Twilight Properties Pvt. Ltd. & Anr vs Romola Bhattacharjee & Ors on 2 December, 2013

Author: Indira Banerjee

Bench: Indira Banerjee, Anindita Roy Saraswati

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(APPELLATE SIDE)

F.M.A.T. No.744 of 2013
With
C.A.N. 5936 of 2013

TWILIGHT PROPERTIES PVT. LTD. & ANR.
VS.
ROMOLA BHATTACHARJEE & ORS.

BEFORE:

The Hon'ble Justice INDIRA BANERJEE
AND
The Hon'ble Justice ANINDITA ROY SARASWATI

For the Appellants : Mr. Bhaskar Sen,
Ms. Fereshte Sethna,
Mr. Satodeep Bhattacharyya,
Mr. Awani Kumar Roy.

For the Respondent No.1 : Mr. Samit Talukdar,
Mr. Amiya Narayan Mukherjee,
Mr. Suman Dutta,
Ms. Sudeshna Bagchi.

For the Respondent No.2 : Mr. Ranjan Bachhawat,
Mr. Subhasis Sengupta,
Mr. Amit Kumar Nag.

For the Respondent Nos. 3 to 8: Mr. Jayanta Mitra,
Mr. Sakya Sen,
Ms. Sanchari Chakraborty.

Heard on : 16.09.2013, 17.09.2013

Judgment on : 02.12.2013

INDIRA BANERJEE, J.: This appeal is against an order dated 21st of May 2011, passed by the learned 2nd Court of Civil Judge, Senior Division at Alipore, District South 24 Parganas, in Title Suit No 10216/2011, dismissing the application of the plaintiff appellants for interim injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure.

According to the plaintiff appellants, sometime in March, 1989, the respondent No. 2, Mr. M.P. Meharia, a practising Solicitor and Advocate approached the plaintiff appellant No.2, a reputed developer, with a proposal on behalf of the Respondent No.1, Romola Bhattacharjee, for development of 3/1, Sunny Park, Calcutta-700019, hereinafter referred to as the 'suit property'.

The suit property initially belonged to Sir Josna Kumar Ghoshal, grandfather of respondent Romola Bhattacharjee, who had bequeathed the same to his grandson, Jitendra Kumar Ghoshal, brother of respondent Romola Bhattacharjee. The said Jitendra Kumar Ghoshal who later became an American citizen, died sometime in July, 1987, leaving a Will, whereby he bequeathed the suit property to his wife, Mary Anne Ghoshal, an American lady.

It was represented to the plaintiff appellant No.2 that, the owner of the suit property, Mary Anne Ghoshal, wished to execute a deed of gift in favour of respondent Romola Bhattacharjee and after the deed of gift was executed, respondent M.P. Meharia would cause respondent Romola Bhattacharjee to enter into an agreement with the plaintiff appellants, for development of the suit property.

According to the plaintiff appellants, respondent M.P. Meharia

informed the plaintiff appellant No.2, that he had an existing right of development secured in favour of Nilanchal Estates Private Limited, a company controlled by him, vide an agreement dated 8th April, 1997, but was unable to develop the suit property on his own, due to financial constraints and the difficulties of dealing with property that was fully tenanted.

According to the plaintiff appellants, respondent M.P. Meharia demanded a fifty percent stake in the development project in lieu of offering the plaintiff appellant No.2, the opportunity to develop the suit premises, to which the plaintiff appellant No.2 duly agreed.

The plaintiff appellants have alleged that respondent M.P. Meharia, represented to the plaintiff appellants, that he would continue to act as respondent Romola Bhattacharjee's solicitor and at the same time also handle matters concerning the development project on behalf of the plaintiff appellants in his capacity as solicitor. Respondent Romola Bhattacharjee agreed to such proposal.

In his written objection to the application of the appellants, for interim injunction, under order 39 Rules 1 and 2 of the Civil Procedure Code, respondent M.P. Meharia, has categorically denied having had any personal interest in the suit property, or of having given any representation to the appellants, to represent the appellants as their solicitor as well.

Respondent M.P. Meharia has strongly asserted that the allegations made by the plaintiff appellants, that respondent M.P. Meharia had offered to act as Solicitor for the plaintiff appellants and respondent Romola

Bhattacharjee at the same time and also the allegations with regard to his alleged request for a 50% stake in the development of the suit property, are malicious, with intent to destroy the faith and trust of respondent Romola Bhattacharjee in him.

