

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) 252/08 & CM 7625/08

MOHAN OVERSEAS P.LTD. Appellant
Through: Mr. D.S.Narula &
Mr. A.S.Narula,
Advs.

-versus-

GOYAL TIN & GENERAL INDUSTRIES ...Respondent
Through: Mr. Harish Malhotra,
Sr. Adv. with
Mr. R.K.Modi and
Mr. Rajender
Aggarwal, Advs.

WITH

FAO(OS) No.350/09 & CM No.11704/09

C.P. SHARMA Appellant
Through: Mr. Madan Gera,
Adv.

-versus-

VIRENDER KUMAR GUPTA Respondent
Through: Mr. Rajesh Katyal,
Adv.

WITH

FAO(OS) 313/09 & CM No.10289/09

RAVINDER SINGH & ANR. Appellant
Through : Mr. Maninder Singh,
Sr. Adv. with Mr.
Saurabh Tiwari, Adv.

-versus-

MANOJ KUMAR PRUTHI & ANR. ...Respondent
Through : Mr. Sandeep Sethi, Sr.
Adv. with Mr. Sanjay

S.Chhabra & Mr. Alok
K. Aggarwal, Advs.
for Respondent No.1
Mr. Amit S. Chadha,
Sr. Adv. with Mr. Kunal
Sinha, Adv. for
Respondent No.2

WITH

FAO(OS) No.64/09 & CM Nos.2693/09 & 3283/09

JAGDISH CHANDER KAPOOR & ORS.	 Appellant
Through :	Mr. P.K. Kapoor and Mr.V.K.Kapoor, Appellants No.2 and 3 in person

-versus-

RUPABH DEVELOPERS PVT. LTD..	...Respondent
Through :	Mr. J.P. Sengh, Sr. adv. with Mr. Vineet Malhotra, Adv.

% Date of Decision : November 27, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE V.K.JAIN

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| 1. Whether reporters of local papers may be
allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported
in the Digest? | Yes |

VIKRAMAJIT SEN, J.

1. Courts are intended to be temples of justice, roads for redressal, and not houses for harassment. A judge will never be able to palate litigation being vulgarized as a vehicle of

victimization. He will scarcely stand idle when he perceives the jural system being employed as an instrument of oppression of an innocent citizen. Given the disturbing reality of decades of pendency of litigation, resulting largely from an exponential explosion of litigation in response to which the imperative of an increase in the strength of judges is startlingly absent, the judge must innovate; he must discover avenues which will minimize the malaise of delay in decision even if it entails routing away for practices which were hitherto fore commonplace. One genre of cases which the judge increasingly countenances are suits for specific performance of ostensible contracts for conveyance of immovable property and this class of *lis* is severely clogging the courts. Dismissing interlocutory injunction pleas in this category of cases is not adequate amelioration, principally because of the doctrine of *lis pendens*, which finds statutory expression in Section 52 of the Transfer of Property Act, 1882 ('TP Act' for brevity).

2. This Appeal assails the Order of the learned Single Judge dated 5.5.2008 passed in CS(OS) No.1528/2007. The Appellant/Plaintiff has filed a suit for Specific Performance, permanent and temporary Injunction in respect of immovable property bearing No.243, Okhla Industrial Estate-III, New Delhi. By the impugned Order the learned Single Judge has rejected IA

No.9469/2007 filed by the Plaintiff seeking an *ad interim* injunction restraining the Defendant from alienating the suit property during the pendency of the suit. IA No.13550/2007 filed by the Defendant under Order XXXIX Rule 4 for vacation of the *status quo* order has been allowed. However, IA No.13551/2007 filed by the Defendant, praying for the rejection of the Plaint on the ground that it does not disclose a cause of action has also been dismissed; against which no appeal has been filed.

3. The Plaintiff's suit is predicated on the following document, which is admitted:-

R E C E I P T

Received from Mohan Overseas(P) Ltd., Okhla Industrial Area, Phase-I, New Delhi through its Managing Director Sh. Sunder Kukreja a sum of Rs.21,00,000- (Rupees Twenty One Lacs Only) in the following manner towards part payment of sale of property No.243, measuring 1211 sq. yards, Okhla Industrial Estate-III, New Delhi. The total sale consideration of the subject property is Rupees 11,90,00,000/- (Rupees Eleven Crore Ninety Lacs Only).

Cash 5,00,000/- (Rupees Five Lacs Only)

Cheque No.615714 of Rupees 16,00,000/- (Rupees Sixteen Lacs Only) of Standard Chartered Bank.

The brief terms of this sale are as under:

1. The total sale consideration is Rupees 11,90,00,000/- (Rupees Eleven Crore Ninety Lacs Only).

2. The seller Goyal Tin & General Industries is partnership firm, having its office at 39 Okhla Industrial Estate-III, New Delhi, consisting of currently three partners, namely 1)Sh. Ramesh Kumar Miglani s/o Sh. Uttam Chand Miglani 2)Sh. Rajat Miglani s/o Sh. Ramesh Kumar Miglani and 3) Sh. Rishi Miglani s/o Sh. Ramesh Miglani, all residents of W-55, Greater Kailash-I, New Delhi. Sh. Ramesh Miglani has represented that he is fully authorized to finalise this sale agreement and that his acts and deeds are binding on Goyal Tin & General Industries and all its partners. Sh.Rakesh Miglani has further represented that the subject property no.243 Okhla Industrial Estate-III is free from all mortgages, lien, prior sale, gift, attachment etc.
 3. The buyer or his nominee(s) shall pay the entire sale consideration within (five) months from this date whichever is later. The seller shall deliver all the relevant documents to the buyer from time to time.
 4. A proper agreement to sell between the parties will be executed shortly.
4. It has not been denied that thereafter an Agreement to Sell on a non-judicial stamp paper of Rupees 100/- had been got prepared by the Plaintiff, the photocopy whereof bears notations in the handwriting of the Defendant. Follow-up correspondence has also been placed on record by learned counsel for the Appellant along with an Agreement to Sell, also on Rupees 100/- non-judicial stamp paper bearing the date 3.8.2007 which appears to have incorporated changes made to the earlier draft

in the handwriting of the Defendant. It has not been denied that the Defendant had received a sum of Rupees 5,00,000/- in cash, along with a cheque for Rupees 16,00,000/-. Rupees 5,00,000/- has till date not been returned by the Defendant. Although the cheque for Rupees 16,00,000/- has not been encashed, it remains in the possession of the Defendant. The Plaintiff has further averred that two cheques dated 3.8.2007, drawn on Standard Chartered Bank, New Delhi for a total sum of Rupees 1,14,00,000/-, have been tendered to the Defendant, who has not encashed them. Balance-Sheets of the Plaintiff have been filed with the purpose of establishing that it has always remained in sound financial health, and that liquidity was not a problem.

