plaintiff would receive 7 times higher fees in every case where the Bank opts for 100% cash sale, where the scope of work performed by Plaintiff was to merely assist the Bank in sale of its NPAs. There is neither any pleading, much less evidence that the Bank was to initially opt for 'Cash+SR' sale, but the Plaintiff assured the Bank that it would take extra efforts in ensuring that the NPAs in the portfolio are sold through '100% cash' sale. As observed above, it was Bank's call to opt for '100% Cash' sale depending on various factors. The scope of work of the Plaintiff was restricted in only assisting the Bank in execution of the sale by performing various tasks as enumerated under the 'scope of work' in the Mandate Letter and merely because the Bank decided to opt for 100% cash sale for its NPAs, the same cannot result in windfall gain for Plaintiff by claiming 7 times higher fees on the entire sale transaction.

53. As a matter of fact, I do not see possibility of two interpretations in respect of the terms and conditions of the Mandate Letter. The stipulations of the Mandate Letter appear to be quite clear that 0.50% fee was payable only on cash component of sale amount by excluding the component of Bank SR from the total sale amount or 0.0749% fees was payable on the entire sale amount received from the

bidder including Bank SRs, with complete discretion being vested in favour of Defendant-Bank to choose either option 'a' or option 'b' after successful completion of the bidding process.

54. The condition at the foot of the table in clause III(2) of the Mandate Letter that '*option will be exercised by the Bank initially for the portfolio*' would only mean that option 'a' or option 'b' will have to be exercised by the Defendant-Bank in respect of the entire portfolio put up for sale. Thus, instead of taking up sale consideration in respect of each individual account, the amount received in respect of the entire portfolio comprising of multiple accounts was required to be considered for exercising either option 'a' or option 'b'. The tender document relied upon by Plaintiff was in respect of a portfolio comprising of 21 individual accounts. Therefore, while exercising option 'a' or option 'b', such option will be made applicable in respect all the 21 accounts. The Defendant-Bank is required to make a particular option applicable uniformly to all the accounts in the portfolio. Use of the word 'initially' would not mean that there was any obligation on the part of the Defendant-Bank to make a declaration to the Plaintiff about the exact nature of sale it was proposing in respect of any particular portfolio for the purpose of deciding fees payable to the Plaintiff. As observed above, the manner in which the sale of its NPAs were to be effected was entirely in the domain of the Defendant-Bank with which Plaintiff had absolutely no concern and fees payable to the Plaintiff were not dependent on the exact choice made by the Defendant-Bank about the bid structure. So far as payment of fees of the Plaintiff is concerned, both the options were open for the Defendant-Bank and the bid structure declared by it in any tender notice (100% cash basis or cash plus SR basis) did not make any

difference. In my view therefore, the condition that '*option will be exercised by the Bank initially for the portfolio*' would essentially mean uniform application of the option in respect of NPAs forming part of a single portfolio.

55. In fact, Plaintiff's interpretation of Clause III(2) of the Mandate Letter renders the condition at the foot of the table completely negatory, especially the word 'discretion' used therein. If option 'a' was to apply to every sale involving only cash component and option 'b' was to apply to composite transaction Cash plus SR component, there was no necessity of stipulating the term vesting discretion in Defendant-Bank to exercise either option 'a' or option 'b' at the foot of the table of Clause III(2) of the Mandate Letter. Options 'a' and 'b' would have been couched in the EOI as under:

- a) success-based fee on sale amount received from bidder through cash sale, without SR.
- b) success-based fee on sale amount received from the bidder, including Bank SRs.

However, there is conscious use of the term 'cash received from the bidder' in option 'a' as contradistinct from use of the expression 'sale amount received from the bidder' in option 'b'. If Plaintiff's interpretation was correct, the Mandate Letter would have used the expression 'sale amount received from the bidder in cash' in option 'a'. The following comparative table would make this clearer:

Option	Use of words and expressions in the Annexure to EOI and in Clause III(2) of the Mandate Letter	Words and expression, which ought to have been used, if Plaintiff's interpretation was correct
'a'	Success based fee on <u>cash received</u> from the bidder (excluding Bank SRs)	success-based fee on <u>sale amount received</u> from bidder through cash sale, without SR.

