

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered on 16.11.2012

+ CS(OS) 150/2012

SHIJU JACOB VARGHESE & ANR.

.... Plaintiffs

Through Mr. Anil Airi with Mr. Naveen Kumar

Versus

TOWER VISION LTD. & ORS.

.... Defendants

Through Mr. Rajiv Nayyar, Senior Adv. For

Defendant nos. 1,2,4,5,6 and Mr. Parag P.

Tripathi , Senior Adv. For Defendant no. 3

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

IA No. 4784/2012 (Order 39 Rule 4 CPC), IA No. 4785/2012 (under Sections 16 to 19 CPC) and IA No. 4786/2012 (Order 7 Rule 11 CPC) in CS(OS) 150/2012

1. This order shall dispose of IA No. 4784/2012 under Order 39 Rule 4, CPC, IA No. 4785/2012 under Sections 16 to 19, CPC and IA No. 4786/2012 under Order 7 Rule 11, CPC filed by the defendants.

2. Before I proceed to decide these applications, a brief narration of the facts of the case as set out by the plaintiffs and germane to the controversy are that the plaintiffs have filed the present suit for perpetual and mandatory injunction, declaration and rendition of accounts against the defendants. The

plaintiff no.1 is stated to be a Non Resident Indian based in United Kingdom having expertise in providing consultancy services relating to business setup in the telecom sector all over the world, more particularly in India. The plaintiff no.2 is a Limited Liability Partnership incorporated under the laws of the United Kingdom wherein the plaintiff no.1 along with one Triassic Investments Ltd. are the members. The defendant no.1, Tower Vision Limited, TVL, is a company incorporated in Israel. The case of the plaintiffs is that the promoters of defendant no.1 company had approached the plaintiffs sometime in the year 2004-05 for setting up the Cellular Tower Business in India and it was promised by the defendant no.1 that in return the plaintiffs would be given sizeable share in the business of defendant no.1 company apart from compensating the plaintiffs for their expert services. Such a promise made by the defendant no.1 was duly recorded in the First Consultancy Agreement dated 1.8.2005, wherein it was specifically agreed that apart from the compensation for its services, the plaintiff no.2 shall also have an irrevocable right to purchase 7% equity shares of the defendant no.1 company at any time for a nominal sum. With the execution of the said Consultancy Agreement, the plaintiff no.1 started providing all inputs, services and expertise required for setting up the Tower Management business in India. After the platform for the launch of the said business was ready, the defendant no.1 incorporated a company under the name and style of Tower Vision India Pvt. Ltd., i.e. TVIL, the defendant no.3 herein on 27.1.2006. The defendant no.1 then formed a Limited Partnership in Israel, TVLP, defendant no.2 herein, by way of a Limited Partnership Agreement dated 26.3.2006 for inter alia making worldwide investments in the field of Telecom Tower Management. Under the

said Limited Partnership Agreement, the defendant no.1 company was made the General Partner of the partnership and in terms of Clause 9 of the same, it was vested with absolute, unlimited and unfettered rights and control over the entire management/ business of the partnership along with the powers to execute and enter into any binding agreements on behalf of the partnership including the right to encumber the business of the partnership. In pursuance of the said agreement, the plaintiffs in a very short span of time were able to secure huge tower erection and management contracts for the defendant no.3 company with various telecom companies including award of a contract for US\$ 65,000,000 (approx. Rs.275 crores) for providing 1000 nos. of cellular tower sites for M/s. Spice Communications Ltd. Under Clause 15 of the said Limited Partnership Agreement, the plaintiffs' 7% right in the said business as per the First Consultant Agreement, was secured by creating a trust in the name of a trustee i.e. defendant no.6 herein, for holding 7% of the partnership's capital in trust for the benefit of the plaintiffs. Then sometime in April/ May 2006, the defendant no. 2 incorporated another company in Mauritius i.e. M/s. Tower Vision Mauritius Limited, TVML, defendant no.4 herein and consequently 99.99% shares of the Indian company i.e. defendant no.3 were vested in the said TVML and 1 share (0.01% share) of the said Company was vested in another group company i.e. M/s. Tower Vision Jersey Ltd., TVJL, defendant no. 5 herein. As per the plaintiffs, in a way the entire share capital and control of the defendant no.3, the Indian company rested with the defendant no.1 which was the General Partner of the defendant no.2 partnership. Thereafter, with a view to confirm an absolute and unconditional 7% right/interest in the business of the Limited Partnership in favour of the

plaintiffs, a separate Share Entitlement Document dated 17.10.2006 was executed by defendant no. 2 partnership. In the said document, the defendant no.2 also confirmed that in case of any structural changes resulting in the partners holding their interest in the Tower Management business through any other entity, the plaintiffs would be entitled to receive their absolute and unconditional 7% rights in any such entity which would be established by the partners of the partnership. It was also clarified in the said document that the Tower Management business of the partners as on that date was being carried out 'via' Tower Vision Mauritius Limited. It is the case of the plaintiffs that on or about 21.11.2006, the plaintiff no.1 made a request to defendant nos. 1 and 2 to transfer the said 7% rights in favour of M/s Triassic Investments Ltd. based on the said Share Entitlement Document granting an absolute and unconditional 7% rights to the plaintiffs in the partnership business. As per the plaintiffs, they were informed by the defendants that they were processing the transfer of the said rights to the nominated entity but factually no such transfer of the 7% rights of the plaintiffs was affected by the defendants in favour of the said nominated entity. The plaintiffs felt disturbed by the apathy and indifference shown by the defendant Nos. 1 and 2 to the request made by them and with a view to seek enforcement of the same, the plaintiffs approached the District Court in Tel Aviv, Israel vide Civil File No. 2192/2008 and the said proceedings are still pending consideration before the said Court. In the said proceedings, the defendants raised objections to the claim of the plaintiffs on technical grounds inter alia that the business of the partnership is outside Israel and therefore the Israel Court lacked territorial jurisdiction to entertain the claim of the plaintiffs. In January, 2011, the plaintiffs sought

interim injunction against the defendants to restrain them from selling/alienating the partnership business in any of the countries like Mauritius, Jersey or India and the said application of the plaintiffs was again opposed by the defendants on technical grounds. As per the plaintiffs, the plea of the defendants was accepted by the Appellate Court and it was observed that such an order cannot be passed by the Israel Court because the foreign companies were not made parties to the said suit. As per the plaintiffs, in opposition to the said stay application, one Mr. Moshe Shushan, a partner in the defendant no.2 partnership and a shareholder-Director of the defendant nos. 1,3, 4 and 5 companies filed an affidavit dated 27.1.2011, taking a stand therein that the defendants had reduced/diluted the partnership holdings in the Tower Management business of the defendant no.3 to a mere 32% as against their holding of 100% of the business at the initial stage when the plaintiffs were made beneficiary of 7% interest/rights. As per the plaintiffs, the stand taken by the said Director was in gross breach and violation of the Share Entitlement Document dated 17.10.2006, wherein 7% rights of the plaintiffs in the partnership business were preserved in a trust. It is the case of the plaintiffs that on account of the said discovery of fact which came to the knowledge of the plaintiffs through the affidavit dated 27.1.2011 filed by Mr. Moshe Shushan, wherein it was disclosed that the partnership's sole asset was the Tower Management business of defendant no.3 in India, the plaintiffs were left with no other option but to approach this court to seek declaration to the effect that the plaintiffs are entitled to hold 7% of the entire business of defendant no.2 in India or entitled to any benefit arising out of their said share in the business and assets of defendant no.3. It is also the case of the

plaintiffs that the defendants are already engaged into major negotiations with various multinational banks and financial institutions for transferring and selling their entire assets and if they succeed in such designs, then the rights of the plaintiffs would be seriously affected and jeopardized. It is also the case of the plaintiffs that the Trustee, i.e, defendant no.6 herein and the other partners of the defendant no.2 partnership owe a fiduciary duty towards the plaintiffs for safeguarding their 7% interest/rights in the business of defendant no.2 partnership, but the defendants clearly seem to be determined in breaching the said fiduciary obligation towards the plaintiffs to the detriment of their interest. Based on these averments, the plaintiffs have approached this court praying for the following directions:-

- a. Pass a decree of perpetual injunction restraining the defendants from further diluting in any manner the shareholding of the Tower Vision Limited Partnership, the defendant no.2 herein, in the business and assets of the defendant no.3 Company to the detriment of the plaintiffs;
- b. Pass a decree of perpetual injunction in favour of the plaintiffs and against the defendants jointly and/or severally restraining them from selling, alienating, transferring or in any manner creating any third party rights in respect of their business, shares, assets and stakes in the Defendant no.3 Company- Tower Vision India Private Limited, in any manner prejudicial to 7% right/share of the plaintiffs in respect of the entire

business of the defendant no.3 Company or its Tower Management business;

- c. Pass a decree of mandatory injunction against the defendant no.6 directing him to hand over the 7% rights of the plaintiffs in the partnership business of the defendant no.2, which he is holding in trust for the benefit of the plaintiffs in accordance with the Tower Vision Limited Partnership Agreement dated 26th March, 2006;
- d. Pass a decree in favour of plaintiffs declaring the plaintiffs as the shareholder of 7% of the equity and the business of the defendant no.3 in India and that the plaintiffs are entitled to all benefits arising of such right/share in the business of the defendant no.3;
- e. Direct the defendant No.3 to render complete accounts to the plaintiffs in respect of its incorporation, its past and present assets and resources regarding the Tower Management business in India, its share-holding and management since inception, any dilution of shareholding or business in favour of third parties, and of any future transaction relating to sale, transfer, alienation, encumbrance, etc. of the business, shares, assets and/or stakes of the defendant no.3, etc;

- f. Award pendent lite and future interest @ 12% per annum on the amount that may be found due and payable to the plaintiffs from the defendants;
- g. Award cost of the suit in favour of the plaintiffs and against the defendants;
- h. Pass such other further orders in favour of the plaintiffs and against the defendants that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

3. Along with the present suit, the plaintiffs filed an application under Order 39 Rule 1 and 2 read with Section 151 of CPC, for the grant of interim stay. Vide ex-parte order dated 20.1.2012, the defendant nos. 2,3 and 4 were ordered not to prejudicially affect 7% share of the plaintiffs in any manner and were restrained from diluting any of their share holdings to that extent in favour of any third party.

4. Aggrieved by the said order dated 20.1.2012, the defendants filed application No. 4784/2012 under Order 39 Rule 4, CPC for vacation of stay and IA No. 4786/2012 under Order 7 Rule 11, CPC for rejection of plaint. The defendants also moved an application, i.e. IA No. 4785/2012, under Sections 16 to 19 of CPC for challenging the jurisdiction of this court. Pending disposal of these applications, the defendant No. 3 filed two separate appeals vide FAO (OS) 242/12 & FAO (OS) 243/2012 challenging the ex-parte order dated 20.1.2012 and subsequent interim orders passed by this court on various dates and vide order dated 30.5.12, the Hon'ble Division Bench of this court declined

to entertain the said appeals while giving liberty to the defendants to seek early hearing and disposal of the above applications. The defendants were also given liberty to seek modification and clarification of the said ex-parte order dated 20.1.2012 passed by this court.

5. Before addressing arguments on the said applications, counsel for the defendants gave background of the case from their point of view.