Respondent M.P. Meharia has categorically denied that he was a co developer, along with the appellants. According to respondent M.P. Meharia, he was all along Advocate and Solicitor of respondent Romola Bhattacharjee and he always advised her, and acted in her best interest. On being informed, that respondent Romola Bhattacharjee was looking for a developer to develop the suit property, he introduced the plaintiff appellant no 2 to her, and as Solicitor and Advocate of respondent Romola Bhattacharjee, he remained present during some of the discussions that ensued.

Even though respondent M.P. Meharia has categorically denied having had any personal interest in the development of the suit property, materials on record including correspondence as also alleged minutes of meetings allegedly held in May 2010 clearly indicate that he had a stake in the development of the suit property. It is, however, difficult to understand how the respondent M.P. Meharia being an experienced Solicitor and Advocate, could have given any proposal, as alleged, to act on behalf of respondent Romola Bhattacharjee, as also the appellants, knowing fully well that their interests were likely, if not bound to clash, at some point of time.

Even assuming, that there was any agreement to the effect that respondent M.P. Meharia would have 50% stake in the development agreement, and that he would represent the plaintiff appellants, while he

continued as Solicitor and Advocate of respondent Romola Bhattacharjee, it is doubtful whether such agreement could ever be enforceable, the same being contrary to law.

Be that as it may, according to the plaintiff appellants, the plaintiff appellant No.2 accepted the terms offered by respondent M.P. Meharia. It was agreed that a private Limited company would be floated by the plaintiff appellant No.2 and respondent M.P. Meharia would join the said company with a moiety share in it. Consequently, the appellant company, Twilight Properties Ltd was incorporated under the Companies Act on 21st of April 1989, for the purpose of development of the suit property.

Ms. Fereshte Sethna appearing for the appellants submitted that on 2nd August, 1989 there was an oral agreement, in terms whereof the plaintiff appellant No.1 was to be given the right to develop the suit property, in lieu of which the plaintiff appellants would get 2/3 share in the developed property and Respondent Romola Bhattacharjee would get 1/3 share and a Bungalow measuring 5,000 to 6,000 Sq. Ft. on land measuring about 7 to 10 Kottahs within the allocation of Respondent Romola Bhattacharjee.

Several meetings were held between the plaintiff appellant No.2, respondent Romola Bhattacharjee and respondent M.P. Meharia, wherein it was agreed that the plaintiff appellant No.2 would undertake all expenses for obtaining the requisite approvals/permissions from Reserve Bank of India, for perfecting the title of respondent Romola Bhattacharjee in the suit property.

Simultaneously with such agreement, the 1987 agreement of Nilachal

Estate was cancelled. Thereafter the plaintiff appellants started taking steps to facilitate formal transfer of the suit property to Respondent Romola Bhattacharjee, from its owner, Mary Anne Ghoshal, a US citizen.

According to the plaintiff appellants, the plaintiff appellant No.2 took steps to obtain probate of the will executed by respondent Romola Bhattacharjee's brother, Late Jitendra Kumar Ghoshal, bequeathing the suit property to his wife, Mary Anne; paid the stamp duty and registration charges in respect of the deed of gift executed by Mary Anne in favour of her sister-in-law, that is, respondent Romola Bhattacharjee; obtained the requisite FERA clearance from the Reserve Bank of India, and the requisite Income Tax clearances, and took steps to vacate tenants and trespassers, in occupation of the suit property, for which the plaintiff appellants had to hire and pay for professionals such as lawyers and Chartered Accountants including their travel expenses to and from Mumbai. The plaintiff appellants claim to have paid the professional fees and travel expenses of inter alia respondent M.P. Meharia.

The plaintiff appellants claim to have spent huge amount of money, exceeding Rs.58 lakhs, pursuant to the agreement for development of the suit property, towards inter alia the costs and charges of obtaining probate of the Will of Late Jitendra Kumar Ghoshal, execution and registration of deed of gift by Mary Anne Ghoshal in favour of the respondent Romola Bhattacharjee, including payment of gift tax, upon obtaining the requisite Reserve Bank of India permissions etc. The plaintiff appellant No.2 also claims to have incurred expenses in engaging surveyors and architects for development of the suit property, and also paying property taxes including

arrears of taxes from 1986 till 1987 in respect of the suit property, apart from litigation and other expenses for removal of tenants and occupiers of the suit property.