'b'	Success based fee on <u>sale amount received</u> from the bidder (including Bank SRs)	success-based fee on <u>sale amount received</u> from the bidder, including Bank SRs.
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Thus, Plaintiff's interpretation is not borne out from the stipulations in the Mandate Letter, and it is attempting to read and substitute words in the contract. Also, the further condition at the foot of the table in Clause III(2) that "*The bank, at is discretion, may choose option 'a' or 'b' payable on successful bids*" makes perfect sense in relation to left side column in above table (actual terms) and makes the said condition completely otiose in relation to the right side column (Plaintiff's intended term). Thus, Plaintiff's interpretation causes violence to other terms of the contract and will have to be necessarily avoided.

56. As observed above, two interpretations of the Mandate Letter are not possible in the present case. However, even if the interpretation sought to be placed by the Plaintiff is accepted as a plausible interpretation, the interpretation placed by the Defendant-Bank would prevail. The contract has been executed in terms of offers invited by the Defendant-Bank where interested parties were required to quote their commercial bids for being considered and accepted by the Bank. The Defendant-Bank has considered and accepted the quote of the Plaintiff on the basis of its interpretation of the terms of advertisement that options 'a' and 'b' would both remain available for it to be chosen after conclusion of sale of portfolio with full discretion being vested in the Bank to choose either of the options. The exorbitantly higher rate of 0.50% on cash component was accepted by the Defendant- Bank with a clear understanding that the same would apply only in a case where the Bank decides to pay fees as

a percentage of cash component out of total sale amount. The Defendant-Bank has never understood option 'a' to mean compulsory payment of quoted percentage of fees on entire sale transaction merely because the sale is conducted on 100% cash basis. This is where the principle of interpretation of employer taking precedence over the one placed by bidder kicks in. Reliance by Mr. Kamdar on judgment of ***Silppi Constructions Contractors*** (supra) in this regard is apposite. The Supreme Court has held in paragraph 20 of the judgment is as under:

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities' the courts should give way to the opinion of the experts unless decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. **The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted.** The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.

(emphasis added)

57. Since Defendant-Bank has floated the advertisement by EOI, it is the best judge to interpret the terms and conditions of the advertisement, which have later been incorporated in the contract. The table providing for payment of fees to Financial Advisor was not introduced for the first time in the contract/Mandate Letter and the same also formed part of the advertisement issued by the Defendant - Bank. Therefore, the principle of interpretation of the tendering authority prevailing over interpretation of the bidder would clearly apply in the present case. However, as observed above, the case does

not even involve possibility of two interpretations of terms and conditions of the Mandate Letter, and it is not really necessary to delve deeper into this aspect. Therefore though Mr. Narichania has sought to distinguish the judgment in ***Silppi Constructions Contractors*** by contending that the principles enunciated therein are in relation to decision of a writ petition challenging the tender process and cannot be made applicable while deciding a suit based on interpretation of terms of contract, I am not inclined to discuss this issue any further. The principle of interpretation of tendering authority prevailing over the interpretation of contractor is invoked only as an additional factor, though not really required, since the terms of contract are clear and unambiguous not possible of any other interpretation.

58. Mr. Narichania has invoked the principle of business efficacy and has relied upon the judgment of the Supreme Court in ***Satya Jain*** (supra) in support of his contention that the Court must interpret contract so as to make business sense. In paragraphs 33 to 35 of the judgment, the Supreme Court has held as under:-

33. The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. **Business efficacy means the power to produce intended results.** The classic test of business efficacy was proposed by Bowen, L.J. in *Moorcock*. **This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied-the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same.** The following passage from the opinion of Bowen, L.J. in *Moorcock* sums up the position: (PD p. 68)

“... In business transactions such as this, what the law desires to effect by the implication is to give such

business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for I respect of those perils or chances."