6. As per the defendants, the defendant No.1 i.e. Tower Vision Limited, TVL is a company incorporated in Israel and the same does not carry any business in India. Defendant No. 2 i.e. Tower Vision Limited Partnership, TVLP is a partnership constituted in Israel and this company also does not carry any business in India. Defendant No.3 is Tower Vision India Pvt. Ltd., TVIL, is a company duly incorporated in India and the same carries on business in the field of Telecom sector in India. Defendant No.4 is Tower Vision Mauritius Ltd., TVML and is a company incorporated in Mauritius and the same does not carry any business in India although it holds 99.99% shares of defendant No.3 Company. Defendant No.5 i.e. Tower Vision Jersey Limited, TVJL is a company incorporated in Jersey and the same also does not carry any business in India and holds less than 0.01% of shares of defendant No.3 Company. Defendant No.6, one Mr. Oron Gitzleter, an Israeli individual, is an advocate and the trustee holding 7% shares in the shareholding of defendant No.2 pursuant to the partnership agreement that incorporated defendant No.2. The said trust was created in Israel under the laws of Israel and any dispute relating to trusteeship and the rights of the parties under the trust are governed by the laws of Israel. As per the defendants, the present claim pertaining to the 7%

shareholding concerns the defendant No.2, the limited partnership company, which does not hold any shares in defendant No.3 company. According to the defendants, plaintiff no.1 and defendant No.1 had entered into an agreement in terms of which plaintiff No.1 was to provide certain consultancy services to defendant No.1 and in terms of clause 5 of the same, in return defendant No.1 granted plaintiff No.1 a right to purchase shares equivalent to 7% of the issued share capital of defendant No.1 as on the date of execution of the First Consultancy Agreement. It is also the case of the defendants that such an option was exercisable upon occurrence of certain terms and conditions which never got materialized. It is also the case of the defendants that on 26.3.2006, defendant No.1 as General Partner and certain other individuals as Limited partners including defendant No.6, the trustee, entered into a Limited Partnership Agreement constituting defendant No.2 herein and in terms of clause 15 of the Partnership Agreement, defendant No.6 was to hold 13% of the partnership capital for the benefit of one Mr. Yuval Sipper and the plaintiff No.1. It is also the case of defendants that on 17.10.2006, the First Consultant Agreement was terminated and on the very same day Second Consultant Agreement got executed between the plaintiffs and defendant No.4 and under this agreement the plaintiffs were to provide certain consultancy services to the defendant No.4. It is also the case of defendants that the plaintiffs' alleged claim in the present suit rests on the Share Entitlement Document under which the plaintiffs were entitled to 7% shares in the defendant No.2 partnership. It is also the case of defendants that the said Share Entitlement Document was not a binding document as the same was being further negotiated between the parties. The defendants have also taken a stand that even otherwise if the said document

is taken to have a binding effect then the same can only be between plaintiff No.1 and defendant No.2 and the same cannot even remotely bind or pertain to the shares of any other entities including defendant No.5, defendant No.4 and defendant No.3 which are all distinct entities operating in countries of their origin. It is also the case of defendants that in November 2006 the said Share Entitlement Document was further negotiated as plaintiffs No.1 had suggested certain changes but the same were not agreed upon by the other parties. It is also the case of the defendants that the said second agreement was terminated by letter dated 22.12.2006 sent by defendant No.4 to plaintiffs No.1 after the plaintiffs had demanded transfer of 7% shares in favour of their nominee vide their letter dated 21.11.2006. It is also the case of the defendants that if the defendants had rejected the claim of the plaintiffs for the transfer of 7% shares in the partnership in favour of their nominee in the month of April 2007, then the cause of action accrued in favour of the plaintiffs in the month of April 2007. It is also the case of the defendants that legal notice dated 16.9.2008 was issued by the plaintiffs and the same was addressed by them to defendant nos. 1,2 & 3 raising their claim for the transfer of 7% rights/shares in defendant No.2 Tower Management business in favour of their nominee and based on the said cause of action the plaintiffs had filed a civil suit No.2192/2008 before the District Court at Tel Aviv, Israel which is equivalent to the High Court in India for the enforcement of their alleged rights for 7% shareholding in defendant No.2 partnership firm. It is also the case of the defendants that the claim made in the present suit is identical to the claim made by the plaintiffs before the Israel court before which defendant nos. 3, 4 & 5 were not made parties to the suit. It is also the case of the defendants that in January, 2011 the plaintiffs had moved

the Israel court to seek an order of restrain against defendant nos. 1, 2, 6 and Mr. Rani Benyamini from transferring any shares or rights in the tower management business in India or from changing the state of assets of the defendants in any manner. It is also the case of the defendants that vide order dated 20.6.2011, the District court of Tel Aviv, Israel had granted interim relief in favour of the plaintiffs by directing the defendants to deposit in trust 7% of any consideration received by any foreign company from any transaction executed by the defendants. It is further the case of the defendants that the said interim order was challenged by the defendants who are parties in the Israel case and by order dated 24.10.2011, the Supreme Court of Israel allowed the appeal filed by the defendants and vacated the interim order. It is also the case of the defendants that the plaintiffs having failed to obtain any favourable relief from the Supreme Court of Israel have filed the present suit to re-agitate the same issues and claims. The counsel submitted that even the interim reliefs sought by the plaintiffs in the present suit are substantially the same as sought by them before the Israel Court.

7. In the backdrop of the above facts, the defendants have not only impinged upon the ex-parte order passed by this court vide order dated 20.1.2012 but also challenged the very maintainability of the present suit itself on various grounds which can be broadly formalized as under :-

- 1) Suppression of facts and approaching this court with unclean hands.
- 2) Lack of territorial jurisdiction of this court
- 3) Suit barred by limitation
- 4) Suit not maintainable based on the principle of comity of courts

5) Forum shopping

6) No cause of action in favour of the plaintiffs to file the present suit before this court.

Suppression of facts and approaching this court with unclean hands.

8. Mr. Parag Tripathi, learned Sr. Advocate appearing for the defendant No.3 and Mr. Rajiv Nayyar, learned Sr. Advocate appearing for the defendant Nos.1,2,4,5 & 6 strenuously contended that the plaintiffs have not only suppressed very vital facts from this court but in fact by such suppressions they have played a serious fraud upon this court. The learned counsels contended that the plaintiffs have deliberately not placed on record copy of the order of the Hon'ble Supreme Court of Israel and had such order been placed on record, this court perhaps would not have granted an ex-parte interim order in favour of the plaintiffs. Counsel further submitted that the plaintiffs in paras 15 & 16 of the plaint have also misled this court by stating that the defendants in the suit before the Israel Court had objected to the plaintiffs claim merely on the technical ground of lack of territorial jurisdiction of Israel courts, while in fact the defendants had raised several objections on the merits of the claim of the plaintiffs including challenge to the validity and enforceability of the Share Entitlement Document. Counsel also submitted that the present suit was filed by the plaintiffs on 17.1.2012, while the judgment by the Supreme Court of Israel was passed on 24.10.2011 and therefore, there was enough time for the plaintiffs to have placed on record the copy of the said judgment with the present suit. Counsel also submitted that plaintiffs herein had filed an application before the

District Court of Tel Aviv, Israel for the release of the guarantee, which application of the plaintiffs was received by the District Court on 26.10.2011 and along with the said application, the plaintiffs had also attached the said order of the Supreme Court of Israel dated 24.10.2011, but with the oblique motives and malafide intentions, the plaintiffs have taken a stand before this Court that the copy of the order of the Supreme Court of Israel was not available with them till the filing of the present suit on 17th January, 2012 and even thereafter till March 2012. Counsel thus submitted that this is a clear case of suppression by the plaintiffs by deliberately not placing on record the copy of the order of the Supreme Court of Israel. Counsel further argued that the plaintiffs have also suppressed the fact that the Share Entitlement Document dated 17.10.06 is not a binding document as even after the execution of the said document, the parties were still negotiating and such negotiations never attained finality so as to give any conclusiveness to the said Share Entitlement Document. Counsel also argued that the plaintiffs have also suppressed the fact that defendant nos. 2 & 3 had filed a claim against the plaintiffs before ICC Arbitration court which was later on withdrawn upon discovery of the bankruptcy status of the plaintiff no. 1 and then similar claims were presented before the Israel court as a counter claim. Counsel further argued that the plaintiffs have also suppressed the fact that the said Share Entitlement Document was signed only by one Mr.Rani Binyamini as against the requirement of it being signed by atleast two Directors and therefore, it could not carry any binding effect. Counsel also argued that the plaintiffs have also suppressed from this court another vital fact of the 7% shareholding, to which the plaintiffs lay their claim, being held in trust with defendant No.6, the trustee

who has even undertaken in the Court of Israel that he will abide by the decision of the Israel court and this security of the interest of the plaintiffs was also taken note of by the Hon'ble Supreme Court of Israel in Para 5 of its order. Counsel also argued that the plaintiffs have also suppressed the factum of an e-mail dated 5.4.2007 sent by defendant no.6 to the plaintiffs No.1 taking a categorical stand that they shall be governed by the order of the Israel court with regard to the said 7% shares.

9. In support of their arguments on the aspect of concealment of material facts by the plaintiffs, counsel for the defendants placed reliance on the following judgments:-

- 1. *SP Chengalvaraya Naidu v. Jagganath* AIR 1994 SC 853 (Para 7)**
- 2. *ANZ Grindlays Bank v. Commissioner*, 1995 34 DRJ 492 (Para 86)**
- 3. *Wheels India v. Nirmal Singh*, 2009 41 PTC 529 (Delhi) (Para 16, 17, 18, 19)**
- 4. *Rohit Dhawan v. G K Malhotra & Anr.* AIR 2002 Delhi 15 (Para 15)**
- 5. *Charanjit Thakral & Anr. V. Thukral & Anr.* Decided on 29.7.2010 by DHC (Para 17, 18)**
- 6. *Polymers Papers Ltd. v. Mr. Gurmit Singh & Ors*, AIR 2002 Delhi 530 (Para 17)**

Lack of jurisdiction of this court

10. Counsel for defendants argued that this Hon'ble Court has no territorial jurisdiction to entertain or try the present suit as the suit filed by the plaintiffs is

neither covered under Section 16 of the CPC nor under Section 19 of the CPC or even under Clause (a), (b) or (c) of Section 20 of CPC. The contention raised by counsel for the defendant was that the plaintiffs alleged claim is based on Partnership Agreement and Share Entitlement Document and both the said documents were executed within the jurisdiction of Israel courts and the parties who had executed the said documents are also located in the jurisdiction of Israel Court. Counsel also submitted that it is an admitted position between the parties that defendant No.2 does not hold any shares in the capital of defendant No.3 as 99.99% of the capital of defendant No.3 is held by defendant No.4 and 0.01% of the capital of defendant No.3 is held by defendant No.5. Counsel also argued that the alleged entitlement of the plaintiffs is only to have a share in the defendant No.2 partnership and such entitlement of the plaintiffs has no nexus whatsoever with the share capital of defendant No.3 and thus defendant No.3 is totally out of picture and its location in Delhi will not confer jurisdiction on this Hon'ble Court. Counsel also argued that in terms of clause 15 of the partnership agreement, 7% rights of the plaintiffs were protected by creating a trust in name of the trustee i.e. defendant No.6 herein, who too is not a resident of India and is thus beyond the territorial jurisdiction of this court. Counsel also argued that defendant nos. 4 & 5 are also beyond the jurisdiction of this court and it is these defendants only who are having share capital in the defendant No.3 company. Counsel also argued that there is no privity of contract between the plaintiffs and defendant No.3 and therefore also the plaintiffs cannot invoke territorial jurisdiction of this court.

Suit barred by Limitation

11. Arguing on the aspect of the limitation, counsel for the defendants contended that the alleged entitlement of the plaintiffs is based on the Limited Partnership Agreement dated 26.3.2006 and the Share Entitlement Document dated 17.10.2006 and in terms of Para 14 of the plaint, the plaintiff No.1 for the first time made a request to defendants Nos. 1 and 2 on or about 21.10.2006 to transfer their 7% rights in favour of one M/s Triassic Investments Ltd. and, therefore, the cause of action to file a suit against the defendants arose in favour of the plaintiffs in November, 2006 and the present suit filed by the plaintiffs much beyond the expiry of 3 years period from the date 21.10.2006 is clearly barred by limitation. Counsel also argued that the plaintiffs have deliberately suppressed from this Court that their alleged entitlement was rejected by the defendants in April, 2007 and thereafter the plaintiffs by way of a legal notice dated 16.9.2008 insisted on their purported entitlement and then ultimately initiated legal proceedings in November, 2008 before the Israel Court. Laying emphasis on these dates, counsel for the defendants argued that at best the period of limitation can be reckoned from the date when the claim of the plaintiffs was rejected by the defendants in the month of April, 2007 and reckoning the period of limitation of 3 years from this period, the suit filed by the plaintiffs in January, 2012 is clearly barred by limitation. Counsel also submitted that in the facts of the present case, the issue of limitation is a pure question of law and not a mixed question of law and fact as this Court has to take into consideration the dates admitted in the pleadings of the parties to consider the question of limitation. Counsel also argued that the plaintiffs were

very much aware of the fact of the dilution of the shareholdings in defendant no. 3 company and the same is evident from the fact that the copy of the legal notice dated 16.9.2008 issued by the plaintiffs' lawyers in Israel which was addressed to defendant nos. 1, 2, and 3 was also sent to TVML, Defendant no. 4 company. Counsel thus submitted that it is absolutely false on the part of the plaintiffs to allege that such dilution of share capital came to their knowledge recently before filing of the present suit. Based on the above submissions, counsel for the defendants submitted that the present suit filed by the plaintiffs is clearly barred by limitation.