The plaintiff appellants claim to have handled Income Tax and Gift Tax matters relating to gift of the suit property from Mary Anne Ghosal to respondent Romola Bhattacharjee. On 22nd July, 1991 the Reserve Bank of India's permission was obtained for transfer of the suit property from Mary Anne Ghosal to the respondent Romola Bhattacharjee. The gift deed executed by Mary Anne Ghosal was duly registered on 8th January, 1992. Thereafter the appellants started negotiations with tenants for their eviction and by June, 1994 secured surrender by HSBC, of the first floor of the Bungalow and the north-west portion of the suit property, which was the largest area, in the occupation of a tenant. The plaintiff appellants also claim to have worked out the strategy for eviction of other tenants and unauthorised occupants through negotiation and settlement and in some cases by institution of legal proceedings.

Ms. Sethna submitted that, at the request of respondent Romola Bhattacharjee, the plaintiff appellants permitted her to use the portion of the suit property vacated and delivered by HSBC, until such time as the property was ready for demolition, upon eviction of other tenants and occupants. This was, according to Ms. Sethna, done in response to the emotional appeal of respondent Romola Bhattacharjee and after obtaining advice from respondent M.P. Meharia, since in any case the areas would be lying vacant until such time as demolition commenced.

On 19th October, 1994, a Memorandum of Understanding was executed between the plaintiff, appellant No.1, Twilight Properties Ltd. and Respondent Romola Bhattacharjee, which according to Ms Sethna, contained an express negative covenant that no modification thereof would be binding upon the parties, unless in writing and signed by both the parties. The agreement was witnessed by respondent M.P. Meharia and also by Mr. Supratik Bhattacharjee, husband of respondent Romola Bhattacharjee.

Simultaneously with the execution of the aforesaid agreement, the plaintiff company tendered Rs.5,00,000/- to the respondent Romola Bhattacharjee. The Memorandum of Understanding inter alia acknowledged the financial investment of the plaintiff appellant No.1, Twilight Properties Ltd in the suit property made prior to the signing of the said Memorandum of Understanding, in consonance with the requirements of the earlier oral agreement and expenditure of Rs.1,50,000/- incurred by the plaintiff appellant No.1, was treated as part of the interest free security deposit, towards development of the suit property.

According to the plaintiff appellants, between 1989 and 1994 the plaintiff appellants spent diverse amounts on the suit property, as stated above, such as, the gift tax on the property, which was then valued at Rs.3,09,000/-. It is also contended that in December, 1994 one of the trespassers was successfully evicted by the plaintiff appellants, after which the plaintiff appellants inducted one Anil Kumar Sinha, a peon, employed in Meharia & Company into the suit property, as their representative.

On 29th December, 1994, respondent Romola Bhattacharjee executed a Power of Attorney in favour of one Dilip Kumar Das, a clerk employed by respondent M.P. Meharia, with the concurrence of the plaintiff appellants. The Power of Attorney was, according to the plaintiff appellants, prepared by respondent M.P. Meharia. The original power of attorney dated 29th December, 1994 was deposited with the plaintiff appellant No.2.

The plaintiff appellants claim that the following measures were taken by them for development of the suit property.

(i) Negotiations were started with the tenants and trespassers requesting them to vacate the suit premises.

(ii) Litigations were started against those tenants and trespassers who refused to vacate.

(iii) Building plans were drawn up by architects for construction of new Bungalow and building which was to be made over to respondent Romola Bhattacharjee in 2000 and in 2008.

(iv) Surveyors, architects, vastu consultants, lawyers, tax consultants, chartered accountants and project consultants were engaged.

Ms Sethna submitted that, until tenants were evicted from the suit property, building plans could not be submitted to the Culcutta Municipal Corporation for sanction, and there was no scope for construction. Admittedly, however, no building plan was submitted for sanction even till May 2011.

According to the plaintiff appellants, while the agreement between respondent Romola Bhattacharjee and the plaintiff appellants, was in force, the plaintiff appellant No.2 entered into an agreement with Surendra Dugar of the P.S. Group, for development of another project at Ballygunge Circular Road. In course of discussions with Mr. Dugar, the appellant No.2 sought his advice on how S.P. Saharia, a tenant at the suit premises, could be approached to vacate through common contacts. Surendra Dugar, therefore, had knowledge of the development agreement between the plaintiff appellant No.2 and respondent Romola Bhattacharjee.