5. According to Mr.D.S. Narula, learned counsel for the Plaintiff, the Receipt reproduced above, sufficiently evidences the formation of a contract for the purchase of the suit property inasmuch as (a) it mentions the total sale consideration as Rupees 11,90,00,000/-; (b) the description of the property leaves no room for doubt as to what was the subject matter of the contract; and (c)there was complete certainty about identity of the contracting parties. Considerable argument has been generated on the fourth concomitant necessary for the formation or emergence of an oral contract, viz. certainty as to

other terms relating to cost of conveyance, time etc. It is trite that every document must be read holistically; the title or heading given to the subject document does not conclusively indicate or establish that it was not an agreement for the sale of immovable property.

6. The learned Single Judge has applied the decision of Single Benches of this Court in *Amarjit Singh Johar & Co. -vs- Shri Prakash Chand Brahmin*, 79(1999) DLT 289 and *High Way Farms -vs- Chinta Ram*, 85 (2000) DLT 355, all of which fall in line with the decision of the Supreme Court in *Mool Chand Bhakru -vs- Rohan*, (2002) 2 SCC 612 in which it was opined that an oral Agreement to Sell must spell out and cover all the essential terms of the Sale including the time-frame within which the Sale Deed has to be executed and as to who would be liable to pay the registration charges etc. In this regard, it seems to us to be of importance to highlight Section 29 of the Stamp Act, 1899 which prescribes that in the absence of an agreement to the contrary, liability for payment of duty rests on the lessee in respect of a lease deed, and on the grantee in the context of a Conveyance. *Kollipara Sriramulu -vs- T. Aswathanarayana*, AIR 1968 SC 1028 must be kept in mind. The law has been explained by their Lordships in the

following paragraph:-

We proceed to consider the next question raised in these appeals, namely whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and so such agreement was executed. We do not accept this argument as correct. It is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Wharton* 6 H.L.C. 238 the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous

agreement In *Von Hatzfeldt-Wildenburg v. Alexander* [1921] 1 Ch. 284 it was stated by Parker, J. as follows :

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. In *Rassier v. Miller* 3 A.C. 1124 Lord Cairns said :

"If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract."

In *Currimbhoy and Company Ltd. v. Creet* 60 I.A. 297 the Judicial Committee expressed the view that the principle of the English law which is summarised in the judgment of Parker, J. in *Van Hatzfeldt-Wildenburg v.*

Alexander [1912] 1 Ch. 284 was be applicable in India. The question in the present appeals is whether the execution if a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be ignored. The evidence adduced on behalf of respondent No. 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and time for completion of the sale were all fixed.

7. We are fully mindful of the comparatively constricted confines of the jurisdiction of appellate courts before whom a challenge to an interlocutory order has been brought. The parameters have been penciled out by the Supreme Court in ***Wander Ltd. -vs- Antox India P. Ltd.***, 1990(Supp) SCC 727 and ***Ramdev Food Products (P) Ltd. -vs- Arvindbhai Rambhai Patel***, (2006) 8 SCC 726. In ***Wander Ltd.*** their Lordships had analysed the powers of the Appellate Court in suchlike matters as follows

- "The appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion". This decision has been followed very recently in ***Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai***, (2006) 5 SCC 282. The City Civil Court had granted a temporary injunction against the Corporation which was challenged before the Bombay High Court. Speaking for the Bench His Lordship R.V. Raveendran

made the following pithy observations:-

32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is “no material”, or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on “no material” (similar to “no evidence”), we refer not only to cases where there is total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, it is not reasonably capable of supporting the exercise of discretion. In this case, there was “no material” to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.

8. In ***Ramdev*** the Supreme Court has taken into consideration both ***Wander Ltd.*** and ***Seema Arshad Zaheer***. His Lordship, S.B. Sinha, J., has perspicuously propounded the law in these words:

The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, the appellate courts will substitute their discretion if they find that discretion has been exercised arbitrarily,

capriciously, perversely, or where the court has ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this Court time and time again. [See for example *Wander Ltd. v. Antox India P. Ltd.*, 1990 (Supp) Supreme Court Cases 727, *Laxmikant V. Patel v. Chetanbhai Shah*, (2002) 3 SCC 65 and *Seema Arshad Zaheer -vs- Municipal Corpn. of Greater Mumbai*, (2006) 5 SCC 282].

The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.

However, in this case the courts below proceeded on a prima facie misconstruction of documents. They adopted and applied wrong standards. We, therefore, are of the opinion that a case for interference has been made out.

9. We would be loathe to reverse or alter the impugned Order had we not arrived at the conviction that the learned Single Judge has misapplied the law. We are unable to overlook the fact that a sum of Rupees 21,00,000/- had been tendered by the Appellant to the Defendant, as evidenced in the Receipt dated 12.5.2006. Out of these monies, the sum of

Rupees 5,00,000/- received in cash has not been returned to the Plaintiff; even the formality of returning the cheque for Rupees 16,00,000/- has also not been ventured upon by the Defendant. This, *prima facie*, is indicative of the Defendant's resolve and mental make-up, viz., that the Agreement arrived at in terms of the said Receipt had not been cancelled by him.

