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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA(OS)No.127/2014 and CM No.13907/2014

Reserved on : 8th April, 2015

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Date of Decision: 26th August, 2015

M/S SICPA INDIA PRIVATE LIMITED Appellant
Through : Mr. C.Mukund, Mr. Ashok
Kumar Jain, Mr. Pankaj Jain
and Mr. Saurav Gupta,
Advs.

versus

MR. KAPIL KUMAR & ORS Respondents
Through : Ms. Lakshmi Gurung and
Mr. Sujeet Kumar Mishra,
Advs. for R-1 to 3.
Mr. Vikas Arora, Mr.
Dheeraj Manchanda and Ms.
Radhika Arora, Advs. for
R-6.
Mr. T.K. Ganju, Sr. Adv.
with Mr. Adarsh Rai, Adv.
for R-7.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

GITA MITTAL, J.

1. Vide this judgment, we propose to decide the challenge to the judgment dated 1st July, 2014 whereby the learned Single Judge has disposed of several applications and consequently the suit

being CS(OS)No.2277/2010.

2. For the sake of convenience, we propose to refer to the appellant as 'SICPA' and the other parties by the same nomenclature as has been assigned to them by the learned Single Judge. Also to facilitate consideration, we may first and foremost note the parties to the litigation. SICPA India Pvt. Ltd. ('SICPA' for brevity hereafter) as plaintiff brought the suit against Shri Kapil Kumar (Defendant no.1); his wife Smt. Ritu Kumar (Defendant no.2); M/s Brushman (India) Ltd. (defendant no.3); ICICI Bank Ltd. (defendant no.4); DLF Ltd. (defendant no.5) and; M/s Genesis Finance Co. Ltd. (Defendant no.6).

It is noteworthy that while the opposite party nos.1 to 3 were arrayed as 'defendants', the defendant nos.4 to 6 were arrayed as 'proforma parties'. They are also so described in the plaint.

3. Details of the applications decided by the impugned judgment dated 1st of July 2014 and the provision of law under which they were filed are as under:

Applications filed by plaintiff :

- (i) I.A. No.15011/2010 [Order XXXIX Rules 1 & 2 read with Section 151 of the Code of Civil Procedure (hereafter referred to as the 'CPC')]
- (ii) I.A. No.15012/2010 (Order II Rule 2 read with Section 151 CPC)
- (iii) I.A. No.478/2011 [Order I Rule 10(2) CPC]
- (iv) I.A. No.274/2012 (Order VI Rule 17 read with Section 151 CPC)

Applications filed by D-1 to D-3 :

- (i) I.A. No.6654/2011 (Section 8 of Arbitration & Conciliation Act, 1996)
- (ii) I.A. No.6657/2011 (Order I Rule 10 read with Section 151 CPC)
- (iii) I.A. No.20809/2011 (Order VII Rule 11 read with Section 151 CPC)

4. The proposed amendment of the plaint by way of I.A.No.274/2012 was rejected primarily for the reason that the plaintiff was thereby seeking to make out a completely new case and that the amendment to the prayers were barred by law also. I.A.No.478/2011 seeking addition of a party was also rejected consequently by the impugned judgment. The learned Single Judge concluded that I.A.No.15012/2010 was devoid of merit.

5. So far as the reliefs of declaration and mandatory injunction sought against defendant nos.4 to 6 in the existing plaint are concerned, it was held that the same are legally not permissible and as a result, I.A.No.20809/2011 was accepted. As a result of the decisions on these applications, the learned Single Judge was pleased to hold that the plaintiff was disentitled to the reliefs sought in prayer clause 1(b) to 1(d) of the plaint against the defendant nos.4 to 6 and that the suit against them therefore, for these prayers was not maintainable.

6. It was held that as there was an arbitration clause in the loan agreement between SICPA and defendant nos.1 to 3 which was

admitted by the plaintiff. Therefore, so far as the claims of SICPA against defendant nos.1 to 3 were concerned, the learned Single Judge held that the amount claimed by the plaintiff/appellant was recoverable only as per law and the plaintiff was required to take necessary steps for initiating arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. For this reason, the suit against defendants nos.1 to 3 could not continue in view of the prohibition under the said enactment. I.A.No.6654/2011 was therefore, accepted.

7. For the sake of convenience, we set down hereunder the heads under which we have considered the facts as well as the challenge in this judgment :

- I. **Factual matrix** (paras 8.1 to 8.47)
- II. **Filing and proceedings in CS(OS)No.2277/2010**
(paras 9.1 to 9.14)
- III. **Challenge to the judgment on I.A.No.274/2012 filed by the plaintiff for amendment of the plaint under Order VI Rule 17 of the C.P.C.** (paras 10.1 to 10.22)
- IV. **Amendments are not imperative for proper and effective adjudication of the present case i.e. whether it satisfies the 'real controversy' test?** (para 11.1)
- V. **Proposed amendments completely change the nature of the suit** (paras 12.1 to 12.40)
- VI. **Amendments result in such prejudice to the defendants which cannot be compensated adequately in terms of money** (paras 13.1 to 13.9)

- VII. Proposed amendments were sought malafide and therefore, impermissible (paras 14.1 to 14.18)
- VIII. SICPA had no concern at all with the basement of the property bearing No.D-6/2, Vasant Vihar, New Delhi-110057 - proposed amendment challenging sale deed of basement was malafide for this reason as well (paras 15.1 to 15.3)
- IX. Proposed amendments are barred by law (paras 16.1 to 16.19)
- X. Amendment sought to avoid rejection of the plaint sought by the defendant nos.1 to 3 by way of I.A.No.20809/2011 (paras 17.1 to 17.3)
- XI. Refusing the amendments would not lead to injustice or multiplicity of litigation (paras 18.1 to 18.25)
- XII. Challenge to the order dismissing I.A.No.15012/2010 filed by plaintiff under Order II Rule 2 of the C.P.C. (paras 19.1 to 19.20)
- XIII. Examination of pleas in I.A.No.20809/2011 (filed on 20th December, 2011) by defendant nos.1 to 3 seeking rejection of plaint under Order VII Rule 11 C.P.C. (paras 20.1 to 20.42)
- XIV. Challenge to the order accepting I.A.No.6657/2011 filed on 24th April, 2011 by defendant nos. 1 to 3 under Order I Rule 10(2) seeking deletion of defendant nos.4 to 6 from the array of parties (paras 21.1 to 21.3)
- XV. Challenge to the order on IA No.478/2011 filed by the plaintiff under Order 1 Rule 10(2) of the C.P.C. for impleadment of Sh.K.L. Chugh (paras 22.1 to 22.17)

XVI. Challenge to the order on I.A.No.6654/2011 filed by defendant nos.1 to 3 under Section 8 of the Arbitration and Conciliation Act, 1996 (paras 23.1 to 23.14)

XVII. Costs (paras 24.1 to 24.70)

We now propose to discuss the above issues in seriatum :

8. Factual matrix

8.1. To the extent necessary for adjudicating upon the challenge placed before us, we proceed to note the essential facts hereafter.

8.2. Mr. Kapil Kumar - the defendant no.1 was the managing director while his wife Ms. Ritu Kumar – the defendant no.2 was a director of the defendant no.3 company. The defendant nos.1 and 2 as well as mother of the defendant no.1 were the promoters of the defendant no.3 company.

8.3. The controversy in the suit revolves around the following two properties which belonged to the defendant nos.1 and 2:

- (i) the ground floor of the property D-6/2, Vasant Vihar, New Delhi-110057 (hereinafter referred to as ‘Vasant Vihar property’)
- (ii) a penthouse 1917A (re-numbered as 1923A), DLF Magnolias, Gurgaon, Haryana (hereinafter referred to as ‘DLF property’).

We note that apart from ground floor, the defendant nos.1 and 2 also owned the basement of the property no.D-6/2, Vasant Vihar, New Delhi.

8.4. The defendant no.3 had obtained financial facilities from the

ICICI Home Finance (defendant no.4) which were secured by creation of charge in its favour with regard to the above properties. It had also taken loans from M/s Genesis Finance Co. Ltd. (defendant no.6 herein).

8.5. So far as the necessity for impleading the defendant no.6 is concerned, it was stated that “*plaintiff has learnt from reliable sources that defendant nos.1 and 2 have taken loan from defendant no.6 and cleared the dues of defendant no.4*”. The plaintiff also states that as the defendant no.6 was claiming to have stepped into the shoes of defendant no.4 ICICI Bank, and understood to have become the first charge holder of the said two properties instead of defendant no.4, and therefore, it was necessary to implead defendant no.6.

8.6. So far as the DLF - defendant no.5 was concerned, SICPA submitted that out of ₹7,75,50,000/-, the total sale consideration for the DLF Penthouse, the defendant nos.1 and 2 had paid a ‘*substantial amount*’ while sums remained due and payable necessitating impleadment of the DLF as defendant no.5 so that it could be directed to record the second charge of SICPA.

8.7. An amount of ₹5,00,00,000/- was loaned by SICPA to the defendant no.3 by way of a loan agreement dated 27th August, 2008 on terms and conditions stated therein. The period of the loan was rolled over for a period of three months vide a loan agreement dated 27th November, 2008. All terms and conditions remained the same except that the interest rate was enhanced to 21%. On the 27th of February 2009, the loan was again re-rolled on request by

the defendant no.3's for a period of 124 days. No immovable property of the defendant nos.1 to 3 was even mentioned in the loan agreement dated 27th August, 2008 or 27th November, 2008. SICPA gave the loan to defendant no.3 on 27th August, 2008 against pledging of shares of defendant no.3 as the only security.

8.8. The second roll over on 27th February, 2009 was without payment of any additional money or facility to the defendant no.3. However, it was upon offer of the "Borrower" i.e. the defendant no.3 to provide inter alia "second charge" of properties of promoters/promoters' relations. We set down hereunder the material terms and conditions of the loan agreement dated 27th February, 2009 (SICPA being referred to as the 'Lender' and defendant no.3 as the 'Borrower') which came to be executed on this occasion :

“B. On request of the Borrower, the Lender has agreed to offer roll over facility of the loan of ***Rs.5,00,00,000/- (Rupees Five crore only)*** granted to the Borrower earlier on 27.08.08 vide cheque no.156128 dated 29.08.08 drawn on Corporation Bank, I.F. branch, New Delhi against Loan Agreement dated 27.08.08 and thereafter rolled over on 27.11.08 vide Loan Agreement dated 27.11.08.”

“NOW THIS AGREEMENT WITNESSES AND THE PARTIES HERETO AGREE AS UNDER:

ARTICLE – 1 TERMS OF THE LOAN

1.1 Amount of Loan

(a) In consideration of the Lender agreeing to roll over of the loan “Facility” the ***Borrower agreed to provide marketable securities held by the Promoter/Promoters’ relations*** by way of pledge, ***Personal Guarantees*** of the Promoter/Promoters’ relations, ***second charge*** on the properties located at D-6/2 ***Ground Floor, Vasant Vihar***, New Delhi – 110057 and ***Penthouse No.1917-A, DLF, Magnolias***, Gurgaon ***jointly owned by its Promoter/Promoters’ relations*** in favour of the Lender, ***Affidavit by the joint owners*** of the aforesaid properties ***agreeing to create a second charge on the properties*** in favour of the Lender and an ***“agreement to sell”*** the property located at D-6/2 Ground Floor, Vasant Vihar, New Delhi-110057 by the joint owners at a ***prefixed price of Rs.5.75 Crore*** to SICPA India Ltd. or its nominees ***in case of default in payment of the Facility***, all forming part of the Loan Agreement dated 27.02.09 and covered under Schedule I to the said Loan Agreement.”

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1.3 Repayment

If, at any time during the currency of this Agreement, the Borrower wishes to repay any part of the loan then outstanding, the Borrower may do so by giving to the Lender a notice of not less than two working days.

The Borrower undertakes to repay to the Lender, loan amount in accordance with the provision in the relevant Schedule of Terms. On occurrence of any Event of Default, the loan Balance shall become payable.

ARTICLE – 2 Security & Margin

A. Primary Security

2.1. Each Loan Facility Balances ***shall be secured by any or all*** of the following:

Securities mean ***securities*** as ***defined*** under Section 2(h)

of the *Securities Contract Regulation Act, 1956* (as amended from time to time) and also includes debentures, bonds, RBI relief Bonds deposits, collateralized debt obligations and securitised debt instruments units of mutual funds etc.

In consideration to the loan facility granted to the Borrower by the Lender, the Borrower ***agrees to create an exclusive pledge*** in favour of the Lender *securities* acceptable to the Lender (collectively ‘Securities’) ***more particularly described in the Schedule of Terms (Schedule I to the Loan Agreement)*** belonging to the Promoters – Mr. Kapil Kumar S/o Late Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 and Mrs. Raj Rani W/o Late Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 hereinafter referred to as the Pledger duly covered and documented under Deed of Pledge executed on 27.02.09 and forming part of this Loan Agreement and the Pledger shall ***do all such acts, deeds and things and execute all such documents, declarations and forms as may be required to*** record/create the pledge under the depository system as per the provisions of the Depository Act, 1996 and the regulations framed by the Securities Exchange Board of India (SEBI) and/or the byelaws of the concerned Depository and ***to do everything required to create an effective pledge*** in favour of the Lender, ***as security*** for repayment of the dues together with interest, default interest, interest tax, charges, dues, fees thereon or otherwise due to the Lender and for due performance by the Borrower of its obligation under this Agreement.

B. **Collateral Security**

2.6 ***Second charge on the properties having housing loans from ICICI Bank located at D-6/2 Ground Floor Vasant Vihar, New Delhi – 110057 and Penthouse No.1917-A, DLF, Magnolias, Gurgaon by Mr. Kapil Kumar S/o Late Kanwal Krishan, R/o D-6/2 Vasant***

Vihar, New Delhi – 110057 **and Mrs. Ritu Kumar** W/o Mr. Kapil Kumar, R/o D-6/2 Vasant Vihar, New Delhi – 110057 **in favour of the Lender** for due fulfilment of the obligations under the Loan Agreement and forming part of the Loan Agreement dated 27.02.09 and mentioned under Schedule I to the said Loan Agreement which is covered and further supported by:

2.6.1 **Affidavit by Mr. Kapil Kumar** S/o Late Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 **and Mrs. Ritu Kumar** W/o Mr. Kapil Kumar, R/o D-6/2 Vasant Vihar, New Delhi – 110057 **to offer second charge** on the aforesaid properties.

2.6.2 **Power of Attorney** executed **by Mr. Kapil Kumar** S/o Late Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 **and Mrs. Ritu Kumar** W/o Mr. Kapil Kumar, R/o D-6/2 Vasant Vihar, New Delhi – 110057 in favour of SICPA India Ltd. in connection with the second charge on the aforesaid properties.

2.6.3 **Will by Mr. Kapil Kumar** S/o Late Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 **and Mrs. Ritu Kumar** W/o Mr. Kapil Kumar, R/o D-6/2 Vasant Vihar, New Delhi – 110057 in connection with the aforesaid properties.

2.6.4 **Agreement to Sell**

“Agreement to sell” the property located at D-6/2 Vasant Vihar, New Delhi – 110057 at **a prefixed price of Rs.5.75 Crore** (Rupees five crore seventy five lakhs only) by Mr. Kapil Kumar S/o Late Shri Kanwal Krishan, R/o D-6/2 Vasant Vihar, New Delhi – 110057 and Mrs. Ritu Kumar w/o Mr. Kapil Kumar, R/o D-6/2 Vasant Vihar, New Delhi – 110057 to SICPA India Ltd. or its nominees in case of **default in payment of the Loan Facility by 30.06.09** or **inability to sell the property before 30.06.09 to fulfil the obligation of repayment of the Loan Facility** under the Loan Agreement.”

(Emphasis supplied)

8.9. We may also note that the events of default for termination of the loan agreement dated 27th February, 2009 were also anticipated under the agreement. In Article 4 of the agreement, the parties had postulated as follows :

“ARTICLE – 4

EVENT OF DEFAULT AND TERMINATION

4.1. Events of Default

Each of the following events is, and shall be deemed to constitute, an “Event of Default” if the Borrower and/or Security provider (wherever applicable)

- a) ***Defaults in the payment of any instalment*** of the Facility, ***any instalment of interest*** or any expense or charges as and when they become payable;
- b) Is called upon to make good the Margin under Article 2.3 and it fails to do so within the period of notice specified in the said article;
- c) Has made any material misrepresentation of facts, including (without limitation) in relation to the Security;
- d) Is unable to pay its debts or has admitted in writing its inability to pay its debts, as and when they become payable; or suffer any adverse material change in his/her/its financial position or defaults in any other agreement with the Lender;
- e) ***Default in creation of the second charge on the properties referred to under clause no.4.1(e) beyond 10 days from the date of signing the Loan Agreement. ...***
- f) Default in making the payment of EMIs by Mr. Kapil Kumar S/o Late Kanwal Krishan, R/o D-6/2 Ground Floor, Vasant Vihar, New Delhi – 110057/Mrs. Rittu Kumar W/o Mr. Kapil Kumar R/o D-6/2 Ground Floor, Vasant Vihar, New Delhi – 110057, for the housing loans taken against security of properties located at D-6/2 Ground Floor, Vasant Vihar, New Delhi – 110057 and Penthouse No.1917-A, DLF, Magnolias, Gurgaon beyond 3 days from the date of

their falling due.”

(Emphasis supplied)

8.10. Inasmuch as the defendant nos.1 to 3 have objected to the maintainability of the suit on account of the applicability of the Arbitration and Conciliation Act, 1996, we set out hereunder the arbitration agreement contained in Clause 5.5 of this agreement as well which reads thus :

“5.5 Arbitration

Any and all disputes arising out of or in connection with this Agreement and the Schedule(s) of Terms attached hereto or the performance of this Agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the Lender and the award thereupon shall be binding upon the parties to this Agreement. The place of the arbitration shall be in Delhi, in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory amendments thereof and will also be under the jurisdiction of the court at Delhi.”

8.11. We may also extract clause 6.3.4 in the Schedule I of the loan agreement relied upon by the plaintiff which read as follows:

“*SCHEDULE I*

SCHEDULE OF TERMS FOR LOAN AGAINST SECURITIES.

ATTACHMENT TO LOAN AGREEMENT DATED 27.02.2009 AND FORMING PART OF THE LOAN AGREEMENT

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6.3.4. “*Agreement to sell*” the property located at *D-6/2 Ground Floor, Vasant Vihar*, New Delhi – 110057 at a *prefixed price of Rs.5.75 Crore by Mr. Kapil Kumar*

S/o Late Shri Kanwal Krishan, R/o D-6/2, Vasant Vihar, New Delhi – 110057 **and Mrs. Rittu Kumar** w/o Mr. Kapil Kumar, R/o D-6/2, Vasant Vihar, New Delhi – 110057 **to SICPA India Ltd.** or its nominees in case of **default in payment of the Loan Facility by 30.06.09 or inability to sell the property before 30.06.09 to fulfil the obligation of repayment of the Loan Facility under the Loan Agreement. ...**”

(Emphasis supplied)

8.12. On this occasion of the second roll over of the loan, therefore, SICPA sought additional security from the defendant nos.1 to 3 by way of the following requirements :

(i) Marketable securities held by promoters/promoters’ relations by way of pledge. [clause 1.1(a)]

(ii) Personal guarantees of the promoters/promoters’ relations. [clause 1.1(a)]

(iii) Second charge on the properties located at D-6/2, Ground Floor, Vasant Vihar, New Delhi and Penthouse No.1917A, DLF Magnolias, Gurgaon, Haryana jointly owned by promoters/promoters’ relations. (Clause 2.6)

(iv) Affidavits by the owners of the aforesaid properties agreeing to create second charge on the properties in favour of lender. (Clause 2.6.1)

(v) Power of attorney by Mr. Kapil Kumar and Ms. Rittu Kumar in connection with second charge. (Clause 2.6.2)

(vi) Will by Mr. Kapil Kumar and Ms. Rittu Kumar in connection with aforesaid properties. (Clause 2.6.3)

(vii) An agreement to sell the property located at D-6/2, Ground Floor, Vasant Vihar, New Delhi by the joint owners at a pre-fixed price of Rs.5.75 crores to SICPA or its nominees in case of default

in the payment of the financial facilities, which formed part of the loan agreement dated 27th February, 2009. (Clause 2.6.4)

8.13. It is not disputed that out of the above requirements set out in Clause 1.1(a) of Article 1 of the Loan Agreement dated 27th February, 2009, the defendant nos.1 to 3 provided the following :

(i) the pledge of shares of defendant no.3 which were held by promoters of the company for an amount equivalent to 2.50 times of the value of the loan amount. As per the Schedule to the loan agreement, the value of the shares was agreed to be the closing share price on BSE as on the date of the pledge.

(ii) SICPA also obtained personal guarantees of the promoter members. SICPA does not seek enforcement of these guarantees. So we are not examining the validity thereof.

(iii) Post-dated cheques for the amounts of the principal and interest were also taken.

(iv) two unregistered General Power of Attorneys both dated 27th February, 2009 were executed by defendant nos.1 and 2. The first General Power of Attorney was in respect of property being Ground Floor, D-6/2, Vasant Vihar, New Delhi-110057 and the second attorney was in respect of property being Penthouse 1917A, DLF Magnolias, Gurgaon, Haryana whereby SICPA was constituted as the general and lawful attorney of defendant nos.1 and 2.

(v) Mr. C. Mukund, learned counsel for the appellant has drawn our attention also to a letter of guarantee dated 27th February, 2009 executed by defendant no.1 and an identical letter of guarantee

executed by defendant no.2 whereby they personally undertook to abide by the terms and conditions of the loan agreement dated 27th February, 2009.

(vii) In terms of Clause 2.6.4 of the loan agreement read with Clause 6.3.4 (of the Schedule thereto), SICPA also entered into an unregistered agreement to sell with the defendant nos.1 and 2 on the 27th February, 2009 itself. This agreement was only in respect of ground floor of the property bearing no.D-6/2, Vasant Vihar, New Delhi-110057. SICPA was referred to as the 'Second Party' while defendant nos.1 and 2 were referred to as the 'First Party' therein. This agreement to sell contained recitals with regard to the disbursement of the loan; its being rolled over twice; the fact that the defendant no.3 had submitted post-dated cheques (PDCs); a demand promissory note (DPN) dated 27th February, 2009 for the sum of ₹5,00,00,000/- payable on 30th June, 2009 and that the defendant nos.1 and 2 had agreed to provide a second charge against the Vasant Vihar property (only ground floor) as well as the DLF property.

8.14. So far as the agreement to sell dated 27th February, 2009 was concerned, SICPA was referred to as the Second Party, while Brushman India Ltd. - defendant no.3 was referred to as the 'BIL'.

This agreement to sell specifically stated as follows :

“And that, should BIL be unable to repay the outstanding dues in respect of said ICD of Rs. 5 crores along with interest and charges thereon in accordance with the terms of the loan agreement dated 27.02.09, the First Party agrees and undertakes as under with respect

to the *aforesaid property located at Ground Floor, D-6/2, Vasant Vihar, New Delhi-110057.*

1. That the First Party is the true and lawful owner of the aforesaid property.

2. That in pursuance to this Agreement, the aforesaid *property has been valued at Rs. 5.75 crores* (Rupees five crores seventy five lacs only) as on 30.06.2009, which *consideration has been agreed* between the parties to be price on 30.06.2009 in *part settlement of the total outstanding dues in respect of said ICD of Rs. 5 crores along with interest* thereon irrespective of and in *supersession of any prior understanding, agreement*, writings, entries in books of account etc.

3. That since the said *property is carrying housing loan(s) from ICICI Bank Limited/ICICI Home Finance*, the *second party shall settle the outstanding dues of ICICI Bank Limited/ICICI Home Finance before enforcing the Agreement.* The *First Party* will however *pay the EMIs due on the home loan* against the aforesaid property during the period *upto 30.06.2009.*

4. In the event the *First Party is able to get a better price than the consideration agreed between them* in this agreement, the *First Party* would be *duly authorized for contracting and selling the aforesaid property without recourse to the Second Party* but *under an information to the Second Party* in respect of contracting a deal of aforesaid sale consideration. In this case the *first party undertakes to settle the ICICI Bank Limited/ICICI Home Finance loans out of the sale proceeds and remit the balance to the second party towards part payment against the ICD.*

5. That the *First Party shall hand over the vacant physical possession* of the aforesaid property *to the purchaser on execution of sale deed* along with the documents relating to the aforesaid property in possession of ICICI Bank Limited/ICICI Home

Finance.”