34. Though in an entirely different context, this Court in *United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera* had considered the circumstances when reading an unexpressed term in an agreement would be justified on the basis that such a term was always and obviously intended by and between the parties thereto. Certain observations in this regard expressed by courts in some foreign jurisdictions were noticed by this Court in para 51 of the Report. As the same may have application to the present case it would be useful to notice the said observations: (SCC p. 434)

"51.... ... "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander, were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!' " *Shirlaw v. Southern Foundries (1926) Ltd.*, KB p. 227."

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' ... An expressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. *Trollope and Colls Ltd. v. North West Metropolitan Regl Hospital Board*, All ER p. 268a-b.'" (emphasis in original)

35. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement. In the present case not only the language of Clause (7) of agreement dated 22-12-1970 is clear and unambiguous there is no other clause in the agreement which had obliged Plaintiff 1 to make any further payment after the initial part-payment of Rs 50,000. The obligation of Plaintiff 1 was to pay any further amount(s) to the Income Tax Authorities, at the request of the defendant, in order to facilitate the issuance of the tax clearance certificate. No

payment to the defendant beyond the initial amount of Rs 50,000 was contemplated by all. The above would appear to be consciously intended by the parties so as to exclude the possibility of any substantial monetary loss to the plaintiff in the event the defendant is to resile from his commitment to execute the said document. The intent of the parties, acting as prudent businessmen, appears to be clear. An obvious intent to exclude any obligation of the plaintiff to pay any further amount (beyond Rs 50,000) to the defendant is clearly discernible. Consequently, resort to the principle of business efficacy by the High Court to read such an implied term in the agreement dated 22-12-1970, in our considered view, was not warranted in the facts and circumstances of the present case.

(emphasis and underlining added)

59. In my view, the judgment in ***Satya Jain*** (supra) is wholly irrelevant in the present case as the principle of business efficacy can be invoked only for the purpose of reading or implying a term in an agreement or contract, which is expressly absent. By invoking the principle of business efficacy, Court can imply a term in a contract, which is expressly not stated therein. It is not the case of Plaintiff that any particular term of the contract was in the mind of the contracting parties, which is absent in the Mandate Letter. There is no pleading, much less any evidence, to suggest absence of any term of contract, which the Court must imply by invoking the principle of business efficacy.

60. This is not a case involving total absence of consideration for contract as discussed by the Apex Court in ***Satya Jain*** (supra). Even with the interpretation placed by Defendant, Plaintiff has earned fees of Rs.1,17,54,518.40/- in respect of the concerned four invoices. Plaintiff has also received additional fees in respect of services rendered by it for sale transactions concluded through cash plus SR modes upto March-2018. What is essentially done by the Plaintiff is to merely sense an opportunity of earning higher fees by misinterpreting clause III(2) of the Mandate Letter after noticing invitation of bids by

the Defendant on 100% cash basis. The contract has not resulted in either absurdity or total failure of consideration and mere nonfulfillment of desire of the Plaintiff to earn higher fees cannot be a ground for invoking the principle of business efficacy and read into the contract something which has not been provided for. It is another case that Plaintiff has neither pleaded nor proved that the contracting parties intended any particular term in the contract though not expressly provided for. Also, in ***Satya Jain*** the Apex Court has held that if the contract makes business sense without the term, the courts will not imply the same. The arrangement of payment of fees to the Plaintiff under option 'b' clearly makes business sense and therefore even if Plaintiff was to plead and lead evidence to prove that the parties always intended to have a particular term included in the contract, this Court would not have invoked the doctrine of business efficacy in the facts and circumstances of the present case.

61. The Apex Court has referred to the judgment in ***Satya Jain*** (supra) in ***Nabha Power Ltd (NPL)*** (supra) and held in paragraph 49 as under:-