According to the appellants, sometime in May 2011, the plaintiff appellant No.2 started hearing rumours that the suit property had been put up for sale. Immediately thereafter, the plaintiff appellant No.2 contacted respondent M.P. Meharia, who allegedly assured the plaintiff appellant No.2, that there was no cause for concern since there was a firm and subsisting contract between respondent Romola Bhattacharjee and the plaintiff appellant No.1. However, respondent M.P. Meharia has, in his pleadings filed in these proceedings denied the existence of any firm contract that was still subsisting.

On 27th May, 2011, respondent M.P. Meharia allegedly informed the plaintiff appellant No.2 telephonically that the suit property had been transferred to the respondent No.3, stating that he and Anil Kr. Sinha had forcibly been dispossessed from the suit property by antisocial elements deployed by the respondent No.3 and respondent Romola Bhattacharjee.

It is alleged that the plaintiff appellant No.2 thereafter rushed to Kolkata and initiated criminal proceedings. Respondent M.P. Meharia was, however, reluctant to file a criminal complaint against his forcible dispossession, ostensibly because respondent Romola Bhattacharjee had been his client.

There was really no reason for the plaintiff appellants to be surprised at the reluctance, if any, of respondent M.P. Meharia to file a criminal complaint against respondent Romola Bhattacharjee, as he could not, as the lawyer of respondent Romola Bhattacharjee, act in a manner detrimental to her interest.

What transpired after 27th May, 2011 is not really relevant to the issues in this appeal. The question in this appeal is whether the learned Court below erred in law in declining the prayer of the plaintiff appellants for injunction in the suit filed by them.

Ms. Sethna argued that respondent Romola Bhattacharjee could not have executed any deed of conveyance in favour of the respondent Nos.3 to 8, since there was a negative covenant in the Memorandum of Understanding between respondent Romola Bhattacharjee and the plaintiff appellant No.1 Twilight Properties Ltd, executed on 19th October 1994, and also because the plaintiff appellants had spent huge amount of money pursuant to the said Memorandum of Understanding.

In the aforesaid circumstances, the plaintiff appellants filed Title Suit No. 10216/11 inter alia for a decree of cancellation of the purported deed of

conveyance dated 27 May 2011, a decree for perpetual injunction restraining the respondents, their men and agents from interfering with the right of the appellants to develop the suit property, a decree of mandatory injunction directing the respondents to hand over possession of the suit property to the appellants in terms of the Memorandum of Understanding dated 19th October 1994 and other consequential reliefs

After the suit was instituted on 28 July 2011, a prayer for ad interim injunction was made. The prayer was however not granted. The plaintiff appellants filed an appeal in this Court which was registered as FMAT 952 of 2011. A Division Bench of this Court declined to interfere, but only directed the Court below to expeditiously dispose of the application for injunction, within the time stipulated in the said order.

In the meanwhile, respondent Romola Bhattacharjee invoked Section 8 of the Arbitration and Conciliation Act 1996, upon recourse to the arbitration clause in the Memorandum of Understanding.

By an order dated 21st of February 2012, the application under Section 8 of the Arbitration and Conciliation Act was rejected on the ground that 3rd party interests had been created in the suit property and those 3rd parties who were not parties to the Arbitration Agreement, had been impleaded in Title Suit No.10216/11.

Respondent Romola Bhattacharjee filed a Revisional application in this Court, being CO No.1029/12 challenging the legality of the said order dated 21 February 2012. By an order dated 28 November 2012, a Single

Bench of this Court set aside the order dated 21 February 2012 and allowed the application of the respondent No.1 under Section 8 of the Arbitration and Conciliation Act.

The plaintiff appellants filed a Special Leave Petition in the Supreme Court challenging the order of this High Court passed on 28 November 2012. We are informed that the Special Leave Petition is pending in the Supreme Court and notices have been issued to the respondents.

To avoid prolixity, this Court does not deem it necessary to record details of the various proceedings initiated by the respective parties, in this Court and in the Supreme Court. Suffice it to mention that, in the meanwhile, the plaintiff appellants filed an application for amendment of the plaint, which was ultimately allowed.