10. When a court is called upon to grant an *ad interim* injunction, *ex parte* or otherwise, it is trite that it must be satisfied of the existence of a *prima facie* case in favour of the Plaintiff, namely, that the suit is more than likely to be decreed. The balance of convenience must also lie in favour of the Plaintiff; and it should be manifestly clear that unless the protection of the Court is granted the Plaintiff will suffer irreparable loss and injury. A new dimension or consideration has now come to be recognized, as is evident from a reading of the following paragraphs in *Mahadeo Savlaram Shelke -vs- Pune Municipal Corporation*, (1995) 3 SCC 33:-

12. In "Modern Law Review", Vol 44, 1981 Edition, at page 214, R.A. Buckley stated that "a plaintiff may still be deprived of an injunction in such a case on general equitable principles under which factors such as the public interest may, in an appropriate case, be relevant. It is of interest to note, in this connection, that it has not always been regarded as altogether beyond doubt whether a plaintiff who does thus fail to

substantiate a claim for equitable relief could be awarded damages". In "The Law Quarterly Review" Vol 109, at page 432 (at p. 446), A.A.S. Zuckerman under Title "Mareva Injunctions and Security for Judgment in a Framework of Interlocutory Remedies" stated that "if the plaintiff is likely of suffer irreparable or uncompensable damage, no interlocutory injunction will be granted, then, provided that the plaintiff would be able to compensate the defendant for any unwarranted restraint on the defendant's right pending trial, the balance would tilt in favour of restraining the defendant pending trial. Where both sides are exposed to irreparable injury ending trial, the courts have to strike a just balance". At page 447, it is stated that the court considering an application for an interlocutory injunction has four factors to consider : first, whether the plaintiff would suffer irreparable harm if the injunction is denied; secondly, whether this harm outweighs any irreparable harm that the defendant would suffer from an injunction; thirdly, the parties' relative prospects of success on the merits; fourthly, any public interest involved in the decision. The central objective of interlocutory injunctions should therefore be seen as reducing the risk that rights will be irreparably harmed during the inevitable delay of litigation".

13. In "Injunctions" by David Bean, 1st Edn, at page 22, it is stated that "if the plaintiff obtains an interlocutory injunction, but subsequently the case goes to trial and he fails to obtain a perpetual order, the defendant will meanwhile have been restrained unjustly and will be

entitled to damages for any loss he has sustained. The practice has therefore grown up, in almost every case where interlocutory injunction is to be granted, of requiring the plaintiff to undertake to pay any damages subsequently found due to the defendant as compensation if the injunction cannot be justified at trial. The undertaking may be required of the plaintiff in appropriate cases in that behalf. In "Joyce on Injunctions" Vol. 1 in paragraph 177 at page 293, it is stated "Upon a final judgment dissolving an injunction, a right of action upon the injunction bond immediately follows, unless the judgment is superseded. A right to damages on dissolution of the injunction would arise at the determination of the suit at law".

11. What is so often glossed over is the fact that wherever immovable property is at the fulcrum of the fight, Order XXXIX prescribes the passing of a temporary injunction during the pendency of the suit. It is platitudinous that the issuance of injunctions is not circumscribed by the Code of Civil Procedure, 1908 ('CPC' for short). It is equally vapid that where a statutory provision is available, the Judge should adhere to its dictates. Rule 1 of Order XXXIX of the CPC covers cases in which temporary injunctions may be granted. It states, *inter alia*, that where in any suit it is proved by affidavit or otherwise that the property in dispute in the suit is in danger of being alienated by any party to the suit, the Court may by an order grant a

temporary injunction to restrain such act or make such other order for the purpose of staying or preventing the alienation of the property as the Court thinks fit, until the disposal of the suit or until further orders. It may be argued that the Code employs the word 'may' instead of 'shall', but in our view, in cases of this genre, the word 'may' would more often than not mandate the grant of an ex parte *ad interim* injunction. Furthermore, Section 10 of the Specific Relief Act, 1963 ('SR Act' for short) lays down that when a Court is confronted with a prayer for the specific performance of a contract to transfer immoveable property, it shall presume that its breach cannot be adequately relieved by compensation in money; hence the prayer may, in its discretion, be allowed. In *M.L. Devender Singh -vs- Syed Khaja*, (1973) 2 SCC 515 the agreement to sell a commercial property contained a clause to the effect that if the Vendor failed to complete the sale transaction, the liquidated sum of Rupees 20,000/- would become payable as damages. The Vendor breached the contract but their Lordships declined to grant damages alone, in view of the provisions of Section 23 of the SR Act. In such a situation, there is added compulsion to grant interlocutory relief.

12. The doctrine of *lis pendens* fortifies and strengthens this interpretation of the law which is to be found in Section 52 of

the TP Act. It contemplates that during the pendency in any Court of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the suit property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made thereto except under the authority of the Court and on such terms as it may impose. The impact of the doctrine of *lis pendens* has been analysed by the Supreme Court very recently in *Guruswamy Nadar -vs- P. Lakshmi Ammal*, AIR 2008 SC 2560 ; the field of operation and interaction of Section 19 of the SR Act and Section 52 of the TP Act have been discussed. Section 19 deals with the availability of the relief of specific performance against a person claiming subsequent title to the property; this relief being unavailable in instances where the subsequent purchaser has paid valuable consideration for the purchase without having any notice or knowledge of the earlier or original contract. Section 52 of the TP Act, it has already been seen, stipulates broadly that where a suit has already been filed in respect of a property it cannot be transferred or dealt with to the detriment of the Plaintiff. Thus, let us conceptualize a case where on 1st April, 2009 A enters into an agreement to sell a house with B, and on the refusal or

failure by A to complete the deal, B is constrained to initiate an action for specific performance against A on 1st May, 2009. Any endeavour of A to transfer the suit property after the latter date shall not defeat the rights of Plaintiff B, this being the doctrine of *lis pendens*. However, if A had sold for value the said property to C in the month of April, 2009 itself, then if C had no knowledge or notice of the agreement between A and B, A would not be able to enforce the relief of specific performance against C, as per Section 19 of the Specific Relief Act. Notice or knowledge should be actual; but it can also be constructively assumed as where the second purchaser fails even to ascertain who is in possession (See *R.K. Mohammad Ubaidullah-vs- Hajee C. Abdul Wahab*, AIR 2001 SC 1658). The two provisions, thus, operate in different fields *albeit* these may be located contiguous or close to each other. In **Nadar** the Defendant Lakshmi had contracted to sell her house for Rupees 30,000/- on 4.7.1974 but the entire price was not paid as per contract by 31.7.1974. Lakshmi thereafter sold the house to Nadar for Rupees 40,000/- on 5.5.1975, the dealings being *bona fide*, that is, NADAR who had been put in possession had no notice of the previous agreement. The Apex Court held that since the second transaction of sale took place after the filing of the suit on 3.5.1975 predicated on the earlier sale agreement,