49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of The Moorcock³ test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test." It also sought to incorporate "the Officious Bystander Test" [Shirlaw v. Southern Foundries (1926) Ltd.⁴]. This test has been set out in B.P. Refinery (Westernport) Proprietary Ltd, v. Shire of Hastings²⁶ requiring the requisite conditions to be satisfied: reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; Capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in Investors Compensation Scheme Ltd. v. West Bromwich Building Society²⁷ and Attorney General of Belize v. Belize Telecom Ltd.³⁰ Needless to

say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

62. For reading into a contract an implied condition, the Apex Court has thus applied penta-principles of (i) reasonable and equitable; (ii) necessary to give business efficacy to the contract; (iii) it goes without saying i.e. the *Officious Bystander* test; (iv) capable of clear expression; and (v) must not contradict any express term of the contract. On application of the above 5 principles, Plaintiff's case clearly fails. Defendant's interpretation is reasonable and equitable as it ensures payment of fees to the Plaintiff in accordance with the rate quoted by it. Defendant's interpretation does not result in total failure of consideration for this Court to interpret the contract by implying a term therein to give business efficacy to the contract. Plaintiff's interpretation fails in '*Officious Bystander Test*' as it cannot be contended that payment of 0.50% fees on entire cash sale value to a Financial Adviser goes without saying and that every bystander would obviously assume it. The fourth and the fifth tests need not be gone into in absence of any pleading or evidence that parties intended any term or condition in the contract, which is not expressly stated therein.

63. The judgment in ***Nabha Power Ltd.*** (supra) is followed in ***Caretel Infotech Limited*** (supra), in which it has held in paragraph 41 as under:-

'41. Nabha Power Ltd. also took note of the earlier judgment of this Court in *Satya Jain v. Anis Ahmed Rushdie*, which discussed the principle of business efficacy as proposed by Bowen, L.J. in *The*

Moorcock. It has been elucidated that this test requires that terms can be implied only if it is necessary to give business efficacy to the contract to avoid failure of the contract and only the bare minimum of implication is to be there to achieve this goal. **Thus, if the contract makes business sense without the implication of terms, the courts will not imply the same.**

(emphasis added)

64. Thus, as held in ***Caretel Infotech Limited*** if the contract makes business sense without implication of terms, the Courts will not invoke the principle of business efficacy by undertaking the exercise of implying a term in the contract. In the present case payment of 0.0749% fees to the Plaintiff on the entire sale amount received from the bidder makes perfect business sense and therefore it is not necessary to imply any term in the Mandate Letter.

65. Mr. Narichania has relied upon ***M/s. D.N. Revri*** (supra) in support of his contention that meaning of a contract must be gathered by adopting business common sense. The Supreme Court held in paragraph 7 as under:

“7. It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. IT would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation. ...

66. In my view, reliance by the Plaintiff on ***M/s. D.N. Revri*** does not assist Plaintiff's case as interpretation placed by the Defendant also make a perfect business sense and does not make contract between parties an absurdity.

67. Mr. Narichania has relied upon judgment of Apex Court in ***Radha Sunder Dutta*** (supra) in support of his contention that

where two constructions of a document are admissible, the one which will give effect to all the clauses therein will have to be adopted ignoring the other which would render one or more of them nugatory. The Apex Court has held in paragraph 11 as under:

11. Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim "ut res magis valeat quam pereat". What has to be considered therefore is whether it is possible to give effect to the clause in question, which can only be by construing Exhibit B as creating a separate Patni, and at the same time reconcile the last two clauses with that construction. Taking first the provision that if there be other persons entitled to the Patni of lot Ahiyapur they are to have the same rights in the land comprised in Exhibit B, that no doubt posits the continuance in those persons of the title under the original Patni. But the true purpose of this clause is, in our opinion, not so much to declare the rights of those other persons which rest on statutory recognition, but to provide that the grantees under the document should take subject to those rights. That that is the purpose of the clause is clear from the provision for indemnity which is contained therein. Moreover, if on an interpretation of the other clauses in the grant, the correct conclusion to come to is that it creates a new Patni in favour of the grantees thereunder, it is difficult to see how the reservation of the rights of the other *Patnidars* of lot Ahiyapur, should such there be, affects that conclusion. We are unable to see anything in the clause under discussion, which militates against the conclusion that Exhibit B creates a new Patni.

68. I do not see as to how reliance by Plaintiff on judgment in ***Radha Sundar Dutta*** (supra) makes its case any better. Firstly, no two constructions of the Mandate Letter are possible as observed above. Even if two constructions were indeed possible, I do not see how the interpretation placed by Defendant would render any clause of the Mandate Letter nugatory. Defendant's interpretation does not violate any other clause in the Mandate Letter. On the contrary, Plaintiff's interpretation makes the condition of vesting discretion in Defendant otiose. Thus, reliance by Plaintiff on judgment in ***Radha Sundar Dutta***, far from assisting its case, actually militates against it.