In the pleadings in the Court below, the plaintiff appellants have pleaded that they had forcibly been dispossessed from certain portions of the suit property which were in occupation of respondent M.P. Meharia, the common Advocate and Solicitor, and/or his employees as agents of the plaintiffs since 1994.

As observed above, it is difficult to believe that respondent M.P. Meharia, an Advocate and Solicitor of repute should have acted as common Advocate and Solicitor for respondent Romola Bhattacharjee and the plaintiff appellants when conflict of interest between them was possible, if not inevitable, having regard to the nature of the agreement between them.

Admittedly, some parts of the suit property were in possession of respondent M.P. Meharia and/or his employees. Neither respondent M.P. Meharia, nor any of his employees have corroborated the case of the appellants that they were in possession of the suit property, on behalf of the plaintiff appellants, as agents of the plaintiff appellants.

The plaintiff appellants have stated that the respondent No.3 has applied for sanction of the building plan for development of the suit properties. On the purported apprehension that demolition and construction may commence immediately upon sanction of the building plan, the plaintiff appellants filed an application in the Court below for temporary injunction under Order 39 Rules 1 and 2 of the Civil Procedure Code, which has been dismissed by the judgment and order under appeal.

Ms. Sethna submitted that the impugned judgment and/or order under appeal was fraught with infirmities and inconsistencies. While the case advanced by respondent Romola Bhattacharjee was that , the contract was at an end in 2010, the Learned Court below came to the finding that there was no binding contract, but only an agreement to agree, which is not consistent with the argument advanced on behalf of respondent Romola Bhattacharjee.

Ms. Sethna submitted that the finding in the judgment and/or order under appeal of forfeiture of Rs.5 lakhs paid by the appellant plaintiffs was also contrary to the case made out by respondent Romola Bhattacharjee, that she had wanted to return the consideration of Rs.5 lakhs (Paper Book Vol. 6, Page 182, Para 25).

Ms. Sethna argued that the incorrectness of the assertion of forfeiture would be borne out by notes made by the Income Tax consultant of respondent Romola Bhattacharjee for the purpose of tax planning, and in particular the analysis of receipts for the purpose of determination of tax liabilities, and treatment of the payment of Rs.5 lakhs received from the plaintiff appellant No.1. Ms. Sethna argued that the contract did not, in any event, confer on the plaintiff appellants, any right to forfeit the security deposit.

Ms. Sethna further argued that professional advice obtained by respondent Romola Bhattacharjee from time to time, particularly in 2008 and again in 2010 based on analysis of receipts and notes of Chattered Accountant do not indicate that the 1994 agreement was given a go by.

Ms. Sethna further argued that the Memorandum of Understanding dated 19th October, 1994 could not have been varied, altered or deviated from except by writing signed by and/or on behalf of both parties. There was no such variation in case.

Ms. Sethna attacked the finding of the learned Court below, that the remedy of the plaintiff appellants must lie in damages to be pursued in arbitration, as misconceived, since there was no prayer in the plaint seeking damages. Ms Sethna next argued that, to proceed on the basis that the developer's possession was merely symbolic or constructive would be erroneous.

Ms. Sethna submitted that the finding of the learned Court below that the developer's possession was merely symbolic or constructive was

misconceived. The learned Court below proceeded on the erroneous premises that a corporate entity entering into an development agreement must induct its directors and executives and none else whereas it is routine to induct clerical staff etc.. Possession through a peon of respondent M.P. Meharia of areas for joint development with the plaintiff appellant No.1 constitutes possession of the plaintiff appellant No.1.

Ms. Sethna argued that there was no cogent explanation forthcoming from any of the respondents as to why a developer, who secured developmental rights in terms of an oral agreement and a written agreement executed on 19th October, 1994, would permit induction of a lawyer or his peon into the suit property. The assertion of the plaintiff appellants that the lawyer in question, i.e. respondent M.P. Meharia and some of his employees were put into possession by and on behalf of the plaintiff appellants stands uncontroverted.

Ms. Sethna also very emphatically argued that respondent M.P. Meharia and the plaintiff appellant No.2 had together given instructions to the criminal lawyer to file criminal complaint in relation to forcible dispossession at the Ballygunge Police Station. Ms. Sethna also argued that the plaintiff appellants have severely been hindered by reason of the fall out with respondent M.P. Meharia who was also his business partner.