the doctrine of *lis pendens* would take effect. In **Nadar** two points came to the fore - (a) that the pendency of a suit for specific performance will invariably act as a clog on property transactions and in unsustainable cases will therefore tantamount to an abuse of the legal process; (b) despite the operation of *lis pendens*, in a genuine case, the Defendant should be enjoined from creating third party rights in the interest of an innocent third party.

13. In a manner, therefore, the passing of protective orders under Rule 1 of Order XXXIX of the CPC may well be seen as otiose and superfluous since the *lis pendens* doctrine may be thought to have same legal consequence. Even so, when orders are passed by a competent court, it invariably has the effect of restraining the parties from acting against the grain of *lis pendens* for fear of having to face Contempt of Court proceedings; and thus third parties are protected from the machinations of unscrupulous litigants.

14. Even if the court has still to find a *prima facie* case in favour of the Plaintiff before it grants an ad interim injunction in the mould of Order XXXIX Rule 1, it seems plain to us that if the Court has dismissed an application under Order VII Rule 11, it is but congruous that it must grant an injunction. It is for the simple reason that an action under Order VII Rule 11 is

defeated if the plaint discloses triable issues. Once this is so, it cannot but lead to the conclusion that a *prima facie* case has been pleaded by the Plaintiff. It was for this reason that we have inquired from learned counsel for the Respondent as to whether an appeal had been preferred against that part of the impugned Order which dismissed their application under Order VII Rule 11. It is indeed significant that no appeal has been filed. In other words, the Defendant has become convinced that the plaint is not liable for rejection at this stage of the litigation because it in fact discloses a cause of action. We are aware that in *M. Gurudas -vs- Rasaranjan*, (2006) 8 SCC 367 their Lordships have opined that –“At the stage of grant of injunction, however, the effect of dismissal of an application under Order 7 Rule 11 of the Code of Civil Procedure would not be of much significance. The plaint in question could not have been rejected under Order 7 Rule 11 of the Code of Civil Procedure. The court at that stage could not have gone into any disputed question of fact but while passing an order on grant of injunction indisputably it can.”

15. It is commonplace that if the suit is perceived by the Court to manifest an abuse of judicial process, it is likely to be dismissed forthwith. Reliefs of injunctions as well as specific performance are essentially discretionary in nature. It is always

open to the Court to decline specific performance and instead grant damages. If damages have, in fact, been prayed for, or courts decline to grant the prayer for specific performance, the suit is perforce metamorphosed into one for recovery of money. In such an event, Order XXXIX Rule 1 would not come into play. Section 20 of the SR Act spells out that the Court has discretion in the matter of decreeing the specific performance of a contract.

16. We recall that in *Parakunnan -vs- Nedumbara*, AIR 1987 SC 2328 : 1987 Supp. SCC 340 the Supreme Court opined that – “Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific relief merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for sale Ex.A1. Since Chettiar had

waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance". There is a plethora of precedents on this aspect of law but we shall mention only *Kanshi Ram -vs- Om Prakash Jawal*, AIR 1996 SC 2150 where their Lordships reiterated that the passing of a decree of specific performance should not be automatic, and the Court should constantly "be guided by justice, equity, good conscience and fairness to both parties. Considered from this perspective in view of the fact that the respondent himself had claimed alternative relief for damages, we think that the Courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair".

17. Our study would be more comprehensive once it contains a consideration of the provision of Order XXII Rule 10 of the CPC. On a plain reading of this provision, it is evident that the situation that is in contemplation therein is the pendency or continuance of a suit in which the assignment, creation or devolution of any interest pertaining to the suit property has taken place. Where the Plaintiff assigns his rights to an assignee, he would ordinarily encounter little difficulty in getting impleaded. The position is totally different where a

Defendant assigns his rights because Order XXII Rule 10 may not apply for the simple reason that it is not the Defendant who “continues the suit”. Independent of the provision, it is apparent that an assignment by the Defendant would never fall in the same category as that of an assignment by the Plaintiff since in almost every case such an assignment would have the effect of destabilizing or jeopardizing the interest of the Plaintiff who has approached the Court for redressal. Where an assignee of the Defendant is desirous of being impleaded, the proper recourse to be adopted would be under Order I Rule 10 of the CPC. *Amit Kumar Shaw -vs- Farida Khatoon*, (2005) 11 SCC 403 was decided *ex parte* the Plaintiff. Even then their Lordships had clarified that the transferee is not entitled, as of right, to be made a party to the suit, though the Court has a discretion to make him a party; the transferee can be added as a proper party if his interest in the subject-matter of the suit is substantial. The Supreme Court had carried out a conjoint reading of Order I Rule 10 as well as Order XXII Rule 10. What was not discussed was whether Order XXII Rule 10 enures only to the benefit of the Plaintiff who, we may reiterate, was not represented in that case. In stark contrast, sub-rule (2) of Order I Rule 10 clarifies that an application can be brought by either party.