(Emphasis supplied)

Thus the basement of the property no. D-6/2, Vasant Vihar, New Delhi-110057, also owned by the defendant nos.1 and 2, was not part of any agreement with the SICPA. Justifiably, therefore, SICPA does not assert second charge, mortgage or any claim with regard to the same.

For the purposes of the instant adjudication, it is noteworthy that by the aforesaid two General Power of Attorneys in favour of SICPA, executed by the defendant nos.1 and 2, SICPA stood authorized to inter alia create collateral security with regard to the two properties for the ICD of ₹5,00,00,000/- which it had advanced to the defendant no.3. The attorneys specified that they would be effective on or after 30th June, 2009 subject to the terms of the loan agreement dated 27th February, 2009. Under Clauses 3, 4, 5, 6 and 8, SICPA had sought and was empowered by the said General Power of Attorney to do the following :

“3. To look after, supervise, manage, and control the affairs of the said Property.

4. ***To execute and to do or cause to be executed and done, all such deeds, instruments and things in relation to any of the matters or purposes in respect of the aforesaid Property as in the absolute discretion of the said attorney/SICPA shall deem expedient***, as full and effectively as Executants could do if they were personally present.

5. ***To transfer the said Property to SICPA in whole or part as the case may be or in any manner whatsoever.***

6. ***To sign, execute, endorse or do any act that may***

be necessary for the registration of documents before any competent authority.

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8. ***To pay*** the arrears of ground rent, price, premium, conversion charge, surcharge, processing fee, ***stamp duty, registration charge***, unearned increase, and other dues of any nature in respect of the said Property to the authorities concerned on demand or otherwise. These expenses shall be borne by the executants and if paid by the lender on any eventuality the amount is to be reimbursed by the executants.

9. To do all acts, deeds and things so that duties, obligations, responsibilities of Executants in respect of said Property, if not complied with.”

(Emphasis by us)

8.15. At this stage, it is also necessary to notice certain facts relating to the dealings of the defendant nos.1 and 2 with defendant no.6 - M/s Genesis Finance Co. Ltd. The defendant no.6 is stated to be a non-banking financial corporation which stands registered with the Reserve Bank of India. Pursuant to a loan agreement dated 26th September, 2006, the defendant no.6 loaned a sum of ₹2,50,00,000/- to the defendant nos.1 and 2 against the equitable mortgage of the Penthouse 1917A, DLF Magnolias, Gurgaon, Haryana (hereafter referred to as “DLF property”). The lien of defendant no.6 was duly marked with defendant no.5 DLF Ltd., the builders thereof.

8.16. It is noteworthy that defendant nos.1 and 2 entered into a financial relationship with defendant no.6 in 2006. This was about two years prior to any dealings of SICPA with the defendant no.3 which commenced on 27th August, 2008.

8.17. On the request of defendant nos.1 and 2 that they were getting loan on better interest rates from ICICI Bank, the defendant no.6 released the DLF property from the flat buyer agreement on 1st September, 2007 and also got its lien removed from the DLF in favour of ICICI Bank. Defendant no.6, however, obtained a pari passu charge over the DLF penthouse with the ICICI Bank.

8.18. On 4th July, 2008, another loan of ₹83,00,000/- was given by defendant no.6 to the defendant nos.1 and 2 against the equitable mortgage of the basement of property bearing no. D-6/2, Vasant Vihar, New Delhi-110057.

8.19. As per the defendant no.6, the loan account was moving smoothly and only approximately ₹47.75 lakhs remained due from the defendant nos.1 and 2. Based on past performance, the defendant no.6 advanced a further sum of ₹172.25 lakhs against the DLF property bringing the total loan to defendant nos.1 and 2 to ₹2.20 crores. A supplementary loan agreement dated 1st October, 2008 was also executed in continuation of the original loan agreement dated 26th September, 2006.

8.20. It is sometime in February, 2010 that the defendant nos.1 and 2 became irregular in the repayment of the financial facility. The defendant no.6 was approached with the information that the defendants were unable to service the ICICI loan facility and the defendant nos.1 and 2 were apprehending adverse action against the DLF and the Vasant Vihar properties by the ICICI bank for recovery. The defendant nos.1 and 2 also disclosed that for the reason that the DLF dues were mounting, it was also threatening to

cancel their allotment.

8.21. The defendant nos.1 and 2 informed defendant no.6 that they had already taken loan upon the ground floor of the Vasant Vihar property from the ICICI Bank and due to their default, ICICI Bank was also likely to take action for recovery. These defendants sought the help of the defendant no.6.

8.22. Due diligence and enquiries by the answering defendant revealed that the DLF had already cancelled the allotment of the penthouse due to non-payment of instalments totalling about ₹80,00,000/-. ICICI loan against the DLF property was about ₹5.85 crores which was also heading towards default. Dues towards the loan advanced by defendant no.6 against the DLF property to defendant nos.1 and 2 were also to the tune of ₹2.80 crores.

8.23. As on 15th February, 2010, against the Vasant Vihar property, the defendant nos.1 and 2 owed over ₹5.40 crores to ICICI Bank and over ₹1.33 crores to the defendant no.6 secured by charges over their properties.

We note that these amounts are beyond the claim of SICPA which had dealings with the defendant no.3.

8.24. Let us see the further position which is disclosed by the defendant no.6 in respect of these properties on record before the learned Single Judge. The defendant nos.1 and 2 entered into a second supplementary loan agreement dated 24th February, 2010 (in continuation of the earlier loan agreement and supplementary loan agreement dated 21st September, 2006 and 1st October, 2008

respectively) with the defendant no.6.

8.25. In these circumstances, the defendant no.6 agreed to assist the defendant nos.1 and 2 by purchasing the basement and ground floor of property bearing no.D-6/2, Vasant Vihar, New Delhi-110057 for a total sum of ₹6.75 crores vide an agreement dated 15th February, 2010 which was paid to them in the following manner :

	Details	Payments
(i)	In cash (against the receipt dated 15 th February, 2010)	₹2 lacs
(ii)	Adjusted towards re-payment of dues of defendant no.6 against loan agreement dated 4 th July, 2008	₹1.33 crores
(iii)	Taking over of the loan liability of ICICI Bank against the ground floor of property bearing no.D-6/2, Vasant Vihar, New Delhi-110057	₹5.40 crores (this amount stands finally paid on 23 rd August, 2010)

8.26. Pursuant to the said agreement dated 15th February, 2010, possession of the Vasant Vihar property was also handed over to the defendant no.6. The defendant nos.1 and 2 clearly represented in this agreement that there was no other loan liability against the properties or previous agreements to sell or legal impediment upon transfer of the property of any nature whatsoever.

8.27. Vide a Second Supplementary Loan Agreement dated 24th February, 2010 in continuation of loan agreement dated 21st September, 2006 and supplementary loan agreement dated 1st October, 2008, the defendant no.6 paid a sum of ₹80,00,000/- to the DLF in the account of the defendant nos.1 and 2 and revived

the allotment of penthouse. The defendant no.6 also cleared the overdue instalments of defendant no.4 (ICICI Bank) and started paying the dues of defendant no.4 on behalf of defendant nos.1 and 2 to regularise the loan with a view to protect the DLF property.

8.28. In the second supplementary loan agreement dated 24th February, 2010 with the defendant no.6, it had been agreed that the defendant nos.1 and 2 shall be at liberty to dispose of the DLF penthouse till 31st May, 2010 and clear the up to date dues of defendant no.6 with interest, failing which, the defendant no.6 agreed to purchase the DLF property on a mutually agreed price.

8.29. In the meantime, till 31st May, 2010, the defendant no.6 continued to pay the dues of the ICICI Bank against the DLF property and also paid the dues of the DLF owed by the defendants.

8.30. In order to further secure the interest of defendant no.6, the defendant nos.1 and 2 executed a registered power of attorney dated 7th April, 2010 in favour of the representative of defendant no.6.

8.31. It appears that defendant nos.1 and 2 could not find a suitable buyer to sell the DLF property till 31st May, 2010. As such finding no way out, the defendant nos.1 and 2 agreed to sell their DLF penthouse to defendant no.6 on a negotiated agreed price of ₹11,51,00,000/-.

This sale consideration, at which the defendant no.6 purchased the DLF property from the defendant nos.1 and 2, was

paid in the following manner:

S. No.	Particulars of payment	Amount
(i)	In cash to the defendant nos.1 and 2 against receipt dated 1 st June, 2010	: ₹1,00,000/-
(ii)	Towards re-payment of dues of defendant no.6 against the loan agreement dated 4 th July, 2008	: ₹5,00,00,000/-
(iii)	Loan liability of the ICICI Bank against the DLF property as on 1 st June, 2010 (paid on 23 rd August, 2010)	: ₹5,65,00,000/-
(iv)	Dues payable to the DLF	: ₹85,00,000/-
	Total	: ₹11,51,00,000/-

8.32. Thus a sum of ₹80,00,000/- stands paid by defendant no.6 to DLF. However, DLF has increased the dues which has now become almost to the tune of ₹2 crores which defendant no.6 is required to pay.

We are informed by the defendant no.6 that for the reason that the matter became subjudice before the court, there has been a time gap in recording a transfer of DLF Penthouse in favour of defendant no.6.

8.33. Towards the sale transaction for the Vasant Vihar property, the defendant nos.1 and 2 executed an agreement to sell dated 15th February, 2010 and a power of attorney of the same date in favour of the defendant no.6. Towards the sale of DLF property, to formally complete the sale transaction of the DLF property in favour of defendant no.6, the defendant nos.1 and 2 executed an agreement to sell dated 1st June, 2010 and a memorandum of

understanding dated 1st June, 2010 besides a general power of attorney dated 7th April, 2010.

8.34. On our query, we are informed by Mr. Vikas Arora, learned counsel for defendant no.6 that the total amount owed by defendant nos.1 and 2 to ICICI Bank against Vasant Vihar property and DLF property was taken over by the defendant no.6 at a figure of ₹11.05 crores (₹5.40 crores and ₹5.65 crores respectively). During the settlement finally effected with the ICICI Bank, the defendant no.6 was able to get a discount.

8.35. In terms of the above commitment, the ICICI Bank loan was cleared by the defendant no.6 on 23rd August, 2010 by payment of ₹10,84,53,097/- to the ICICI Bank. As a result, on 6th September, 2010, the ICICI gave its no objection certificates in favour of defendant nos.1 and 2 to defendant no.6 to the transfers of the properties. By this certificate, the ICICI had also confirmed that it had no other or further dues or claims from the defendants under the loan. This corroborates the assertion by defendant no.6 of the payments made to ICICI.

8.36. ICICI Bank thereafter released the original title deeds of the Vasant Vihar property as well as the DLF property to the defendant no.6. In terms of requirements of DLF, defendant no.6 got its lien marked in the records replacing name of the ICICI.

8.37. The defendant no.6 has contended that it made the payments to ICICI as well as DLF asserting ownership over the properties.

8.38. We are informed by defendant no.6 that though it had paid the full and final consideration to the defendant nos.1 and 2 with

regard to the purchase of the Vasant Vihar property (both ground floor and its basement), however, to minimise its own costs, the defendant no.6 did not get the formal sale deed executed or registered in its favour. It was agreed that as and when the defendant no.6 exercised its rights to do so, the defendant nos.1 and 2 would execute all necessary documents, either in favour of the defendant no.6 or in favour of its nominee.

8.39. It appears that on 11th October, 2010, the defendant no.6 also located a buyer (the proposed defendant no.7) for both the basement and ground floor of D-6/2, Vasant Vihar, New Delhi-110057 for a total sale consideration of ₹6,75,00,000/-. The deal was finalised by this buyer giving a token amount of ₹10,00,000/- by a cheque bearing no.327861 drawn on Standard Chartered Bank on this date. The formal agreement to sell was executed on 21st October, 2010 by the defendant no.6 from the defendant nos.1 and 2. The representative of the defendant no.6 signed the agreement to sell as a witness and confirming party to the transaction. The formal conveyance deed i.e. the sale deed was executed and registered in favour of proposed defendant no.7 on the 7th of December 2010 by the defendant no.6 from the defendant nos.1 and 2 for the total sale consideration of ₹6,75,00,000/-.

8.40. It is admitted before us that other than the aforementioned offers by defendant nos.1 and 2 in the loan agreement dated 27th February, 2009 to create a second charge in favour of SICPA with regard to the ground floor of the Vasant Vihar property as well as the DLF property, nothing further was undertaken by the defendant

nos.1 and 2. Furthermore, as on 27th February, 2009, when SICPA entered into loan agreement as well as agreement to sell with defendant nos.1 and 2, the ground floor of the Vasant Vihar property was bound as security towards the loan of ₹5.40 crores from the ICICI. While the loan of ₹1.33 crores from the defendant no.6 stood secured against the basement of the said property.

So far as the DLF penthouse was concerned, the defendant no.6 had a pari passu charge with ICICI to secure their loans. However, subsequently defendant no.6 took over the ICICI and DLF liabilities of defendant nos.1 and 2 and its lien and rights were recorded qua this property as well.

8.41. On behalf of the defendant no.3, the defendant no.1 wrote to SICPA on the 23rd February, 2010, pointing out that the company had offered to create a second charge with regard to the ground floor of the Vasant Vihar property and the DLF property to secure the loan taken by the defendant no.3. SICPA was clearly informed by this letter that there were demands from DLF and ICICI housing loan department to clear the liabilities and that the defendants were under pressure to sell both properties to clear the loans and that a buyer had been found for the Vasant Vihar property. By the letter dated 23rd February, 2010, SICPA was informed as follows:

“... We wish to inform you that there is a ***demand notice*** raised by ***DLF on the Penthouse*** No.1923A of appx. ***Rs.98 lacs*** and the allotment is liable to be cancelled in case this amount is not paid within a reasonable time. Further, there is a ***pressure from ICICI housing loan department to clear off the loans on both the properties***, failing which they have threatened to initiate action as

per law. We are therefore, under pressure to sell off ***both the properties*** and clear the bank loans.

We ***have found a buyer*** for ***Vasant Vihar property*** and ***have taken a token advance against the same***, for a total ***net consideration of Rs.675 lacs*** (ground plus basement combined). Out of this, a ***sum of Rs.540 lacs (appx) has to be paid to ICICI bank*** various loans running against the Vasant Vihar property while ***Rs.133 lacs has to be paid to M/S Genesis Finance Co. Ltd.*** towards the ***loan running against the basement***. This ***leaves a sum of Rs.2.00 lacs (appx) balance with us to be repaid to you.*** You are aware of the financial crunch at our end and we are sure that this gesture of ***remitting you more amount than what is left out of sale proceeds*** shall not go unappreciated by you. xxx xxx xxx

It is not out of place to inform you that ***talks with prospective buyers for Magnolia property are also underway*** and we hope to ***finalise*** the same ***within next two/three weeks.*** ...”

(Emphasis by us)

8.42. The defendants further informed SICPA that, “.... *as a goodwill gesture, we are remitting you a sum of ₹ lacs (vide D/D No.020507 dt. 15/2/10 for ₹2 lacs and No.020508 dt. 15/2/10 for ₹3.00 lacs, both drawn in your favour on HDFC Bank)*”. SICPA was also informed that the talks with prospective buyers for the DLF property as well were also underway and that the defendants hoped to “*finalise the same within two three weeks*”.

8.43. SICPA has submitted that the letter dated 23rd February, 2010 from the defendant was received by it only on 4th March, 2010. Mr. C. Mukund, learned counsel for SICPA has attempted to

make much about this “*belated receipt*”. However, given SICPA's reaction to the information furnished thereby, nothing turns on this. This letter also shows that SICPA had been clearly put to notice with regard to the debts owed by the defendant nos.1 to 3 from the ICICI Home Finance – defendant no.4 as well as Genesis Finance Co. Ltd. - defendant no.6.

8.44. Let us see what was SICPA's response to the letter dated 23rd February, 2010 of defendant no.3? The same can be summed up thus :

(a) Firstly, SICPA raised no objection to the property transactions, the sale consideration or the adjustment of the sale consideration by the defendant nos.1 to 3. SICPA did not claim any right, title or interest in these properties of defendant nos.1 and 2.

(b) Secondly, SICPA unconditionally encashed the two enclosed demand drafts for ₹5,00,000/-. This amount included the surplus consideration available with the defendant nos.1 and 2 from the sale of the Vasant Vihar property, of course after clearing the dues of ICICI Bank - the defendant no.4 and of some amount to defendant no.6. In fact, SICPA thereby thus ratified the sale of these properties by the defendants.

(c) Thirdly, as noted above, in order to secure the financial facility given by SICPA, defendant nos.1 and 2 (along with mother of defendant no.1) had also pledged shares worth 2.5 times of the value of the loan amount of ₹5.0 crores. After receipt of the letter dated 23rd February, 2010 and the amount of ₹5.0 lakhs from the

defendant no.3, between the period from 23rd March, 2010 till 17th May, 2010, out of these shares, it sold 18,74,000 equity shares whereby it realized a sum of ₹1,69,95,042/-. As a result, after giving credit for the sum of ₹7,790/- being the value of the remaining 1,000 shares, a sum of ₹1,70,02,832/- fell to the credit of the said defendants. According to SICPA, after giving adjustment on this amount, a sum of ₹4,93,17,156/- still remained due and payable from the defendant nos.1 to 3 as on 17th May, 2010. On account of interest liability thereon, as on 30th September, 2010, a sum of ₹5,56,55,973/- became due and payable by the defendant nos.1 to 3 to the plaintiff.

(d) Fourthly, SICPA wrote a registered letter on the 9th of March 2010 requesting attested copies of the conveyance deed/agreement to sell for Vasant Vihar property as well as the request letter written to ICICI Bank (defendant no.4) and Genesis Finance Co. Ltd. (defendant no.6) for settlement of the loan including pre-payment etc. and their response.

(e) Fifthly, SICPA issued a reminder dated 13th March, 2010 to the defendant no.1 only pointing out that the value of the securities with SICPA was below the total outstanding amount payable by the defendant no.1, SICPA thus recognized the validity of the property transactions by defendant nos.1 and 2 and did not assert any rights therein.

(f) Sixthly, by its letter dated 6th April, 2010, SICPA reiterated the request for copies of the conveyance documents without making any claim in either the Vasant Vihar or DLF property.

SICPA did not convey any objection or any distress on its part about the sale of the properties by the defendants.

(g) Seventhly, a legal notice was addressed to defendant nos.1 to 3 by the plaintiff on 10th June, 2010 still seeking copies of documents executed by the defendants for agreeing to sell the properties. Reference was made to the action of the DLF in cancelling the offer of buying back of the flat under its scheme and a final notice was given by SICPA seeking status of the two properties.

Interestingly the legal notice dated 10th June, 2010 refers to “*aforesaid two properties which are lying mortgaged with our client as second charge, first charge thereof are with ICICI Bank*”. At the end of this communication also, the legal notice stated that information would be given to the general public about the “mortgage of the above two properties”.

In this notice, SICPA thus refers to a mere second charge on the properties and that the properties could be sold after clearing SICPA’s dues and after obtaining its consent.

(h) Eighthly, it appears that unfortunately the legal notice dated 10th June, 2010 which was sent to the defendant nos.1 to 3 was not properly printed. The defendants objected to its legibility by their communication dated 22nd June, 2010. In the response dated 6th July, 2010 sent by SICPA’s lawyers (enclosing a legible copy of their previous notice), SICPA merely demanded from the defendant no.3, information about the “present status of the aforesaid properties” failing which “our client shall proceed with

causing of paper publication of 'Public Notice' in two news papers, one in English and the other one in Hindi, having circulation at Delhi informing the general public about our **client's second charge** in respect of the above two properties''.

(i) Ninthly, under SICPA's instruction public legal notices were got published by its lawyers on the 23rd of July 2010, in the English and Hindi editions of Hindustan Times informing the public that the Vasant Vihar and DLF penthouse were mortgaged the properties in favour of SICPA as a second charge.

8.45. SICPA thus makes no objection that defendant nos.1 and 2 could not have transferred the properties. It asserted no relationship or rights under the agreement to sell dated 27th February, 2009. In terms of Clause 3 of this agreement to sell, SICPA did not offer to make good the ICICI liability. SICPA does not claim any right in the properties other than a second charge.

We shall deal with the validity of this claim of "mortgage" and "second charge" at a later stage in this judgment.

8.46. The defendant no.6 has urged that it was not aware of the loan between SICPA and the defendant no.3. It has stated that it had no knowledge of any second charge on the properties purchased by it and that the purchased transactions were completed with regard to the Vasant Vihar property in February, 2010 and the DLF on 1st June, 2010.

8.47. It is also necessary to note the letter dated 11th October, 2010 sent by SICPA to the defendant no.6 whereby for the first time it called upon defendant no.6 to provide details of the loan given by it

to the defendant nos.1 to 3 and arrangement entered into for taking over loans. SICPA thereby called upon the defendant no.6 only to record its second charge of the plaintiff upon the properties including the DLF Penthouse.

The defendant no.6 promptly informed SICPA vide letter dated 27th October, 2010 that the two properties had been purchased by it against due consideration and as such second charge of SICPA could not be recorded against the two properties.

This was received by the plaintiff on the 4th of November 2010.

9. **Filing and proceedings in CS(OS)No.2277/2010**

9.1. Let us now examine the legal action initiated by SICPA. It did not initiate legal action upon receipt of the information by the letter dated 23rd February, 2010. CS(OS)No.2277/2010 was filed only on the 2nd November, 2010 by the plaintiff which came to be listed before the court on 10th November, 2010 for the first time.

9.2. SICPA also filed I.A.No.15011/2010 under Order XXXIX Rules 1 and 2 of the CPC seeking interim injunction and I.A.No.15012/2010 under Order II Rule 2 of the CPC along with the plaint.

9.3. SICPA did not mention the letter dated 27th October, 2010, informing that defendant no.6 was the purchaser of the properties, before the court on the 10th of November, 2010. No ex-parte interim injunction was granted by the court.

9.4. Mr. C. Mukund, learned counsel for the appellant would

contend that the defendants, deliberately and with malafide intentions, refused to accept the summons issued by the court. The defendant nos.1, 2, 3 and 6 were served on 2nd December, 2010 through courier service. A grievance is made that despite knowledge of these defendants of the pendency of the present case and SICPA's claim therein, the Vasant Vihar property was sold by defendant nos.1 and 2 by the sale deed dated 7th December, 2010 to the proposed defendant no.7, wherein representative of defendant no.6 signed as the confirming party.

9.5. In the proceedings before the learned Single Judge on 9th December, 2010, a submission was made by learned Senior Counsel on behalf of the defendant nos.1 to 3 that in order to settle the accounts of the defendant no.4 - ICICI and the defendant no.6, the properties at Vasant Vihar as well as DLF have been sold by them. Counsel for defendant no.6 further stated that it had sold the Vasant Vihar property to one Mr. Chugh on 7th December, 2010 as it had to generate funds with a view to liquidate loans of defendant nos.1 to 3. The court directed the defendant no.6 to intimate the counsel for the plaintiff in writing within 24 hours, the name, particulars and details of the sale of the Vasant Vihar property. The record reflects that counsel for the defendant no.6 also gave information with regard to the details of the purchaser, date of the sale deed and the consideration amount of the Vasant Vihar property vide e-mail sent on 21st December, 2010 to counsel for the plaintiff.

9.6. On 9th December, 2010, the court passed an order directing

the defendant no.6 to maintain status quo with regard to the possession and title of the DLF property.

9.7. On 3rd January, 2011, SICPA filed I.A.No.478/2011 under Order I Rule 10 CPC seeking permission to add Mr. K.L. Chugh as defendant no.7 in the suit. SICPA challenged the sale of the property to Mr. K.L. Chugh.

9.8. Vide I.A.No.6654/2011, on 25th April, 2011, filed by the defendant nos.1 to 3 under Section 8 of the Arbitration and Conciliation Act, it was pointed out by defendant nos.1 to 3 that the loan agreement dated 27th August, 2008, 27th November, 2008 and 27th February, 2009 contained an arbitration agreement whereby “any and all disputes arising out of or in connection with the said agreement and the schedule of terms attached thereto or the purpose of the agreement shall be settled by arbitration to be referred to a sole arbitrator to be appointed by the lender (SICPA)”. It was urged that the suit was based upon rights of the parties arising out of the contract containing the said arbitration clause; that the suit seeking enforcement of claims under the loan agreement was consequently, barred under the provisions of Arbitration and Conciliation Act, 1996 and therefore, had to be mandatorily referred to arbitration. A prayer was made for dismissal of the suit and relegating the parties to arbitration in accordance with their contract.