Ms. Sethna argued that dispossession need not be actual dispossession for the purpose of Explanation II to Section 3 of the Transfer of Property Act since it includes dispossession from symbolic as well as constructive possession. Ms. Sethna argued that it was a settled criteria for grant of interim injunction that the Court should be satisfied that the claim

was not frivolous or vexatious and that a fair question had been raised as to the existence of the legal right which the plaintiff had set up, that is, where there was a fair point for trial. To grant interim relief the Court is required to satisfy itself whether there is a bona fide contention between the parties and then determine on whose side the balance of convenience lies. However, where there was a negative covenant, the question of balance of convenience and whether damages were an adequate remedy was immaterial.

Ms. Sethna submitted that where a contract contains both positive and negative terms the positive terms might be enforced by a decree of specific performance and the observation of negative terms must be enforced by injunction. A conclusion that the positive obligations under the contract were not capable of being specifically enforced, would not preclude the grant of an order of injunction to perform the negative agreement. This Court has time and again held that any injunction does nothing more than to confer the sanction of the process of the Court to that which is already in the contract between the parties, which is, in effect, the specific performance by the Court of that negative bargain which the parties made with their eyes open.

Mr. Samit Talukdar, appearing on behalf of respondent Romola Bhattacharjee submitted, and in our view, rightly, that even though the appellants are apparently seeking to enforce a negative covenant, the suit is in effect and substance a suit for specific performance of the alleged development agreement, as will be evident from the reliefs sought by the plaintiff appellants, which include delivery of possession, declaration of their exclusive right of development on the basis of the alleged oral agreement

dated 2nd August, 1989 and the written agreement dated 19th October, 1994, and injunction restraining the respondents from interfering with the right of the plaintiff appellants to develop the suit property.

As held by the Supreme Court in Smt. Mayawanti Vs. Smt. Kaushalya Devi reported in JT 1990 (3) SC 205, cited by Mr. Talukdar, it is settled law that the condition precedent for exercise by the Court of its power to order specific performance of a contract is the existence of a valid and enforceable contract, with terms which are certain and definite. Section 14 of the Specific Relief Act 1963 provides as follows:-

"Section. 14. Contracts not specifically enforceable.--(1) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualification or violation of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves, the performance of a continuous duty which the Court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in Clause (a) or Clause (c) or Clause (d) of Sub-section (1), the Court may enforce specific performance in the following cases:

(a) Where the suit is for the enforcement of a contract,--

(i) to execute a mortgage or furnish any other

security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company.

(b) Where the suit is for,--

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of share of a partner in a firm.

(c) Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:

(i) the building or other work is described in the contract in terms of sufficiently precise to enable the Court to determine the exact nature of the building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief, and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed."

In Vipin Bhimani Vs. Sunanda Das reported in (2006) 2 CHN 396

cited by Mr. Talukdar, a Division Bench of this Court held:-

"11. From the provisions contained in Section 14(3)(c) of the Act, it is clear that a suit for specific performance of a development agreement at the instance of a developer is clearly hit by the provisions contained therein. However, a suit for specific performance of such agreement at the instance of the owner of the building would be maintainable if possession is already handed over to developer and Clauses (i) and (ii) of Section 14(3)(c) are complied with.

> 12. In the case before us, the suit is at the instance of the developer and as such, the formality required under Section 14(3)(c)(iii) is, on the face of it, absent."

The proposition enunciated by the Division Bench of this court in Vipin Bhimani & Anr. Vs. Sunanda Das (supra) was reiterated by another Division Bench of this court in Sushil Kumar Agarwal Vs. Kalidas Sadhu reported in AIR 2009 Cal 174, also cited by Mr. Talukdar.

As a Bench of Coordinate Strength we are bound by the judgment of this Court in Vipin Bhimani & Anr. Vs. Sunanda Das (supra) and we are constrained to hold that the suit is, prima facie, hit by Section 14 of the Specific Relief Act, 1963 in view of prayers (c), (g) and (h) of the plaint. As argued by Mr. Talukdar, a decree enforcing any negative covenant will not serve the purpose of the plaintiff appellants.

Mr. Talukdar submitted that in the original plaint it was the case of the plaintiff appellants that there was only one development agreement which was dated 19th October, 1994. Moreover there was only a vague statement that the plaintiff appellants were in possession of the suit property, without any further details.