18. In this analysis, it seems to us that there are myriad alternatives which the Court can adopt in suits for specific performance. If it is satisfied that it would be unconscionable or unfair for the Defendant to transfer or create any third party interest in the immovable property which is the subject-matter of a concluded contract the Court can pass an injunction. Keeping in mind that specific performance orders are essential equitable reliefs, the Court will not allow the pendency of a suit to work inequities against the owners of the property. The mere rejection of a temporary injunction does not remove this imbalance since the very pendency of the suit has the effect of jeopardizing the title of the Defendant/Owner. Broadly speaking, we are of the opinion that in most cases, directing the Plaintiff to deposit the sale consideration in the Court, would have the effect of placing the parties on equal footing. Obviously, this is the rationale behind the First Explanation to Section 16(c) of the SR Act which preserves the power of the Court to make such direction. There may be cases where at the pre-trial stage the Court comes to a *prima facie* conclusion that a contract had not been concluded or that the contract was such as would make it appropriate to decline the grant of the equitable reliefs of specific performance. We see no impediment in the Court declining at that stage itself the relief of Specific performance,

leaving it to the Trial to determine whether any damages should be awarded, and if so, for what amount. If the Defendant wants to sell the property under litigation or deal with it in any legally permissible way, Section 52 of the TP Act itself permits him to seek such relief from the Court and the Court would be justified in granting it, if the Plaintiff fails to *prima facie* show merit in his case. We should not be understood to have digressed or departed from the well-entrenched position of law to the effect that in any interlocutory stage of a suit the averments made in the pleadings will have to be taken at face value. In other words, if a plaint is to be rejected or returned, the asseverations made in the plaint will have to be taken as correct. Similarly, a suit can only be decreed taking all the averments pleaded in the Written Statement to be correct. Further, since the relief of specific performance is essentially discretionary and equitable in nature, we can think of no impediment in circumscribing the contours within which the discretion is to be exercised. In fact, the discretion of a judge cannot be fettered or regulated.

19. Returning to the facts in FAO(OS) No.252/2008, it will be recalled that Mr. Narula, learned counsel for the Appellant, has stated that the Appellant is ready and willing to deposit the entire sale consideration. The arguments before us have essentially touched upon the absence of a concluded contract. It

has not been contended that the consideration for the sale of the property was inadequate or unrealistic at the time when the negotiations were taking place. The Defendant has not appealed against the Order rejecting his application under Order VII Rule 11. Therefore, the Suit in respect of relief for specific performance as well as damages, if and when claimed, would continue. It is in these circumstances that we direct the Appellant to deposit the balance sale consideration with the Registrar-General of this Court within sixty days from today. The Registrar-General shall invest the said sum of money in a Fixed Deposit with a nationalized bank initially for a period of one year with automatic renewals on the most beneficial terms. On the deposit being made, the Respondent shall be restrained from creating any third party interest or rights in the suit property without leave of the Court.

20. FAO(OS) No.252/2008 along with CM No.7625/2008 stands disposed of accordingly.

FAO(OS) No.350/2009

21. Mr. Madan Gera, learned counsel for the Appellant in FAO(OS) No.350/2009, has sought support from the observations of the Division Bench occurring in **FAO(OS) No.19/2009** titled **Vinod Seth -vs- Devinder Bajaj** and FAO(OS) No.66/2009 between the same parties who are

presently before us, both of which had been dismissed on 27.1.2009. The issue before our learned brothers was whether the Trial Court was competent to direct the Plaintiff to furnish an undertaking to the effect that in the event of the suit failing the Plaintiff would be liable to pay the Defendant a sum of Rupees 25,00,000 by way of damages. The Division Bench found that this course adopted by the Trial Judge was “not without the sanction of law looking to the ground realities...” Our learned Brother had specifically adverted to Order XXV of the CPC which postulated just this. The law in India expects damages to be proved, and that payments by way of penalties, cannot be automatically allowed. Therefore, undertakings, as a form of security to pay costs may be called for, so long as the stated sum does not have the trappings of ‘damages’.

22. FAO(OS) No.66/2009 was filed by the Appellant against the Respondent before us assailing the Order of the learned Single Judge passed on 18.12.2008 directing the Plaintiff/Appellant (a) to deposit the balance sale consideration of Rupees 29,60,000/- and (b) to file an undertaking to the effect that in the event of the Plaintiff failing in the suit he would pay damages to the Defendant to the tune of the then prevailing market value of the suit property. That Appeal was decided on 24.2.2009 affirming both these directions. Our learned Brothers

went on to opine that the consequences of failure to make the money deposit would reflect on the ability and willingness of the Plaintiff/Appellant to pay the balance sale consideration which would be examined in trial. When the suit was heard on 10.7.2009, our learned Brother, S. Muralidhar, J. noted that the affidavit/undertaking ordered on 18.12.2008 to be filed by his predecessor and our learned Brother, Rajiv Sahai Endlaw, J. had not been filed. By the impugned Order, Muralidhar, J. has dismissed the suit, indirectly indicating that he was in complete agreement with the view taken by Rajiv Sahai Endlaw, J. The only caveat that the Division Bench had articulated was that if there was non-compliance with the direction for depositing the balance sale consideration, the Court would consider whether or not to dismiss the suit. In our view, the mention of the stage of trial by the Division Bench cannot be construed as an unequivocal view that such a conclusion can only be arrived at 'at the trial'. Rejecting a prayer for specific performance is an exercise of discretionary powers which the Appellate Courts have never regulated.

23. Reliance has also been placed by learned counsel for the Appellant on ***Abdul Gafur -vs- State of Uttarakhand***, (2008) 10 SCC 97, which, in our analysis, has no relevance to the conundrum concerning us. In ***Abdul Gafur*** a writ petition was

filed by one Tek Chand challenging the acquisition of land which came to be dismissed consequent upon the clarification by the Government that the road in question was not going to be used exclusively by the Hospital. This apparently did not assuage the fears of Tek Chand who thereafter filed two suits against the Hospital in which judgment was reserved. Undaunted, Tek Chand filed yet another writ petition in the course of hearing of which the High Court summoned the two pending suits to the file of the High Court. These two suits were thereupon dismissed by the High Court. It was in those circumstances that the Supreme Court observed that Section 9 bestowed on civil courts inherent jurisdiction, which could be whittled or watered down only by specific statute and, therefore, a suit could not be dismissed on the ground of it being frivolous. Their Lordships were, in no manner, desirous of diluting earlier observations made by the Supreme Court calculated to bring an expeditious and early conclusion of litigation, including civil suits. This is obvious from a reading of paragraph 20 of the Judgment which is reproduced below:-