In reply, SICPA took the stand that the subject matter of the dispute in the suit could not be referred to arbitration for the reason that several parties to the suit, were not parties to the arbitration

agreement.

9.9. On 27th April, 2011, defendant nos.1 to 3 filed I.A.No.6657/2011 under Order I Rule 10 of the C.P.C. seeking deletion of the names of defendant nos.4 to 6 from the array of the parties. The defendant nos.1 to 3 urged that SICPA was claiming under the loan agreement and that defendant nos.4 to 6 were not parties to this agreement which governed the relationship between SICPA and defendant no.3; that they were strangers and had no privity of contract with SICPA. It was pointed out that even as per SICPA, defendant nos.4 to 6 had been arrayed as “*proforma parties*” and were so referred to in the plaint. The applicants also pointed out the knowledge and consent of SICPA to the sale of the property and that the purchasers were bonafide purchasers for consideration. The applicants alleged malice in filing the suit.

9.10. On 20th December, 2011, the defendant nos.1 to 3 also filed I.A.No.20809/2011 under Order VII Rule 11 of the C.P.C. praying for rejection of the plaint. Inter alia, the defendant nos.1 to 3 objected to the maintainability of the suit on the ground that it was based on unregistered documents; absence of cause of action; that the plaintiff had failed to file appropriate court fee; that the plaintiff had failed to seek specific performance of the agreement to sell dated 27th February, 2009 in its favour.

9.11. In retaliation, on 5th of January 2012, SICPA filed I.A.No.274/2012 an application under Order VI Rule 17 of the C.P.C. for the first time praying for amendment of the plaint to incorporate a challenge to the sale deed dated 7th December, 2010

as well as a prayer for specific performance of the agreement dated 27th February, 2009.

9.12. On 15th February, 2012 when defendant no.7 happened to be present in court, the learned Single Judge recorded that he “*agrees that till next date of hearing, he will not dispose of the suit property i.e. basement and ground floor of the property at Vasant Vihar*”. The interim order has been continued in the suit.

9.13. After hearing and consideration, by the order dated 1st July, 2014, the learned Single Judge dismissed the I.A.Nos.478/2011 (under Order I Rule 10 of the CPC) and 274/2012 (under Order VI Rule 17 of the C.P.C.), I.A.No.15011/2010 (under Order XXXIX Rules 1 and 2 CPC) and I.A.No.75012/2010 (under Order II Rule 2 of the CPC) filed by the plaintiff. Further, I.A.No.6657/2011 [under Order I Rule 10 of the C.P.C.]; I.A.No.20809/2011 by defendant nos.1 to 3 (under Order VII Rule 11 of the C.P.C.); and the I.A.No.6654/2011 by defendant nos.1 to 3 (under Section 8 of the Arbitration and Conciliation Act, 1996) were allowed.

As a result of the above, the plaint was rejected and the suit was dismissed reserving the right to SICPA to seek reference of its disputes to arbitration. This judgment stands assailed before us by way of the present appeal.

9.14. We have heard Mr. T.K. Ganju - learned Senior Counsel, Mr. C. Mukund, Mr. Vikas Arora and Ms. Lakshmi Gurung, learned counsels for the parties at great length. Learned counsels have also taken us through the record of CS(OS)No.2277/2010 as well as the present appeal. Having given our considered thought to

the matter, we propose to consider the challenge by the appellant in seriatum. Inasmuch as law mandates priority to the application seeking amendment of the plaint, just as the learned Single Judge, we first examine SICPA's challenge to the judgment on I.A.No.274/2012 whereby amendment of the plaint stands rejected.

10. **Challenge to the judgment on I.A.No.274/2012 filed by the plaintiff for amendment of the plaint under Order VI Rule 17 of the C.P.C.**

10.1. Let us firstly examine the challenge to the order passed on I.A.No.274/2012 whereby SICPA sought amendment of the plaint. In this application, it was urged that the sale deed dated 7th December, 2010 was executed after the filing of the present suit and hence was a fact subsequent to the filing of the case necessitating the impleadment of Mr K.L. Chugh, the purchaser as defendant no.7. It also sought addition of paras 19(a) to 19(l) whereby SICPA proposed to place on record the events relating to the service of the summons in the suit and notice in the injunction application; orders for service dated 10th November, 2010, 16th November, 2010 and 9th December, 2010 of the court. SICPA further sought leave to amend the plaint to incorporate its contention that the sale of the property by defendant nos.1 to 3 to defendant no.6 and by defendant no.6 to proposed defendant no.7 was bad, illegal and void ab initio as having been done during the pendency of the suit and injunction applications, as amounting to “*criminal breach of trust*” having been made by defendant nos.1 to

3 and 6 for making wrongful gains and to cause wrongful losses to the plaintiff. SICPA contended that defendant nos.1 to 3 “*were fully aware that they were not entitled to transfer or to create any third party interest in respect of the property*”. Alleging collusion and conspiracy between the defendant nos.1 to 3 and 6 on the one side and the purchaser, Mr. K.L. Chugh, the other the plaintiff prayed for impleadment of the said Mr. K.L. Chugh as party, respondent no.7.

So far as defendant no.6 was concerned, it was stated that “*defendant no.6 having knowledge of illegal transfer in their favour fraudulently created third party interest on 7th December, 2010 knowing fully well about the pendency of the present suit*”. By the proposed amendment, SICPA challenged the entitlement of defendant nos.1 to 3 as well as 6 to transfer the property to third parties on the sole plea of “*pendency of the present suit*”.

10.2. In para 1 of the plaint, SICPA sought to add averments with regard to a fresh resolution authorising the signing, verification and filing of the amended plaint. SICPA additionally sought leave to amend the plaint and to add paras 24(a) to 24(m) for the first time claiming that it had acquired “*right, title, interest as a beneficial owner*” in respect of the “*suit property*”; challenging the entitlement of defendant nos.1 and 2 to sell the property to any other third party in breach and violation of the terms of its agreement and challenging the agreement to sell dated 21st October, 2010 and sale deed dated 7th December, 2010 in favour of defendant no.7 for this reason. SICPA also asserted that the sale

by defendant nos.1 and 2 to defendant no.7 was not at a better price. SICPA admitted receipt of the letter dated 23rd February, 2010 whereby information was received from the defendant nos.1 and 2 about its dealings with the suit property. It also admitted sending the letter dated 9th March, 2010 seeking copies of the documents. SICPA sought to incorporate the prayer for cancellation of the sale deed dated 7th December, 2010 and a direction to the defendant nos.1 and 2 to execute the sale deed in respect of the ground floor of the Vasant Vihar property in its favour as well as possession thereof.

10.3. SICPA claimed that the entire sale consideration of ₹5.75 crores under the agreement to sell dated 27th February, 2009 stood paid by it to defendant nos.1 and 2 and that they were duty bound to sell, transfer and convey the said property. An alternative prayer was sought to be incorporated that, if court was not willing to decree the suit for specific performance of the agreement to sell dated 27th February, 2009 in favour of SICPA, a decree for the sum of ₹8,50,36,918/- being the amount advanced to defendant nos.1 and 2 with interest as on 31st December, 2011 as well as future interest against defendant nos.1 to 3 be passed in its favour.

10.4. Amendments were also sought in respect of the penthouse 1917A, DLF Magnolias, Gurgaon, Haryana to contend that the defendant nos.1 and 2 had agreed and accepted to create a second charge in respect thereof in its favour; that these defendants were bound by the said agreement and were not entitled to sell the said property to defendant no.6 or create any third party interest unless

the charge in favour of SICPA was satisfied and any sale in favour of defendant no.6 with regard thereto was bad, illegal and void ab initio. In para 24(k), SICPA has averred that the “*said penthouse property at Gurgaon was given as mortgage on second charge in favour of the plaintiff*” which could not be transferred in favour of defendant no.6 prior to clearing such charge. SICPA claimed entitlement to the declaration that the sale of this property in favour of defendant no.6 was void ab initio and a nullity.

10.5. Additionally, amendment in para 27 of the plaint to incorporate the above narration about the agreement to sell dated 21st October, 2010; court orders and the sale deed dated 7th December, 2010 was sought.

10.6. As a result of the above, SICPA proposed the addition of prayers as prayer ‘e’ to ‘i’.

10.7. In the original plaint, SICPA insisted and prayed for declaration of rights only as a “*second charge holder*” in the entire D-6/2, Vasant Vihar property and the DLF Penthouse. While seeking the amendment, SICPA still maintains these prayers.

10.8. The defendant nos.1 to 3, defendant no.6 and the proposed defendant no.7 filed replies contesting the maintainability of the amendment. It was inter alia urged that the proposed amendment would constitutionally and fundamentally change the nature and character of the case and that the plaintiff was trying to introduce a new case which was not its original case, converting the suit for declaration and injunction into one for specific performance and in the alternative for recovery; that the amendments are not necessary

for proper and effective adjudication of the issues raised in the plaint; that the proposed amendment was sought with malafide intention and ulterior motive to thwart the valid objections of the defendants raised in the defendants' application under Order VII Rule 11 of the C.P.C. It was also asserted that the amendment application was a dishonest and malicious attempt of changing the nature and texture of the original plaint and to frustrate the validly accrued substantive rights of the defendants. It was contended that the amendment application was detrimental to the legal rights of the defendants and would adversely affect such rights and interest which could not be compensated in terms of money.

10.9. The defendant no.7 filed a reply on 14th March, 2011 opposing impleadment, enclosing the sale deed dated 7th December, 2010 whereby it had purchased basement and ground floor of the Vasant Vihar property for the sale consideration of ₹6,75,00,000/-. It was further clearly stated that SICPA does not have any charge or right whatsoever in respect of the ground floor or basement of D-6/2, Vasant Vihar, New Delhi-110057 which has been bonafide bought by defendant no.7, after due diligence by the Standard Chartered Bank.

The defendant no.7 stated that the plaint failed to disclose any legal rights of the plaintiff with regard to the Vasant Vihar property and vehemently objected to the maintainability of the proposed amendment urging that SICPA had no cause of action against the proposed defendant no.7 or the Vasant Vihar property; that the existing plaint was barred by law and the proposed

amendment could not be permitted as there was no cause of action against defendant no.7. The proposed defendant no.7 set out the details of the manner it was introduced to the defendant nos.1 and 2. It was also pointed out that at the time of registration of the sale deed on 4th December, 2010, the defendant nos.1 and 2 were informed by the Registrar of documents of an objection raised by the State Bank of India that there was a loan taken by the defendant nos.1 and 2 from the State Bank of India against the Vasant Vihar property. It was pointed out that the defendant nos.1 and 2 had produced the no dues and no objection certificate from the State Bank of India. No claim or entitlement of SICPA with respect to this property was registered with the Registrar of documents.

10.10. Reference was made by defendant no.7 to the declaration made to it by the defendant nos.1 and 2, that they have clear title to the property sold which was free from any encumbrance, charge or lien and that the original title documents pertaining thereto were in possession of defendant nos.1 and 2 which were shown at the time of execution of the agreement to sell dated 21st October, 2010 and handed over to the proposed defendant no.7 at the time of execution and registration of the sale deed dated 7th December, 2010. Only thereafter the property was registered in its favour on 7th December, 2010 which facts corroborated that the property was free from encumbrances as on 7th December, 2010.

10.11. The proposed defendant no.7 disclosed in its reply that the sale consideration was paid by him after availing a loan of ₹2.50 crores from the Standard Chartered Bank which had carried out due

diligence in respect of said property before advancing the above amounts. The payment of the sale consideration was effected by the proposed defendant no.7 in the following manner :

S. No.	Cheque/ Draft No.	Date	Drawn on Bank	Amount (in ₹)
(i)	327861	11.10.2010	Standard Chartered Bank, Greater Kailash – I, New Delhi.	10,00,000/-
(ii)	327863	21.10.2010	Standard Chartered Bank, Greater Kailash-I, New Delhi	90,00,000/-
(iii)	099094	02.12.2010	Standard Chartered Bank, Greater Kailash-I, New Delhi	3,25,00,000/-
(iv)	465421	30.11.2010	Standard Chartered Bank, Narain Manzil, Barakhamba Road, Delhi	2,50,00,000/-
			Total	6,75,00,000/-

10.12.It is the stand of proposed defendant no.7 that it had no information or knowledge about any of the transactions between the appellant and the respondent nos.1 to 3. Information about the litigation was received by him on receipt of copy of the application filed by the appellant. Upon learning about the case, the proposed defendant no.7 states that he had filed a complaint dated 6th April, 2011 against the defendant nos.1 and 2 with the Economic Offences Wing and the Crime Branch of the Delhi Police. The proposed defendant no.7 has also contested the case set up by the appellant on merits, which submissions we shall consider at a later part of this judgment.

10.13. The defendant no.6 also points out that the agreement to sell dated 27th February, 2009 was executed between SICPA and the defendant nos.1 and 2, whereas the loan liability to SICPA is that of the defendant no.3. The submission is that defendant no.3 has no concern with the properties in question.

10.14. In its rejoinder dated 19th March, 2011, SICPA merely reiterated the same stand as in the application, placed reliance on its two public notices dated 23rd July, 2010 and objected that the agreement to sell dated 21st October, 2010 in favour of defendant no.7 is antedated.

10.15. We have summarized above the proposed amendments as well as the prayer clause. Before considering the permissibility thereof, we may set down the legal principles which guide courts in considering an application for amendment of the plaint. Amendment of pleadings is permissible under Order VI Rule 17 of the C.P.C.

10.16. We note that Order VI Rule 17 CPC consists of two parts, whereas the first part contains the expression ‘*may*’ allow either party to alter/amend pleading, rendering it discretionary to the court to allow either party to alter or amend the pleading, the second part wherein the expression ‘*shall*’ is to be found, is imperative and enjoins the court to allow all amendments "*necessary for the purposes of determining the real question and controversy between the parties*" [Ref. : (2006) 4 SCC 385, **Rajesh Kumar Aggarwal & Ors. v. K.K. Modi & Ors.**)]

10.17. In the judgment reported in **AIR 1957 SC 363, Pirgonda**

Hongonda Patil v. Kalgonda Shidgonda Patil & 2 Ors., the Supreme Court affirmed the principles on which courts would consider prayer for amendment of pleadings laid down by Batchelor, J. in the judgment reported at ***(1920) LR 47 IA 255, Kisandas Rupchand v. Rachappa Vithoba*** :

- (i) an amendment which does not work injustice to the other side ought to be allowed.
- (ii) an amendment necessary for the purpose of determining the real questions in controversy between the parties has to be permitted.
- (iii) where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs would be rejected.
- (iv) an amendment setting up a fresh claim in respect of a cause of action which since the institution of the suit have become barred by limitation must be refused.

These principles guide consideration of applications for amendment of pleadings even today.

10.18. We find authoritative guidance on the manner in which a court should evaluate a prayer of amendment of pleadings in the judgment of the Supreme Court of India reported at ***(2009) 10 SCC 84, Revajeetu Builders and Developers v. Narayanaswamy and Sons & Ors.*** in paras 58 and 59 of the pronouncement which read as follows:

“Whether amendment is necessary to decide real

controversy

58. The first condition which must be satisfied before the amendment can be allowed by the court is *whether such amendment is necessary for the determination of the real question in controversy. If that condition is not satisfied, the amendment cannot be allowed.* This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

No prejudice or injustice to other party

59. The other important condition which should govern the discretion of the court is the *potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side.* The courts have *very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.*”

(Emphasis by us)

10.19. The summation of the discussion is to be found in para 63 of *Revajeetu* which reads as follows :

“Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.”

(Emphasis supplied)

10.20. The court finally concluded in para 64 as follows:

“64. The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that *while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments.*”

(Emphasis supplied)

10.21. Rules governing pleadings have been incorporated to advance the interest of justice and to avoid multiplicity of litigation. It has been repeatedly stated that rules of procedure are merely handmaidens to the ends of justice. Therefore, it is the concerns of substantive justice which would guide adjudication by the courts of law.

10.22. It is equally well settled that courts could not permit an amendment which seeks incorporation of a claim prohibited by law. It is also trite that while considering an application seeking amendment of pleadings, it is not open to the court to examine the

merits of the proposed amendments. It is not open to the court to go into the correctness or to the falsity of the case in amendment.

The prayer for amendment of the plaint in the present case has to be tested on the above well settled principles.

11. *Amendments are not imperative for proper and effective adjudication of the present case i.e. whether it satisfies the 'real controversy' test?*

11.1. We have extracted above the prayers sought to be incorporated by the amendment. There can be no manner of doubt that SICPA is seeking to incorporate completely new pleas and new reliefs. The prayers 'b' to 'd' in the existing plaint are premised on the plea that SICPA is the second charge holder over the suit properties. SICPA seeks to incorporate by the amendment the prayers 'e' to 'h' based on a completely independent claim that SICPA is entitled to the ownership of the Vasant Vihar property of the defendants under an agreement to sell. It is quite evident that the amendments are completely unnecessary for deciding the real dispute between the parties in the plaint as laid i.e. whether SICPA has a second charge over the properties or not.

Therefore, so far as the '*real controversy*' test which is the basic or the cardinal test is concerned, it has to be held that the proposed amendments fail this test.

12. **Proposed amendments completely change the nature of the suit**

12.1. It is necessary to answer the question as to whether the proposed amendments change the nature of the suit. If they do, the amendment cannot be permitted. For this purpose, it is necessary to examine the proposed amendments from the perspective of their impact on the existing claim in the plaint

12.2. The recitals and clauses of the agreement to sell dated 27th February, 2009 would show that, thereby, the parties really intended only to create security for the financial facility advanced by SICPA to the defendant no.3. There is a detailed reference to the two ICD's obtained by Brushman India Ltd. (defendant no.3) from SICPA, one of which was for ₹5 crores and had been extended by these two parties up to 30th June, 2009. The agreement also refers to the defendant nos.1 and 2 having given ₹18,75,000/- equity shares of defendant no.3 as "***primary security***". Even these covenants of the agreement with regard to the ground floor of the Vasant Vihar property would come into existence only "*should BIL be unable to repay the outstanding dues in respect of the said ICD of Rs.5 crores along with interest and charges thereon in accordance with the terms of the loan agreement dated 27.02.09*".

12.3. That the agreement to sell dated 27th February, 2009 was really in the nature of a re-enforcement of the loan agreement is also apparent from clause 10 of the agreement which reads as follows :-

*“10. That upon receipt of Rs.5 crores along with interest thereon on or before 30.06.09 the Second Party shall have no right, title, claim or interest of any nature whatsoever in the aforesaid property or against the First Party in any manner whatsoever and **second charge** shall be withdrawn.”*

Clearly by the agreement to sell, SICPA was not interested in anything other than securing repayment of the loan which it had advanced to defendant no. 3 which it claimed to have secured by the “*second charge against the property*”.

12.4. In order to examine this issue, let us set down the prayers made by SICPA in the original plaint which read as follows :

Prayers in CS(OS)No. 2277/2010

- (a) Leave be granted under Order 2 Rule 2 CPC;
- (b) Decree for ***permanent injunction*** restraining the defendant Nos.1 & 2 and their men, agents and associates from selling, transferring, conveying and/or creating ***third party interest*** or creating any interest of any nature whatsoever in respect of the (a) ***Land and Property at D-6/2, Vasant Vihar, New Delhi*** and (b) Property at ***Penthouse No.1917-A (New No.1923-A), DLF, Magnolias, Gurgaon*** and/or in respect of any rights relating to the said properties;
- (c) Decree for ***declaration*** that the ***properties No.(a) D-6/2, Vasant Vihar, New Delhi*** and (b) ***Pent House No.1917-A (New No.1923-A), DLF, Magnolia, Gurgaon*** are ***under the Second charge*** of the Plaintiff and the Defendant Nos.4, 5 & 6 are bound to take note of the fact and to ***keep the records in their Books that both the aforesaid properties are under Second Charge*** of the Plaintiff;
- (d) ***Mandatory Injunction directing the Defendant Nos.4, 5 & 6 to record in their Books of Accounts the name of the Plaintiff as Second Charge Holder, the first charge thereof was with the Defendant No.4.***”

12.5. Indubitably, SICPA was claiming rights only as a second charge holder in the original plaint. We propose to note some essential pleadings of the plaintiff in this plaint hereafter.

12.6. In paras 14 and 15A of the original plaint, SICPA states that it was unable to get the status of the properties from the defendant nos. 1 and 2 and it was apprehending that they are negotiating for sale of the properties in market for which no information was received from ICICI Bank or the DLF; that by its letter dated 10th June, 2010, it had informed the defendants that they must inform the “status about the ownership of the properties” failing which a newspaper notice would be published intimating the public about the “second charge over the properties”. In para 18, SICPA refers to telephone calls from persons negotiating for purchase of the property as well as visits of three persons who were proposed purchasers and came to discuss the status of the properties with SICPA. In para 19, SICPA has pleaded that it apprehended that defendant nos. 1 and 2 are “understood to have entered into an agreement for sale”. SICPA at the same time in the same para avers that the defendant nos. 1 and 2 gave “mortgage of their properties”. In para 24, SICPA urges that it was necessary to sue defendant no. 5 to “record the second charge” of the DLF Penthouse and not to permit defendant nos. 1 and 2 to transfer their rights without first clearing the dues of the plaintiff.

12.7. The most telling statement is contained in para 27 whereby SICPA details the manner in which cause of action had accrued in its favour. SICPA has pleaded that “*cause of action*” accrued in its

favour inter alia “on 27th February, 2009 when further loan agreement and agreement to sell was entered into whereby the two said properties D-6/2 Vasant Vihar, New Delhi and another Penthouse No. 19178 (New) 1923-A, DLF Magnolias, Gurgaon, were mortgaged to the plaintiff as second charge”.

12.8. SICPA has also referred to the letters dated 4th, 8th, 10th and 15th June, 2010; 6th and 15th July, 2010 to the defendant no.5 for recording its second charge. It stated that the defendant no.5 failed to record the second charge in SICPA's favour; that apprehending malafide on the part of the defendant nos.1 and 2, the plaintiff on 2nd November, 2010 filed the present suit.

12.9. Let us also set down SICPA's pleading in the original plaint qua accrual of the cause of action in its favour in paras 27 and 28 which reads thus :

“27.The cause of action for institution of the present suit have arisen on **27.08.2008** when the **loan agreement** between the parties was entered into, on 27.11.2008 when a fresh loan agreement was entered into and on **27.02.2009** when further **loan agreement and agreement to sell was entered into whereby the two said properties D-6/2, Vasant Vihar, New Delhi and another Penthouse No.1917-A, (New No.1923-A), DLF, Magnolias, Gurgaon,** were **mortgaged to the Plaintiff as second charge** and on 27.09.09 and 13.03.10 and on all such dates as and **when the plaintiff demanded back their money** from the Defendants and on **05.03.2010** when the Plaintiff received a letter dated **23.02.2010** whereby the Defendant nos.1 & 2 conveyed their intention to sell both the properties and thereafter on such dates when the correspondences between the parties exchanged including dated 10.06.2010, 22.06.2010, 06.07.2010 exchanged

between the parties and on **23.07.2010** when the ***public notice was published*** and thereafter on **24.06.2010, 26.06.2010 and 27.06.2010 and 28.06.2010** when various people called the Plaintiff's representative over telephone and enquiring about the development of the case as well as visiting at the Plaintiff's place of business and wanted to see the documents and no part of the Plaintiff's claim is barred by limitation.

28. It is submitted that the present suit is within the period of limitation viz. ***agreement by which the first and second defendants agreed to sell and executed agreement for sale & General Power of Attorney all dated 27.02.2009*** and the wrongful action of the defendants for intending to sell the said properties to third parties.”

12.10.SICPA never had any claim of ownership of the properties under the agreement to sell.

12.11.Therefore, the only case of the plaintiff in the existing plaint was, that by virtue of the “*loan agreement and the agreement to sell*” dated 27th February, 2009, SICPA had a second charge over the two properties and nothing beyond that. SICPA also used the expression “*second charge*” as synonymous with “*mortgage*” and understood these as its only rights under the loan agreement as well as the agreement to sell dated 27th February, 2009 as is evident from the above narration.