69. Plaintiff has relied upon judgment of UK Supreme Court in ***Rainy Sky*** in support of his contention that if two constructions are possible, the Court would prefer the construction which is consistent with business common sense and reject the other. It is held:

21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

70. I have already observed that two constructions are not possible in the present case and even if the same was possible, construction by the Bank of Clause III(2) of the Mandate Letter still makes business common sense. Reliance of Plaintiff on the judgment in ***Rainy Sky*** (supra) therefore is misplaced.

71. In the present case, Plaintiff has chosen not to lead any evidence possibly because it felt that the case merely involves interpretation of Clause III(2) of the Mandate Letter. While this belief of the Plaintiff is not entirely wrong, its argument of business efficacy and business common sense was required to be backed by supportive pleadings and evidence. Plaintiff ought to have pleaded and proved that it is a practice consistently followed in banking industry to pay agreed percentage of fees to Financial Advisor on the entire transaction value, where the Bank opts for 100% cash sale. Plaintiff has not led evidence to prove that even Defendant-Bank, at any time, followed the practice of choosing option 'a' in case of 100% cash sale either in the Plaintiff's own case or with other contracting

parties. No evidence is led to prove that other banks or financial institutions consistently follow such practice. Therefore, the argument of business efficacy, business common sense, trade practice, etc. cannot be accepted in absence of evidence. In absence of evidence, this Court cannot assume that payment of fees under option 'a' on entire cash transaction is an obvious thing in banking industry or financial market. Once Plaintiff has failed to lead evidence to prove existence of any such business practice, it will have to depend solely on interpretation of the terms and conditions of Mandate Letter and cannot expect this Court to enter into the realm of speculation by implying a term into the Mandate Letter, which is expressly absent, by invoking the principle of business efficacy.

72. It is strenuously argued on Plaintiff's behalf that there are admissions given by the Defendant in various paragraphs of the Written Statement, relieving the Plaintiff of responsibility of leading evidence. Much is said about the table included by the Defendant in Para 3 of its written statement in which Defendant has indicated details of sale consideration received on 100% cash basis, the fees demanded by the Plaintiff on the basis of option 'a' and the fees paid by the Defendant as per option 'b'. Merely because the Defendant has used the words 'sale consideration (100% cash basis)' and 'fees paid by Defendant as per cash-cum-SR basis (0.0749%)' in that table would not mean that there is any admission on the part of the Defendant-Bank that it was liable to pay fees on the basis of option 'a' but it erroneously paid fees on the basis of option 'b'. Defendant's non-denial of contents of averments in paragraphs (a) to (f) of the Plaint also does not make the case of the Plaintiff any better. Similar is the case in respect of contents of paragraph 4(j) to (l) of the Plaint. In my view, there is no admission in the written statement given by the

Defendant which would enure to the benefit of Plaintiff in support of its case. Nothing pleaded in the written statement would relieve the Plaintiff of burden of proving its contentions of extra efforts being taken in 100% cash sale transactions, existence of any business practice, condition of payment of fees as per option 'a' on entire sale value for 100% cash sales being in the minds of parties, etc.

E. ANSWERS TO ISSUES

73. In my view therefore Issue No.1 will have to be answered in the affirmative and I proceed to do so. Accordingly, issue No.1 is answered in the affirmative.

74. Since Issue No.1 is answered in the affirmative, Issue No.2 will have to be necessarily answered in the negative.

75. In the light of answer to Issue Nos.1 and 2, Plaintiff's Suit will have to be dismissed while answering Issue No.3.

F. ORDER

76. I accordingly proceed to pass the following order :

- (i) The Suit is dismissed with costs.
- (ii) Decree be drawn up accordingly.

(SANDEEP V. MARNE, J.)

SUDARSHAN
RAJALINGAM
KATKAM
Digitally signed
by SUDARSHAN
RAJALINGAM
KATKAM
Date:
2025.02.25
14:38:53 +0530

katkam/megha/