Comity of courts

12. Much emphasis was laid by both the counsels representing the defendants on the well-established principle of "Comity of Courts" for non-maintainability of the present suit. Argument of the counsels for the defendants was that the principle of "Comity of Courts" demands that this Hon'ble Court ought not to interfere with the proceedings pending before the Israel Court based on the same cause of action and seeking same reliefs. Counsels argued that it is an admitted position between the parties that the plaintiffs had opted to invoke the jurisdiction of the District Court in Tel Aviv, Jaffa, Israel, which is equivalent to the High Court of India, in the year 2008, although interim application was moved by the plaintiffs much later in January, 2011 seeking the same interim relief as is sought by the plaintiffs in the stay application moved before this Court. Counsel further argued that the present suit is based on the two documents, namely, Limited Partnership Agreement dated 26.3. 2006 and Share Entitlement Document dated 17.10.2006, both of which are already under

consideration in the said Civil Suit filed by the plaintiffs before the District Court of Israel and filing of the present suit by the plaintiffs based on the same cause of action is clearly against the principle of Comity of Courts, the principle that has been well recognized in various judgments of the courts of India. Counsel also argued that the plaintiffs approached this Court when they could not succeed before the Supreme Court of Israel in the appeal preferred by the defendants wherein the Supreme Court of Israel vide its order dated 24.10.2011 vacated the injunction order granted by the learned District Court of Tel Aviv, Israel. Counsel argued that the plaintiffs had no grievance so long the order of the District Court of Israel was in their favour and it was only when the order of the District Court of Israel was vacated by the Supreme Court of Israel, that the plaintiffs, with a view to overreach the order passed by the Supreme Court of Israel, filed the present suit in utter disregard to the said principle of Comity of Courts. In support of his argument, Counsel placed reliance on the cases *Abdul Kareem v. Comm. and Secy. Govt. and others*, MANU/KE/0402/1994 and *Shree Precoated Steels Ltd. v. Macsteel International Far East Ltd. and Anr.*, 2008 (2) BomCR 68.

Forum Shopping

13. Counsel for the defendants also contended that this Court should decline jurisdiction even if it has the jurisdiction as the present suit filed by the plaintiffs is a gross abuse of the process of the Court to over reach the order passed by the highest Court of competent jurisdiction of another Sovereign State. Counsel further argued that cause of action for both the suits is the same and issues raised by the plaintiffs in both the suits are exactly the same and, therefore, the

adjudication of the same cannot take place before the competent Courts of different countries. The counsel submitted that the present case is in fact a classic case of re-litigation before this Court while the previous litigation between the parties is pending before another competent Court of jurisdiction. The counsel also invited the attention of this Court to para 17 of the plaint wherein the plaintiffs themselves have taken a stand that the present suit has been filed by them as an abundant precaution and such an averment on the part of the plaintiffs by itself is sufficient to show the ulterior designs of the plaintiffs in filing the present suit. The contention raised by the counsel for the defendants was that there cannot be any suit filed by any party as an abundant precaution. Counsel also argued that if the plaintiffs are allowed to litigate the present suit here in India then later another suit can be filed by them in courts of Mauritius and thereafter, if they fail to get any favourable order there, then in the Courts of Jersey based on the shareholdings of defendant Nos. 4 and 5 in defendant No.3 Company. In support of their arguments counsel for the defendants placed reliance on the judgment of the Apex Court in *K.K. Modi vs. K.N. Modi & Ors. AIR 1998 SC 1297*. Based on these arguments counsel submitted that the present case is a clear case of forum shopping to over reach the order passed by the highest Court of the country of Israel.

No cause of action

14. Mr. Rajiv Nayyar, learned Senior Counsel appearing for defendant Nos. 1, 2, 4, 5 and 6 laid much stress on his argument that there has been a complete adjudication of the rights between the parties before the Israel court and thus there can be no cause of action for the plaintiffs to approach this court for

adjudication of the same rights through the present suit. Counsel also submitted that on a bare perusal of the order of the District Court of Israel as well as the order passed by the Supreme Court of Israel, it is manifest that both the courts have examined the issues on merits and in fact the District Court of Israel had given a sweeping injunction against defendant No.2 after passing a detailed judgment. Counsel thus submitted that the plaintiffs cannot be allowed to ride in two boats at the same time by filing two separate suits, one after the other before two courts of different countries seeking same reliefs and that too based on the same cause of action. Counsel also submitted that the plaintiffs had been non suited by the Supreme Court of Israel on merits and not on technical grounds and having failed to succeed before the Supreme Court of Israel, the plaintiffs cannot be allowed to have a second inning before this court after trying their luck in the first suit before the Israel court. During the course of arguments, Mr. Rajiv Nayyar, had also drawn attention of this court to the prayer Para of the application filed by the plaintiffs under Order 39 Rule 1 & 2 CPC for comparing the same with the prayer para in the interim application filed by them before the District Court of Israel to drive home his contention that the prayer Para 2 of the interim application of the Israel court is identical to the prayer Para (b) of the present interim application and similarly prayer Para 3 of the interim application filed before the Israel court is identical to the prayer Para (c) of the present interim application. Counsel further submitted that the two fold prayer of the plaintiffs before both the courts is firstly with regard to injunction against the defendants to restrain them from diluting shareholding of defendant No.2 in defendant No.3 company in any manner and secondly, for preserving the 7% shares of the plaintiffs in the Tower Management Business. Counsel also

argued that even if it is assumed that the plaintiffs have any claim as such, then the claim can only be made against the trustee, i.e., defendant No.6 but clearly the plaintiffs have no claim or cause of action against defendant nos. 3 to 5 who are the distinct business entities with individual corporate and juristic personalities. Counsel also submitted that so far the defendant No.6 is concerned, claim against him can only be made within the jurisdiction of Israel courts and which infact has been made by the plaintiffs much prior to the filing of the present suit. Based on the above submissions, counsel for the defendants contended that the plaintiffs have no cause of action to invoke the jurisdiction of this court and the suit filed by the plaintiffs merit rejection on this sole ground.

15. Mr. Parag Tripathi, Senior Advocate for the defendant no.3 also submitted that ex-parte order granted by this court is in the nature of a “Mareva Injunction” which is a English law concept and akin to Order 38 Rule 5 CPC and none of the conditions laid down in the said provision, even on taking a prima-facie view of the matter, are satisfied for the grant of an order of injunction in favour of the plaintiffs. In support of this argument, counsel for the defendants placed reliance on following judgments:

- 1. Uppal Eng. Co. (P) Ltd. v. CIMMCO Birla Ltd., 2005 (2) Arb. LR 404 (Para 12, 13)***
- 2. Iridium India Telecom v. Motorola 2003 (6) BCR 511 (para 49, 50)***
- 3. Raman Tech. & Process Engg. Co. v. Solanki Traders, (2008) 2 SCC 302 (Para 4, 5 & 6)***
- 4. Deepali Designs & Exhibits Pvt. Ltd. v. PICO Deepali & Ors.***

2011 (123) DRJ 705 (Para 62, 67, 70)

5. Indian Oil Corporation Ltd. v. Iranian Offshore Engineering & Construction Co., Delhi HC, 15 Sept, 2009 (para 11)

6. Rita Approach Group Ltd., v Rosoboronexport AIR 2007 Del. 145 (Para 6)

16. Counsel appearing for defendants further argued that the plaintiffs do not have a prima-facie case to succeed in the matter, more particularly after passing of the judgment by the Supreme Court of Israel securing 7% share-holding of the plaintiffs in trust held by the trustee, the defendant No.6 herein, pending final decision before the District Court of Israel. The contention raised by counsel for the defendants is that there is no threat or danger to the said 7% shareholding of the plaintiffs in terms of their Share Entitlement Document. Counsel also argued that except defendant No. 1, 2 & 6 who are already impleaded as defendants before the Israel court, the other defendants are strangers to the alleged share entitlement of the plaintiffs and no right whatsoever have accrued or even could have accrued in favour of the plaintiffs and against the other defendants under the Share Entitlement Document and therefore also the plaintiffs have no prima-facie case as against defendant nos. 3, 4 & 5.

17. Combating the aforesaid submissions, Mr. Anil Airi, learned counsel appearing for the plaintiffs strenuously argued the case of the plaintiffs justifying the grant of ex-parte ad interim injunction by this court in their favour as well as the maintainability of the suit filed by the plaintiffs before this court. The counsel contended that the facts and the documents placed on record prima facie prove the fact that the plaintiffs have 7% right/share in the

business of the defendant no.3. Counsel submitted that the defendants are group of corporate entities created by a common set of promoters who, after the Indian Government had allowed 100% foreign direct investment in the Telecom Infrastructure Sector, had set up the tower management business in India by incorporating the defendant no.3. Counsel also argued that these independent corporate entities i.e. defendant nos. 1,2, 4 and 5 herein are paper entities which do not have any independent business other than Tower Management Business in India being run through the defendant no.3 company. Counsel further submitted that prior to the incorporation of defendant no.3, only the defendant no.1 (TVL) was in existence and they had engaged the plaintiffs for setting up the business in India in terms of the First Consultant Agreement dated 1.8.2005, wherein the plaintiffs were granted irrevocable stock option i.e. right to purchase 7% of the equity shares of TVL, defendant no.1 herein. Counsel also argued that the plaintiffs had duly performed their obligations in terms of the said Consultant Agreement and it is through the efforts made by the plaintiffs that the defendant no. 1 was able to set up its business in India. Counsel further submitted that the defendant no.1 had incorporated defendant no.3 company in India in January, 2006 and in the Indian company there were only two shareholders, i.e. (i) defendant no. 1, TVL with 99.99% shares and (ii) Elgadcom Group Ltd., holding one share. Counsel further submitted that subsequently, the promoters of the defendant no.1 in a unilateral decision decided to carry out the said tower management business in India through a limited partnership i.e. defendant no.2 herein, which was incorporated on 26.3.2006. Counsel also submitted that at this stage, it was also unilaterally decided by these defendants that the plaintiffs'

7% rights in the said business will be held by a self-created trust, in the name of the trustee, the defendant no.6 herein. Counsel further submitted that in April/May 2006, these defendants incorporated defendant no.4 company in Mauritius for routing the funds through this company in India and after incorporation of this entity, the defendants sought an amendment in the FIPB Approval which was earlier obtained in the name of the defendant no.1 and through this amendment it was informed that 99.99% shareholding of Defendant No. 1 in Defendant no. 3 company stood transferred into defendant no.4 i.e. TVML. Counsel further submitted that with the said changes a new Agreement i.e. Share Entitlement Document dated 17.10.2006 was executed between the parties and on the same date Termination Agreement terminating the First Consultant Agreement dated 1.8.2005 was also executed. The contention of the counsel for the plaintiffs was that in the said Share Entitlement Document, an absolute and unconditional 7% right of the plaintiffs was secured in the partnership or in any other entity established by the partnership to carry out the said Tower Management Business. Counsel further submitted that it was also clarified that as on that date, the Tower Management Business in India was being carried out only through Tower Vision Mauritius Ltd., defendant no.4 herein. Counsel thus submitted that a closer evaluation of the facts would clearly reveal that the creation of these entities was merely a corporate jugglery and a device adopted by the defendants primarily for setting up Tower Management business in India through the services of the plaintiffs. Counsel further submitted that the source of umbilical cord of all these companies is the defendant no.1 and therefore these defendants cannot escape from their liability so as to deprive

the plaintiffs of their legitimate right of having 7% share in the business of the defendant no.3 based on the admitted documents, mainly the First Consultant Agreement dated 1.8.2005 and the later document executed on 17.10.2006. Counsel thus submitted that through this case the plaintiffs seek to unravel the true picture of defendant no. 1 which is trying to hide under the facade of multiple entities created so as to defeat the rights of the plaintiffs.

18. Counsel further submitted that it is a settled proposition of law that intention of the parties to the contract has to be gathered from the documents executed between the parties from time to time and also through various e-mails exchanged between them and the defendants cannot be allowed to set up a defense contrary to the written documents which are primary evidence under Section 90/92 of the Evidence Act. Counsel further argued that defendants in order to non-suit the plaintiffs are withholding the best evidence in their power and possession i.e. the e-mails exchanged between the parties leading to the execution of the documents on 17.10.2006. Counsel also argued that plaintiffs were never involved in the alleged corporate re-structuring and the same could never affect the entitlement of the plaintiffs of their 7% rights in the Tower Management Business of defendant nos. 1 & 2 in India. Counsel further argued that the plaintiffs never consented to any amendment in the Share Entitlement Document and this is evident from the fact that no reciprocal advantage has been pleaded by the defendants or shown due to which the plaintiffs would have given up their said right. Counsel also argued that Limited Partnership Agreement, being a self-serving document, was unilaterally created by defendant nos. 1 & 2 to perpetuate fraud on the plaintiffs and this is evident

from the fact that stock option was made in favour of plaintiffs No.2 while the so-called trust created under the said agreement was for the benefit of plaintiff No.1. Counsel also submitted that at no point of time the plaintiffs admitted the creation of the said trust or the right of the alleged trustee to hold the shares/rights on behalf of the plaintiffs.

19. Mr.Anil Airi then proceeded to refute various preliminary objections raised by the counsel for the defendants to attack the maintainability of the present suit.