12.12.By the proposed amendments, SICPA seeks addition of the following prayers 'e' to 'h' :

“(e) Decree for Declaration that the ***Sale Deed dated 07.12.2010*** as also the ***agreement to sale*** dated ***21.10.2010*** by the defendant Nos.1 and 2 selling the property situated at D-6/2, Vasant Vihar, New Delhi in favour of the defendant No.7 Mr.

K.L. Chugh is ***bad, illegal, void and unenforceable*** in law as a consequence whereof ***cancel the Sale Deed***;

(f) Decree for ***specific performance of agreement for sale*** dated ***27.02.2009*** in favour of the plaintiff inter alia directing the defendant Nos.1 & 2 to execute and register Sale Deed in respect of ***ground floor*** of land and property ***No.D-6/2***, Vasant Vihar, New Delhi.

(g) Decree for ***mandatory injunction*** directing the defendant Nos. 1 to 3 and 7 to ***quit, vacate and deliver*** the ***vacant possession*** of the ***ground floor*** of premises No. D-6/2, Vasant Vihar, New Delhi to the plaintiff.

(h) ***Declare*** that ***transfer and/or creation of*** any rights in favour of ***defendant No.6, in respect of Pent House No.1917-A***, (New No.1923-A), DLF, Magnolia, Gurgaon ***without first satisfying the claim of the plaintiff*** is ***bad, illegal, void ab initio*** and has no force in law.

Alternatively,

(i) Pass a ***Decree for the sum of Rs.8,50,36,918/-*** (Rupees Eight Crore Fifty Lacs Thirty Six Thousand Nine Hundred Eighteen only) in favour of the plaintiff and against the defendant Nos.1,2 and 3 in respect of the amount paid by the plaintiff to the defendant Nos.1 to 3 together with further interest @24% p.a. and damages & cost;”

12.13.The above prayers are premised on the following proposed additions in the cause of action para :

"27. xxx xxx xxx ***The cause of action further arose on 21st October 2010 when the defendant Nos.1 and 2 wrongfully and illegally entered into an agreement for sale with the proposed defendant No.7 Mr. K.L. Chugh for sale of the property in issue. The cause of action again arose on 7th December, 2010 when Sale Deed was sought to be executed by the defendant Nos. 1 and 2 in favour of the plaintiff, intimation whereof was given on 09.12.2010 by the advocate for the defendants before this Hon'ble Court. The cause of action again arose on 09.12.2010 intimation***

was also given when the advocates for the defendant Nos.1, 2, 3 and 6 also intimated and confirmed to this Hon'ble Court that the property at Pent House No.1917A(New No.1923-A) situated at DLF, Magnolia, Gurgaon stand sold in favour of the defendant No.6 when this Hon'ble Court vide an order of even date restraining the defendant No.6 from further dealing or alienating the property and no part of the plaintiff's claim is barred by law of limitation. The suit is filed well within the period of limitation.

*28.xxx xxx xxx The suit is also within limitation since the defendant Nos.1 and 2 wrongfully and illegally **entered into agreement for sale on 21.10.2010** and wrongfully and illegally transferred and registered the Sale Deed in favour of the defendant No.7 on the 7th day of December 2010 and when the defendant Nos.1 & 2 purportedly transferred DLF property in favour of Defendant No.6 and on 09.12.2010 conveyed to this Hon'ble Court about transfer of DLF property in favour of defendant No.6."*

(Emphasis by us)

12.14. We have set out Clauses 3 and 4 of the agreement to sell dated 27th February, 2009 hereinabove. Clause 3 demonstrates that the right to enforce the agreement to sell would arise only if the SICPA settles the outstanding dues of the ICICI Bank Ltd./ICICI Home Finance. On the date when the above dues were settled by the other defendants, defendant no.3 was owing to ICICI Bank Ltd. over ₹5.40 crores against the Vasant Vihar property and ₹5.65 crores towards the DLF property. There is not a whisper of averment in the existing plaint (or even in the proposed amendments) that SICPA offered settlement or paid these dues of ICICI Bank Ltd. The event to trigger any claim for enforcing the agreement dated 27th February, 2009 (as sought by proposed prayer

'f') has thus not even come into existence as yet.

12.15.Clause 4 of the agreement to sell between these parties, specifically authorized the defendants for “*contracting and selling the ground floor of D-6/2, Vasant Vihar, New Delhi without recourse to the Second Party (SICPA) but under an information to SICPA, if the defendant was able to get a better price than the consideration agreed*” under the agreement. Clearly, a gateway was provided to the defendant nos.1 and 2 in Clause 4 of the agreement to sell dated 27th February, 2009 as well. Clause 4 enabled the ‘first party’ (defendant nos.1 and 2) to find a buyer at a better price than the consideration of `5,75,00,000/- agreed between them. The defendant nos.1 and 2 thus stood authorized for contracting and selling the property without recourse to SICPA with only ‘information’ to be given to SICPA in respect of the deal. Furthermore, out of the sale consideration, the defendant nos.1 and 2 were required to first settle the loans of the ICICI Bank out of the sale proceeds under Clause 4. Only thereafter, the balance (if any) had to be remitted to SICPA towards the “*part payment*” against the ICD. The parties therefore, had anticipated the fact that even the higher sale consideration obtained by the defendants may not be sufficient for it to discharge the liabilities of the ICICI Bank as well as SICPA.

12.16.Under Clause 5, the defendant nos. 1, 2 and 3 were mandated to hand over physical possession of the property to the purchaser on execution of the sale deed along with documents relating to the said property which were in the possession of ICICI

Bank Limited/ICICI Home Loan.

SICPA had entered into these transactions and agreements fully conscious of the impact thereof.

12.17. It is also significant to note that Clause 2 valued the ground floor of the Vasant Vihar property as on 30th June, 2009 at ₹5.75 crores but clearly contemplated that there may be buyers at a higher price.

12.18. The sale to SICPA was conditioned upon the defendant nos. 1 and 2 not getting a buyer at a higher price (under clause 3) is reinforced by Clauses 7 and 8 of the agreement which read as follows :

“7. And whereas the Second Party agrees that the sale **in case has to be made in its favour** shall take place on ‘as is where is basis’ without any defects, demands, dues and arrears levied/imposed by the authorities in respect of the aforesaid property in any manner whatsoever.

8. That First Party further undertakes to the Second Party that **in the event this Agreement has to be enforced and sale has to be made in favour of Second Party**, the First Party shall obtain all the requisite permissions/clearances to be obtained from all the concerned and competent authorities under any law, in order to complete the sale as well as the ownership and title of the Second Party. The First Party assures the Second Party that they shall fully cooperate with the Second Party, if required, in these regards and it would execute and sign all necessary documents and deeds etc.”

The use of the expressions "in case" in Clause 7 and "in the event" in Clause 8 amplify the intent of the parties and the purpose of the agreement.

12.19.The parties had also stipulated what was the remedy available to SICPA in case defendant nos. 1 and 2 did not fulfil their obligations under the agreement. This was provided in specific terms in clause 11 which reads thus :

“11. That in any case, if the First Party does not fulfil its contractual obligation then the Second Party will be free to take *legal action against First Party for recovery of Rs.5 crores alongwith interest an charges* thereon.”

12.20.SICPA has admitted that it had received the letter dated 23rd February, 2010 on behalf of the defendant no.3 and accepted part payment of the sale consideration from the defendant nos. 1 and 2, in terms of the agreement to sell dated 27th February, 2009 SICPA filed the suit without disclosing that it had encashed the amount of ₹5 lakhs (inclusive of the part sale consideration) received by it from the defendant nos.1 and 2 unconditionally and with prejudice.

12.21.In these facts, SICPA acknowledged that it could seek specific performance of the agreement to sell dated 27th February, 2009 only after SICPA complied with Clause 4 of the agreement and made payment of the dues of ICICI Bank. SICPA was not willing to do so. Consequently, SICPA consciously and rightly did not seek specific performance of the agreement.

12.22.SICPA thereafter consciously chose to file the suit on 2nd November, 2010 asserting merely a second charge based on the loan agreement dated 27th February, 2009 and sought injunctions based thereof. SICPA claimed no entitlement to any right or interest or ownership in the property. It rightly did not suggest any

ownership rights or claim to title based on the agreement to sell dated 27th February, 2010.

12.23. In the light of the above narration, it is also necessary to consider the circumstances in which the plaintiff seeks amendment of the plaint. Perusal of the application would show that SICPA has explained the circumstances in which it filed the suit in para 11 of I.A.No.274/2012 (seeking amendment) in the following terms:

“11. ***Apprehending*** some malafides that the ***Defendant Nos.1 & 2*** have ***surreptitiously been trying to sell the properties and have understood to have entered into an agreement for sale of property*** situated at D-6, Ground Floor, Vasant Kunj, New Delhi, the ***Plaintiff is filing the present suit for injunction restraining the Defendant Nos. 1 & 2 for selling the said properties*** in the market and from creating any third party interest thereupon. The ***defendant No.3 is necessary party because the money was lent and advanced to the defendant No.3***, for whom the ***defendant Nos. 1 and 2*** gave ***mortgage of their properties*** and the defendant Nos.1 is the Managing Director of the defendant No.3 company.

12. The Defendant No.4 has been added as party defendant for the reason that the ***said properties (a) D-6/2, Vasant Vihar, New Delhi and (b) Penthouse No.1917-A, (New No.1923-A), DLF, Magnolias, Gurgaon are mortgaged as first charge in favour of ICICI Bank Ltd.*** ICICI Bank Ltd. were ***requested to make a note in their records about the second charge created in favour of the plaintiff vide their letter dated 28.02.09*** and the plaintiff yet to ***receive confirmation*** of recording the ***second charge of the properties*** by ICICI Bank Ltd. The defendant No.6 has also become necessary party to be impleaded. As already stated

above, *recently* the *Plaintiff* came to learn from *reliable sources* that the *defendant Nos.1 & 2* has taken loan from the *defendant No.6* and cleared the dues of the *defendant No.4*. As such the *Defendant No.6* is claiming to have stepped into the shoes of the defendant No.4 and understood to have *become first charge holder of the said two properties in place and stead of Defendant No.4.*”

(Emphasis supplied)

12.24.The only explanation propounded by SICPA for the necessity of filing the I.A.No.274/2012 for amendment of the plaint has been given in para 17 that in view of the “*subsequent developments in the matter*” SICPA was required to amend the plaint. In para 19 of the application, it was stated that the amendment sought for would not change the nature and character of the suit.

12.25.The amendment was sought by SICPA stating thus:

“(q) The developments as mentioned hereinabove would reveal that the *cause of action* as stated in the aforesaid paragraphs *are post issuance of summons* by this Hon’ble Court or information not being provided by the defendants despite direction by this Hon’ble Court on which steps were taken by the defendants holistically and marginally which delayed the filing of the instant application. The plaintiff all along has been endeavouring to get information from the defendants, be it prior to filing of the suit or post thereafter. Whilst however the defendants attempts were in not giving full information to the plaintiff, and suppressing complete information in the process delaying entire progress and trial of the suit.”

12.26. Let us see whether the above justifications are correct. It is noteworthy that the only event which was subsequent to the filing of the suit was the execution and registration of sale deed in favour of proposed defendant no.7 on 7th December, 2010. So far as the reliefs of recovery of money; specific performance etc. are concerned, the necessary facts and reliefs were existing and available to SICPA at the time of filing of the suit.

12.27. The proposed plea that it has “*acquired the right, title and interest as a beneficial owner in respect of the Vasant Vihar property*”, is a completely new plea, was available when the plaint was filed.

12.28. By the proposed amendment, SICPA also seeks to urge that the defendant nos. 1 and 2 were “*not entitled to sell the said property to any other third party in breach and violation of the terms contained in agreement to sell except the plaintiff*”. This plea was also available when the suit was filed.

12.29. We note here the submission made by Mr. C. Mukund, learned counsel for the SICPA that the defendant no.3 had sought permission to sell the property by the letter dated 23rd February, 2010 which was never granted by SICPA and therefore, the defendant no.3 could not have sold the property. This submission fails to note that defendant no.3 had no title or interest in the Vasant Vihar or the DLF properties which were owned by the defendant nos.1 and 2. Furthermore, Clauses 3 and 4 of the agreement dated 27th February, 2009 was with regard to only the ground floor of Vasant Vihar property and enabled the defendant

nos.1 and 2 to sell the same at a price above the amount cited therein. Therefore, the letter dated 23rd February, 2010 though couched as a letter seeking permission, no such sanction of SICPA was required. This is obvious from the statements contained in the letter to the effect that it had finalized the transactions and received token payment even. The dues of ICICI and defendant no.6 which were being cleared from the transaction amount were clearly stated and balance of the sale consideration of ₹2,00,000/- was sent to SICPA.

12.30.SICPA also did not treat this letter as one seeking "permission". It accepted the adjustment effected by the defendants of the amounts from the sale consideration and also appropriated part thereof. SICPA merely demanded copies of the conveyance deed by its letter dated 9th March, 2010 and thereafter. Therefore, the construction placed on this letter by Mr. Mukund is completely erroneous.

12.31.More importantly both the above pleas are inconsistent with the plea set up in the original plaint where SICPA has not urged anything other than the "*second charge*" (as synonymous with a "*mortgage*").

12.32.SICPA unfortunately conceals the fact that it has endorsed the information about the owings of defendant no.3 to ICICI (defendant no.4) and defendant no.6; the sale transactions; adjustments of the sale consideration and the fact that it appropriated part of the sale consideration forwarded by the defendants with their letter dated 23rd February, 2010. SICPA

falsely alleges that it “*came to learn from the reliable*” sources about defendant no.3 clearing the dues of ICICI and DLF. SICPA has further made a false statement when it pleads ignorance about the transfer of property to defendant no.7 till the information was disclosed on 21st December, 2010 by counsel for defendant no.6 vide e-mail.

12.33. Interestingly, SICPA is still maintaining the prayers 'b' and 'c' made in the original plaint premised on SICPA's claim that a second charge was created in its favour by the “*loan agreement and the agreement to sell*” in the subject properties.

Now relying on the same agreement to sell dated 27th February, 2009, SICPA seeks to incorporate contradictory claims as prayers 'e' to 'g', a prayer for a decree for declaration and cancellation of the sale deed in favour of proposed defendant no.7; a decree of specific performance of the agreement to sell dated 27th February, 2009; and as decree for vacation of the property.

12.34. By the proposed amendment, SICPA is altering the fundamental character of the suit inasmuch as it is seeking to incorporate the new pleas shifting the foundation of the suit to the claim for ownership rights in the property premised on the same agreement to sell which is not legally permissible [**Ref.: AIR 1950 PC 68(70), Angammal v. Muthupechiammal Meenal; AIR 1954 Saurashtra 66 (70) (Full Bench), Desai Narshiprasad Lakshmiprasad v. Desai Vidutray Yashwantprasad]**

12.35. The learned Single Judge has relied on the following observations in paras 26 to 28 of the judgment reported at (2008)

13 SCC 658, Bharat Karsondas Thakkar v. Kiran Construction Company & Ors. which read as follows :

“26. Having carefully considered the submissions made on behalf of the respective parties, and the decisions cited on their behalf, we are of the view that the Division Bench of the High Court erred in law in allowing the amendment of the plaint sought for by Respondent 1 herein as the plaintiff in the suit.

27. Even if the bar of limitation is not taken into account, the plaintiff, namely, Respondent 1 herein, is faced with the ominous question as to whether the amendment of the pleadings could have at all been allowed by the High Court *since it completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale* entered into between its assignee and the vendors of the assignees.”

(Emphasis supplied)

12.36. Reliance is also placed on the pronouncement of the Supreme Court reported at (2011) 12 SCC 268, *State of M.P. v. Union of India* wherein in para 22, it was held thus:

“22. Finally, the *original plaint* proceeds that the *exercise of power* by the Central Government by passing the impugned Notifications dated 2-11-2004 and 4-11-2004 under Sections 58(3) and 58(4) of the MPR Act was *arbitrary, unjust and unfair* and had resulted in serious anomalies in the apportionment of assets and liabilities. In our view, *after praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the vires of the* said provisions, then the *very basis* on which the *plaintiff is claiming its right to apportionment of assets*, rights and liabilities of the undivided Board *will*

cease to be in existence and the entire suit of the plaintiff will be rendered infructuous. Moreover, it is settled principle of law that *leave to amend will be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit.*”

(Underlining by us)

12.37. In this regard, Mr. Vikas Arora has placed the pronouncement reported at ***AIR 2007 Allahabad 29, Bhu Deo v. District Judge, Etah & Ors.***, wherein the amendment was rejected for the reasons that firstly, it was sought at a very late stage without giving any explanation whatsoever for not having mentioned the facts initially; secondly, that under the garb of seeking amendment, it would not be permissible to substitute cause of action or change the nature of the suit or change the prayer except when the court thinks it proper and necessary.

12.38. Learned counsel has also placed a Division Bench pronouncement of the Allahabad High Court reported at ***AIR 2004 Allahabad 369, Devendra Mohan v. State of U.P.*** wherein it was held that “*the amendment is not permissible if the very basic structure of the plaint is changed or the amendment itself is not bonafide. In case, the facts were in the knowledge of the party at the time of presenting the pleadings, unless satisfactory explanation is furnished for not introducing those pleadings at the initial stage, the amendment should not be allowed*”.

12.39. SICPA is thus clearly seeking to introduce not only a totally new case on the same document but also an inconsistent case i.e. of

entitlement to a mere 'second charge' on the one hand, and acquisition of 'title' by virtue of the same agreement dated 27th February, 2009 on the other hand.

The proposed amendments are unquestionably inconsistent with the original claim in the suit; they fundamentally and constitutionally change its basic nature and character and are legally impermissible.

12.40. For all these reasons, the conclusion of learned Single Judge in para 46 of the impugned judgment, that the proposed amendment on the face of it fundamentally changes the basic nature and character of the suit and cannot be allowed, has to be upheld.

13. **Amendments result in such prejudice to the defendants which cannot be compensated adequately in terms of money**

13.1. It is well settled that amendment of pleadings will generally be allowed provided that they do not cause prejudice or surprise the opposite party. [Ref.: *AIR 1981 SC 485, Suraj Prakash Bhasin vs Smt. Raj Rani Bhasin And Ors.*; *AIR 1937 PC (42), Mahant Ramdhan Puri & Ors. v. Chaudhury Lachmi Narain & Ors.*; (2004) 111 DLT 798 (800), *Steel Authority of India Ltd. v. Kailashpati Steel Industries Ltd.*]

13.2. The above narration would show that several transactions running into crores of rupees have taken place between the defendants after the 23rd of February 2010 or involving third

parties. The rights of the parties including rights and interests in immovable properties stand created during this period. Title in the Vasant Vihar property stands transferred by a duly registered instrument.

13.3. Even at the cost of repetition, we may sum up several transactions which have taken place. The defendant no.6 had to pay the ICICI Bank over ₹11.05 crores (₹5.40 crores for Vasant Vihar property and ₹5.65 crores for DLF property). This was fully and finally cleared by payment of ₹10,84,53,097/- to the ICICI Bank and defendant no.6 stepped into its shoes qua the Vasant Vihar and DLF penthouse properties. Subsequently, it purchased the ground floor and the basement of the Vasant Vihar property for a sum of ₹6.75 crores from the defendant nos.1 and 2. We have detailed the payments made by the defendant no.6 to the DLF as well in paras 7.31 and 7.32 above. Thus the defendant no.6 has incurred liability of over ₹18,26,00,000/- to acquire rights in the properties.

13.4. The defendant no.7 has pointed out that in order to purchase the Vasant Vihar property at ₹6.75 crores, it had sought financial assistance from the Standard Chartered Bank which had approved the purchase after due diligence. This exercise by the Standard Chartered Bank revealed no charge or rights of SICPA over these properties. As a result, the defendant no.7 has received financial assistance to the tune of ₹2.50 crores from the Standard Chartered Bank. The defendant no.7 has purchased the ground as well as the basement and the ground floor of the Vasant Vihar property by a

composite sale deed.

13.5. Additionally, the loan taken by defendant no.7 stands secured by creation of an equitable mortgage with the Standard Chartered Bank by deposit of the title deeds. The plaintiff has neither impleaded the Standard Chartered Bank nor sought any relief against it. Certainly valuable rights of the Standard Chartered Bank, which is not a party in these proceedings, would be impacted if the proposed amendments were permitted.

13.6. There is a steep variation in prices of property as well over the period. Judicial notice can be taken of the fact that prices have steeply fallen. Indubitably, the amendments would result in such prejudice to the defendants, proposed defendant no.7 as well as a third party which cannot be compensated adequately in terms of money.

13.7. The loss to defendant no. 6 can be examined on the perspective of either loss of rental income on the property or the interest at notional bank rate on the amount involved. We also need to estimate the loss based on the drop in the sale value on account of property prices. We have analysed these computations in the segment of the judgment where we are considering costs which deserve to be imposed on the appellant in the present appeal.

We have found that the defendant no.6 has been deprived of approximately ₹2.40 to ₹3.00 crores if the DLF property had been rented out. The interest computation alone comes to between

₹4.60 crores to ₹5.50 crores for 60 months (5 years). The property values in DLF, Gurgaon, have fallen between 25% to 30%.

Actual loss to defendant no. 6 on account of deprivation of rental income, prohibition on disposal of property as well as interest on the amount it has invested hereinabove, would run into crores of rupees.

So far as the impact of the injunction and litigation on the rights of the defendant no. 7 is concerned it has been estimated on the above perspectives aswell. The return on rentals, which the defendant no. 7 has been deprived of, would be to the tune of approximately ₹1.40 Crores. The interest computation has been assessed at between ₹2.50 to ₹3.00 Crores for 57 months (4 years & 9 months). Decline in the value of properties in South Delhi has been to the tune of 30%.

So far as the actual loss to defendant no. 7 on these accounts is concerned it would run into crores of rupees as well.

13.8. In *(2001) 8 SCC 115, Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy*, the Supreme Court observed thus :

“... The amendment should, generally, be allowed unless it is shown that *permitting the amendment would be unjust and result in prejudice against the opposite side which cannot be compensated by costs or would deprive him of a right which has accrued to him with the lapse of time.*”

13.9. So far as the defendant nos.1 to 3 are concerned, they are compelled to defend this litigation and face unnecessary

uncertainty with regard to their rights and liabilities. The amendments, if permitted, certainly result in such prejudice to the defendants as cannot be compensated in terms of money.

14. **Proposed amendments were sought malafide and therefore, impermissible**

14.1. We are conscious of the limited inquiry that can be conducted by the court while considering a prayer for amendment of pleadings. However, the essential inquiry into the intent in filing the application necessitates a limited examination of the plaintiff's claim and reliance.

14.2. By the proposed amendments, the appellant is seeking specific performance of the agreement to sell and claiming ownership rights on Vasant Vihar property. It is well settled that specific performance of a contract has to abide by terms of the agreement and cannot be granted in violation thereof.

In fact, in terms of Clauses 3 and 4 of the agreement to sell dated 27th February, 2009, the liability secured to ICICI by the ground floor of the Vasant Vihar property would be the liability of the SICPA which it has to clear before it could seek enforcement of the agreement to sell. Under the agreement to sell, SICPA cannot assert any rights till such time it abides by its own commitments. This event has not occurred even till date.

14.3. It not only admitted the right of defendant nos.1 and 2 to sell the Vasant Vihar property to third parties but permitted the sale and accepted part of the consideration.

14.4. SICPA waits for the defendant no.6 to settle the dues of ICICI Bank and DLF.

14.5. Based on the consent of SICPA to the sale, as conveyed by its conduct, the defendant no.6 has substantially altered their position and incurred heavy liabilities to the tune of ₹18,26,00,000/- towards the liabilities of defendant nos. 1 and 2 to the ICICI Bank and the DLF Ltd.

14.6. SICPA has therefore, deliberately permitted the third party rights to be created in accordance with Clause 4 and permitted execution of the sale deed dated 7th December, 2010 and handing over of original title deeds as well as possession of the Vasant Vihar property by defendant nos.1 and 2 to the purchasers (firstly, the defendant no.6, and thereafter to proposed defendant no.7) in consonance with the agreement to sell dated 27th February, 2009 with SICPA.

14.7. The sale of the Vasant Vihar property was effected by defendant nos.1 and 2 for the amount of ₹6,75,00,000/-. We do not know the apportionment thereof, but the defendants contend that the consideration for the ground floor was more than ₹5.75 crores (quantified in Clause 3 of SICPA's agreement). It is admitted on the record that SICPA was duly intimated about the transaction and it has willingly received the remainder of the sale consideration. It therefore, accepted that the sale was on agreed terms.