20. Having considered the matter in the light of the aforesaid legal position, we are of the opinion that the impugned order cannot be sustained. It is true that under Section 24 of the Code, the High Court has jurisdiction to suo motu withdraw a suit or appeal,

pending in any court subordinate to it, to its file and adjudicate itself on the issues involved therein and dispose of the same. Unless the High Court decides to transfer the suit or the appeal, as the case may be, to some other court or the same court, it is obliged to try, adjudicate and dispose of the same. It needs little emphasis that the High Court is competent to dispose of the suit on preliminary issues, as contemplated in Order 14 Rules 1 and 2 of the Code, which may include the issues with regard to maintainability of the suit. If the High Court is convinced that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J. in *T. Arivandandam -vs- T.V. Satyapal*, (1977) 4 SCC 467, if on a meaningful –not formal- reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Order 10 CPC. Nonetheless, the fact remains that the suit has to be disposed of either by the High Court or by the courts subordinate to it in a meaningful manner as per the procedure prescribed in the Code and not on one's own whims.

24. So far as FAO(OS) No.350/2009 is concerned, we have already mentioned that Mr. Gera has contended that the direction for deposit of the entire sale consideration is an

onerous one. Even if it be so, it is as onerous as the freezing of the ownership of the property in the hands of the Defendant/Owner. It makes no difference that the Appellant is in possession of the property by virtue of his tenancy. The second submission of Mr. Gera that the Plaintiff may have to borrow monies to make the deposit appears to be fatal to the Plaintiff's case since it is indicative of the fact that the Plaintiff was not possessed of sufficient funds in order to complete the contract and hence was not entitled to the grant of the discretionary relief of specific performance. That, in itself, would be a reason to dismiss the suit so far as the relief of specific performance is concerned. FAO(OS) No.350/2009 is dismissed. Pending Application also stands dismissed

FAO(OS)313/2009

25. This Appeal has been preferred against the Order dated 11.5.2009 passed by the learned Single Judge in CS(OS) No.1894/2008 and CS(OS) No.46/2009. By the consent of parties, both the suits had been heard together and the pending applications had been decided by the said common impugned Order dated 11.5.2009. The Plaintiffs/Appellants have not filed any Appeal in CS(OS) No.1894/2008, as a consequence of which a neat question of law has arisen, namely, that the Plaintiffs/Appellants have accepted the Order, whereby they

were declined any interim relief against Shri Naresh Kukreja, the owner of the shop in question. The anomalous position is that once ad interim finality attaches to such a *pendente lite* arrangement, so far as the rights of the Plaintiffs in the suit shop are concerned, he would automatically be ineligible and incompetent to take legal cudgels against what he asserts was a subsequent contract entered into between the owner and the sitting tenant, namely, Manoj Kumar Pruthi. Ordinarily, we would have considered this situation to be sufficient reason to dismiss the Appeal on merits. However, we refrain from disposing of the matter on technicalities.

26. The facts, as set-out by the Plaintiffs/Appellants, are that on 15.9.2009 they had entered into an oral Agreement to Sell with the owners of Shop No.6-A, Khan Market, New Delhi for a consideration of Rupees 1,00,00,000/-. A sum of Rupees 4,00,000/- was paid by the daughter of Plaintiff No.2 by cheque and a sum of Rupees 6,00,000/- was paid in cash to the Defendants. However, no written document or receipt for either the sum of Rupees 4,00,000/- or for the sum of Rupees 6,00,000/- allegedly paid in cash was given. According to the Plaintiffs, it had been agreed between the parties that the shop would be converted into freehold.

27. The Defendant/owner has denied the oral agreement as well as receipt of any sum of money from the Plaintiffs. So far as the cheque for Rupees 4,00,000/- is concerned, the owner has stated that it was towards payment for jewellery etc. purchased by the daughter of Plaintiff No.2 from the Defendant. The cash payment of Rupees 6,00,000/- has been denied outrightly.

28. In the second suit, the grievance of the Plaintiffs is that the owner (Defendant No.2) had, on 11.10.2000, entered into an Agreement to Sell the said shop to Manoj Kumar Pruthi (Defendant No.1), who was the sitting tenant.

29. The learned Single Judge has found no credence in the case pleaded by the Plaintiffs. He has disbelieved that a transaction of this magnitude would have rested only on oral parleys and agreements; that if any amounts had been paid towards the Agreement to Sell by the Plaintiffs to the owner, that would have been evidenced by the execution of documents, receipts or otherwise; that the sum of Rupees one crore did not reflect the market price; that even as per the averments made in the plaint an agreement with the father of Defendant No.2 for purchase of the shop had been entered into as far back as on 11.10.2000. The learned Single Judge has concluded that in these circumstances the owner would not have entered into any other agreement, especially since the price allegedly agreed

to with the parties was nowhere near the market price which undeniably was between Rupees four and five crores. We find no perversity in the approach of the learned Single Judge, as has been articulated in the impugned Order.

30. It would be advantageous to reflect on the pronouncements of the Hon'ble Supreme Court so far as exercise of appellate powers in respect of discretion is concerned as expounded and clarified in ***Wander Ltd.*** and ***Manjunath Anandappa -vs- Tammanasa***, (2003) 10 SCC 390. The ratio of these Judgments has, in fact, pervaded our reasoning in all the matters before us which we have decided by this common Judgment. The role of the Appellate Court in interlocutory matters invariably involves the exercise of discretion. As has been spelt out in ***Wander Ltd.*** and ***Manjunath*** the Appellate Court would be ill-advised to substitute its understanding or appreciation of the factual matrix with that of the original forum. The opinion of the Apex Court to this effect is evident from the following passage from ***Ramdev***:-

128. The grant of an interlocutory injunction is in exercise of discretionary power and hence, the appellate courts will usually not interfere with it. However, appellate courts will substitute their discretion if they find that discretion has been

exercised arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunctions. This principle has been stated by this court time and time again. (See for example *Wander Ltd. V. Antox India P. Ltd.*, (1990) Supp SCC 727, *Lakshmikant V. Patel v. Chetanbhai Shah*, (2002) 3 SCC 65 and *Seema Arshad Zaheer v. MC of Greater Mumbai*, (2006) 5 SCALE 263).