Suppression of facts and approaching this court with unclean hands

20. Counsel for the plaintiffs with all vehemence disputed the contentions raised by counsel for the defendants that the plaintiffs had suppressed the judgment/order dated 24.10.2011 passed by the Supreme Court of Israel from this court. Explaining the bonafide conduct of the plaintiffs, counsel submitted that plaintiffs in the plaint have specifically disclosed about the pendency of the case filed by the plaintiffs before the Israel court as well as the judgment passed by the Hon'ble Supreme Court of Israel. Counsel further submitted that copy of the order passed by Hon'ble Supreme Court of Israel could not be filed by the plaintiffs as plaintiffs did not have a translated copy of the judgment dated 24.10.2011 at the time of filing the present suit and the same was immediately filed by the plaintiffs on 9.4.2012 after the plaintiffs had received the certified apostiled copy of the said order. Counsel also submitted that there was no reason for the plaintiffs to have suppressed the said order of the Supreme Court from this court as filing of the separate suit by the plaintiffs before the Israel court does not come in their way of filing the present suit. Counsel further argued that

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the proceedings pending before the Israel court have not yet culminated in the passing of any final judgment for adjudication of respective rights and obligations of the parties therein and so far the order passed by the Supreme Court of Israel is concerned, the same is merely a interlocutory order and not a conclusive decision based on the merits of the case. Counsel further argued that the observation of the Supreme Court of Israel in the order dated 24.10.2011 that the Share Entitlement Document was not binding on the foreign companies cannot be said to be a conclusive decision so as to affect the rights of the plaintiffs in the present suit. Counsel further submitted that it is about a month later from the date of execution of Share Entitlement Document that the defendants sought to amend the same but the said request of the defendant was declined by plaintiff No.1. Counsel also submitted that the alleged negotiations between the parties even as per the defendants own case did not result in the execution of any fresh binding document and therefore validity of Share Entitlement Document remained unaffected. Giving answer to another contention raised by the defendants that the plaintiffs have suppressed material fact of the defendants having invoked ICC arbitration is again misconceived argument as the said invocation of ICC arbitration on the part of the defendants was totally baseless and the defendants on realizing the non-maintainability of the claim themselves withdrew the same and therefore non-disclosure of such an inconsequential fact cannot lead to attributing any kind of suppression on the part of the plaintiffs. Counsel thus submitted that plaintiffs have approached this court with clean hands and with absolute and full disclosure of the facts and it is rather the defendants who are guilty of “*suggestion-falsi*” and “*suppression-veri*”. In support of his argument on suppression, counsel placed reliance on the

cases *Arunima Baruah v. UOI & others*, (2007) 6 SCC 120 and *Collector of Customs, Calcutta v. Tin Plate Co. of India Ltd.*, 1997 (10) SCC 538.

Lack of jurisdiction of this court

21. Answering the arguments on the second objection raised by the counsel for the defendants with regard to lack of territorial jurisdiction of this court, the counsel submitted that the Tower management business of the defendants is solely based in India and consultancy services of the plaintiffs were engaged for setting up of tower management business of defendant No.1 in India. Counsel further submitted that even by the affidavit dated 27.1.2011 filed by Mr. Moshe Shushan before the District Court, Israel, the defendants have clearly admitted that the sole asset of the limited partnership is the tower management business of defendant no.1 which is situated and registered at New Delhi, India. Counsel further submitted that since it is the business and the assets of the Indian company which are under the threat of dissipation by the defendants and which are within the jurisdiction of this court, the plaintiffs have invoked the jurisdiction of this court to protect their rights and shares in the said business which is being run by defendant no.3 on behalf of the other defendant companies. Counsel for the plaintiffs further argued that the defendants had raised an objection before the District Court of Israel that the said court has no territorial jurisdiction to entertain the suit filed by the plaintiffs because some of the defendants are foreign entities and before this court the defendants have again raised an objection with regard to the lack of jurisdiction of this court on false and flimsy grounds. Counsel further submitted that the First Consultancy Agreement dated 1.8.2005 specifically provided that tower management

business would be set up in India and accordingly the services of the plaintiffs were engaged in the setting of the said tower management business in India. Counsel stated that further incorporation of entities by defendant No.1, even by changing the share pattern in the subsequent companies will not oust the jurisdiction of this court as indisputably, the services of the plaintiffs were engaged by defendant No.1 under the said consultancy agreement to set up tower management business in India. Counsel thus stated that a substantial part of cause of action has arisen in India and therefore the present suit filed by the plaintiffs is squarely covered within the scope of Section 16(f) as well as under the residuary provision of Section 20 CPC. Counsel also argued that if the corporate veil of all the entities created by defendant No.1 is lifted then the correct picture will emerge which will expose the true picture that the other entities are created by defendant no.1 only with oblique motives to avoid its contractual obligations towards the plaintiffs and for tax benefits. Counsel also argued that for deciding the issue of jurisdiction, the court has to take into consideration the averments made in the plaint as a whole and based on the material placed on record and in the facts of the present case it cannot be said that the plaintiffs have not made sufficient averments for the maintainability of the present suit within the jurisdiction of this court. In support of his arguments, counsel placed reliance on the following judgments

- 1. A.B.C. Laminart Pvt. Ltd. & anr. v. A.P. Agencies, Salem, (1989) 2 SCC 163 (Paras 11 to 15)***
- 2. Laxman Prasad v. Prodigy Electronics Ltd. & Anr., 2008 (1) SCC 618 (Paras 29-36)***

Suit barred by Limitation

22. Dealing with the next contention raised by the counsel for the defendants that the suit filed by the plaintiffs is barred by limitation, counsel for the plaintiffs submitted that the entitlement of the plaintiffs to 7% rights in the business of the defendant no.1 is absolute and unconditional and till such rights are not transferred the cause of action continues in favour of the plaintiffs. Counsel further submitted that the Share Entitlement Document has not been terminated by the defendants till date and even the trustee continues to hold plaintiffs' 7% share in the partnership for the benefit of the plaintiffs. Counsel also argued that in response to the plaintiffs' request for the transfer of their 7% rights, the defendants had informed that they were processing the transfer of the plaintiffs' right but till date no such transfer was effected by them and therefore there is a continuing breach on the part of the defendants. Counsel also argued that a fresh cause of action had arisen in favour of the plaintiffs after the filing of an affidavit dated 27.1.2011 by Mr. Moshe Shushan before the District Court of Tel Aviv, Israel, wherein for the first time the defendants took a stand with regard to the dilution of partnerships holding in the tower management business of defendant no.3 to a mere 32% as against their initial holding of 100%. Counsel further argued that even in the said affidavit, the defendants took a stand that the assets of the defendants are outside the jurisdiction of Israel court and taking into consideration the said stand of the defendants, the Supreme Court of Israel vacated the stay order granted by the District Court of Israel. Counsel also refuted the contention of the counsel for the defendant that vide e-mail

dated 5.4.2007, the defendant no. 6 had rejected the plaintiffs' entitlement in the business of the partnership as on perusal of the said e-mail, the defendant no.6 had merely shown his inability to act as per the request of the plaintiffs in the absence of any clear instructions from both the parties. Counsel also submitted that till date, the defendants have neither terminated the Share Entitlement Document nor they have dissolved the trust and therefore so long the defendants have not transferred 7% shares/rights in their business in favour of the plaintiffs, the cause of action in favour of the plaintiffs continues. Counsel also argued that the limitation is a mixed question of law and fact and therefore the same cannot be decided by this court at the very threshold of the case without giving an opportunity to the parties to lead evidence on the same. Based on the above submissions, counsel submitted that the present suit filed by the plaintiffs cannot be held to be barred by limitation. In support of his arguments, counsel placed reliance on the following judgments

***1. Firm Ramnath v. Firm Bhagatram, AIR 1959 Raj 149 (FB)
(Paras 14, 15)***

***2. Kama and others v. K.T. Eshwara SA & others, 2008 (12)
SCC 661, (Paras 21, 22, 23, 25)***

***3. Balasaria Construction (P) Ltd. v. Hanuman Seva Trust
and others, 2006 (5) SCC 638***

***4. Jagjit Industries Ltd. v. Labour Officer, 2011(4) SCC 2969
(Paras 12 to 15)***

Comity of Courts

23. Refuting to the objection raised by the counsel for the defendants challenging the maintainability of the present suit based on the well-established principle of comity of courts, counsel for the plaintiffs submitted that the present suit filed by the plaintiffs is not in conflict with the suit filed by the plaintiffs before the Israel court and in fact the same is an extension of the earlier suit. Counsel further submitted that the plaintiffs were compelled to approach this court with a view to protect and secure their rights in the business of defendant no.3, which indisputably is in India, and the said right of the plaintiffs was threatened by the defendants through their dishonest and self-contradictory stands taken by them before the Israel court, especially through the affidavit dated 27.1.2011 filed by Mr. Moshe Shushan. Counsel also submitted that the defendants as per their own stand were already at an advanced stage of selling and transferring the entire assets of defendant no.3 and in such circumstances, the plaintiffs had no option but to invoke the jurisdiction of this court to protect their 7% rights in the business of the defendant no.3 and it is through the ex-parte ad interim injunction granted by this court in the present suit, that the plaintiffs could protect their rights. Counsel also argued that the remedy of the plaintiffs to file a separate suit is also protected under the Explanation to Section 10 of CPC which clearly envisages that the pendency of the suit in a foreign court does not preclude the courts in India from trying a suit on the same cause of action. Counsel thus submitted that the defendants' contention regarding non maintainability of the present suit based on the principle of comity of courts is completely

baseless and liable to be rejected. In support of his arguments, counsel placed reliance on the judgment *Essel Sports Pvt. Ltd. v. BCCI, 178 (2011) DLT 465 (DB)*

Forum Shopping

24. Refuting the contention raised by the counsel for the defendants with regard to the principle of forum shopping, counsel for the plaintiffs submitted that the cause of action for filing the present suit by the plaintiffs is separate and independent and the said cause of action in favour of the plaintiffs primarily arose due to the specific objections raised by the defendants before the Israel court, thereby challenging the jurisdiction of Israel court to pass any order with regard to business and assets of the defendant no.3, the same being outside the jurisdiction of the Israel court. Counsel also argued that giving weightage to the said objection raised by the defendants, the Hon'ble Supreme Court of Israel declined to protect the interest of the plaintiffs and the imminent threat of the defendants dissipating the entire assets of the defendant no.3 which are in India alone also afforded an independent cause of action to the plaintiffs to approach this court. Counsel also argued that such technical objections are being taken by the defendants in the present suit with the oblique motives to frustrate and defeat the rights of the plaintiffs as the defendants have not only challenged the jurisdiction of this court but have also challenged the jurisdiction of the Court at Israel as well to grant the reliefs claimed by the plaintiffs there. Based on these submissions, counsel for the plaintiffs submitted that if not the entire, but admittedly a substantial cause of action arose in India to file the

present suit against the defendants and therefore it cannot be said that this is a case of forum shopping.

No Cause of Action

25. Dealing with the next contention of the counsel for the defendants that there is no cause of action that arose in favour of the plaintiffs to file the present suit, counsel for the plaintiffs submitted that it is a settled legal position that the disclosure of the cause of action has to be determined based on the averments made in the plaint and not based on the defence raised by the defendants in their written statement. Counsel further argued that in the plaint, the plaintiffs have disclosed the complete sequence of events which led to the filing of the present suit by the plaintiffs. With a bare perusal of the same, no dispute can be raised with regard to the non-disclosure of the cause of action or the present suit being filed without any cause of action.

26. Elaborating his arguments, counsel submitted that each of the defendants are a link in a corporate chain set up by the promoters and the persons who are having comity of interest in the business and the assets of the defendant no.3 in India. Counsel further submitted that it is an undisputed fact that all these defendants were constituted to carry out the tower management business of the limited partnership in India and the plaintiffs were left with no option but to file the present suit to claim their 7% rights in the said business which admittedly was being carried in India and all the assets of defendant no.3 company being present in India. Counsel also submitted that the plaintiffs were not involved in the corporate restructuring of the defendants which were the defendants jugglery to deny legitimate

rights of the plaintiffs. Counsel also submitted that during all discussions/negotiations which had taken place between the parties, the plaintiffs entitlement in respect of consultancy fee and 7% interest in the tower management business of defendant nos. 1 and 2 has remained undisputed. Counsel further argued that it is a well settled proposition of law that the intention of the parties to the contract has to be gathered as a whole based on the terms of the contract entered into between the parties and subsequent exchange of documents and on careful scrutiny of all these documents one cannot dispute the legitimacy of the claim of the plaintiffs in the present suit and its maintainability with complete disclosure of cause of action. Counsel also submitted that never at any point of time, the plaintiffs had admitted to the creation of the said trust or the alleged trustees' right to hold the property on their behalf. Counsel also submitted that the Share Entitlement Document was executed on 17.10.2006 much after the creation of the said trust on 26.3.2006, and therefore the rights of the plaintiffs in the said telecom business of the defendants can neither be defeated nor can be postponed with the creation of the said trust. Based on these submissions, counsel for the plaintiffs submitted that the present suit filed by the plaintiffs cannot be said to be without any cause of action.