14.8. The proposed amendments including those to the prayer clause and addition of clause 'f' in the prayer clause whereby the plaintiff prays for a decree for specific performance of the

agreement for sale deed dated 27th February, 2009 in its favour directing the defendant nos. 1 and 2 to “*execute and register sale deed in respect of ground floor of land and property no. D-6/2, Vasant Vihar, New Delhi*” in its favour and the prayer sought to be added as clause ‘g’ for mandatory injunction directing the defendant nos. 1, 2, 3 and 7 to vacate and deliver vacant possession of the said premises to the plaintiff, are also contrary to SICPA's agreement to sell with defendant nos.1 and 2 and have been sought malafide and have been rightly rejected.

14.9. This brings us to an examination of the prayer of SICPA sought to be incorporated qua the DLF penthouse.

14.10. In para 5 of the existing plaint, relying on the loan agreement, SICPA has asserted a second charge over the DLF penthouse. It admits that ICICI Bank – defendant no.4 had first charge over both the Vasant Vihar and the DLF penthouse. SICPA also states that defendant no.6 cleared the dues of the ICICI Bank and became the first charge holder of both these properties. It refers to no other documents to support such claim.

14.11. Other than the offer by the defendant no.3 in the loan agreement dated 27th February, 2009 to create a charge over this property (DLF property), there is no commitment by the defendant nos.1 and 2 who had rights over this property.

14.12. SICPA has sought no amendment in the body of the plaint regarding the DLF property other than addition of one sentence in para 27 relating to cause of action. Without laying any factual basis, SICPA has merely sought to incorporate at Serial No.'h', a

prayer for a declaration that the transfer and/or creation of rights in favour of defendant no.6 in respect of the DLF Penthouse without first satisfying the claim of SICPA is bad, illegal and void ab initio.

The defendants have rightly opposed this amendment on the ground that SICPA had no charge over this property and the proposed amendment was clearly malafide, contrary to law and cannot be permitted to be incorporated.

14.13.SICPA has filed the application (I.A.No.274/2012) seeking the proposed amendments mindlessly, confident in an arrogant and misguided belief that amendments must be liberally allowed, irrespective of the factual basis or the intent of the plaintiff. This cannot be so.

14.14.By virtue of I.A.No.274/2012, SICPA has also sought to incorporate by amendment as prayer 'e' seeking a decree for cancellation of the composite sale deed dated 7th December, 2010 executed by defendant nos.1 and 2 in favour of defendant no.7, as also the agreement to sell dated 21st October, 2010 as bad, illegal and void and unenforceable in law and as a consequence whereof, the sale deed be cancelled. The sale deed conveys the basement as well as the ground floor of the Vasant Vihar property to the defendant no.7.

14.15.Clearly, this application, which is bereft of factual and legal basis, exhibits the malafide intention to pressurize the defendant no.7 by seeking cancellation of the entire sale deed and injunction qua the entire property owned by defendant nos.1 and 2, comprising of the basement and ground floor of D-6/2, Vasant

Vihar, New Delhi cannot be allowed. As postulated in ***Revajeetu Builders and Developers***, the application for amendment is not only misconceived and malafide but is worthless and the learned Single Judge had no option to reject the same.

14.16. The malafide intention in filing the amendment application seeking to cast a cloud over rights, title and interest of defendant nos.6 and 7 is writ large on the face of the record.

14.17. Other than baldly complaining that the sale deed dated 7th December, 2010 was executed, "*after the filing of the suit*", fraudulently and was *void ab initio*, SICPA gives no reason as to how the instrument was executed illegally or was unenforceable. SICPA does not spell out what was the fraud in the transaction.

14.18. The learned Single Judge has rightly held that the amendments are not permissible for this reason as well.

15. **SICPA had no concern at all with the basement of the property bearing No.D-6/2, Vasant Vihar, New Delhi-110057 - proposed amendment challenging sale deed of basement was malafide for this reason as well**

15.1. The basement was not the concern of SICPA in any document executed by the defendant nos.1 and 2 in its favour. Consequently, SICPA is legally disentitled to a decree for declaration and cancellation of the composite sale deed dated 7th December, 2010 or the agreement to sell dated 21st October, 2010 executed by the defendant nos.1 and 2 in favour of defendant no.7.

15.2. The amendments to the plaint including the prayer regarding the basement conveyed to defendant no.7 by the composite sale

deed dated 7th December, 2010 have no factual or legal basis.

15.3. SICPA's prayer for amendment of the plaint to incorporate the challenge to the composite rights of defendant no.7 qua the ground floor and basement of the Vasant Vihar property cannot be legally permitted.

16. **Proposed amendments are barred by law**

16.1. We now need to examine the objection of the defendants that the proposed amendments are barred by law and cannot be permitted at all.

(i) **Court Fees Act, 1870**

16.2. Fees chargeable on plaints are prescribed under the Court Fees Act, 1870. Section 3 thereof pertains to levy of fees in High Courts on their original sides. Computation of fees payable in specific suits are prescribed under Section 7 of the Court Fees Act.

16.3. By virtue of the amendment, SICPA seeks to incorporate as prayer 'e', a decree for declaration that the sale deed dated 7th December, 2010 as well as the agreement to sell dated 21st October, 2010 for the same consideration are bad, illegal, void and unenforceable and as a consequence, cancel the sale deed.

16.4. The amendment prayer clause without making the mandatory averments regarding the valuation for the relief and the court fee payable thereon would be barred by application of the provisions of the Suit Valuation Act and Court Fees Act.

As further proposed prayer 'f', SICPA has sought specific

performance of the agreement to sell dated 27th February, 2009.

By the proposed prayer 'g', a decree for mandatory injunction directing the defendant nos.1 to 3 and 7 to vacate and deliver possession of the ground floor of the Vasant Vihar property to SICPA.

In addition, by proposed prayer 'h', SICPA has sought a decree for declaration that transfer/creation of any rights in favour of defendant no.6 with regard to the DLF penthouse, without first satisfying the claim of SICPA is bad, illegal, void ab initio and has no force in law.

As serial No.'i', SICPA has sought incorporation of an alternative prayer in the plaint of a decree for the sum of ₹8,50,36,918/- against defendant nos.1 to 3 with further interest @24% per annum and damages and costs. It would appear that prayer 'i' is an alternative to all the other prayers in the suit.

16.5. So far as the existing plaint is concerned, we find that the plaintiff has disclosed the following valuation and court fees :

“For the purpose of court fees and jurisdiction the suit is valued at Rs.30,00,000/- i.e. Rs.20,00,000/- for permanent injunction and Rs.5,00,000/- for Declaration and Rs.5,00,000/- for Mandatory Injunction and the Court Fee of Rs.36,800/- has been paid on the present suit.

	Relief	Valuation	Court Fee
a)	<i>For Permanent Injunction</i>	<i>Rs.20,00,000/-</i>	<i>Rs.22,300/-</i>
b)	<i>For Declaration</i>	<i>Rs.5,00,000/-</i>	<i>Rs.7,250/-</i>
c)	<i>For Mandatory Injunction</i>	<i>Rs.5,00,000/-</i>	<i>Rs.7,250/-</i>
		<i>Total</i>	<i>Rs.36,800/- ”</i>

16.6. So far as the valuation and court fee is concerned, the following amended para 29 has been proposed in I.A.No.274/2012:

*“For the purpose of court fees and jurisdiction the suit is valued at Rs.30,00,000/- i.e. Rs.20,00,000/- for permanent injunction and Rs.5,00,000/- for Declaration and Rs.5,00,000/- for Mandatory Injunction. **The suit is valued at Rs.575 Lacs for specific performance of the agreement for sale dated 27.02.2009 and agreement for loan dated 27.02.2009 and the Court Fee of Rs.4,65,900/- is being paid on the said Relief and the total Court Fee of Rs.5,02,700/-has been paid on the present suit.***

	Relief	Valuation	Court Fee
a)	<i>For Permanent Injunction</i>	<i>Rs.20,00,000/-</i>	<i>Rs.22,300/-</i>
b)	<i>For Declaration</i>	<i>Rs.5,00,000/-</i>	<i>Rs.7,250/-</i>
c)	<i>For Mandatory Injunction</i>	<i>Rs.5,00,000/-</i>	<i>Rs.7,250/-</i>
d)	<i>Decree for specific performance of the agreement for sale dated 27.02.2009 and agreement for loan dated 27.02.2009.</i>	<i>Rs.575 Lacs</i>	<i>Rs.4,65,900/-</i>
		<i>Total</i>	<i>Rs.36,800/-”</i>

16.7. It is evident therefore, that so far as the proposed prayers ‘e’, ‘g’ and ‘h’ are concerned, the plaintiff has neither proposed a valuation nor the court fee which the plaintiff seeks to affix thereon, in case the amendment is permitted.

16.8. For the alternative relief of money proposed at Serial no.‘i’

by virtue of Section 7(i), the plaintiff is required to pay court fee on the amount claimed. For the reliefs of the declaratory decree and consequential relief sought in prayer 'e' as well as the prayer for mandatory injunction (Section 7(iv)) in prayer 'g', the plaintiff is required to mandatorily state the amount at which he values the relief sought. We may note that the prayer 'h' though simply couched as a prayer for declaration also incorporates the relief of injunction.

16.9. We may point out that as per Section 8 of the Suit Valuation Act, the court fee and jurisdictional value of suits, other than those referred to in Section 7(v), (vi), (ix) and (xd) of the Court Fees Act, has to be the same. So far as the alternative relief of recovery sought to be incorporated by the amended prayer clause 'i' is concerned, the same would therefore, be required to be valued at ₹8,50,36,918/-.

16.10. It is well settled that where reliefs are prayed for in the alternative, the court fee is payable on the highest of the reliefs. The plaintiff has prayed for a relief of money as an alternative to other prayers. The relief for specific performance is valued at ₹5.75 crores. Obviously no valuation for the other reliefs has been assigned. In the original plaint, prayers 'b' to 'd' are valued between ₹5,00,000/- and ₹20,00,000/-. Obviously, the value for the alternative prayer of money is the highest and SICPA would be required to pay court fee thereon.

16.11. SICPA seeks to incorporate multiple prayers on distinct subjects. Therefore, under Section 17 of the Court Fees Act, the

plaint is chargeable with the aggregate amount of the fees to which the plaint embracing each of these prayers would be liable under the enactment.

16.12. The proposed amendments, without incorporating a specific plea and without valuation of the reliefs on the proposed prayers and the court fees admissible thereon, would be barred under the Court Fees Act.

(ii) Specific Relief Act, 1963

16.13. Clause 3 of the agreement to sell dated 27th February, 2009 notes that the ground floor of the property D-6/2, Vasant Vihar, New Delhi-110057 is carrying housing loans from the ICICI Bank Ltd./ICICI Home Finance. The agreement postulates payment by SICPA to ICICI before SICPA can claim any right thereunder. SICPA at no point of time even offered to do so. Thus this agreement is not enforceable on its terms and no specific performance thereof as prayed under proposed clause 'f' can be granted.

16.14. Interestingly, despite detailed submissions on this aspect by the respondents even before us, SICPA did not even suggest its willingness to make good the payments to ICICI Bank Ltd. and otherwise in accordance with Clause 3 of the agreement to sell dated 27th of February 2009.

16.15. A legal impediment comes in the way of SICPA. The prayer for specific performance sought to be incorporated is also barred by operation of the Specific Relief Act. It is well settled, that the

relief of specific performance is a discretionary relief and a purchaser of the property cannot seek the same as of right. Considerations of equity have to be weighed while moulding the relief in suit for specific performance.

16.16. As per Section 16(c) of the Specific Relief Act, 1963, it is mandatory for the plaintiff to aver and establish that it was ready, willing and able to perform its part of the agreement on all material dates. There is no such statement in the existing plaint. No fact making out readiness and willingness has been pleaded. SICPA does not request permission to incorporate such averments by the proposed amendments. For this reason as well, the relief for specific performance of the agreement to sell dated 27th February, 2009 would be barred under the provisions of the Specific Relief Act. The proposed amendment is legally impermissible for this reason as well.

16.17. Thus the proposed prayer 'f' is barred additionally by Section 16(c) of the Specific Relief Act.

16.18. So far as the proposed alternative prayer 'i' for a decree of ₹8,50,36,918/- against the defendant nos.1 to 3 is concerned, no such prayer was made in the original plaint, though such claim was in existence and SICPA was aware of it.

16.19. We have extracted above Clause 5.5 of the loan agreement dated 27th February, 2009 which contains an arbitration agreement between these parties to refer all disputes arising out of or relating to the agreement whereby the loan was advanced to the defendant nos.1 and 2 to arbitration. For this reason, the civil suit seeking

recovery of the amount would be barred under Section 8 of the Arbitration and Conciliation Act and not maintainable.

The aforementioned proposed amendments to the plaint therefore, cannot be permitted for the reason that they are barred by law.

17. **Amendment sought to avoid rejection of the plaint sought by the defendant nos.1 to 3 by way of I.A.No.20809/2011**

17.1. In the instant case, the defendant nos.1 to 3 filed I.A.No.20809/2011 on 20th December, 2011 under Order VII Rule 11 of the CPC seeking rejection of the plaint on the ground that it did not disclose any cause of action and that the reliefs were barred in law. In retaliation, SICPA has filed I.A.No.274/2012 under Order VI Rule 17 of the CPC praying for leave to amend the plaint.

17.2. In the judgment of the Supreme Court reported at **(1990) 2 SCC 42, Patasibai & Ors. v. Ratanlal**, the application for amendment of the plaint was dismissed on the ground that “apart from being highly belated, is clearly an afterthought for the obvious purpose of averting the inevitable consequence of rejection of the plaint on the ground that it does not disclose any cause of action or raise any triable issue”.

17.3. The amendments proposed by the plaintiff in the present case also are highly belated and clearly sought in retaliation to the prayer of the defendants seeking rejection of the plaint. As in **Patasibai**, I.A.No.274/2012 seeking leave to amend must be dismissed for this reason as well.

18. **Refusing the amendments would not lead to injustice or multiplicity of litigation**

18.1. It is a settled principle that discretion is conferred on courts, if justified in the facts and circumstances of the case, to condone negligence, overlook delays and permit amendment of the pleadings in deserving cases to meet the ends of justice. However, a few very pertinent questions arise in the present case, which must be answered. Does a plaintiff have an absolute right to amend its pleadings whensoever and in whatever manner it so desires? Are not concerns of conscious election so far as choice of reliefs; grave negligence (even if no election); deliberate concealment of material facts and misrepresentation to be ignored while considering a prayer for amendment? Would not these concerns disentitle an unscrupulous plaintiff from succeeding in an application seeking amendment of the plaint? Can the huge resources, financial and legal, available to a large corporation as SICPA be ignored while assessing the bonafide of an amendment application? Would not SICPA's conduct and the careful interpretation and understanding of its rights and remedies from the time it received the letter dated 23rd February, 2010 not preclude it from making contradictory additional pleas and inconsistent claims? Does a plaintiff have an absolute right to avoid paying court fee, postpone claiming a relief to any limit?

18.2. Is a huge financing corporation to be equated and same

considerations applied as those to an illiterate, ignorant, poor litigant whose ability to reach out for legal resources is obstructed by his financial incapacity? Are prayers for amendment of pleadings to be “liberally” granted irrespective of the negligence, malafide and dishonesty of the party proposing them? The answer has to be in the negative. We record our reasons hereafter.

18.3. What would be the reaction of the prudent creditor who is faced with the transactions by its debtor/surety involving transfer of immovable property which it believes are the only security available with it? The letter dated 23rd February, 2010 informs SICPA about the relationship between the defendant nos.1 and 2 on the one hand and the defendant no.6; as well as of the relationship between the defendant no.3 and the ICICI Bank which was secured by the Vasant Vihar property.

18.4. The actions of SICPA were well thought out and deliberate. It waited till defendant no.6 cleared liabilities of defendant no.3 towards the ICICI Bank – defendant no.4 as well as DLF – defendant no.5 by investing ₹18,26,00,000/- before for the first time raising any claim.

18.5. If SICPA had rights in the immovable properties, the minimal reasonable diligence required SICPA to write a letter to the Registrar of Documents asserting its rights. In case the defendant nos.1 and 2 succeeded, a simple title search at the office of the Registrar would have enabled it to get the details of the transfer by defendant nos.1 and 2 in favour of the proposed defendant no.7.

18.6. On receipt of the letter dated 23rd February, 2010, a prudent creditor who believed the properties to be securing its loan, would have forthwith moved a suit for prohibitory injunction restraining the defendant nos.1 and 2 from dealing with the property. After complying with the stipulations of Clauses 3 and 4 of the agreement to sell dated 27th February, 2009, SICPA ought to have forthwith filed a suit for specific performance of the agreement to sell dated 27th February, 2009 on receipt of the letter dated 23rd February, 2010.

18.7. Instead, SICPA waits for defendant no.6 to pay off all liabilities to the ICICI and the DLF before filing the suit for permanent prohibitory injunction and mandatory injunction without ever having demanding repayment of its dues from the defendant no.3 or seeking specific performance of the agreement.

18.8. SICPA got executed power of attorneys dated 27th February, 2009 from the defendant nos.1 and 2 but did not bother to get them registered. It also did not ever call upon these defendants to do so.

18.9. We also emphasize that the first legal notice was sent on 27th July, 2009 seeking repayment of the loan to defendant no.1 as Managing Director of defendant no.3. SICPA has also acted under legal advice after receipt of the letter dated 23rd February, 2010. It issued legal notices on 10th June, 2010 and its lawyers got published notices in the newspapers on 23rd July, 2010 taking the only stand that it held a second charge over the properties. SICPA thus was acting under legal advice right from 2009.

18.10. Most pertinently, the letter dated 23rd February, 2010

addressed by the defendant no.3 disclose the status of the properties as well as the financial facilities taken by it from defendant nos.4, 5 and 6. On this date, the properties had not been transferred to third parties by conveyances, though they were the subject matter of first charges.

18.11.Despite notice, SICPA exercised neither dispatched nor diligence. No reasonable steps were taken by it. It issued no public notices asserting entitlements over the properties. SICPA made no effort to undertake the simple exercise of writing to the Sub-Registrar of documents to interdict transactions with regard thereto.

18.12.Can SICPA be permitted to set up a plea that this court cannot examine the merits of the amendments while considering an application for amendment of a plaint? It cannot be so. Else any dishonest plaintiff would stand enabled to implicate parties and properties in baseless litigation endlessly by incorporation of pleas and claims by amendment. It cannot be the intent of law to disallow such limited inquiry of the plaint and documents of the plaintiff. Such limited inquiry is essential to examine every principle and standard on which an amendment application has to be tested, especially regarding malafides and impact of the amendment on the other side; whether it is possible to compensate the other side or whether injustice results.

18.13.There is another negative impact on judicial resources if such inquiry was precluded. Permitting baseless amendments would compel other sides to move applications for rejection of the

claims so incorporated in the plaints. Court would have no option to examine the amendment on demurer, but after expending valuable judicial time. Therefore, certainly the limited inquiry, especially one premised on the pleadings of the plaintiff and its documents would be permissible in these circumstances.

18.14.The above narration would show that SICPA did not even call upon the defendant nos.1 to 3 to get the process of creation of the second charge in its favour undertaken.

18.15.How would a corporation being threatened with dilution of valuable securities react? It would forthwith seek legal redressal which could include a suit for injunction seeking prohibition of the defendants from dealing with the property. No such thing was undertaken by the plaintiff.

18.16.While filing the suit on 2nd November, 2010 (almost nine months after the receipt of the information that the defendants were transferring the properties) which classifies as 'commercial', SICPA has taken a well considered view of both its interpretation of the documents as well as the reliefs which it deemed itself entitled to. Other than the plea for cancellation of the sale deed dated 7th December, 2010, all pleas and claims sought to be incorporated by amendment are based upon facts available at the time of filing of the original plaint. Even the sale deed dated 7th December, 2010 with the defendant no.7 is premised on the prior agreement to sell dated 21st October, 2010. Defendant no.3 informed SICPA about the sale of the properties by the letter dated 23rd February, 2010. Part of the sale consideration enclosed with this letter was

appropriated by SICPA without any objection about the sales. The suit was filed only in November, 2010.

18.17. That SICPA was advised and had knowledge about the requirement in law of asserting all claims in the plaint, is manifested from the fact that it filed I.A.No.15012/2010 under Order II Rule 2 of CPC (we deal with the nature and merits of this application separately) seeking leave to sue subsequently.

18.18. We also note that this case is not one where the reliefs were not sought because of "oversight" or "negligence" but because of a conscious election. SICPA thus took every plea and made election of the reliefs sought in the original plaint after careful consideration and election. Merely because it has changed its mind, SICPA cannot seek exercise of discretion and indulgence to permit it to amend the plaint to incorporate pleas and reliefs which were available to it when it filed the suit and deliberately and consciously did not seek.

18.19. A new case based upon facts which were available to the plaintiff at the time of the filing of the original plaint but were not pleaded in the original plaint cannot be permitted to be set up by way of amendment. [Ref.: *AIR 1984 Del 248, R.C. Gupta v. O.P. Gupta*; *AIR 1986 Cal 113, Monika Bannerjee v. Biswabikash Sengupta*].

18.20. In the present case, in its supreme arrogance, SICPA does not even suggest an explanation for its conduct.

18.21. The appellant gives not one word of explanation for not mentioning all the facts which were in its knowledge when it filed

the suit. It does not even suggest an explanation for not seeking the reliefs which were available to it and seeks to incorporate by the proposed amendment. The application seeking leave to amend the plaint would require to be dismissed for this reason as well.

18.22. We have noted above how and why SICPA permitted third party rights to be created in the properties against consideration of crores of rupees; consciously elected the pleas as well as the reliefs and filed the suit. Therefore, it cannot be held that injustice would result to the plaintiff by denial of its prayer for leave to amend the plaint.

18.23. In the given facts, SICPA is disentitled to any indulgence or exercise of any discretion in its favour also for the reason that, even in the amendment application, SICPA has taken an utmost casual approach; asserted pleas with contradictory existing pleadings; seeks incorporation of additional prayers which are inconsistent with existing prayers. SICPA has set up pleas which are contrary to the express terms of the Contract Act, Registration Act, Stamp Act, Specific Relief Act amongst others. We shall elucidate on this aspect further at a later stage of this judgment. The amendment application has completely ignored first and settled principles of law.

18.24. The learned Single Judge has rightly concluded that SICPA was also guilty of gross laches and delay inasmuch as the contemplation and creation of third party rights in the properties was brought to its notice on 23rd February, 2010. Therefore, refusing the amendment does not lead to injustice or multiplicity of

litigation.

18.25. In the light of the above discussion, we are of the view that even if any of the above points could be held in favour of SICPA, it would still be disentitled to the amendments prayed for.

For all these reasons, the judgment of the learned Single Judge dismissing I.A.No.274/2012 has to be upheld for all these reasons.

19. **Challenge to the order dismissing I.A.No.15012/2010 filed by plaintiff under Order II Rule 2 of the C.P.C.**

19.1. Learned counsel for the appellant would seek to rely on the fact that the plaintiff had filed I.A.No.15012/2010 under Order II Rule 2 of the CPC along with the plaint. This application stands dismissed by the impugned judgment. The plaintiff contends that this dismissal was erroneous. We are therefore, required to also deal with the ruling of the learned Single Judge on this application filed by the plaintiff under Order II Rule 2 and the order thereon.

19.2. Before proceeding to examine this objection, it is essential to examine the statutory provisions. Order II of the C.P.C. provides for the “*Frame Of Suit*”. The entire emphasis of the legislature in the drafting of the Code of Civil Procedure is to minimise the litigation, expedite adjudication and to motivate parties that all disputes between the parties relating to the same transaction should, as far as possible, be expeditiously disposed of in the same suit (**Ref. :** Sections 10, 11 and 12 and Order II Rules 1 and 2 of the C.P.C.). The fundamental aim and object of the statutory

provisions is to avoid multiple suits as may be founded on the same cause of action or may relate to the same subject matter. While Rule 1 of Order II merely prescribes a general Rule (“*as far as practicable*”), Rule 2 incorporates a bar to a subsequent suit upon failure of a party to include the entire claim to which a person is entitled when a suit is filed.