On the basis of such pleadings in the original plaint and injunction petition, the learned Court below inter alia held that a suit for specific performance of a development agreement by a developer was not maintainable in law, following the judgment of this Court in Vipin Bhimani & Anr. Vs. Sunanda Das (supra) and in Sushil Kumar Agarwal Vs. Kalidas Sadhu (supra).

Mr. Talukdar submitted that interim order was rightly refused. Realising the short comings in the plaint, substantial amendments were carried out and new documents were disclosed, as a result of which the original plaint which had 24 pages became a plaint constituting 56 pages after amendment.

Mr. Talukdar submitted that by amending the plaint the appellants inter alia contended that prior to the Memorandum of Understanding allegedly dated 19th October, 1994, there was an oral agreement allegedly dated 2nd August, 1989. The Memorandum of Understanding dated 19th October, 1994 reinforced the concluded and binding contract arrived at on 2nd August, 1999. The new story of the alleged oral agreement dated 2nd August, 1989 spun out by the appellant, was contrary to the case made in paragraph 12 of the original plaint.

It is true, that certain averments, not made in the original plaint have been incorporated by amendment of the plaint. However, the materials on record prima facie reveal, that there was some oral agreement for development of the suit property, as otherwise the plaintiff appellants would not have spent their valuable money, time and energy in trying to secure the Reserve Bank of India approvals for transfer of the suit property in the name of respondent Romola Bhattacharjee, and in sorting out tax issues, paying for services rendered by professionals. Nor would the plaintiff appellants have paid any property taxes relating to the suit property or any other taxes costs and charges in connection with the transfer of the suit property.

As pointed out by Mr. Talukdar, amendments were made in the plaint to show that, from time to time, the plaintiff appellants obtained symbolic possession of portions of the suit property either by themselves or through respondent M.P. Meharia, who according to the plaintiff appellants, was not only a common solicitor of the plaintiff appellants and respondent Romola Bhattacharjee, but also a partner and/or co-developer. Respondent M.P. Meharia has categorically denied that he is either partner or co-developer of the suit property.

As submitted by Mr. Talukdar, the two documents relied upon by the appellants i.e. the power of attorney given to Dilip Das and the criminal complaint filed by Anil Kumar Sinha are also of no assistance to the appellants, since none of those documents disclose any connection of Dilip Das with the plaintiff appellants or any thing regarding possession of the appellants in the suit property. On the other hand, as pointed out by Mr. Talukdar, the respondent Nos. 2 to 8 had disclosed documents to show that Anil Kumar Sinha voluntarily left the premises upon receiving suitable compensation from the said respondents.

Mr. Talukdar also argued that had the plaintiff appellants been dispossessed, as contended by them they would have initiated appropriate proceedings under the Specific Relief Act for recovery of possession, which they have not done. However, failure to institute proceedings under the Specific Relief Act, does not in itself establish that the plaintiff appellants were not dispossessed.

Mr. Talukdar submitted that apart from some bare averments, there was nothing to show that the appellants had taken steps for development of

the suit property. No building plan was prepared, no one was appointed to prepare any building plan, no soil testing was done, no statutory clearances were taken, the tenants and trespassers were not evicted and/or relocated, the exact area on which construction would take place was also not decided. Thus, there is nothing on record to show that the appellants had taken any step for development of the suit property during the long term of 17 years.

Mr. Talukdar referred to Clause 9 of the Memorandum Understanding which provided that the developer would commence construction within a period of six years after taking all statutory clearances and after settlement with all tenants and buyers.

Mr. Talukdar submitted that even after 17 years from the date of execution of Memorandum of Understanding, construction had n commenced. It was not expected that even after 17 years, an owner of valuable property who intended to have the property developed, would leave the property as it is, when no agreement had been executed between the parties for development of the suit property. The owner Romola Bhattacharjee had no option but to sell the suit property to the respondent Nos.2 to 8.

Mr. Talukdar argued that the alleged oral agreement dated 2nd August, 1989 and the alleged Memorandum of Understanding dated 19th August, 1994 were not specifically enforceable. No suit lies for specific performance of the Memorandum of Understanding and thus no interim relief can be granted.

Mr. Talukdar's argument that the Memorandum of Understanding is not an agreement at all, but merely an agreement to enter into a further detailed agreement, upon fulfilling certain conditions as embodied in the alleged Memorandum of Understanding, is difficult to accept. The Memorandum of Understanding prima facie constituted a development agreement between respondent Romola Bhattacharjee and the plaintiff appellant No.1 for development of the suit property in two phases, of which the eastern portion was to be developed first and thereafter the western portion which was under the occupation of respondent Romola Bhattacharjee.