27. Counsel also submitted that under Section 15(h) of the Specific Relief Act, the plaintiffs have every right to enforce the performance of the contract based on the First Consultancy Agreement dated 1.8.2005 and the Share Entitlement Agreement dated 17.10.2006 as the same binds the defendants and as a consequence thereof, the defendants cannot take any stand contrary to

the terms of the contract entered into by their promoter companies. Counsel also strongly refuted the allegations leveled by the defendants, attributing mala fides on the part of the plaintiffs in filing the present suit. Counsel also argued that this court has unfettered rights to protect the rights and interests of the plaintiffs and the interim stay claimed by the plaintiffs in the present suit fully satisfy the test laid down for the grant of mareva injunction.

28. I have heard the verbose arguments of the learned counsel for the parties and perused the documents placed on record by both the parties.

29. Before I deal with the contentions raised by the counsel for the parties, it would be apt to spell out some of the basic facts which are not in dispute between the parties. Prior to the filing of the present suit on 17.1.2012, the plaintiffs herein had filed a civil suit before the District Court of Tel Aviv, Israel. In both the suits, the plaintiffs have claimed almost identical reliefs i.e. declaration, rendition of accounts and perpetual injunction. Before the Israel Court, the plaintiffs have impleaded Tower Vision Limited as defendant no.1 and Tower Vision Limited Partnership as defendant no.2 and Advocate Mr. Oron Gitzleter as defendant no. 3. Before the Israel court the plaintiffs have also impleaded Mr. Rani Benyamini as defendant no. 4, who is one of the directors of Tower Vision Limited Company and had signed the Share Entitlement Document dated 17.10.2006. In the suit before this court, the plaintiffs, besides impleading these common defendants have also impleaded Tower Vision India Pvt. Ltd as defendant no.3, which is an Indian company incorporated on 27.1.2006 by the promoters of the defendant no.1 for managing and running the Tower Management business in India which

included the business of building sites/towers for cellular antennas and leasing them to Indian Telecom service providers. The plaintiffs have also impleaded Tower Vision Mauritius Ltd. as defendant no.4. This company was incorporated by defendant nos. 1 and 2 in April/May 2006 for the purposes of routing the resources and finances for the tower management business in India. This company held 99.99% shares in the Indian company and 0.01% shares of the Indian company were vested in another group company i.e. M/s Tower Vision Jersey Ltd. which has been impleaded as defendant no.5 in the present suit. As per the plaintiffs, these three additional defendants were impleaded by the plaintiffs in the present suit based on an affidavit dated 27.1.2011 filed by Mr. Moshe Shushan, partner in the defendant no.2 and shareholder director in the defendant nos. 1, 3, 4 & 5 companies, which affidavit, as per the plaintiffs disclosed various startling and shocking facts and one of them being that the partnership holding in Tower Management Business of the defendant no.3 had reduced to merely 32% as against their initial holding of 100% in the defendant no.3 company thereby resulting in dilution of plaintiffs' rights in the said telecom business. It is also an undisputed fact that the plaintiffs have filed an interim application for temporary injunction for restraining the defendants from further transferring the shares in the telecom business before both the courts till the final disposal of the respective cases. The interim stay application was filed by the plaintiff before the District Court at Israel in the month of January, 2011 i.e. much after filing of the statement of claim by them. It is further not in dispute that vide order dated 20.6.2011, the District Court of Tel Aviv, Israel allowed the interim application of the plaintiffs with the direction to the respondent therein to deposit 7% of

the proportionate share of the partnership in any consideration to be received by any of the foreign company, from any transaction that they may complete, in trust with the attorneys for the parties –Advocate Gitzleter and Advocate Polak (or such other bank account as shall be agreed upon between the parties). It is also not in dispute between the parties that the said interim order of the District Court, Israel was challenged by the defendants therein before the Hon'ble Supreme Court of Israel and vide order dated 24.10.2011, the Hon'ble Supreme Court of Israel accepted the appeal filed by the defendants and set aside the temporary relief as was granted by the District Court, on the ground that there was no justification for granting temporary relief considering the fact that the rights of the plaintiffs in the partnership were held in trust for them with the trustee (who is defendant no.6 before this court) and also on the reading of document of entitlement it was clear that the said right of 7% of the plaintiffs was not binding on the foreign companies.

30. With the passing of the said order by the Hon'ble Supreme Court of Israel, the plaintiff preferred to invoke the jurisdiction of this court to seek almost identical reliefs in the main suit as well in the stay application. It would be pertinent to reproduce the relevant prayer paras of the Statement of Claim filed by the plaintiff before the Israel Court and the reliefs sought by the plaintiffs in the present suit as well as the interim reliefs claimed by the plaintiffs in both the suits.

31. The reliefs claimed by the plaintiffs in the statement of claim filed by them before the Israel court are reproduced as under :-

6.1 The enforcement of the undertakings of the Partnership and the Trustee pursuant to the Document of Entitlement and Section 15 of the agreement for the establishment of the Partnership, to which we shall refer below, to transfer to the Plaintiff, or to whomever the Plaintiff so orders, the rights owing to him and to which he is entitled in the Partnership.

6.2 To declare that the said rights reflect the Plaintiff's share in the Partnership at a rate of 7% of all of its assets, monies, rights and/or any other right, since its founding, whether held by the Partnership directly or if held through affiliated companies or by any other means and through which the Partnership manages its business, that is to say the substitute entity and/or Tower Vision Mauritius, as shall be detailed in the Statement of Claim below; and also –

6.3 The issuing of orders for the providing of accounts in order to determine the value of the rights which are not known by the Plaintiffs, including detailing the assets and the value of the assets held by the Partnership and/or the substitute entity and/or Tower Mauritius, as shall be detailed in this Statement of Claim below.

6.4 The splitting-up of relief with the aim of enabling a claim for monetary compensation for the breach of those undertakings and those damages sustained by the Plaintiffs due to the conduct of the Defendants and/or any one of them in this context.

The reliefs claimed by the plaintiffs in the present suit are as under:

- a. Pass a decree of perpetual injunction restraining the Defendants from further diluting in any manner the shareholding of the Tower Vision Limited Partnership, the Defendant No.2 herein, in the business and assets of the Defendant No. 3 Company to the detriment of the Plaintiffs;
- b. Pass a decree of perpetual injunction in favour of the Plaintiffs and against the Defendants jointly and/or severally restraining them from selling, alienating, transferring or in any manner creating any third party rights in respect of their business, shares, assets and stakes in the Defendant No.3 Company p Tower Vision India Private Limited, in any manner prejudicial to 7% right/share of the Plaintiffs in respect of the entire business of the Defendant No. 3 Company or its Tower Management business;
- c. Pass a decree of mandatory injunction against the Defendant No. 6 directing him to hand-over the 7% rights of the Plaintiffs in the Partnership business of the Defendant No. 2, which he is holding in trust for the benefit of the Plaintiffs in accordance with

the Tower Vision Limited Partnership Agreement dated 26th March, 2006;

d. Pass a decree in favour of Plaintiffs declaring the Plaintiffs as the shareholder of 7% of the equity and the business of the Defendant No.3 in India and that the Plaintiffs are entitled to all benefits arising of such right/share in the business of the Defendant No. 3;

e. Direct the Defendant No. 3 to render complete accounts to the Plaintiffs in respect of its incorporation, its past and present assets and resources regarding the Tower Management business in India, its share-holding and management since inception, any dilution of shareholding or business in favour of third parties, and of any future transaction relating to sale, transfer, alienation, encumbrance, etc of the business, shares, assets and/or stakes of the Defendant No. 3, etc.;

f. Award *pendent lite* and future interest @ 12% per annum on the amount that may be found due and payable to the Plaintiffs from the Defendants;

g. Award cost of the suit in favour of the Plaintiffs and against the Defendants;

h. Pass such other of further orders in favour of the Plaintiffs and against the Defendants that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

The reliefs claimed by the plaintiffs in the interim stay application before the Israel court are as under :-

1. To order the Respondents in a temporary injunction order to prevent, jointly and/or severally and/or through any person and / or any other legal entity on their behalf, including other entitles in the chain of ownership of the business (as described below) including – Tower Jersey and/or Tower Mauritius and/or Tower India (as shall be described below), from undertaking any act containing one or more of the following :-

a. To remove and/or transfer and/or sell and/or pledge assets and/or monies and/or benefits and/or shares held by them and/or by anyone on their behalf and/or by any holder, arising from and/or related to the business of cellular telecommunication towers of the Respondents in India (the "Business"), and any assets and/or monies and/or benefits due to them as a result of and/or related to the transaction with respect of the rights in the Business (the

Assets'), regardless of whether the Assets are located in Israel or overseas;

b. To change the state of the Assets and/or the state of the rights therein.

2. To order the Respondents, in a mandatory order, to leave the monetary and financial situation of Respondent No.2 (the "Partnership") and of the Applicants' rights in the Partnership and in the Business (the "Rights" as shall be detailed further below in the Application) intact, whether by themselves or through anyone on their behalf, including other entities in the chain of ownership of the Business (as described below)-including Tower Jersey and/or Tower Mauritius and/or Tower India (as shall be described below)- and all of this in a manner which will not harm the Rights and shall not remove monies from the Partnership and especially shall not remove and/or transfer rights and/or assets and /or part thereof from Respondent No.3

3. Alternatively: to order the depositing of 7% of any consideration, of any sort, to be received as a result of any action, the prohibition of which is requested as stated above, with a trustee to be appointed by the Hon'ble Court.

The reliefs claimed by the plaintiffs in the stay application filed along with the present suit are reproduced as below:

a. Restrain the defendants by way of an ad-interim ex-parte order from selling, alienating, transferring or creating any third party right in respect of the assets, stakes and/or the business of the Defendant No.3 Company, Tower Vision India Private Limited during the pendency of the present suit;

b. Restrain the defendants from further diluting the shareholding of the Defendant No. 2 i.e. Tower Vision Limited Partnership, in the Defendant No.3, Tower Vision India Pvt. Ltd. in any manner during the pendency of the present suit which is detrimental to the rights and interest of the plaintiffs;

c. Direct the defendants to deposit in this Hon'ble Court all amounts to which the plaintiffs are entitled to in lieu of their 7% right/share in the Tower Management business of the Defendant No.3 Company, Tower Vision India Pvt. Ltd., during the pendency of the present suit;

d. Pass such other or further orders in favour of the plaintiffs that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

32. In both the suits, the genesis of the plaintiffs' claim rests on two basic documents i.e. First Consultancy Agreement dated 1.8.2005 and Share Entitlement Document dated 17.10.2006. As per clause 5 of the First Consultancy Agreement, the plaintiffs were given an irrevocable right to acquire 7% of the shares of the defendant no.1 upon fulfillment of certain terms and conditions mentioned therein. Clause 5 of the First Consultancy Agreement is reproduced as under:

5. STOCK OPTION

5.1 Stock option grant

The Company hereby grants SJ an irrevocable right to purchase, or designate one or more persons which are detailed in Annex C attached hereto (each a "Designee") to purchase shares equivalent to 7% of Tower Vision Ltd.'s issued share capital at the date of this Agreement, at the exercise price described in Clause 4.3 herein (such right being the "Stock Option"), subject to the conditions described in Clause 4.2 herein.

5.2 Mile Stones for exercise of Stock Option

SJ may exercise the Stock Option by issuing a written notice to the Company (the "Stock Option Notice") and specifying the number of shares to be purchased from the company (the "Option Shares") at the earlier of:

(a) Event One

(i) The Company having concluded a joint venture agreement for India; and

(ii) The Indian joint venture company having secured contracts for at least 500 sites irrespective of whether such contracts are sale and leaseback or build to suit transactions; or

(b) Event Two

Immediately prior to any equity investor presented by SJ to acquire shares in the Company whether by direct share purchase, merger or acquisition. For the avoidance of doubt, the Stock

Option shall be exercised prior to dilution taking place as a result of new equity investment into the Company.

5.3 Exercise Price

The purchase price of the Option Shares (the "Stock Exercise Price") shall equal one NIS (0.01 NIS)

5.4 Registration of Option Shares

(a) Prior to the grant of Stock Option the Company shall cause to promptly convene a shareholders meeting, at which a resolution shall be adopted approving the Company's grant of Option Shares to SJ and/or the Designee (s); and

(b) Upon exercise of the Stock Option the relevant parties shall execute all other necessary contract, agreements or documents, obtain all necessary government licenses and permits and take all necessary actions, to give valid ownership of the Option Shares to SJ and/or the Designee (s) to become the registered owner(s) of the Option Shares. For the purpose of this Section and this Agreement, "security interest" shall include security, mortgages, third party's rights or interests, rights or interests, right to offset, ownership detention or other security arrangements etc except for the limitations on the Option shares in accordance with Section 6 and the Company's Articles of Associations. To clarify, security interest shall not include any security interest generated under this Agreement or under the Company's Articles of Association.