19.3. For the purposes of convenience, we are extracting hereunder the Rule 2 of Order II of the CPC:

“2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.- A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.”

19.4. Mr. C. Mukund, learned counsel appearing for SICPA has placed reliance on the pronouncement reported at **(2010) 10 SCC 141 Alka Gupta v. Narender Gupta**. In this case, so far as the second suit under consideration was concerned, the issue of res judicata was the primary plea of the defendants. The first suit related to rights under an agreement to sell, while a second suit had been filed with regard to rights under the partnership deed. Consequently, while an issue stood framed with regard to the bar of res judicata urged by the defendant, no issue under Order II Rule 2 had been framed. The Supreme Court had concluded that the two suits were based on different and distinct cause of action. It was therefore, held that the bar under Order II Rule 2 was not attracted.

Before us, the plaintiff does not even suggest that the relief prayed in the suit and the prayers sought to be incorporated are based on different causes of action. Therefore, the principles laid down in **Alka Gupta** would have no application to the instant case.

19.5. In the Constitutional Bench pronouncement of the Supreme Court reported at **AIR 1964 SC 1810 Gurbux Singh v. Bhooralal**, the Supreme Court unequivocally declared that in order that a plea of bar under Order II Rule 2(3) CPC should succeed, the defendant who raises the plea must make out that *(i) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (ii) that in respect of that cause of action, the plaintiff was entitled to more than one relief, (iii) that being thus entitled to more than one relief the plaintiff, without leave obtained*

from the Court, omitted to sue for the relief for which the second suit had been filed.

19.6. From this analysis, it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the causes of action on which the earlier suit was filed and that on which the claim in the later suit is based, there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action, but, this might, by no means, be the universal rule. The Constitution Bench also held that as the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning.

19.7. Mr. C. Mukund, learned counsel for the appellant has also placed reliance on the pronouncement by the Supreme Court reported at (2013) 1 SCC 625, *Virgo Industries (Engineering) Pvt. Ltd. v. Venturetech Solutions Private Limited*. This pronouncement again is of no assistance to the plaintiff for the reason that in this case, the relief of specific performance was premature on the date of filing of the suit. Hence, it was held that there was no bar to filing the later suit claiming such relief to which the plaintiff had become entitled to at a point of time subsequent to the filing of the first suit. We may usefully extract para 10 of this judgment wherein the court has discussed the considerations which must weight with the court for granting leave under Order II Rule 2 of CPC which reads as follows :

“10. The object behind the enactment of Order 2 Rules 2(2) and (3) CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order 2 Rules 2(2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the *Constitution Bench* of this Court in *Gurbux Singh v. Bhooralal* [AIR 1964 SC 1810] may be usefully recalled below: (AIR p. 1812, para 6)

“6. In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.”

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments in *Deva Ram v. Ishwar Chand*[(1995) 6 SCC 733] and *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co.* [(1997) 1 SCC 99 : AIR 1997 SC 1398]"

(Emphasis by us)

19.8. In the instant case, SICPA filed I.A.No.15012/2010 under Order II Rule 2 CPC along with the plaint. In para 1 of the application, SICPA has merely reproduced the prayer clause in the plaint. The rest of the application reads thus:

“2. The plaintiff states that there are *other reliefs which the Plaintiff is entitled to* against the Defendants *including but not limited to the reliefs for specific performance of agreement and other alternative reliefs arising out of the same cause of action, which the Plaintiff is not in a position to seek the same at this stage and has been advised to seek at the appropriate time.*

3. The Plaintiff is *therefore seeking Leave* of this Hon’ble Court under Order 2 Rule 2 for grant of liberty to pray for other reliefs subsequently as and when the Plaintiff will be so advised.

PRAYER

It is therefore humbly prayed that this Hon’ble Court may be pleased to:

(a) Grant liberty to the Plaintiff Leave to file the present Suit with the liberty under Order 2 Rule 2 of the Code of Civil Procedure; ...”

(Emphasis supplied)

19.9. SICPA does not disclose as to which are the reliefs the plaintiff was entitled to seek in the entirety of I.A. No.15012/2010. The disclosed reason in the application for not seeking the same

was “*plaintiff is not in a position to seek the same*”.

19.10. The plaintiff has premised its claim in the plaint on the dues owed by defendant no.3 under loan agreement dated 27th February, 2009. SICPA further asserts entitlement to enforce the securities in the nature of “*second charge*” as seen above.

19.11. As seen above, by the letter dated 23rd February, 2010, SICPA had been informed about the intention of sale of the property. Therefore, in case SICPA had any rights in these properties, the cause of action for the enforcement of such rights stood triggered off.

19.12. SICPA has complained that the defendant no.3 failed to abide by the financial discipline as agreed by it necessitating the filing of the suit. On its pleas, consequently as on the date of the filing of the suit, SICPA could have sought the following :

- (i) recovery of the amount of ₹8,50,36,918/- against defendant no.3 as principal debtor as well as defendant nos.1 and 2 as guarantors;
- (ii) enforcement of “mortgage as a second charge” of the Vasant Vihar and DLF property;
- (iii) “creation of the second charge” in terms of the loan agreement;
- (iv) specific performance of the agreement to sell dated 27th February, 2009.

19.13. Instead, SICPA filed the suit without asserting its claim for recovery of any of these reliefs. It has simply prayed for a decree for prohibitory injunction restraining the defendant nos.1 and 2 from creating third party interest; a declaration that the Vasant Vihar property and the DLF Penthouse are under the second charge

of the plaintiff; that the defendant nos.4 to 6 are bound to take note of this fact and lastly; for a mandatory injunction.

19.14.Mr. Vikas Arora, learned counsel for the defendants has placed the judgment of the Bombay High Court reported at ***AIR 2009 Bom. 1992 Prakash Balaram Nichani v. Mohandas Parshuram Ahuja*** urging that the proposed amendments are barred by the provisions of Order II Rule 2 of the C.P.C. In this case, an application under Order II Rule 2 of the CPC seeking permission to omit the relief for specific performance of the agreement in question from the purview of the suit was prayed for. The court placed reliance on the pronouncement of the Supreme Court reported at ***(1995) 6 SCC 733 Deva Ram & Anr. v. Ishwar Chand & Anr.*** and ***AIR 2000 Bombay 34 SNP Shipping Services Pvt. Ltd. v. World Tanker Carrier Corporation & Anr.*** wherein it had been held that if the cause of action is the same, the plaintiff is required to place all his claims in one suit. The use of the expression "*shall*" in Rule 2 of Order II CPC indicates that the provisions are mandatory.

19.15.In ***Virgo Industries***, the submission was that the relief for specific performance was premature on the date of filing the suit. In the instant case it is not so. All reliefs sought by the proposed amendment were available on the date the suit was filed. Clearly, a subsequent suit for the relief of specific performance of the agreement dated 27th February, 2010 was barred under the provisions of Order II Rule 2 of the CPC.

19.16.The appellant admits that the cause of action for the other

reliefs (except the execution of the sale deed dated 7th December, 2010) had arisen before the suit was filed.

19.17. The facts brought out on record make out no difficulty in seeking the reliefs in the original plaint.

19.18. An application for grant of leave under Order II Rule 2(1) CPC is not a matter of right of the plaintiff which has to be given as of course. The very fact that the legislature has mandatorily required ‘*leave*’ to be given by the court, manifests that the plaintiff is required to lay down the factual matrix and seek permission of the court to split reliefs, which prayer would be granted only after the court has satisfied that a case for splitting reliefs into two suits is made out. This is in consonance with the spirit, intendment and purpose of Order II Rule 2 of the CPC which is to prevent multiplicity of litigation and to bring a finality to adjudication. The court has to be satisfied before granting relief, that the application is bonafide and does not amount to abuse of the process of the court.

19.19. It has been authoritatively held in ***Virgo Industries*** that leave of the court under Order 2 Rule 1 and 2 can be granted only upon “*due satisfaction*” and for “*good and sufficient reasons*”. The averments made by the plaintiff in the present case give no reason why SICPA did not seek the prayers (specific performance of the agreement; recovery of money etc.) which it was admittedly entitled to on the date of filing of the suit. No material at all is available in the application for the court to record its satisfaction or justification for grant of the permission to bring subsequent suit for

reliefs available to SICPA when it filed the plaint or arising from the same cause of action.

19.20. The learned Single Judge has noted that the plaintiff did not even argue this application and rejected the same. Mr. C. Mukund, learned counsel for SICPA has disputed this. In any case, we have examined the record of the suit and heard learned counsels on the merits of this application. We are also of the view that the plaintiff cannot be granted leave under Order II Rule 2 of the CPC under any circumstance.

Thus, the order of the learned Single Judge rejecting IA No. 15012/2010 under Order II Rule 2 of the C.P.C. cannot be faulted in the facts and circumstances of the case.

20. **Examination of pleas in I.A.No.20809/2011 (filed on 20th December, 2011) by defendant nos.1 to 3 seeking rejection of plaint under Order VII Rule 11 C.P.C.**

20.1. Let us now examine the challenge by SICPA to the judgment allowing I.A.No.20809/211 filed by defendant nos.1 to 3 under Order VII Rule 11 of C.P.C.

20.2. Based on the loan agreement dated 27th February, 2009, SICPA has asserted that it has a valid and binding second charge over the properties bearing nos. D-6/2, Vasant Vihar, New Delhi-110057 and Penthouse 1917A, DLF Magnolias, Gurgaon, Haryana. Therefore, in the original plaint, as prayer 'b', SICPA has sought a decree of permanent injunction against the defendant nos.1 and 2 restraining them from transferring or creating of third party right or

interest in the said properties. Furthermore, as prayer 'c', SICPA sought a decree for declaration that the properties are under the second charge of SICPA and that the defendant nos.4,5 and 6 are bound to take note of the fact and record this fact in their books. SICPA has sought a decree of mandatory injunction as prayer 'd' against defendant nos.4, 5 and 6 to record its second charge in favour of the plaintiff in respect of the said land and property.

20.3. The plaintiff has pressed in para 27 of the plaint (extracted above) that the mere signing of the loan agreement and entering into the loan agreement dated 27th February, 2009 tantamounted to creation of a charge upon properties owned by defendant nos.1 and 2.

20.4. In para 21 of the original plaint, SICPA admitted knowledge of the fact that the Vasant Vihar property and the DLF Penthouse were “*mortgaged as first charge in favour of ICICI Bank Ltd.*”. It was also stated that SICPA was yet to receive confirmation of recording of its second charge of these properties by the ICICI Bank Ltd.

20.5. The defendants question the maintainability of such prayers in the facts placed in the plaint and on the documents filed by the plaintiffs. The defendants challenge the very existence of a valid and binding charge on the properties of the defendants and urge that the plaintiff has no cause of action to bring and maintain the suit. What were SICPA's rights, if any, over the Vasant Vihar and DLF properties of the defendants?

20.6. It is well settled that to examine these issues, we are

restricted in our scrutiny to an examination of only the plaint and SICPA's documents. We confine our consideration to these. It is an admitted position that other than the powers of attorney, letters of guarantee of defendant nos.1 and 2 and the agreement to sell dated 27th February, 2009, no further documents in terms of Clause 2.6 of the loan agreement dated 27th February, 2009, have been executed by the defendant nos.1 to 3 in favour of SICPA.

20.7. The period of 10 days postulated under Clause 4.1(e) of the loan agreement dated 27th February, 2009 for creation of the charge on the property, would have come to an end on 9th March, 2009. SICPA does not refer to a single communication to the defendant nos.1 or 2 calling upon them to create the second charge on the properties. SICPA does not say that it treated such failure as a default till date.

20.8. It is necessary, at this stage, to also note the correspondence exchanged between SICPA and the defendant nos.1 to 3. A legal notice dated 27th July, 2009 was sent by counsel for SICPA only to Shri Kapil Kumar as Managing Director of defendant no.3 referring to the execution of the loan agreement dated 27th February, 2009. It was not served on the defendant no.1 in his personal capacity. While referring to an earlier communication dated 27th June, 2009, also sent by the counsel, this notice called upon the noticee to repay the entire loan amount together with interest thereon and the amount which was deducted as and by way of tax deducted at source and all other expenses incurred by SICPA on behalf of defendant no.3. In the last para of this notice, the

plaintiff threatened several actions against the defendants. SICPA did not threaten the disposal of the properties over which the defendant nos.1 and 2 are now asserting rights to recover dues. This notice was also not served on Mrs. Ritu Kumar - defendant no.2, a co-owner of the Vasant Vihar and DLF properties. It is obvious deduction therefrom that clearly SICPA understood that it had no charge or rights over the property.

20.9. In the earlier part of this judgment, we have dwelt at length about SICPA's admitted responses to the letter dated 23rd February, 2010 (received by it on 4th of March 2010) intimating it about the property transactions which also does not even remotely suggest or assert any right or interest in the properties.

20.10. Neither in its plaint nor in the letters, legal notices, has SICPA stated that it objected to or complained against the proposed sale by defendant nos. 1 and 2.

20.11. SICPA has in some places claimed creation of a charge by the defendants in its favour and at others it has claimed a 'mortgage'. This brings us to a pertinent question - how is a charge created in law? What is the difference between a 'charge' and 'mortgage'? Are there any statutory requirements necessary to create a valid and binding charge and a mortgage? In this regard, it is necessary to read Sections 100 and 101 (dealing with creation of a charge) of the Transfer of Property Act, 1882. We may also note the provisions of Sections 58 and 59 defining mortgage.

20.12. For the purposes of convenience, we extract the relevant statutory provisions of the Transfer Property Act hereunder which

read thus :

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” defined.—

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

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(f) Mortgage by deposit of title-deeds.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay and in any other town which the State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of

this section is called an anomalous mortgage.”

(Underlining by us)

20.13. We may also extract Sections 100 and 101 of the Transfer of Property Act which read thus:

“100. Charges.—

Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained¹[which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

“101. No merger in case of subsequent encumbrance.—

No merger in case of subsequent encumbrance.—Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the

prior mortgage or charge, or otherwise than subject thereto.”

(Emphasis by us)

20.14. The statute (in Sections 58 and 100) in clear terms brings out the difference between a ‘charge’ and a ‘mortgage’ and this needs no further elaboration.

20.15. Section 100 dealing with the creation of a charge makes applicable the provisions of a simple mortgage to it. The statute prescribes the manner in which the mortgage is created in the following terms:

“59. Mortgage when to be by assurance.-

Where the *principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.*

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.”

20.16. In the judgment reported at **2013 SCC OnLine SC 1102, Haryana Financial Corporation v. Gurcharan Singh & Anr.**, the Supreme Court had occasion to consider the difference between creation of a charge and mortgage of property. In this case, only an undertaking stood executed by the respondent which was being pressed as creating a 'charge' over his property. It was held by the Supreme Court in para 11 that the conjoint reading of Section 100 and Section 59 of the Transfer of Property Act, made it clear that a

charge, which is by way of act of party, has to be by way of a compulsorily registered instrument and not otherwise.

20.17. In this regard, the principles laid down by the Supreme Court in para 9 of (2005) 11 SCC 520, *Bank of India v. Abhay D. Narottam & Ors.* are also material and read thus:

“9. It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. “Mortgage” has been defined in Section 58(a) of the Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. *Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge under Section 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge.* The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.”

(Emphasis by us)

20.18. It is evident from the reading of the above statutory provisions, that a charge can be created only under Section 100 of the Transfer of Property Act, 1882 and further that all provisions which apply to a simple mortgage, mandatorily apply to creation of any charge. Under Section 58 of the Transfer of Property Act, a simple mortgage is described as effected where, without delivery of the possession of the mortgaged property, a mortgagee binds himself personally to pay the mortgaged money and in the event of his default, the mortgaged property can be sold. Section 59 defines

the manner in which mortgages are effected. It stipulates that every mortgage, other than the mortgage by deposit of title deeds (i.e. an equitable mortgage) can be effected only by a “registered instrument” signed by the mortgager and “attested by at least two witnesses”.

20.19. The further issues before us are whether a 'charge' on a property requires registration? If it does, then what is the effect of non-registration? So far as the registration of instruments is concerned, it is necessary to refer to the provisions of the **Registration Act, 1908**. We may refer to the provisions of Section 17 of this enactment which lists such documents as are compulsorily registerable. Clause(b) of sub-section (1) of this section is relevant for our purposes which reads thus:

“Section 17. Documents of which registration is compulsory.-

(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No, XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(a) xxx xxx xxx

(b) Other ***non-testamentary instruments*** which purport or ***operate to create, declare***, assign, ***limit*** or extinguish, whether in present or in future, ***any right, title or interest***, whether vested or contingent, of the value of one hundred rupees and upwards, to or ***in immovable property*** xxx”

(Emphasis by us)

20.20. Our attention is drawn in this regard also to the pronouncement of the Supreme Court reported at *(1969) 1 SCC 573, M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons & Ors.* It is noteworthy that in *M.L. Abdul Jabbar Sahib*, there was a registered security bond before the court which stood attested by only one witness. The issue before the court was whether attestation by only one witness on the security bond was sufficient. While answering this question, it was observed as follows:

“16. If a *non-testamentary instrument creates a charge* of the value of Rs 100 or upwards, the *document must be registered under Section 17(1)(b) of the Indian Registration Act.* But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses.”

(Emphasis supplied)

It is manifest from the above that any document purporting to create a valid charge on a property valued over one hundred rupees requires mandatory registration. It is required to be duly stamped as well. It is therefore, well settled that charge can be created only by a document duly stamped and registered.

20.21. In the present case, the principal money secured by SICPA runs into several crores of rupees. Therefore, by application of Sections 59 and 100, a valid mortgage as well as charge can be effected only by a registered instrument signed by the mortgager (defendant nos.1 and 2) and attested by at least two witnesses.

20.22. We find that the loan agreement dated 27th February, 2009 was entered into between SICPA on the one hand and Brushman

India Ltd. (defendant no.3) on the other.

20.23. The defendant no.3 is a company incorporated under the provisions of the Indian Companies Act and is a legal entity. It has no concern with either the Vasant Vihar property or the DLF penthouse. It is the defendant nos.1 and 2 who are the owners of the property on the ground floor and basement of D-6/2, Vasant Vihar as well as the DLF Penthouse. The defendant no.2 has not signed this loan agreement. Therefore, on the face of it, Clauses 3 and 4 of the loan agreement cannot bind the defendant no.2. Any commitment made in the loan agreement with regard to creation of a charge of properties of defendant no.2 is of no consequence. It does not create any charge over the rights of the defendant no.2 in the properties. The defendant no.1 has also signed the loan agreement only as authorized signatory of the defendant no.3 company.

20.24. Even otherwise, Clause 1.1(a) of the loan agreement dated 27th February, 2009 only notes the agreement of the “*borrower*” (i.e. Brushman India Ltd.) “*to provide marketable securities held by promoters/promoters’ relations by way of pledge, personal guarantees of promoters/promoters’ relations, second charge on the properties located at D-6/2, Ground Floor, Vasant Vihar, New Delhi-110057 and the Penthouse 1917A, DLF Magnolias, Gurgaon, jointly owned by its promoters/promoters’ relations in favour of the Lender*”. By Article 2(B), Clause 2.6, the defendant no.3 had agreed that the loan facility balance shall be secured by creation of second charge on the said properties. It was also noted

that these properties were having housing loans from the ICICI. Clearly the agreement was consciously drafted and did not state that, by itself, it created a 'charge'.

20.25. A charge on immovable property therefore, can be created only by a registered instrument. The execution of the loan agreement therefore, does not create a mortgage or a charge over the properties of defendant nos. 1 and 2.

20.26. There is yet another reason as to why the loan agreement and the agreement to sell dated 27th February, 2009 cannot be treated as instruments creating a charge or mortgage. Mr. Vikas Arora, learned counsel for defendant no. 6 has drawn our attention to Article 32(b)(ii) of Schedule I of the Indian Stamp Act, 1899, wherein the stamp duty payable on an instrument imposing a further charge on mortgaged property is prescribed. SICPA in the instant case is seeking second charge over the properties of which possession has not been given to it, in respect of a loan amount of ₹5 crores. Admittedly, there exists a prior charge over the properties. Therefore, stamp was payable in accordance with Article 32(b)(ii) which prescribes that it shall be exigible to the stamp duty as a bond (in accordance with Article 15 of the Schedule I) for the amount of the further charge secured by such instrument. We find that a stamp of about Rs. 2,50,000/- would accordingly be liable to be affixed in order to create a second charge thereon. Neither the loan agreement nor the agreement to sell are so stamped. Though the defect of insufficient stamping may be remedied (by impounding the document and complying

with the prescribed procedure of paying penalty etc. under the Act), however, the defect of registration cannot be remedied. The agreements do not bear the stamp as are required to create a charge in accordance with law.

20.27. SICPA is, thus, relying on a mere offer to create charge in a loan agreement by a company (defendant no.3), who is not the owner of the property, to urge that it had a second charge over the properties. The offers of promoters of the company (defendant nos.1 and 2) to create a charge are also inconsequential inasmuch as the same are neither stamped, witnessed or registered in accordance with law.

20.28. We have extracted hereinabove Clause 4.1(e) wherein the failure to create the second charge on the said properties beyond 10 days from the date of signing of the loan agreement would constitute an event of default of the borrower. We have also noted the Schedule I of the loan agreement which notes the 'offer' of the defendant no.3 to obtain a charge from the defendant nos.1 and 2 on the properties. A conjoint reading of Clauses 2.6 and 4.1(e) and the Schedule I makes it further clear that the loan agreement by itself did not create a charge on the properties in favour of SICPA and that the parties had postulated the execution of further documents to create the second charge.

The loan agreement on the face of it therefore, does not create a charge on the properties of the defendant nos.1 and 2.

20.29. We have to examine SICPA's claim of the second charge from another perspective. In the plaint, SICPA has claimed

creation of the charge by execution of the agreement to sell dated 27th February, 2009 by defendant nos.1 and 2 in its favour. Can such agreement be treated as having created a 'charge' on the properties in favour of SICPA?

20.30.Mr. T.K. Ganju, Senior Counsel appearing for defendant no.7 has relied on the provisions of Section 54 of the Transfer of Property Act and the pronouncement of the Supreme Court reported at *(2005) 11 SCC 520, Bank of India v. Abhay D. Narottam & Ors.* in support of the submission that the agreement to sell dated 27th February, 2009 also cannot amount to creation of a charge in the property.

20.31.Let us examine Section 54 of the Transfer of Property Act which reads as follows:

“54. “Sale” defined.—

‘Sale’ is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made - Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale - *A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.*

It does not, of itself, create any interest in or charge on such property.”

(Emphasis supplied)

The agreement to sell is not sufficiently stamped to create a charge or a mortgage. It is also not a registered document. It relates only to the ground floor of the Vasant Vihar property. We have elaborately dealt with the impact of the covenants thereof. It is therefore, apparent that be execution of the agreement to sell as well, no charge or mortgage was created in favour of SICPA.

20.32. We may note that interestingly, neither the original plaint nor the proposed amendment states anywhere as to the manner in which a charge on the properties in favour of SICPA was created. In the plaint, SICPA simply avers that the defendants had no right in the property to sell, transfer or alienate the property to third parties because of SICPA's charge over the properties. Without describing its rights or definition of its claim, the plaintiff has simply incorporated the prayers 'a', 'b' and 'c' extracted above.

20.33. In the correspondence and the pleadings, SICPA and learned counsels appearing on its behalf have used the expressions 'charge' as synonymous with 'mortgage'. This is not so and the statutes have drawn a clear difference. The rights created thereunder are not the same.

20.34. It is trite that a decree for permanent injunction (as prayed in prayer 'b' and 'd') can be granted only if there is a legal right to be protected. In the instant case, SICPA has failed to make out any legal right in the properties in question, be it as a second charge

holder or under the agreement to sell.

20.35. In this regard, Mr. T.K. Ganju, learned senior counsel for proposed defendant no.7 has also drawn our attention to the provisions of Section 41(e) of the Specific Relief Act, 1963 which reads thus:

“Section 41. Injunction when refused

An injunction cannot be granted. -

xxx xxx xxx

(e) To prevent the breach of a contract the performance of which would not be specifically enforced xxx xxx”

We have discussed above as to how the cause of action to seek specific performance has not accrued in favour of the plaintiff as yet. The prayer of injunction qua the properties cannot be granted by the court in view of Section 41(e) of the Specific Relief Act.