129. The appellate court may not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that it had considered the matter at the trial stage it would have come to a contrary conclusion.

These precedents proscribe interference in Appeal except where the discretion has been exercised in a perverse manner, that is, which no reasonable man would adopt. The impugned Order does not manifest any aberration of these perverse proportions. All that has to be seen is that the Order should not run contrary to law.

31. We affirm that no *prima facie* case to justify restraining the Defendants from alienating or encumbering the suit shop has been made out as has been rightly concluded by the learned

Single Judge. We, therefore, need not delve on the intricacies of the proposal by the tenant to bring in a fresh tenant at monthly rental of Rupees three lacs since the injunction prayed for by the Plaintiff has been declined.

32. The issue that also has been argued before us in detail pertains to the legality of the directions of the learned Single Judge, calling upon the Plaintiffs to file an undertaking to pay damages to the Defendants upon being unsuccessful in the suit. The learned Single Judge had found it expedient to make this direction, keeping Section 52 of the TP Act in perspective. The principle of *lis pendens* has agitated the minds of several of our learned Brothers for the reason that this principle works hardship on the owner inasmuch as it creates a clog on the property in litigation. We have already expanded on this legal nodus and, therefore, shall not reiterate these jural concerns. The learned Single Judge noted that the current market price of the shop was between Rupees four and five crores and since the purchaser/tenant had been permitted by him to let out the property, "three years rent or the price at which the plaintiff claims to have an agreement to sell should furnish a good estimate of the damages with which the plaintiffs should compensate the defendants". These concerns would not have vexed the learned Single Judge had he thought it expedient and

appropriate to dismiss the suit so far as the claim for specific performance of the contract was concerned, leaving it open for the plaintiffs to prove damages if so advised. Mr. Maninder Singh, learned Senior Counsel appearing for the Appellant, submits that the learned Single Judge did not possess jurisdiction to make these direction and he should have traversed no further than dismissing the interim application for injunction. Perhaps, it is for this reason that the Plaintiffs/Appellants have not considered it necessary to challenge the impugned Order in the context of CS(OS) No.1894/2008. Reliance has been placed on a recent Judgment of the Supreme Court in *Ashok Kumar Mittal -vs- Ram Kumar Gupta*, 2009(234) ELT 193(SC) : 2009(2) SCC 656. We are unable to appreciate any manner by which this decision would be of any assistance to the arguments raised before us. Their Lordships in that case had imposed exemplary costs of Rupees 1,00,000/- each which were to be deposited with the Delhi High Court Legal Services Committee by both the parties. It was in that context that Sections 35 and 35A of the Code of Civil Procedure Code, 1908 were adverted to which stipulates a ceiling of Rupees 3,000/-. Their Lordships had recommended amendments to these provisions to make them relevant. The previous decision of a Three-Judge Bench in *Salem Advocate Bar*

Association -vs- Union of India, (2005) 6 SCC 344 was not specifically adverted to.

33. As we see it, this device of furnishing an undertaking was found appropriate by the learned Single Judge to balance the equities between the parties so that the very entertainment of equitable relief could be considered. Even though it is our analysis that the prayer for specific performance can be declined in a given set of circumstances, we should not be understood to say that this should be done in every case. It is impossible to circumscribe the exercise of discretionary power and it must be left to the trial Court in every case to work out a balance which would ensure that litigation is not raised as a tool of oppression. In this case, this is precisely what the learned Single Judge has endeavoured to do. This device has already received the *imprimatur* of the Division Bench in **Vinod Seth**. It is a matter of judicial pride that the judges think long and hard for creating a situation where the judicial process is not reduced to one causing oppression. However, this balancing act must be done within the confines of law. We have already mentioned that in India damages have to be proved before they can be claimed. Penalties cannot be made payable merely because they find mention in the contract. Pre-determination of the costs likely to be incurred can legitimately be presented to the Court.

As and when so done, the Court can direct the party to give an undertaking by exercising the powers contained in Order XXV Rule 1 of the CPC.

34. It is in these circumstances that the Appeal is allowed with a clarification that the learned Single Judge may direct the furnishing of an undertaking with a view to securing the costs likely to be incurred in the course of litigation. Liberty is granted to the Defendant to move an application for this purpose. Pending Application also stands disposed of.

FAO(OS) No.64/2009

35. In this case an Agreement to Sell dated 4.2.2004 has uncontrovertedly been executed between the parties, the salient terms of which were that the sale consideration was fixed at Rupees 1.77 crores, out of which Rupees 18 lacs was paid as an advance; the purchaser/Plaintiff was also obligated to pay a further sum of Rupees 35 lacs on or before 7.3.2004; possession was to be handed-over to the purchaser at the time of the execution of the Sale Deed. It appears that the Appellants/Defendants addressed a letter dated 13th -15th March, 2004, reminding the Plaintiffs/Respondents that they had committed default with regard to this obligation. In response thereto the Plaintiffs asked the Defendants to collect the payment of Rupees 35 lacs or collect the full payment and give

possession of the entire property. By their letter dated 29.3.2004 the Appellants reiterated that the Plaintiffs had committed a breach of the Agreement in not paying the sum of Rupees 35 lacs. What is important is that the Plaintiffs were granted another opportunity to pay within two days the said amount of Rupees 35 lacs vide letter dated 29.3.2004. As this amount was not paid, the contract was cancelled by the Appellants/Defendants' vide letter dated 7.4.2004. It is relevant to recall that the legal principle is that it is the debtor who is bound to find the creditor and, therefore, it may not have been open to the Plaintiffs to ask the Defendants to collect payment. After an exchange of legal notices, the suit for Specific Performance was filed on 2.9.2005.