33. Under the Share Entitlement Document which was signed by the plaintiff No. 1 with the defendant No.2 Tower Vision Ltd. Partnership, in which defendant no.1/TVL is a general partner, it was confirmed that the plaintiffs had an absolute and unconditional interest in 7% rights of the partnership. It was further confirmed that in case of any structural changes which will result in the partners holding their interest in the Tower Management Business through any substituted entity, the plaintiffs shall be entitled to receive absolutely and unconditionally 7% of the rights in the

substituted entity. The terms as contained in the Share Entitlement Document are reproduced as under:

"1. We the undersigned Tower Vision Limited Partnership, an Israeli registered limited partnership (the "Partnership") hereby confirm that you have today an absolute and unconditional interest in 7% of the rights of the Partnership. We further confirm that in case of any structure changes which will result in the partners holding their interests in the Tower Management Business through any other entity. You shall be entitled to receive absolutely and unconditionally 7% of the rights of any such other entity, which will be established by the partners of the Partnership, and which will replace the Partnership in any holding structure related to the Tower Management business of the Partnership. For the avoidance of doubt such Tower Management business of the partnership is today carried out via Tower Vision Mauritius Limited.

2. We will allocate the rights or shares referred to in Section 1 above to your name or to any other entity as instructed in writing by you.

3. Our undertaking herein supersedes any previous undertaking provided to you by us and/or by any related entity in respect of your entitlement to receive any share and/or right in the Partnership's tower management business. Any previous undertaking and/or obligation regarding the subject matter or this letter shall become null, and void as of the date of this Letter."

34. It would be thus seen from the above that at the time of execution of the First Consultancy Agreement, none of the defendants i.e., defendant nos. 2 to 5 were in existence and it is only the defendant no.1/TVL who had entered into the said agreement with the plaintiffs while at the time of the signing of the share entitlement agreement, the defendant no.2 partnership was in existence. The corporate maze starts with the defendant no.1, which is a company incorporated in Israel. The Tower Vision Limited Partnership which is defendant no.2 herein was constituted on 26th March, 2006 with the defendant no.1 /TVL holding 1% shares of the partnership business but with

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unrestricted rights, authority and power to inter alia manage and control the partnership business as its General Partner. The rest of the 99% shares in the partnership were held by the other partners, the Trustee being one of them. As per the Limited Partnership Agreement, the said Trustee held 13% of the partnership capital for the benefit of the plaintiff Mr. Shiju Vargese, to the extent of their 7% rights in the same and for one Mr. Yuval Sipper, to the extent of 6% of the their rights in the partnership capital. Relevant Clause 15 of the said Limited Partnership Agreement is reproduced as under:

The Trustee

The Trustee will hold 13% of the Partnership's capital as per Section 6 above, for the benefit of Mr. Yuvraj Sipper and Mr. Shiju Vargese, each of which may be entitled to become partners of the Partnership, subject to fulfillment of certain terms and conditions agreed between Messers Sipper and Vargese in certain agreements entered by each of them and the Partnership (the "Agreements"). It is agreed that pursuant to each such respective Agreement Mr. Yuval Sipper may be entitled to hold up to 6% of the Partnership's capital and Mr. Vargese may be entitled to hold up to 7% of the Partnership's capital. Subject to the fulfillment of the conditions relevant to Mr. Sipper and Mr. Vargese respectively, the Trustee will release such percentages as may be due to them at the date such percentages become due pursuant to their respective Agreement.

It is hereby agreed that in the event that the conditions precedents for the release of the percentages to Messers Sipper and Vargese do not occur then the General Partner may allocate, at its sole discretion the percentages held by the Trustee, to any third party as the General Partner deems fit and the Trustee will release the percentages held by him in accordance with the General Partner's instructions from time to time.

For the avoidance of doubt, it is hereby clarified that should the terms and conditions of the agreement between the Partnership and Messers Sipper and Vargese be fulfilled, the rights to Messers Sipper and Vargese shall be deemed to have been allocated at the establishment of the Partnership and they shall be entitled to all the rights in the Partnership.

35. As already stated above, Tower Vision India Ltd., which is an Indian company and the defendant no.3 in the present suit was constituted on 27.1.2006 with only two shareholders i.e. defendant no.1 with 99.9% shares and remaining 0.01% share with one Elgadcom Group. Defendant no.4, M/s Tower Vision Mauritius Ltd. TVML was constituted sometime in April/May 2006 for the purposes of routing the resources and finances for the Tower Management Business in India and 99.9% shares of the Indian company were held by the Mauritius company, TVML and 0.01% shares of the Indian company were vested in another company i.e. M/s. Tower Vision Jersey Ltd., TVJL, the defendant no. 5 herein. So far defendant no.5 Tower Vision Jersey Ltd. is concerned, the same was constituted in 2007 and this company had 52 % shareholding in TVML.

36. In the backdrop of the above corporate structure, the disputes between the parties arose when the defendant nos. 1 and 2 failed to transfer 7% rights of the plaintiff in favour of Triassic Investment Ltd., as per the request made by the plaintiffs through their e-mail dated 21.11.2006. This refusal on the part of these defendants was taken to be a clear violation of the terms and conditions of the Share Entitlement Document dated 17.10.2006 and this refusal led the plaintiffs to first send a legal notice and then to file a suit before the Israel court and after having not succeeded before the Hon'ble Supreme Court of Israel, feeling remediless they have now invoked the jurisdiction of this court to seek almost identical reliefs in the main suit as well as in the stay application.

37. Before I consider various issues raised by both the parties, the plaintiffs, at the threshold, would be required to cross the legal hurdle of satisfying this court as to whether based on the same cause of action the plaintiffs can be permitted to file a second suit; and also whether filing of such a second suit will be against the principle of comity of courts and thus a gross abuse of the process of the court to overreach the order passed by the court of a competent jurisdiction of another sovereign state and a clear case of forum shopping. The other shadow of doubt that the plaintiffs need to clear is whether the plaintiffs are guilty of suppressing from this court material facts by not placing on record copy of the judgment passed by the Hon'ble Supreme Court of Israel which was not in their favour along with the present suit.

38. The plaintiff who sets the litigation in motion by presenting a plaint or statement of claim being a dominus litus is an Architect of his case. It is the plaintiff who takes a decision to invoke the jurisdiction of a particular court or a forum to have his rights adjudicated upon by such court or forum. Certainly before invoking jurisdiction of any court, the plaintiff has to be careful and cautious that the court or forum chosen by him is the proper court/forum for the adjudication of his disputes regarding the subject matter, territorially and as per the pecuniary limits of his claim. The plaintiff, wherever there is any jurisdiction clause in the agreement, has also to give due weightage to such clause to decide the situs of initiating proceedings. The jurisdiction of any court or forum to adjudicate will thus depend upon three important facets; first and foremost that whether it has

jurisdiction to decide the particular subject matter of a suit; secondly, whether it has the territorial jurisdiction to try and entertain the suit and; thirdly, whether the suit filed is within the pecuniary limits of its jurisdiction.

39. In the case at hand, the plaintiffs who have based their claim on their 7% rights in the limited partnership business of defendant nos. 1 and 2 under the First Share Consultancy Agreement and after cancellation of the same under the Share Entitlement Document dated 17.10.2006 had preferred to invoke the jurisdiction of the District Court of Tel Aviv, Israel. On a closer look at the averments made in the plaint before the Israel court and the averments made in the plaint before this court, it is clearly discernible that there is not much variation in the basic facts. After filing the suit before the District Court of Tel Aviv, Israel in 2008, the plaintiff had preferred to file an application for temporary injunction much later in January 2011 and the sum and substance of the interim reliefs sought by the plaintiffs before the District Court of Tel Aviv, Israel are the same as have been claimed by the plaintiff in the stay application filed by them in the present suit on 17.1.2012. In the said interim application before the District Court of Tel Aviv, Israel, the plaintiffs had expressed an apprehension that the respondents in India were about to sell and/or transfer their rights in the business to a third party as was learnt by them through some publications in the Indian Press. The plaintiffs therein also stated that the business of the defendants was operated in India through the Mauritian Company, TVML, Defendant no. 4 herein, which was practically the sole owner of Tower India, Defendant no. 3, herein, and which was under full ownership of Defendant no.2 Partnership firm. The plaintiffs

also took a stand that they are fully aware that the assets of the partnership were located outside the jurisdiction of Israel and they were not aware of any other asset of the partnership in Israel or overseas which could be used to protect the claim of the plaintiffs. It is also an undeniable fact that the affidavit of Mr. Moshe Shushan dated 27.1.2011 on which strong emphasis was laid by the plaintiffs in the present suit to carve out a separate cause of action was filed before the District Court of Tel Aviv, Israel prior to the filing of the said stay application by the plaintiffs in the said court. It is further manifest that in the detailed order passed by the District Court of Tel Aviv, Israel there is a due discussion on the affidavit dated 27.1.2011 filed by Mr. Moshe Shushan. For instance a perusal of Paras 43 and 44 from the said order dated 20.7.2011 clearly refer to the said affidavit filed by Mr. Moshe Shushan. The District Court of Tel Aviv, Israel also made reference to the Mareva orders as envisaged under Rule 383 of the Rules of Civil Procedure as applicable in Israel and took a view that by giving directions to the defendants, their use of assets even if located outside their territorial jurisdiction can be restricted. Relevant Para 33 of the same is reproduced as under:

“The applicants are applying for an order under Rule 383 of the Rules of Civil Procedure. This Rule originates in English Law, in an order that is called a Mareva injunction. The Rule provides as follows:

“Subject to the provisions of Article one, Court or the Registrar may order that the Respondent refrain, in person or through any person on his behalf, from removing assets from his or from a holder’s possession, from selling, charging or changing their condition or his rights to them, if the Court or the Registrar is satisfied, on the basis of prima facie credible evidence, that there is

a reasonable danger that not making the order will make it difficult to execute a judgment”.

A sub-regulation defines “assets” in this regulation as “including assets located outside the borders of the State”. In other words, this is a form of relief that can restrict the use by a litigant of an asset situated outside the borders of Israel.

The order that is the subject of the Rule is an order in personam and consequently the location of the asset is of no importance (see Goren, Issues in Civil Law Procedure”. 8th Edition, Page 539). The order resembles an attachment order in terms of being intended to ensure the possibility of enforcing the judgment, but as opposed to an attachment order, it does not relate to the assets themselves, but is directed towards the Defendants and by virtue of it, their use of the assets is restricted.”

40. After having discussed the various parameters for the grant of an interim injunction which are in consonance with the principles for the grant of interim injunction in terms of Order 39 Rules 1 & 2 of our Civil Procedure Code, 1908 the District Court of Tel Aviv, Israel directed the respondents to deposit 7% of the proportionate share of the partnership in any consideration to be received by any of the foreign companies from any transaction that they may complete in the Trust. The operative paras of the said interim order dated 20.7.2011 are reproduced as under:

“52. In view of all the foregoing matters set out in the Decision, I believe that there are grounds for granting the Application for interim relief.

The applicants argue that they filed a letter of undertaking at the time of the filing of the application for Temporary Relief. I believe that apart from this undertaking, and apart from the amounts that have so far been deposited, the applicants, as a condition for making the order, must be ordered to deposit in Court as additional cash sum of NIS 100,000.

After the aforementioned cash sum is deposited, I order the Respondents to deposit 7% of the proportionate share of the Partnership in any consideration to be received by any of the

foreign companies, from any transaction that they may complete, in trust with the Attorneys for the parties-Advocate Gilzelter and Advocate Polak (or such other bank account as shall be agreed upon between the parties).

53. The applicants have argued that there are grounds for ordering that a translation into English of any decision that is pronounced should be forwarded to the foreign companies. I do not accept this argument. As has been made clear above in this Decision, the contents of the Decision in respect of the order are directed to the Respondents and only to them. The Applicants have not in the context of the action, sued any of the foreign companies, and neither is the Application addressed to them. The order that has been requested is a personal order directed against the Respondents, and not against property. The respondents were represented in the hearing and there is no need for a translation of the Decision for them.

Nevertheless, the Decision is not a privileged one and the Applicants cannot be prevented from making use of it, and notifying other parties about it. The applicants may inter alia- as well as the Respondents – translate the Decision and send the translation of it to the foreign companies.

I find against the respondents for payment of the Applicants' costs in respect of the present application of a total sum of NIS 30,000.

41. Feeling aggrieved by the said order of the learned District Court of Tel Aviv, Israel, the defendants therein challenged the same before the Hon'ble Supreme Court of Israel and vide order dated 24.10.2011 the Hon'ble Supreme Court of Israel vacated the said interim injunction granted by the District Court of Tel Aviv, Israel. In the said decision, the Hon'ble Supreme Court of Israel observed that the Share Entitlement Document was signed between the plaintiffs and the defendants therein and the same could not bind the foreign companies. The said Court also observed that the rights of the plaintiffs in the partnership were held secured for them in a trust which

should mitigate their concerns of irreversible damage being caused to the plaintiffs as a result of the defendants performing some transactions .