20.36. By virtue of Section 41(e) of the Specific Relief Act, no injunction can be granted to prevent breach of a contract which cannot be specifically enforced. We have noted above that right to seek specific performance of the agreement to sell dated 27th February, 2009 has not even accrued as SICPA has not complied with the covenant in Clause 3 thereof. Obviously therefore, the agreement cannot be specifically enforced.

For these reasons as well, the prayer ‘b’ in the plaint is barred by law and cannot be granted.

20.37. There is yet another reason why there is no cause of action for prayers ‘b’ and ‘c’.

20.38. In prayer ‘b’, SICPA has sought the relief of permanent

injunction restraining defendant nos.1 and 2 from selling, transferring, conveying or creating third party rights and interest in respect of the entire land and property at D-6/2, Vasant Vihar, New Delhi-110057. It also sought in prayer 'c' as well a decree for declaration qua the whole of the property bearing No.D-6/2, Vasant Vihar, New Delhi. Clearly, the reliefs for the '*entire*' or '*whole*' of the Vasant Vihar property are beyond the agreement.

20.39.Mr. Ganju, learned Senior Counsel has pressed yet another legal prohibition to grant of decree of permanent injunction. In this regard, placing reliance on Section 41(g) of the Specific Relief Act, 1963, it is urged that the plaintiff is disentitled to injunction against a breach of contract, if has acquiesced in the same. Section 41(g) reads as follows :

“Section 41. Injunction when refused

An injunction cannot be granted. -

xxx xxx xxx

(g) To prevent a continuing breach in which the plaintiff has acquiesced; xxx xxx”

20.40.As discussed above, SICPA acquiesced to the alleged breaches, if any, by defendant nos.1 and 2. Therefore, even if it could be held that by selling Vasant Vihar properties to proposed defendant no.7, there was any breach of the agreement to sell dated 27th February, 2009, SICPA was still disentitled to grant of a decree of permanent injunction as such relief had to be refused to it under Section 41(g) of the Specific Relief Act, 1963 as it had fully acquiesced in such breach.

20.41. The loan agreement and the agreement to sell, both dated 27th February, 2009, which are neither stamped nor registered in accordance with law, do not meet the statutory requirements and cannot be accepted as either creating a charge on the properties of defendant nos.1 and 2 in favour of SICPA or amounting to a mortgage thereof. SICPA clearly has no charge in law over the properties of defendant nos.1 and 2. No other right or interest is claimed in the properties. The pleas and prayers in the suit premised on a ‘charge’ or ‘mortgage’ are clearly without factual and legal basis and no cause of action has therefore, arisen in favour of the plaintiff as a result. SICPA therefore, has no right which is legally liable to be declared or protected. The reliefs sought by prayer ‘c’ seeking a declaration of such charge as well as prayers ‘b’ and ‘d’ for injunction over the properties premised thereon, are barred by law and cannot be therefore, granted.

20.42. In view of the above discussion, the finding of the learned Single Judge that no charge in respect of the subject properties had been created in favour of SICPA by virtue of execution of the loan agreement or the agreement to sell dated 27th February, 2009 and therefore, SICPA had no cause of action for bringing the present suit is unassailable and cannot be faulted.

21. **Challenge to the order accepting I.A.No.6657/2011 filed on 24th April, 2011 by defendant nos. 1 to 3 under Order I Rule 10(2) seeking deletion of defendant nos.4 to 6 from the array of parties.**

21.1. While pressing I.A.No.6657/2011 filed by the defendants

under Order I Rule 10(2) of the C.P.C. seeking deletion of defendant nos.4 to 6, it is pointed out that SICPA relies on the loan agreement and the agreement to sell dated 27th February, 2009 which have been executed between SICPA on the one hand and the defendant nos.1, 2 and/or 3 on the other. It was the defendants' case that the defendant nos.4 to 6 are not party to these agreements and that SICPA had no privity of contract with them.

21.2. The above discussion would also show that these defendants are neither necessary nor proper parties for adjudication upon the subject matter of the case.

21.3. SICPA has also described the defendant nos.4 to 6 merely as “*proforma parties*” in the plaint. No cause of action against these defendants was disclosed and therefore, the suit against them was clearly not maintainable. The learned Single Judge has rightly agreed with the applicants and allowed I.A.No.6654/2011.

22. ***Challenge to the order on IA No.478/2011 filed by the plaintiff under Order I Rule 10(2) of the C.P.C. for impleadment of Sh.K.L. Chugh***

22.1. SICPA had filed IA No.478/2011 under Order 1 Rule 10(2) of the C.P.C. praying for impleadment of Sh. K.L. Chugh as defendant no.7. SICPA was relying on the applicability of the doctrine of *lis pendens* contending that it had filed the suit on 2nd November, 2011 and that defendant nos. 1 and 2 had sold the Vasant Vihar property to Sh. K.L. Chugh by a sale deed dated 7th December, 2011. SICPA contends that as such the transfer of the

property in favour of Sh. K.L. Chugh was hit by the doctrine of *lis pendens*.

22.2. The transferee Shri K.L. Chugh – proposed defendant no.7 in the present case, does not wish to be impleaded as a party to the suit and has staunchly opposed the proposed amendment.

22.3. Mr. C. Mukund, learned counsel for the plaintiff has placed reliance on the pronouncement of the Supreme Court reported at **(2013) 5 SCC 397, Thomson Press (India) Ltd. v. Nanak Builders & Investors Private Limited & Ors.** in support of SICPA's contention. In this case, the sale of the property was effected in violation of the order of injunction, prohibiting any transaction of the suit property till disposal of the suit. The purchaser (appellant before the Supreme Court) had made an application for being impleaded in the pending suit for specific performance of the prior agreement to sell. The court held that the transfer in favour of a purchaser *pendente lite* is neither illegal nor *void ab initio* but remains subservient to rights eventually determined by the courts in the pending litigation. Hence, a transfer in favour of purchaser *pendente lite* is an effective transfer of title subject to certain obligations as the decision of a court in a suit is binding not only on litigating parties but also on those who derive title *pendente lite*. In para 33, placing reliance on clause (b) of Section 19 of the Specific Relief Act, the Supreme Court declared that “*a suit for specific performance cannot be enforced against a vendor who is a transferee from the vendor for valuable consideration and without notice of the original contract which is*

sought to be enforced in the suit”.

22.4. On the facts of that case, the Supreme Court was of the view that the subsequent purchaser had entered into a clandestine transaction with the seller and got the suit property transferred in their favour. For this reason, the subsequent purchaser could not be held to be a bonafide purchaser without notice. The court had affirmed the following principle laid down in ***AIR 1931 Cal. 67 Kafiladdin v. Sameeraddin*** :

“Equity will enforce specific performance of the contract for sale against the vendor himself and against all persons claiming under him by a title arising subsequently to the contract except purchasers for valuable consideration who have paid their money and taken a conveyance without notice to the original contract.”

(Emphasis by us)

The Supreme Court also laid down the principles which would apply to the manner in which a decree in favour of the purchaser against the seller as well as the subsequent purchaser would be drawn up in such eventuality. The subsequent purchaser was added as a party/defendant in the ***Thompson Press India Limited*** in the “*facts and circumstances of the case and also for the ends of justice*”.

22.5. We may usefully extract the discussion in the supplementing reasons recorded by T.S. Thakur, J. in ***Thompson Press India Limited***. It was observed that the *appellant was aware of the pre-existing agreement to sell between the plaintiff and the defendants*

in the suit and that the sale in favour of the subsequent purchaser was a clandestine transaction. In the light of this finding, it was held that it was futile for the appellant (subsequent purchaser) to deny that the specific performance prayed for by the plaintiff was and continued to be enforceable not only against the original owner/defendants but also against the appellant, their transferee. It was held that the appellant was not protected by the transfer for the reason that even though the same was for valuable consideration, the transfer was “*not in good faith nor was it without notice of the original contract*”.

22.6. We extract hereunder the reliance on judicial precedents and the discussion in the supplementing reasons in paras 49 to 52 as well as the principles authoritatively set down in para 53 which read as under :

“**49.** The second aspect which the proposed judgment succinctly deals with is the *effect of a sale pendente lite*. The legal position in this regard is also fairly well settled. A transfer pendente lite is not illegal ipso jure but remains subservient to the pending litigation. In *Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593] this Court while interpreting Section 52 of the Transfer of Property Act observed: (AIR p. 602, para 25)

“25. ... the words ‘so as to affect the rights of any other party thereto under any decree or order which may be made therein’, make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendente lite have been held to be valid and operative as between the parties thereto.”

50. To the same effect is the decision of this Court

in *Vinod Seth v. Devinder Bajaj* [(2010) 8 SCC 1 : (2010) 3 SCC (Civ) 212] wherein this Court held that Section 52 does not render transfers affected during the pendency of the suit void but only render such transfers subservient to the rights as may be eventually determined by the Court. The following passage in this regard is apposite: (SCC p. 20, para 42)

“42. It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.”

51. The decision of this Court in *A. Nawab John v. V.N. Subramaniam* [(2012) 7 SCC 738 : (2012) 4 SCC (Civ) 324] is a recent reminder of the principle of law enunciated in the earlier decisions. This Court in that case summed up the legal position thus: (SCC p. 746, para 18)

“18. ... ‘12. ... The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court.’ [As observed in *Sanjay Verma v. Manik Roy*, (2006) 13 SCC 608, p. 612, para 12.] ”

52. We may finally refer to the decision of this Court in *Jayaram Mudaliar v. Ayyaswami* [(1972) 2 SCC 200 : (1973) 1 SCR 139] in which were extracted with

approval observations made on the doctrine of lis pendens in *Commentaries on the Laws of Scotland*, by Bell. This Court said: (SCC p. 217, para 43)

“43. ... Bell, in his *Commentaries on the Laws of Scotland* said, that it was grounded on the maxim: *Pendente lite nihil innovandum*. He observed:

‘It is a general rule which seems to have been recognised in all regular systems of jurisprudence, that during the pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced.’”

53. There is, therefore, little room for any doubt that the ***transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit.*** Although the *above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective.* The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the ***sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor.***”

(Emphasis by us)

22.7. So far as right of a transferee *pendente lite* to seek addition as a party-defendant in a suit under Order 1 Rule 10 of the C.P.C. is concerned, the Supreme Court in para 54 reiterated the well settled legal position that no one other than the parties to an

agreement to sell is a necessary and proper party to a suit for specific performance. However, the court held that the enabling provisions of Order XXII Rule 10 of the C.P.C. could be invoked “if the fact situation so demanded”. The court relied on the judicial precedents reported at (1983) 1 SCC 18 ***Kemchand Shankar Choudhari v. Vishnu Hari Patil*** and (2005) 11 SCC 403 ***Amit Kumar Shaw v. Farida Khatoon*** in this regard.

The subsequent purchaser (in the *Thomson Press (India) Ltd.*) was found not to be a bonafide purchaser without notice. It was held that therefore, it was not entitled to protection against specific performance of the contract between the parties to the original suit. The court observed that he would therefore, not be protected from the application of the doctrine of lis pendens.

22.8. In the present case, SICPA was informed about the sale as back as on 23rd February, 2010 and unconditionally accepted part of the sale consideration as well. SICPA also did not assert any rights under the agreement to sell in any letter, notice, correspondence, public advertisements or when it filed the suit on 2nd November, 2011.

22.9. The defendant nos.1 and 2 sold the Vasant Vihar property to the defendant no.6 on the 15th of February 2010 for a total sale consideration of ₹6.75 crores. The sale transaction having been completed, possession of the property was handed over to the defendant no.6. However, in order to minimise costs, the formal sale deeds of the ground floor and the basement of the Vasant Vihar property were not got executed by defendant no.6 in its

favour. Upon locating Shri K.L. Chugh as a buyer of this property, the deal was finalized on 11th October, 2010 and a cheque was received from the prospective buyer. The formal agreement to sell of this property for ₹6.75 crores was got executed on 21st October, 2010 by defendant no.6 from defendant nos.1 and 2 directly in favour of the proposed defendant no.7. All payments received in this transaction were simultaneously credited in the account of the defendant no.6. In terms of the agreement to sell dated 21st October, 2010, the formal sale deed was executed and registered on 7th December, 2010 by defendant nos.1 and 2 directly in favour of the proposed buyer.

22.10.SICPA does not even make a whisper that defendant no.7 had any information or knowledge about its transactions with the defendant nos.1 to 3 or its claims over the properties. There is nothing at all on record to show that the proposed defendant no.7 had any knowledge about the transactions between SICPA and defendant nos.1 and 2 or defendant no.3 for that matter. Therefore, so far as the sale to defendant no.7 is concerned, the doctrine of *lis pendes* and the ratio of ***Thomson Press (India) Ltd.*** have no application to the facts of the present case.

22.11.We find that the learned Single Judge has concluded that the doctrine of *lis pendens* would be of no assistance to SICPA as it does not invalidate the title of the property but would only makes it subject to the result of the suit. In the light of the above discussion, this conclusion is unassailable.

22.12.One more reason is available to the defendant no.7. Let us

also refer to the mandate of Section 19(b) of the Specific Relief Act which reads as follows :

“19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, *specific performance of a contract may be enforced against—*

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, *except a transferee for value who has paid his money in good faith and without notice of the original contract; ...”*

22.13. In this regard, reliance is placed on para 28 of *Bharat Karsondas Thakkar* which reads as follows :

"28. Along with that is the other question, which very often raises its head in suits for specific performance, that is, *whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963.* The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of *“parties to the agreement”*. The appellant also does not come within the ambit of *Section 19* of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in *Kasturi case* [(2005) 6 SCC 733] . While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, Their Lordships observed that a *third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a*

different character.”

(Emphasis supplied)

22.14. In the present suit, the agreement to sell is between SICPA on the one hand and defendant nos.1 and 2 on the other. The proposed defendant no.7 (even defendant nos.3 to 6) are strangers to this agreement. Addition of the party is actually sought by SICPA to convert suit from one for declaration and injunction, into one for specific performance and, in the alternative, to one for recovery of money.

22.15. Even if SICPA's plea that it had a valid mortgage or charge qua the properties is accepted, we find that the provisions of Section 100 of the Transfer of Property Act protect a bonafide purchaser without notice of a mortgage from the consequences thereof. Shri K.L. Chugh being a bonafide purchaser without notice would stand protected from the consequences.

22.16. Looked at from any angle, defendant no.7 is not a necessary or proper party for the purposes of present litigation.

22.17. The order of the learned Single Judge rejecting the prayer for impleadment of Sh. K.L. Chugh as proposed defendant no. 7 cannot be faulted.

23. **Challenge to the order on I.A.No.6654/2011 filed by defendant nos.1 to 3 under Section 8 of the Arbitration and Conciliation Act, 1996**

23.1. We now examine the challenge to the order of the learned Single Judge on I.A.No.6654/2011 filed by the defendant nos.1

to 3 under Section 8 of the Arbitration and Conciliation Act, 1996 praying for appointment of an arbitrator.

23.2. In para 58 of the order dated 1st July, 2014, the learned Single Judge has held that the plaintiff - SICPA has to take necessary steps for invoking the arbitration agreement in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and that the suit for such relief cannot continue in the presence of this clause.

23.3. We have set out above the arbitration clause in the loan agreement dated 27th February, 2009 which mandates that any or all disputes “*arising out of or in connection with*” the Agreement as well as the Schedules shall be settled by arbitration before referred to a sole arbitrator to be appointed by a lender (SICPA). It is undisputed that the plaintiff has not taken any steps for arbitration. In fact, there is not a single communication or legal notice on record whereby SICPA has called upon the defendant no.3 to register any charge. For the first time, by way of the amendment prayed in I.A.No.274/2012 an alternative prayer for recovery of the amount of ₹8,50,36,918/- has been sought.

23.4. SICPA does not deny the existence of the arbitration clause but has contended that the matter cannot be referred to arbitration for the reason that there are parties other than the defendant no.3 against whom it had sought reliefs. It is contended that there is no arbitration agreement with such parties and consequently, the civil suit is the most appropriate remedy.

23.5. SICPA has privity of contract under loan agreement only

with the defendant no.3. It has advanced finances only to the defendant no.3. So far as the loan is concerned, SICPA can recover the same only from the defendant no.3.

23.6. SICPA is asserting a mortgage or a second charge over immovable properties which were owned only by defendant nos.1 and 2. We have concluded that SICPA has no right, title or interest in the nature of a mortgage or a second charge as claimed in the properties of the defendant nos.1 and 2.

23.7. It has also been held that SICPA has no cause of action to bring or maintain a suit for specific performance of the agreement to sell dated 27th February, 2009.

23.8. The defendant no.6 has placed the pronouncement of the Supreme Court reported at *(2011) 14 SCC 66, SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd.* wherein the court held thus :

“16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.”

23.9. There is no dispute that so far as the claims under the loan agreement are concerned, such disputes are covered under the arbitration clause contained in Clause 5.5 of the loan agreement

dated 27th February, 2009.

23.10. The existing suit has been held to be without cause of action and the plaint liable for rejection under Order VII Rule 11 of the CPC.

23.11. This application was filed on 25th April, 2011. Despite its filing and being reminded of the arbitration agreement, SICPA has not taken any action. Instead it vehemently contested the prayers. SICPA also non-chalantly filed one frivolous application after another.

23.12. In the original plaint, there is no such prayer for recovery of money. The relief of recovery of the amount of ₹8,50,36,918/- is sought by way of the amendment.

The prayer for amendment has been held as not maintainable in law.

23.13. We have also accepted the defendants contentions that SICPA had no cause of action for bringing the original suit and that the prayers were factually and legally untenable. As a consequence, it has been held that the plaint has been rightly rejected.

23.14. SICPA is vehemently pressing the present challenge premised on the very agreement which contains the arbitration clause. Clearly this challenge is devoid of any legal merit. SICPA has no option but to proceed in accordance with law with regard to any relief which may be legally available to it and only against such parties against whom it is entitled to proceed in accordance with statutory prescription.

24. **Costs**

24.1. We have found the present appeal to be bereft of any merit. It has been held that SICPA is casually proceeding in the matter with utter lack of seriousness ruthlessly implicating parties and property unmindful of the facts which subsist, contrary to statutory provisions and ignoring the well settled position in law. This judgment would therefore, be incomplete without calling upon SICPA to pay appropriate costs to the other side. In such a case involving commercial claims and valuable properties valued at several crores of rupees, what would be a fair amount of costs which SICPA ought to be called upon to pay? We briefly advert to the legal position, before arriving at our conclusions in this regard.

24.2. The expression ‘costs’ is not statutorily defined. However guidance on the meaning thereof is to be found from the ***Black’s Law Dictionary*** wherein it is defined thus :

“Costs : A pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action or a distinct proceeding within an action”

Lord Coke has defined costs in litigation as *“for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence”*.

24.3. The question regarding the powers of an appellate court to

award costs in civil litigations has been dealt with in great detail in a judgment of this Bench pronounced on 03.08.2015 *in RFA(OS) 162/2014, Harish Relan v. Kaushal Kumari Relan & Ors.* in paras *61 to 126*. We rely upon those very principles so expounded for the purposes of the present judgment as well.

Statutory Provisions

24.4. We shall first delve into the *statutory provisions* for imposition of costs.

24.5. Civil proceedings are governed by the Code of Civil Procedure, 1908 ('CPC' for brevity). Section 35 of the CPC provides that "*costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid*".

24.6. Section 35A enables the court to award "*compensatory costs*" in respect of "*false or vexatious claims or defences*". Sub section 2 puts a statutory limit on the maximum costs that can be awarded under this section. A statutory limit of ₹3,000/- or the limits of the pecuniary jurisdiction of the court, whichever amount is less, is fixed under Section 35A(2).

However, Section 35A does not apply to appeal or revision proceedings.

24.7. The present adjudication is an appeal assailing the judgment passed in exercise of original jurisdiction by the Ld. Single Judge of this court. Therefore, the imposition of costs by us has to be in

terms of Section 35 and the bar under Section 35A shall not apply to the present proceedings.

24.8. Order XXA of the Code also deals with Costs. Rule 1 of Order XXA, enumerates and suggests certain items in respect of which costs can be imposed whereas Rule 2 of Order XXA mandates that the award of costs under this rule shall be “*in accordance with such rules as the High Court may make in this behalf*”.

Therefore, anything that the Code prescribes in regard to imposition of costs, is subject to the rules made by the respective High Courts in this regard.

24.9. The present appeal is concerned with a challenge to the judgment and decree passed in exercise of the original jurisdiction by the learned Single Judge of this court which proceedings are governed by the ***Delhi High Court Rules, 1967***. Upon perusal of the Rules, we find that Chapter 11 Part C thereof is captioned “*Award of Costs in Civil Suits*”. Rule 6 of this Chapter again enumerates expenses which may be included in the costs awarded.

24.10. We also find that the Delhi High Court Rules contain Chapter 16 entitled “*Legal Practitioners*” which provide for appointment of legal practitioners in proceedings before this court. Rule 12 of Chapter 16 Part B provides that in appeals, the fee of the legal practitioner “*shall be half of the fee calculated on the same scale as in the original suits and the principles of the above rules as to original suits shall be applied, as nearly as may be*”.

Rule 7 of Chapter 16 Part B provides for a case where there

are several defendants. It stipulates that “*fee for each of the defendants who shall appear by a separate counsel may be allowed, in respect of his separate interest*”.

24.11. Chapter XXIII of these Rules provides for “*Taxation of Costs*” contains in the Schedule thereto, the table of fees which are admissible to a counsel. Sub clause 2 of Item A of the Schedule stipulates as follows :

“A. In defended suits :

xxx xxx xxx

(2) If the amount or value shall exceed Rs. Five Lakh, ***on Rs. Five Lakh as above*** and on the remainder at 1 per cent subject, however, that in no case the amount of fee shall exceed Rs.50,000/- (Rupees fifty thousand) or the actual, whichever is less, subject to the condition that a certificate of fee must be filed.”

Item C relating to “*Miscellaneous Proceedings*” in this Schedule contains Clause (iii) which provides that “*In appeals, the fee shall be calculated at half the scale as in the original suits and the principle of the above rules as to the original suits shall be applied, as nearly as may be.*”

24.12. Further, on the aspect whether costs can be imposed by invoking the inherent powers of the court, the Supreme Court has held in the judgment of ***Ashok Kumar Mittal v. Ram Kumar Gupta, (2009) 2 SCC 656*** that though award of costs is within the discretion of the court, it is subject to such conditions and limitations as may be prescribed by the Code of Civil Procedure and subject to provisions of the Rules framed by the High Court.

It is trite that where the issue is governed and regulated by

Sections 35 and 35A of the Code, there is no question of exercising inherent power contrary to the specific provisions of the court.

24.13. Sections 35, 35A, 35B as well as Order XXA and Order XXIII of the Code of Civil Procedure apply to civil suits alone. So far as appellate jurisdiction is concerned, there is no statutory provision even providing for imposition of costs, let alone restricting the exercise of power of the appellate court to do so.

24.14. We also find that even under the Delhi High Court Rules, 1967 only, the manner in which counsel's fee may be computed in the appeal against the decree on the original side, is provided. There is no provision in the Delhi High Court Rules as to the manner in which the costs in appeals are to be evaluated or imposed. There is therefore, no limitation by statute or the Rules at all on the appellate court to impose actual, reasonable costs on the losing party.

24.15. No specific provision in these Rules governing computation of costs to be awarded in appeals against the losing party could be pointed out to us. Counsel's fee is only one of the several components constituting fees.

24.16. From a conjoint reading of the above, it would appear that in appeals there is a restriction only by way of an upper limit so far as legal fees are concerned. The maximum that would be admissible on this account would be an amount of ₹25,000. An appellate court thus has a *free hand* in respect of imposition of costs and the court can do so in exercise of its inherent powers, other than the limit on the quantification of counsel's fees.

24.17. We hasten to note here that the Rules have not envisaged at all or provided for designated Senior Counsel's fees. Therefore, so far as award of fees of Senior Counsel is concerned, it would be at the absolute discretion of the Single Judge exercising jurisdiction on the original side as well as that of the Appellate Bench. Such discretion has to be exercised guided by the principles laid in binding judicial precedents discussed hereafter.