36. On the first date of hearing learned counsel for the Defendants volunteered that the Defendants would not alienate, mortgage, transfer or part with the possession of the suit property. The learned Single Judge directed the Plaintiffs to file a Statement of Accounts to show that they were possessed of requisite funds. The Bank Statement appears to have been filed around September, 2005, in response to which learned counsel for the Defendants had insisted that Statement of Account should have pertained to March, 2004, which was the period when the Plaintiffs ought to have been possessed of necessary

funds. This, in our view, would have been either Rupees 35 lacs or the entire balance sale consideration. After several intervening hearings, the suit was listed on 25.5.2006 when it was stated that the volunteered undertaking not to create third party interest would continue provided the Plaintiffs deposit the balance sale consideration of Rupees 1.59 crores. It was in these circumstances that this sum came to be deposited by the father of the Plaintiff/Director, who had also undertaken to the Court that he would not claim this money on the ground that he was not a party to the suit. The question of whether it was open to the father of the Plaintiff/Director to make this deposit instead of the Plaintiff before us, had been argued by learned counsel for the Defendant before the successor Court on subsequent hearings. We have perused the records and find that repeated adjournments had been consumed by the Plaintiffs and nevertheless its evidence remains incomplete till date. No fault for delay can be laid on the Defendants/Appellants.

37. The impugned Order has been passed by the second successor Court. We have pointed this out for the reason that the initial Order directing the Plaintiffs to make deposit the balance sale consideration was a discretionary order which ordinarily would not be open to modification by a successor Court, unless circumstances had changed to such an extent that

modifying the initial Order would be necessitated in the interest of justice. It could have been assailed in Appeal, but since this was not done, the ad interim arrangements had become unalterable during the pendency of the suit. In fact, it is the Plaintiffs who had taken several adjournments and they could not, therefore, make a grievance that the amounts deposited were not available to the Plaintiffs because of willful defaults of the Defendants.

38. The Appellants have appeared in person. They state that they had to discharge their Advocates since they are not possessed of sufficient funds to pay further legal fees. They have also submitted before us that they had planned to buy separate properties in 2004 itself, on the receipt of the total sale consideration as per the Agreement. They justifiably contend that today it is not possible for them to purchase separate residences for themselves from the sale consideration owing to the sharp escalation in the price of real estate. They have also stressed on the fact that they are from a service background, whereas the Plaintiffs are in the property business.

39. In support of the impugned Judgment, whereby the second successor Court has reversed the initial Order directing the Plaintiffs to deposit the balance sale consideration, Mr. J.P. Sengh, learned Senior Counsel appearing for the Respondents,

has relied heavily on the Order in *Sukhbir Singh -vs- Brij Pal Singh*, JT 1996 (6) SC 389 : 1997 (2) SCC 200. This Order, however, does not advance the case of the Plaintiffs. What their Lordships clarified was that it was not necessary for the purchasers to carry money with them from the date of the suit till the date of the decree. Their Lordships noted that the purchaser was present at the sub-Registrar's Office (leading to the inference that they were possessed of sufficient funds) and, therefore, the suit for specific performance had been rightly decreed. In the case in hand, an appeal against the order of the learned Single Judge directing the deposit of the balance sale consideration of Rupees 1.59 crores has not been preferred by the Plaintiffs at any stage. It is noteworthy that the Plaintiffs had not made this deposit themselves which can legitimately lead to the inference that they were not possessed of sufficient funds, not only at the relevant time, that is, when payments were to be made as per the terms of the contract, but also subsequent to complying with the Orders of the learned Single Judge. Learned Senior Counsel has also sought support from the decision of the Division Bench in *Ansal Properties Industries(Pvt.) Ltd. -vs- Rajinder Singh*, 1990(19) DRJ 17 : 41(1990) DLT 510 which has subsequently been followed by a Single Bench. In *Ansal* the sequence of events are peculiar and

unique. At the initial hearing, the trial Court had held that the suit was for part performance of the Agreement to Sell and such a suit would be maintainable after the party suing pays or has paid the consideration for the whole contract reduced by the consideration for the part that must be left unperformed. It was in that context that reference was made to Section 12 of the SR Act. It is Section 16 which is relevant for our purposes. It is not open to learned counsel to rely only on the observations that a direction for payment of consideration can be issued only at the time when initial decree is passed. This was obviously in the context of Section 12 and not Section 16 of the SR Act. Be that as it may, the Bench had earlier clarified that an Order directing the party to deposit the sale consideration “should be adopted rarely and only when the Court is of the opinion that the averment of the plaintiff being ready and willing to perform the contract may not be quite true”.

40. We are of the opinion that the impugned Order must be set aside on two grounds. Firstly, it should be disclosed to the Court that circumstances have so drastically and significantly changed that continuing with the prevailing interim arrangement would indisputably lead to injustice so far as the Appellant is concerned. If interim orders are incorrect or inappropriate, it is for a party to castigate them in appeal.

Secondly, we cannot find any flaw in the direction calling upon the Plaintiffs to deposit the balance sale consideration. This additionally assumes relevance and importance because it is not the Plaintiffs who had made the deposit and it is only their financial capacity at the relevant time which is the focal issue. The correspondence between the parties, *prima facie*, shows that the Plaintiffs had not performed their obligations under the Agreement to Sell. If despite this fact the Plaintiffs, who are in the property business, are permitted to freeze transactions of the suit property, it would cause an equitable imbalance. As has already been observed, the reality is that regardless of whether an injunction has been passed or not, the Appellants/Owners/Defendants would not be in a position to sell their property at the market rate while the suit is pending. Therefore, the Order directing the Plaintiffs to deposit the balance sale consideration was essential and was, therefore, rightly passed. We are unable to concur with the reasoning in the impugned Order that the deposited amount should be returned because the Defendants are not agreeing for the sale to go through. The corresponding consideration is that the Plaintiffs should also not be permitted to utilize the sale consideration for deriving profit, which the Defendants are foreclosed from earning. *Prima facie*, it appears to us to be

unfair to compel a party to sell their property at an achronistically low price. The learned Single Judge had properly exercised discretion at the initial stage, and the successor Judge had not been shown sufficient reason to change the situation.

41. In these circumstances, the Appeal is allowed. The impugned Order dated 17.2.2009 is set aside and the previous Order passed on 25.5.2006 is restored. Pending Applications stand disposed of.

42. Parties to bear their respective costs.

(VIKRAMAJIT SEN)
JUDGE

November 27, 2009
tp

(V.K. JAIN)
JUDGE