42. In the backdrop of the aforesaid admitted facts, it would be amply clear and certainly not incongruous to state that so long as the order of the District Court of Tel Aviv, Israel was in favour of the plaintiffs, the plaintiffs were fully satisfied by the proceedings before the court at Israel despite the fact that by that time Mr. Moshe Shushan had already filed his affidavit stating the alleged dilution of the shareholding of the partnership and it is only when the Supreme Court of Israel had set aside the interim order of the District Court, vide order dated 24.10.2011, an order not serving the interests of the plaintiffs that the plaintiffs rushed to invoke the jurisdiction of this court to seek identical reliefs as sought by them before the Israel court. For maintaining the present suit before this court, the plaintiffs made the said affidavit of Mr. Moshe Shushan dated 27.1.2011 as the mainstay for giving a new cause of action as in the said affidavit for the first time it was disclosed that there was dilution of shareholding of the defendant no.2 in the Tower Management Business in the defendant no.3 company which came down to merely 32% from 100% as initially owned by the limited partnership. The plaintiffs have also taken a stand in the present suit that through the said affidavit for the first time it was acknowledged that the business of the defendant no.3 in India was the sole asset of the partnership and if the defendants succeed in secretly selling or alienating the said Tower Management business of the defendant no.3 in India then the plaintiffs will be deprived of their legitimate right over 7% shares in the business of the

defendant no.3, being the substituted entity of defendant no.2. In Para 26 of the plaint relating to the jurisdiction clause, reliance has been placed on the said affidavit dated 27.1.2011 to invoke the jurisdiction of this court especially on account of the said disclosure made in the affidavit. It would be quite interesting to note that the said affidavit dated 27.1.2011 was filed by Mr. Moshe Shushan before the decision given by the District Court of Tel Aviv, Israel and as already stated above there is due discussion on the said affidavit by the District Court, Israel in the order dated 20.7.2011.

43. Now to ascertain whether the disclosure made in the said affidavit would constitute a new cause of action or not, it would be determined by the parameters of what constitutes a '*Cause of Action*'. **Black's Law Dictionary (8th Edn)** defines 'Cause of Action' to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person. In **Stroud's Judicial Dictionary** a 'Cause of Action' is stated to be the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment. In **"Words and Phrases"** (4th Edn.) the meaning attributed to the phrase 'Cause of Action' in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf. It is thus a settled law that 'Cause of Action' consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to

claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. Applying the aforesaid principles, in the case at hand, the cause of action as disclosed by the plaintiffs for filing the statement of claim before the Israel court was the refusal of the defendant nos.1 and 2 to accede to the request of the plaintiffs to transfer their 7% share in favour of M/s. Triassic company. The said suit was filed by the plaintiffs before the District Court of Tel Aviv, Israel on 13.11.2008 and filing of an affidavit on 27.1.2011 during the course of proceedings by any of the defendants therein would not afford any fresh cause of action to the plaintiffs to file another independent suit that too within the jurisdiction of another sovereign state. Cause of action or series of cause of actions precedes the date of filing of such a suit unless any cause of action is in the nature of a recurring cause of action. It also cannot be disputed that there may be two or more competent courts of jurisdiction to try and entertain a particular suit founded on the same cause of action and it is the plaintiff who sets the machinery of the litigation in motion after selecting a place of jurisdiction based on the facts of his case. The said affidavit dated 27.1.2011 filed by Mr. Moshe Shushan, thus in my considered view, cannot give any fresh cause of action to the plaintiffs to file a suit before this court in India, once the said affidavit was placed on record by the defendant before the Israel court and was taken into consideration by the Israel court.

44. Thus the moot question that arises before this court is that whether the plaintiffs can file a fresh suit before this court seeking same reliefs and based on the same cause of action when it had admittedly chosen to approach another court of a competent jurisdiction and that too of another sovereign state.

45. Much emphasis was laid by the counsel for the plaintiffs on the explanation to Section 10 of CPC, in support of his argument that pendency of a suit in a foreign court does not preclude the courts in India from trying a suit even if the same is founded on the same cause of action. For better appreciation of this argument, Section 10 of CPC is reproduced as under:

"Section 10- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

46. As would be seen from the bare reading of the said provision, it starts with a non-obstante clause and clearly prohibits trial of any suit by a court in which the matter in issue is also directly and substantially issue in a previously instituted suit between the same parties or between the parties under whom they or any of them claimed to be litigating. The rigour of Section 10 of CPC, however, will not come in the way of courts in India to try a suit despite the fact that a suit between the same parties founded on the same cause of action is already pending before a foreign court. The object of

the explanation appended to section 10 is that nobody is able to defeat the right of a plaintiff to succeed in his legitimate claim before a competent court of jurisdiction of Indian courts simply because the other party has pre-empted to file a suit before a foreign court based on the same cause of action. The plaintiffs having invoked the jurisdiction of the Israel court by filing a suit much prior to the filing of the present suit thus cannot take refuge under explanation of Section 10 of CPC to maintain the present suit filed by none else but by the plaintiffs themselves. The plaintiffs who themselves are based in the United Kingdom had filed their statement of claim before the non-exclusive jurisdiction of the Israel court based on the domicile of the defendants impleaded therein and based on the same cause of action the plaintiffs cannot invoke the jurisdiction of this court by impleading some of the additional defendants who are not party to the said suit before the Israel court. The explanation appended to Section 10 of CPC could come to the rescue of the plaintiffs had the defendants filed a suit before the Israel court based on the same cause of action and also prior in time but will not come to the aid of the plaintiffs to legitimize filing of the present suit before this court. The plaintiffs herein who themselves are the plaintiffs before the Israel court thus cannot take shelter under the said explanation to take a plea that they can maintain the present suit even during the pendency of a prior suit filed by them before a foreign court based on the same cause of action. The argument canvassed by the counsel for the plaintiffs although looked attractive at the first blush but on closer examination of the said plea and on proper appreciation of true import of the said explanation attached to Section 10 of CPC, does not salvage the institution of the said suit by the plaintiffs. The

interpretation of the explanation appended to section 10 CPC as canvassed by the counsel for the plaintiffs, if accepted, would result in a gross abuse and misuse of the said provision by the same party before different courts and this court is thus not persuaded to accept the same and allow the perversion of the said provision.

47. Now coming to the principle of comity of courts, the argument actuated by the counsel for the defendants was that the principle of comity of courts would require this court to refrain from passing any order in favour of the plaintiffs. Simply stated, this principle refers to the concept that the courts should not act in a way that demeans or in any way undermines the jurisdiction, laws or judicial decisions of another jurisdiction. The court has to give thus due credit to the justice dispensation of the court of another jurisdiction. The concept of comity of courts as explained in the book **Conflict of laws** by **Dicey, Morris & Collins (14th Edn, Vol I)**, describes it to be of wider acceptance between the courts of different countries to mutually respect the territorial integrity of each other's jurisdiction. The principle of comity of courts would require the courts to give due regard to the orders passed by foreign courts. This principle of comity of courts has been well recognized and accepted by the Indian courts in various judgments. Here it would be relevant to quote the judgment of the Apex Court in the case of **Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540** wherein it quoted the following para :

"In A Treatise on the Law Governing Injunctions by Spelling and Lewis, it is stated:

"Section 8. Conflict and loss of jurisdiction.—Where a court having general jurisdiction and having acquired jurisdiction of

the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or Judge from jurisdiction, yet the granting of the injunction by a second Judge may lead to complications and retaliatory action...."

48. While accepting the doctrine of comity of courts, the Hon'ble Division Bench of this court in ***Max India Limited vs. General Binding Corporation*** **2009IXAD(Delhi)274** held that comity is granted out of respect, deference or friendship rather than as an obligation. Relevant paras of the said judgment are reproduced as under:

"45. Again, in National Mineral Development Corporation v. Government of India and Ors. WP (C) No. 8004/2007 decided on 18.2.2008, this Court referred to various judgments of the US courts as well as its own earlier judgments while accepting the doctrine of Comity of Jurisdiction. Relevant observations contained in the said judgment runs as under:

20. In Hartford Fire Ins. Co. v. Cal. 509 U.S. 764, it was observed that the comity of courts refers to a situation where judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.

46. Similarly, on grounds of comity and pursuant to federal law, the Supreme Court has generally refused to allow federal courts to intervene in pending cases in state courts in the absence of showing of bad faith harassment.

47. Comity is a tool for co-operation. But it can also be a tool for exclusion. Forum non conveniens (Latin for "inconvenient forum" or "inappropriate forum") (FNC) is a discretionary power of mostly common law courts to refuse to hear a case that has been brought before it. The Courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties. In the present case, having regard to the scope and spirit

behind Article 19 of the Agreement we feel that arbitration proceedings in Singapore or the courts at Singapore are appropriate forum even for the purpose of seeking interim measure."

49. The doctrine of comity of courts thus requires that the court should gauge the effect of the proceedings instituted in a foreign court on the proceedings instituted before itself and let the decision in a previously instituted suit in a foreign country determine the effect on the proceedings before it. Our codified law in the form of the statute of the Code of Civil procedure also gives due regard to this principle as it would be evident that under Section 13 of the Code of Civil Procedure, 1908 judgments given by the foreign courts have been held to be binding and conclusive until and unless they fall in any of the exceptions as spelled out in clause (a) to (f) of the same. Under section 14 of CPC, there is a presumption of conclusiveness attached to any foreign judgment being pronounced by the court of competent jurisdiction unless the contrary appears on record. It would be thus quite manifest that unless any foreign judgment is impeached on any of the grounds as envisaged in sub-clause (a) to (f) of Section 13 CPC, the foreign judgments are binding on the parties and this section engrafted in CPC is in due recognition of the principle of the concept of comity of courts and in recognition of the sovereignty and territorial integrity of jurisdiction of foreign courts. This court has the onus to carry the mantle and be alive to its responsibility laid down by the dicta of the Apex Court in the case of ***Narendra Kumar Maheshwari vs. Union Of India, 1990 (Supp) SCC 440*** wherein the court held that before the courts grant any injunction, they should have regard to the principles of comity courts in a federal structure and

should have regard to self-restraint, circumspection, although no definite norms were laid down. It was also held that it may be impossible to lay down hard and fast rule of general application because of the diverse situations which give rise to problems of this nature as each case has its own special facts and complications and it will be a disadvantage rather than an advantage, to attempt and apply any stereotyped formula to all cases, and the High Courts themselves should introduce a certain amount of discipline having regard to the principles of comity of courts administering the same general laws applicable all over the country in respect of granting interim orders which will have repercussion or effect beyond the jurisdiction of the particular courts. Although, in the present case the final judgment of the Israel court has yet to come but the question which arises at this juncture in the present case is as to whether the plaintiffs who themselves have invoked the jurisdiction of the Israel court can re-agitate or re-ventilate their grievance before the Indian Courts, that too in the circumstances when they failed to succeed in securing a favourable order from the highest court of another sovereign state.

50. The Apex Court in its authoritative pronouncement in the case of ***K.K. Modi Vs. K. N. Modi, AIR 1998 SC 1297***, strongly deprecated the practice of re-litigating the same issue which has already been tried and decided earlier against a litigant and the same was held as an abuse of the process of the court and contrary to the principles of justice and public policy. The Apex Court also placed reliance on the English decision reported in the case of ***Greenhalgh v. Mallard, (1947) 2 All ER 255***. In that

case, the appellants had resorted to two parallel proceedings, one under the Arbitration Act and the other by way of a suit. When the order of interim injunction obtained by the appellants was vacated in arbitration proceedings, they obtained an injunction in the suit. The issues in the two proceedings were identical and the suit was substantially to set aside the award and the court took a view that if the plaintiff has chosen to put his case in one way he cannot thereafter bring the same transaction before another court to put his case in another way and say that he is relying on a new cause of action and held that the proceeding by way of a suit was an abuse of the process of court since it amounted to litigating the same issue in a different forum through different proceedings. Relevant paras of the said judgment are extracted below:

"43. One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. Undoubtedly, it is a matter of courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding.

44. In the case of Greenhalgh v. Mallard, (1947) 2 AER 255 the court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court, held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the

court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of *res judicata* or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of court.

45. In *McIlkenny v. Chief Constable of West Midlands Police Force and Anr.*, (1980) 2 AER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the court since it raised an issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial. The court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of *res judicata* or the requirement of issue estoppel."

51. In another recent judgment of the Hon'ble Apex Court, ***M. Nagabhushana v. State of Karnataka and Ors.***, AIR 2011 SC 1113, the same view was reiterated in the following paras:-

"21. Therefore, any proceeding which has been initiated in breach of the principle of *Res Judicata* is *prima-facie* a proceeding which has been initiated in abuse of the process of Court.

22. A Constitution Bench of this Court in *Devilal Modi v. Sales Tax Officer, Ratlam and Ors.* AIR 1965 SC 1150, has explained this principle in very clear terms:

But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Article 226, cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of *res judicata* is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide: *Daryao v. State of U.P.* AIR 1961 SC 1457.

23. This Court in *All India Manufacturers Organisation (supra)* explained in clear terms that principle behind the doctrine of *Res Judicata* is to prevent an abuse of the process of Court.