24.18. Let us examine how the courts have burdened those, who have come to equity with *unclean* hands. In ***Padmawati v. Harijan Sewak Sangh & Ors.***, (2008) 154 DLT 411, a petition was filed under Article 227 of the Constitution of India assailing the order of the first appellate court dismissing the petitioner's appeal against the eviction order passed by the Additional Rent Controller. In this pronouncement, this court has come down heavily on the class of people who perpetuate illegal acts by obtaining stays and injunctions from the courts and observed that such class of people must be made to pay the sufferer, not only the entire illegal gains made by them as costs to the person deprived of his right but also must be burdened with exemplary costs. It was observed that even if these litigants ultimately loose the lis, they become the real victors and have the last laugh.

Padmawati's challenge in the Supreme Court by way of a Special Leave Petition was dismissed by an order reported at (2012) 6 SCC 460, ***Padmawati v. Harijan Sewak Sangh & Ors.***

24.19. The use of civil litigation by unscrupulous litigants to the prejudice, harassment and deprivation of the hapless other side and

the necessity to put an end to such practice was considered at length by the Supreme Court in the judgment reported at (2011) 8 SCC 249, *Ramrameshwari Devi v. Nirmala Devi & Ors.* and in paras 43 and 47 observed as follows :

“43. We have carefully examined the written submissions of the learned amicus curiae and the learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases.

xxx

xxx

xxx

47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. ...”

24.20. The principles laid down in *Ramrameshwari Devi* were reiterated by a three Judge Bench of the Supreme Court in the judgment reported as *Maria Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira*, (2012) 5 SCC 370.

24.21. We are bound by the enunciation of law by the Supreme Court of India as well as by the statutory provisions. Interest of justice mandate that we examine an appropriate order for payment of costs by the appellant to each of the respondents.

Object of imposing costs

24.22. What would be the object and theory on which costs are awarded in favour of the successful party? Light is thrown on this question by a pronouncement of the Division Bench of the Calcutta High Court in the judgment reported as *Manindra Chandra Nandi v. Aswini Kumar Acharjya*, ILR (1921) 48 Cal 427 which reads thus :

“...the theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; *costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault* XXX XXX

XXX XXX

Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but *to indemnify the successful litigant for actual expenses necessarily or reasonable incurred in what are designated as important cases or difficult and extraordinary cases...*”

(Emphasis by us)

We have found that SICPA has sued without cause.

24.23. In *Vinod Seth v. Devinder Bajaj & Anr.*, (2010) 8 SCC 1,

the Supreme Court has also made observations on what would be the object of the imposition of costs. Broadly, the object of imposition of costs is that it should act as a deterrent to frivolous litigation.

24.24. **Ramrameshwari Devi** has mandated that costs must be awarded to discharge the dishonest and unscrupulous litigants from abusing the judicial system. It was observed that, it was imposing the costs “*not out of anguish*”, but following the fundamental principle that “*wrongdoers should not get benefit out of frivolous litigation*”.

24.25. The Supreme Court also repeatedly noted the huge strain caused by unnecessary and dishonest litigation on the limited judicial resources, which it is compelled to spend unnecessary time thereon.

24.26. This was also noted by this court in the judgments reported at **138 (2007) DCT 62, Goyal MG Gases Pvt. Ltd. v. Air Liquid Deutchland Gambh & Ors.** and **ILR (2012) IV DEL 110, Punjab National Bank v. Virendra Prakash.**

24.27. In **Ashok Kumar Mittal v. Ram Kumar Gupta, (2009) 2 SCC 656**, expounding on the object and scope of the jurisdiction to impose costs, the Supreme Court emphasized that a more realistic approach relating to costs needs to be adopted to act as a deterrent to vexatious or luxury litigation borne out of ego or greed or resorted to as a “*buying time factor*”.

The facts noted above manifest how SICPA having obtained interim orders qua valuable properties, dragged the litigation. It

has involved defendants and properties without cause of action or rights therein.

What should constitute costs and quantum thereof

24.28. On this aspect, in para 37 of *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344, the court declared that it is implicit in Section 35(2) of the CPC that costs follow the event. It was observed that costs awarded should be the actual reasonable costs including the **cost of the time spent** by the successful party, **the transportation and lodging**, if any, or any **other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs** in relation to the litigation, except in those cases where the court in its discretion, for reasons recorded, directs otherwise. It was also declared that they should be realistic and not nominal.

24.29. In *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust*, (2012) 1 SCC 455, the Supreme Court has articulated the meaning of the words “*actual realistic costs*”. It has expressed that actual realistic cost should have a correlation to costs which are realistic and practical. If a party engages a battery of high charging lawyers and succeeds, awarding of such hefty fees as *actual costs* is not practical. The Supreme Court has further held that litigation is a time consuming and costly process and a plaintiff/petitioner/appellant who is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his

expenses in accordance with law.

24.30. In *Sanjeev Kumar Jain* the Supreme Court has dealt with the awarding of costs by appellate courts and held thus :

“Costs should invariably follow the event and reasons must be assigned by the appellate court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments.”

24.31. Further in the same pronouncement of *Sanjeev Kumar Jain*, on the concept of imposition of “*actual realistic cost*”, the court explained the imperative need for making provision of an appropriate statutory scheme in the following terms :

“35. A serious fallout of not levying actual realistic costs should be noted. A litigant, who starts the litigation, after some time, being unable to bear the delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realises that even if he succeeds he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice system. When a civil litigant is denied effective relief in courts, he tries to take his grievances to “extra-judicial” enforcers (that is, goons, musclemen, underworld) for enforcing his claims/right thereby criminalising the civil society. This has serious repercussions on the institution of democracy.”

36.We, therefore, suggest that the Rules be amended to provide for “actual realistic costs”. The object is to streamline the award of costs and simplify the process of assessment, while making the cost “actual and realistic”. While ascertainment of actual costs is necessary in regard to expenditure incurred (as for example, *travel expenses of witnesses, cost of obtaining certified copies, etc.) insofar as advocates' fee is concerned, the emphasis should be on “realistic” rather than “actual”*. The courts are not concerned with the number of lawyers engaged or the high rate of day fee paid to them. For the present, the advocate fee should be a realistic normal single fee.”

24.32. In light of decided precedents, it is imperative that SICPA be burdened with heavy costs which are actual as well as realistic for instituting a civil suit for mandatory injunction & declaration without a cause of action. SICPA had a more efficacious remedy of filing appropriate recovery proceedings in terms of its loan agreement with defendant no. 3. Valuable rights, in the properties worth crores of rupees belonging to defendant no. 6, defendant no.7 as well as Standard Chartered Bank (not a party herein), have been entangled in this litigation.

24.33. It is further observed, that it has become a common practice amongst such litigants to first obtain an interim order of injunction on valuable properties of others by making false asserts that their legitimate rights were involved which were being denied enforcement. The property becomes tied in litigation so long, that ultimately the legitimate owner has to settle with them and get the suit withdrawn. Misguiding the court in doing its duty in this

manner, calls for heavy costs to be imposed on such plaintiffs.

24.34. We would, thus, be failing in our duty if SICPA is not burdened with costs, so heavy, that sends a strong message to all litigants who misuse the judicial process on claims without factual basis and legal merits, for making wrongful gains. This message must be reinforced where commercial transactions as involved in the present case are concerned. What is of concern is the conduct of SICPA pre and post litigation. We also note the efforts of SICPA to overawe and subjugate a private individual (defendant no. 7) into being blackmailed and pressurised into meeting the claims of a large corporation like SICPA. While SICPA obviously has the endless & adequate resources to engage in protracted litigation, a private individual cannot be expected to match it. This approach of SICPA tantamounts to nothing short of abuse of process of court as enshrined in Section 151 of the CPC.

Orders under Section 151 CPC for abuse of process of the court

24.35. It is also necessary to advert to the power of the court under Section 151 of the CPC. This statutory provision specifically states that “*Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court*”. The spirit, object and intendment of the statutory provisions, as well as statutory scheme shows, that the inherent powers of the court are complementary to the powers specifically conferred on the court by the Code, and are in addition

thereto. While Section 35A is confined to award of compensatory costs in respect of “*false or vexatious claims or defences*”, Section 151 takes within its ambit a much wider area of litigation which tantamounts to abuse of process of court. Section 151 therefore, enables a court to pass orders as may be necessary for the ends of justice, or to “*prevent abuse of process of the court*” which is beyond the “*false and vexatious*” litigation covered under Section 35A and are wide enough to enable the court to pass orders for full restitution.

24.36. It is trite that an order imposing reasonable and realistic costs is necessary to do the right and undo the wrong by an unscrupulous litigant in the course of administration of justice. This court, constituted for the purpose of doing justice, must be deemed to possess the power to pass an order necessary to prevent the abuse of the process of the court in exercise of its appellate jurisdiction under the Delhi High Court Act and the Code of Civil Procedure.

24.37. In the instant case, the plaintiff (SICPA), has tied up valuable rights of the defendants in litigation since 2010. Moreover, SICPA has sought an application for amendment of plaint under Order VI Rule 17 of the Code. It is observed that allowing such an amendment would change the basic structure of the suit. Moreover, SICPA has acted negligently to the effect that, in terms of loan amount advanced to defendant no. 3, none of the documents (Loan Agreement, Agreement to Sell, GPA, WILL, Letters of Guarantee) are registered.

24.38. We find that there is not a whit of an explanation as to why SICPA failed to get executed the documents creating a second charge or any of these documents registered when such a hefty amount was advanced to defendant no. 3. SICPA invoked no legal remedy when informed by defendant no. 3 about this transaction.

24.39. Clearly, in the facts of the present case, instituting a suit to tie up the valuable rights of bona fide purchasers for value for their own negligence, should be construed as abuse of the process of the court. Defendant no. 6 has not been able to get the DLF Property transferred in its name, despite paying a handsome amount of ₹11.51 Crores, due to this pending litigation and has obviously been deprived of Rent/Interest for this period. Defendant no. 7 is a bona fide purchaser for value having done his due diligence before buying the Vasant Vihar property. We have concluded the malafide in the actions of SICPA hereinabove. SICPA has to be called upon to pay fair costs to the other side.

Computation of costs in the present case

24.40. Let us now examine the facts of the present case for the purposes of application of the above principles.

24.41. We have discussed above that the discretion of the Division Bench of this court exercising appellate jurisdiction is not fettered by any limits.

One of the suit properties is situated in Vasant Vihar, a posh residential colony in South Delhi, and the other is situated in The Magnolias, DLF Golf Links, Gurgaon an equally, if not more

valuable and posh location.

Inasmuch as the question of detriment effected to defendant no. 6 and defendant no. 7 in respect of their rights in the DLF & Vasant Vihar Properties respectively, we examine this aspect separately.

DLF Property

24.42. The defendant no. 6 has paid an amount of ₹11.51 crores towards the purchase consideration for the DLF Property since June 2010. An interim order of injunction dated 6th December 2010 was passed in respect of the DLF property directing defendant no. 6 to maintain status quo qua possession & title. Therefore, enforcement of defendant no. 6's rights in respect of this property stood predicated to the outcome of the suit. Defendant No. 6 has also not been able to enjoy the imputed rentals which it would have enjoyed in a perfect scenario. Alternatively, it could have invested the sum of ₹11.51 Crores and reaped the fruits of interest.

24.43. We are now in August 2015 and a period of more than 60 months has elapsed since the full payment has been made by defendant no. 6. Defendant no.6 has held an imperfect or incomplete title for the past 5 years.

24.44. Judicial notice can be taken of the steep slump in property prices in the preceding years. Even if defendant no. 6 wished to get the transfer of the property completed in its own favour, it cannot because of the injunction. If defendant no. 6 wished to sell or let out the property, it couldn't. It has been compelled to hold on to the

property.

24.45. For the sake of computation, the loss to defendant no. 6 can be examined from three perspectives (i) of either loss of rental income on the property, or, (ii) the interest at notional bank rate on the amount involved and lastly, (iii) on the estimated loss based on the drop in the sale value on account of property prices. We do so in seriatim hereafter.

24.46. Let us firstly explore the rental angle first. Even with the decline of property prices in the preceding years, the rentals for a penthouse in DLF Magnolias are projected as astonishingly high. Certain real estate websites show 'to-let' advertisements quantifying the rental for such a property between ₹4-5 Lacs/month.

Therefore the return on rentals, which defendant no. 6 could have earned may have been anything up to ₹5 Lacs a month. On this basis, for the period of five years i.e. 60 months, defendant no. 6 has been deprived of approximately ₹3 crores. If computed on the basis of rental at the rate of ₹4 Lacs a month, this rental comes to ₹2.40 crores.

24.47. So far as the second aspect of interest on the amount involved is concerned, interest accrued on a Fixed Deposit at the rate of 8.00% compounded quarterly, initiated in June, 2010 (about 60 months ago) is computed below :

Computation of Interest		
Principal Amount	:	₹11,51,00,000
Interest Rate	:	8.00%
Period of Deposit (2010-2015)	:	60 Months
Total Interest Receivable	:	₹5,59,32,545

he interest computation alone thus comes to over ₹5.50 crores for 60 months (5 years).

Simple interest at the rate of 8% per annum on the above amount comes to ₹4,60,40,000 (ie. About Rupees Four crores Sixty Lacs and odd).

24.48. Let us now examine this aspect from the third perspective, and that is the decline in the value of properties as well. This would be relevant to consider the impact of the litigation on defendant no. 6's right to sell the property. The defendant no. 6 has spent an amount of ₹11,51,00,000 on this property. It is widely stated that the prices of immovable properties (residential) have fallen by 25-30%.

We are not undertaking the exercise of evaluating the market value of the property in 2010 and the present day value. However, we do note that if defendant no. 6 sought to sell the property today, it would procure 25-30% less than it could have in 2010, which would be in several crores of rupees.

24.49. Actual costs to defendant no. 6 be it on account of deprivation of rental income or; prohibition on disposal of property or from the perspective of interest on the amount it has invested hereinabove, would thus run into crores of rupees. Defendant no. 6

would additionally have incurred expenses on its representatives attending hearings before us, incidental expenses etc. as well.

24.50. Costs run into crores of rupees in this case. Though such award may be warranted however, it may not be possible for us to actually quantify the amount. This is because such award required proper material to be placed before us, prior to making such award. Even the appellant could have been called upon to do so. The parties could have placed the material in this regard before us. Award of actual costs, as directed by the Supreme Court, requires such exercise if a fair order on costs could be passed. Not having undertaken the exercise, therefore, from the standpoint of reasonableness and equity, it is only just and proper to award notional costs of ₹5 Lacs in this appeal to defendant no. 6, in addition to counsel's fees.

Vasant Vihar Property

24.51. So far as the proposed defendant no. 7 is concerned, it is a bonafide purchaser of the Vasant Vihar Property for valuable consideration (₹6.75 crores) vide the registered Sale Deed executed on 7th December, 2010. In fact defendant no. 7 got its due diligence done from Standard Chartered Bank, the financier of the said property. However, till date, the proposed defendant no. 7 is faced with the insecurity of the ruthless challenge to its title to the sale deed *qua* the basement as well as ground floor of the Vasant Vihar Property. Defendant no. 7 would also be at a losing edge in the light of the falling property prices as well.

24.52. The defendant no. 7 would have been traumatised by the shock of SICPA's prayer for his impleadment and property's involvement in the suit (and then this appeal). His right to dispose of the entire property stands interdicted by the order dated 15th February, 2012.

24.53. In addition, this proposed defendant no. 7 also stands exposed to the threat of obvious litigation at the hands of the Standard Chartered Bank, if SICPA succeeds in its designs.

24.54. So far as the impact of the injunction and litigation on the rights of the defendant no. 7 also, on the above perspectives deserve to be estimated and would be in the following range :

(i) We shall examine the rental aspect first. Certain real estate websites show 'to-let' advertisements quantifying the rental for such a property between ₹1.5-2.5 Lacs/month.

Therefore the return on rentals, which the defendant no. 7 could have earned may have been upto ₹ 2.5 Lacs a month. On this basis, for the period of 57 months, defendant no. 7 has been deprived of approximately ₹1.40 Crores.

(ii) So far as interest on the amount involved is concerned, interest accrued on a Fixed Deposit at the rate of 8.00% compounded quarterly, initiated in December, 2010 (about 57 months ago) is computed below :

Computation of Interest		
Principal Amount	:	₹6,75,00,000
Interest Rate	:	8.00%
Period of Deposit (2010-2015)	:	57 Months
Total Interest Receivable	:	₹3,08,34,754

The interest computation alone thus comes to over ₹3.00 Crores for 57 months (4 years & 9 months).

Calculated at the same rate, on simple interest basis, the interest amount comes to ₹2,56,50,000 (i.e. About Rupees Two Crores Fifty Six Lacs and odd).

(iii) Let us examine this aspect from the decline in the value of properties alone. The defendant no. 6 has spent the amount of ₹6,75,00,000 on this property. It is widely stated that the prices of immovable properties (residential) in South Delhi have fallen by around 30%.

Again, we are not undertaking the exercise of evaluating the market value of the property in 2010 and the present day value. However, we do note, that if defendant no. 7 sought to sell the property today, it would procure 30% less than it could have in 2010.

24.55. Therefore, the actual loss to the defendant no.7 as noted above with regard to the Vasant Vihar property on account of deprivation of rental income; prohibition on disposal of property as well as interest on the amount it has invested hereinabove, would also run into crores of rupees.

24.56. Just as qua the DLF property, the above figures are also

estimates. The exercise of calling upon the parties for material was not undertaken. In this background, it may not be possible to direct payment of actual costs which run into several crores of rupees. It has further been contended that the whole experience has been a tremendous shock and traumatic for the defendant no.7. He is living with mental agony over the pendency of this case. It is pointed out that defendant no.7 has meticulously attended hearings. Therefore, he would have incurred expenses of travelling, refreshments etc. as well as other ancillary and incidental expenditure. Therefore, payment of a consolidated moderate amount of ₹5 Lacs to defendant no. 7 as well would indubitably be a just and reasonable amount as costs, in addition to senior counsel and counsel's fees.

24.57.As expounded above, the defendant nos. 6 & 7, bonafide purchasers have been disadvantaged by either being deprived of a perfect title or their title being made the subject matter of challenge. Their rights and titles have been needlessly dragged in this litigation and it is reasonable to assume that this has inflicted financial trauma on the defendants, justifying the imposition of the lump-sum costs in their favour.

24.58.So far as the defendant nos.1 and 2 are concerned, as discussed above, SICPA has not moved a step towards legally securing its loan against their properties. Instead of invoking its remedies against defendant no. 3 in accordance with law, it has filed this misconceived litigation. SICPA has not even sought such reliefs as it could have.

24.59. Keeping in view today's prices, it can be reasonably expected that each party would have spent a considerable amount on each hearing on expenses of travelling, refreshments and other incidental expenses. Even defendant nos. 1 & 2 are entitled to these miscellaneous expenses as they have had to contest this misconceived and frivolous litigation. The defendant no.1 was the managing director of defendant no.3.

We therefore, quantify costs payable to each of defendant nos.1 and 2 at ₹25,000/- each apart from counsel's fees.

Counsel's Fee

24.60. In addition to the above costs premised, counsel's fee is an essential component of the costs which are to be awarded to a successful party.

24.61. Under the Rules aforesaid, the fees admissible to the counsel in the appeal are to be calculated at a rate equivalent to half of what would be paid for the suit. For this purpose, let us calculate the fees which could be admissible to a counsel for the defendants on the suit claim. In the original plaint, the reliefs have been valued at ₹30,00,000/- (Rupees Thirty Lacs) by the plaintiff. Thus as per the Schedule to Chapter XXIII, the counsel fees in the suit has to be computed in the following manner:

1.	If the amount or value shall exceed ₹1,00,000/- and not exceed ₹5,00,000/-		
	Up to ₹1,00,000/-	:	₹6,500/-
	On the remainder	:	At 2%
2.	If the amount or value shall exceed ₹5,00,000/-		
	Up to ₹5,00,000/-	:	As computed above
	On the remainder	:	At 1%
	<i>However, in case the amount of fee shall exceed ₹50,000/- or the actual, whichever is less, subject to the condition that a certificate of fee must be filed.</i>		

24.62. Keeping in view the above mandate of Rules, the fees of the defendant's counsel in the unamended suit would be computed in the following manner:

Computation on total suit value of ₹30,00,000/- (unamended suit)			
	<i>For the amount upto ₹5,00,000/-</i>		
(i)	Up to ₹1,00,000/-	:	₹6,500/-
	On remainder i.e. ₹4,00,000/- @ 2%	:	₹8,000/-
	Total	:	₹14,500/-
(ii)	<i>Computation on balance ₹25,00,000/- @ 1%</i>	:	₹25,000/-
	Total value (₹25,000 + ₹14,500)	:	₹39,500/-

24.63. We also compute hereunder the counsel's fee, if the amendment of the suit [which increases the valuation to ₹6,05,00,000/- (₹30,00,000 + ₹5,75,00,000)] was permitted :

Computation on total suit value of ₹6,05,00,000/- (amended suit)			
	<i>For the amount upto ₹5,00,000/-</i>		
	Up to ₹1,00,000/-	:	₹6,500/-

On remainder i.e. ₹4,00,000/- @ 2%	:	₹8,000/-
Total	:	₹14,500/-
<i>Computation on balance ₹6,00,00,000/- @ 1%</i>	:	₹6,00,000 /-
Total value (₹6,00,000 + ₹14,500)	:	₹6,14,500 /-

The Counsel's fee, based on the valuation of the suit, therefore in the unamended plaint would be computed at ₹39,500 and if the amendment of the plaint was allowed, it would be an amount of ₹6,14,500/-.

However, as per the Rules only a maximum of ₹50,000/- is admissible as the counsel's fee component towards costs.

24.64. We have not allowed the amendment prayed for under Order VI Rule 17. However, protracted arguments on each of the applications have been addressed. In fact, the defendants would be justified in pressing costs on each application. Therefore in the interests of justice we are inclined to accept award of counsel's fee computed at ₹50,000 (instead of ₹39,500/-) being fair and reasonable. In appeals, the fee has to be halved and therefore, a defendant would be entitled to half of ₹50,000/- which comes to ₹25,000/-. We note that, in view the prevalent rates of counsels' fees, this amount is on an extremely lower side. However, keeping the stipulation under the Delhi High Court Rules and the directions of the Supreme Court in the above pronouncements, we are compelled to restrict the counsels fee to ₹25,000/- as part of the costs.

24.65. We also note that in the appeal before us, the defendant nos.

1-3 were represented by the same counsel and defendant no. 6 and defendant no. 7 were represented by different counsels. Therefore the defendant nos. 1 to 3 shall be entitled to one set of counsels fee only as one group.

24.66. It has been noted that the Rules are silent on awarding costs for engaging a designated Senior Counsel. Before us, submissions were addressed by Mr. TK Ganju, Senior Advocate. The practice of engagement of Senior Counsels on hearing basis is the norm followed in this court. Fees are also charged and paid on hearing basis. We are of the view that Senior Counsel's fees deserve to be computed at the rate of ₹75,000/- per hearing. Costs thereon shall also be computed and paid on this basis to defendant no. 7.

24.67. The defendant nos. 4 & 5 have not appeared or contested these appeals as their rights are not involved. No order of costs is therefore being made qua them.

24.68. Looked at from any angle, such orders are necessary to meet the ends of justice as well, keeping in view the harassment to which the defendants have been exposed because of the litigation initiated by the plaintiff.

24.69. I.A. No.15011/2010 has been filed by SICPA under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure. Inasmuch as we have found the suit, inter alia, completely without cause of action and rejected the plaint, the plaintiff is not entitled to any interim injunction as prayed in this application which is consequently dismissed.

24.70. In view of the above discussion, it is held as follows :

- (i) The appeal is dismissed with costs.
- (ii) The costs are quantified and shall be paid to the defendants in the following manner :
 - (a) In terms of *Paras 24.49, 24.55 and 24.58*, costs of ₹5 Lacs payable to defendant no. 6; costs of ₹5 Lacs payable to defendant no. 7, and costs of ₹25,000/- payable to each of the defendant nos.1 to 2.
 - (b) In addition to (a), counsel's fee assessed at ₹25,000 shall be paid by the appellant to the defendant nos.1 to 3 as a group and ₹25,000 to each of defendant no. 6 & defendant nos.7.
 - (c) Costs incurred towards fees for the designated Senior Counsel shall be computed in terms of *Para 24.65* and paid to defendant no.7.

The costs shall be within a period of eight weeks from today.

- (ii) CM No.13907/2014 is also hereby dismissed.

GITA MITTAL, J

P.S. TEJI, J

AUGUST 26, 2015

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