24. In explaining the said principle the Bench in *All India Manufacturers Organisation (supra)* relied on the following

formulation of Lord Justice Somervell in Greenhalgh v. Mallard (1947) 2 All ER 255 (CA):

I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

52. The Hon'ble Apex Court in the case of **Jai Singh Vs. UOI, 1977 (1) SCC 1**, deprecated such practice of pursuing parallel remedies in respect of the same subject matter. In the case before the Supreme Court the issue was whether the appellant could file a suit agitating the same question which was the subject matter of the writ petition which was already dismissed and the court took a view that the appellant cannot pursue two parallel remedies in respect of the same matter at the same time. Following Para from the said judgment is extracted below:

"...There cannot, in our opinion, be any doubt on the point that the extent of purity of the gypsum won by the appellant is a question of fact. It has also been brought to our notice that after the dismissal of the writ petition by the High Court, the appellant has filed a suit, in which he has agitated the same question which is the subject matter of the writ petition. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."

53. Thus it would be manifest from the above principles that the plaintiffs cannot be allowed to continue two parallel remedies whether before two courts of the same country or the two courts of different countries and grant of any favourable relief to the plaintiffs will amount to overreaching the order passed by the Hon'ble Supreme Court of Israel which has already

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declined to grant interim relief as has been claimed by the plaintiffs in the present suit. Any indulgence by this court will result in causing serious interference with the process of justice of the foreign court. In fact passing of any order by this court can be in serious conflict with the orders passed by the Israel courts and such a situation would be in clear transgression of the principle of comity of courts and will result in creating anomalies and irreconcilable situation because of the continuation of two parallel proceedings before two competent courts of jurisdiction of two sovereign states.

54. The plaintiffs are themselves conscious of their ingenuity in approaching this court as in the plaint itself they have averred that the present suit has been filed by them as an abundant precaution and during the course of arguments also their stand was that at best the present suit can be considered as an extension of the earlier suit filed by them before the Israel court. How there can be an extension of a suit filed before a court of one sovereign state by the suit filed before the court of another sovereign state or that any suit can be filed by any party by way of an abundant precaution is beyond the comprehension of this court.

55. It is also trite that during the pendency of any proceedings if the plaintiff finds that he has wrongly invoked the jurisdiction of any court he can retrace his steps with the leave of the court to take his remedy before a competent court of jurisdiction. The defendant no.1, TVML, in the present case is a Mauritius company and it is an admitted case of the parties that the defendant no. 4 has 99.9% shares in the defendant no.3 company, then

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tomorrow on this premise the plaintiff can also file a suit before the Mauritius court and likewise before the Jersey court as well where the defendant no. 5, TVJL, has its base. The argument of the plaintiffs that they were unaware that the entire telecom business of the defendants in India was carried through the Indian company i.e. Defendant no.3 is just a shot in the dark. It also cannot be believed that there was any legal hurdle in the way of the plaintiffs to have impleaded the Indian company and other companies before the Israel court for a complete and effectual adjudication of the controversy between the parties. It also cannot be lost sight of the fact that the defendants before the Israel Court have also filed a counter claim and the parties are yet to enter the trial before the Israel court. Counsel for the plaintiffs very strongly took a plea that the source of the chain of these defendant companies is the defendant no.1 and the creation of such companies is only with a view to defeat the rights of the plaintiffs to claim their 7% share in the business of defendant no.3 company. Surprisingly, before the Israel court the plaintiffs opposed the plea of lifting of corporate veil of these companies. The following para of the order of District Court of Tel Aviv, Israel illustrates such inconsistency on the part of the plaintiffs:-

"it was further argued that the applicants are not requesting a "lifting of corporate veil" but rather they are claiming that the other companies are "the holder in person, or persons in his behalf" as such expression is defined in Rule 383 of the Rules of Civil Procedure. The applicants argue that any venture in India must be viewed as one group that is concerned with the establishment of cellular towers, and not as a separate cluster of companies engaged in separate activity. The applicants argue that directors of all subsidiary companies were appointed by the respondents, and the evidence of this is- that the directors of the parent company- the partnership, are office holders in the subsidiary company of the ventures. The partnership is the "operating brain" of the business and it is the partnership that

employed the applicants as advisers and experts in respect of the activity of the Indian subsidiary. Control is exercised by the partnership which directs all the activity of the subsidiaries."

56. Thus it is apparent from above that the case of the plaintiffs is a case of shifting stands as they have taken conflicting stands taken before this court and before the Israel court and thus the plea of the plaintiffs to lift the corporate veil of the defendant companies to unmask the core company which created the web of subsidiary companies for the purposes of tax evasion and also for the purpose of playing with the legitimate rights of their creditors including the plaintiffs, with whom they had entered into the First Consultancy Agreement dated 1.8.2005 and Share Entitlement Agreement dated 17.10.2006, cannot be appreciated as the only judicial forum which was available to the plaintiffs to raise such a plea was the Israel court where for the reasons best known to them they not only failed to implead defendants Nos. 3 to 5 but also failed to raise any such plea in that regard.

57. The counsel for the defendants also with great vigour alleged the defendants being guilty of suppression and misleading the court by not placing on record the order of the Hon'ble Supreme Court of Israel along with the present suit. On the other hand, much emphasis was laid by counsel for the plaintiffs on their contention that by merely not placing a copy of the judgment of the Supreme Court of Israel along with the present suit, which was not available with the plaintiffs by the time the present suit was filed, cannot be construed as an act of suppression on the part of the plaintiffs and that too when in the plaint the plaintiffs have duly disclosed the fact of filing of an appeal before the Appellate Court of Israel. Counsel also took a stand that considerable

time was consumed in getting the judgment of the Supreme Court translated to English language and further getting it apostilled. It would apt here to reproduce the paragraphs of the plaint wherein there is mention of the said order as under:

"15. Faced with the apathy and disregard of promises made by the defendants in the aforesaid documents/ agreements, the plaintiffs were compelled to approach the District Court in Tel Aviv, Israel vide a Civil File No. 2192/08, titled as "Shiju Jacob Varghese and another v. Tower Vision Ltd. and others" for enforcement of their said 7% rights. The said proceedings are still pending before the District Court in Israel. In the said proceedings, though the Defendant no. 1 and 2 have not denied the execution of any of the aforesaid agreements and the Share Entitlement Document dated 17th October, 2006 granting "absolute and unconditional" 7% right of the plaintiffs in the Tower Management business of the Partnership, they have objected to the Plaintiffs' claim on the technical ground inter alia that the businesses of the Partnership are outside Israel, and is therefore, beyond the territorial jurisdiction of the court in Israel, and as such, the Plaintiffs' claim cannot be entertained by the Israel court."

16. That in January, 2011, during the pendency of the aforesaid suit, the plaintiffs sought an interim injunction against the defendants from selling/ alienating the partnership business in any of the countries, like Mauritius, Jersey and/or India. The defendants opposed the said application of the Plaintiffs also on the technical ground that the said businesses and entities were outside the territorial jurisdiction of the courts in Israel. The said plea of the defendants was also accepted by the appellate court in Israel and it was observed that such an order cannot be passed by the Israel courts, more so because the foreign companies were not parties to the said suit."

58. As would be seen from the aforesaid paras of the plaint, the only disclosure made by the plaintiffs with regard to the order passed by Hon'ble Supreme Court of Israel is that plea of defendants was also accepted by the *appellate court* in Israel and it was observed by the said court that such an

order cannot be passed by the Israel courts, more so when the foreign companies were not parties to the present suit. Counsel for the defendants however took a stand that these very plaintiffs themselves filed a copy of the said judgment before the District Court Israel on 26.10.2011 along with the application for return of the bank guarantee deposited and therefore they cannot take a plea that copy of the judgment of the Supreme Court was not available to them or they could not get the same translated into English language for such a long period of over two months. The question thus arises is that whether such half - hearted disclosure by the plaintiffs can be considered as fair and honest disclosure or whether it will amount to suppression of material facts. It is a settled legal position that the litigant who approaches the court is bound to disclose all material facts and produce all the documents which are relevant to the litigation and if he withholds a vital document in order to gain advantage then he would be guilty of playing fraud on the court as well as on the opposite party. Here it would be worthwhile to refer to the celebrated and often quoted judgment of the Apex Court, ***S.P. Chengalvaraya Naidu v. Jagannath***, ***AIR 1994 SC 853***, wherein it was held as under:

"7. ...We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax- evaders, bank-loan-dodgers and

other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

The court went on to say that

"...A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

59. Counsel for the plaintiffs placed reliance on the judgment of the Apex Court in the case ***Arunima Baruah Vs. UOI & Ors.,(2007)6SCC120*** to support his argument that suppression must be of a material fact and if facts suppressed are not material for determination of lis between the parties then the court may not refuse to exercise its discretionary jurisdiction. The said judgment cited by the plaintiffs would not come to their rescue although there can be no quarrel with the legal position enunciated therein. For the purposes of the present adjudication, the order of the Hon'ble Supreme Court is a material fact as it is an order of the highest court of another state adjudicating the same matter in issue. Thus, in my considered view, any order passed by any judicial forum between the parties to the suit with regard to the controversy or disputes involved between the parties is a material fact and any suppression or withholding of such an order from any court is an act of suppression on the part of such a party. It is

a principle which forms the edifice of the justice dispensation system, that he who seeks equity must do equity. A person approaching the court must come with clean hands and a person not disclosing the correct and true facts is not entitled to seek justice. I am also astounded to find that the plaintiff had not even placed on record the copy of the order passed by the District Court of Tel Aviv, Israel at the time of filing of the present suit, although the said order was in support of the plaintiffs. So far as the order of the Hon'ble Supreme Court of Israel is concerned, this court finds that disclosure made by the plaintiffs in the averments of the plaint is a faint and a feeble attempt to suggest the said order but the said averments do not transparently declare that any order of the highest court of Israel was passed against them and on the contrary is a vague pitch. It also cannot be lost sight of the fact that the order of Supreme Court of Israel was passed on 24.10.2011 and the present suit was filed by the plaintiffs on 17.1.2012 and thus the translated copy of the same could be easily filed by the plaintiffs at least before the appearance of the defendants in the present case. The plaintiffs could have also taken leave of this court to file the said order of the Supreme Court of Israel if there was any difficulty coming in their way in getting the judgment of the Supreme Court of Israel translated into English language. This court is thus of the view that half-hearted and perfunctory disclosures by the plaintiffs in the averments made in the plaint, by not even mentioning that there was an order by Supreme Court of Israel against them and also by not placing on record copy of the order of the Supreme Court Israel, is certainly an act of suppression on the part of the plaintiffs.

60. To put in a nutshell, the plaintiffs have approached two courts for the same cause, one after the other, after being unlucky in the first round. The plaintiff chose to approach this court as it could not get a favourable order from the Israel court. The practise of choosing a particular forum by the plaintiffs for redressal of his grievances i.e choosing a place to sue which is convenient to him or a court which has an umbilical connection with the cause of action, etc is undeniably an unfettered right. However since a long time now the pernicious practice of choosing a particular court by the plaintiff with a motive to get a favourable order is becoming commonplace. This graphically described practice of *forum hunting* or *forum shopping* indubitably leads not only to the multiplicity of proceedings but also of the abuse of the process of the court. The courts have to discourage such practice with a heavy hand. Judicial propriety and discipline do not permit to give a free hand to the plaintiffs to manoeuvre the process of the court for its own self conceived designs. The present case thus clearly tantamounts to forum shopping; to take a chance before the Indian courts after having not succeeded before the Hon'ble Supreme Court of Israel which is the highest court of land of another sovereign state.

61. Section 151 of the Code of Civil Procedure recognises the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. It acknowledges the powers of the court to do what is right and undo what is wrong, that is, to do all things necessary to secure the ends of justice and prevent abuse of its process. As the provisions of the Code are not exhaustive, Section 151

recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances. The conduct of the plaintiffs approaching this court and institute parallel proceedings and indulging in forum shopping along with suppressing facts from the court is certainly an abuse of the process of the court. A party certainly cannot take recourse to a machination which amounts the abuse of the process of the court. The valuable judicial time spent in adjudicating the rights of the parties and making life altering decisions is being wasted in adjudicating vexatious suits which is most unfortunate, to say the least. It is an opportune time to sound a word of caution; desist and deflect; to the ones approaching this court with clandestine motives attempting to manipulate the process of law via exasperating litigation to recoil and refrain from the same.

62. In the light of the above discussion, this court is of the considered view that the present suit filed by the plaintiffs is not only a classic case of forum-shopping but also a case clearly impinging upon the well-established principle of comity of courts. The plaintiffs are also guilty of suppressing material facts from this court as discussed above. In the ultimate analysis, this court is not inclined to threadbare discuss the various other issues raised and also the judgments cited in support thereof by both the parties and hereby dismiss the present suit in the exercise of inherent powers vested in the court under Section

151, CPC so as to prevent the abuse of the process of the court and to secure the ends of justice.

63. It is ordered accordingly.

KAILASH GAMBHIR, J

November 16, 2012