Clause 4(c) of the Memorandum of Understanding contemplated construction of such maximum area as might be permitted by the Municipal Authorities after setting apart 7 to 10 cottahs of land for construction of a bungalow comprising area of 5000 to 6000 Square Feet, within the allocation of respondent Romola Bhattacharjee.

The Memorandum of Understanding clearly shows that at least in 1994, there was an agreement in terms whereof the plaintiff appellant No.1 was to develop the suit property on inter alia the condition that the appellant No.1 would retain 2/3rd of the constructed area and proportional share in the land appertaining thereto and respondent Romola Bhattacharjee would get 1/3rd of the constructed area and proportional share in the appertaining land. Construction would be in two phases, and would cover the maximum permissible area allowed by the Calcutta Municipal Corporation authorities. Construction would be in two phases. The eastern portion would be constructed first and thereafter the western portion under occupation of respondent Romola Bhattacharjee, for whom a

separate Bungalow was also to be constructed.

It is, therefore, difficult to accept the argument that on the basis of the Memorandum of Understanding, no construction, was possible because the Memorandum of Understanding was silent as to how many buildings would be built, whether one building or several buildings, how many storeyed the buildings would be and the height of such buildings.

Pursuant to the agreement the plaintiff appellants paid Rs.5,00,000/- to respondent Romola Bhattacharjee. It is true that certain details were left to be worked out at a later stage. The question of demarcation and allocation of specific areas, could only arise after approval and sanction of building plan, which had not been done. The Memorandum of Understanding contemplated maximum area utilization permissible after setting apart 7 to 10 cottahs for the bungalow for respondent Romola Bhattacharjee.

A party entering into an agreement cannot resile from its commitments thereunder on the plea of possibility of a future dispute. It was always open to the developer to accept the demands of the owner, within the four corners of the agreement, with regard to construction and allocation, and thereby resolve disputes amicably. The main question is whether there was any binding, concluded agreement subsisting and in force as on 27th May, 2011, which could be specifically enforced. As observed above, a development agreement is prima facie not specifically enforceable at the instance of a developer, as held in Vipin Bhimani & Anr. Vs. Sunanda Das (supra) and in Sushil Kumar Agarwal Vs. Kalidas Sadhu (supra).

Mr. Talukdar submitted that for grant of injunction the Court has to be satisfied that there is a strong prima facie case, the balance of inconvenience is involved and the grant of injunction and compensation would not afford the applicant any of adequate relief. In the instant case, the plaintiff appellants had themselves given a go-by to the Memorandum of Understanding and had started negotiating for a fresh agreement. In course of such negotiations, new partners were sought to be inducted. The respondent Meharia and one Arun Poddar were sought to be inducted by the appellants as co-developers. The amount of security deposit was agreed to be increased from Rs.5 Lakhs to Rs.5 Crores. The role of Romola Bhattacharjee was also sought to be changed. Initially, the owner had no role to play in the development project, whereas, during subsequent negotiations, the owner was to play a substantial role in the development of the project. There was a total shift from the terms and conditions of the Memorandum of Understanding dated 19th October, 1994 and the earlier oral agreement, if any.

Mr. Talukdar submitted that it was evident that there was no concluded contract by and between the parties and negotiations were going on from time to time since 2000 for entering into a fresh contract. The alleged Memorandum of Understanding expired in 2000. The plaintiff appellant No.2 also left Kolkata and started staying at Pune.

Mr. Talukdar submitted that the sum of Rs.5 Lakhs paid by the appellants in 1994 was not refundable as would appear from the correspondence dated 28th May, 2010 at page 1465 of Volume IV of the paper book. The parties agreed to fresh consideration of Rs.5 Crores but there was no mention of any adjustment of Rs.5 Lakhs. The consideration of

Rs.5 Crores was never paid.

Mr. Talukdar also submitted that the allegations and counter-allegations made by the respective parties on affidavit cannot be adjudicated in the absence of a regular trial. It is impossible for the Court to ascertain the veracity of the contentions of the appellants.

May be, as argued by Ms. Sethna a development agreement is a kind of assignment of interest in property akin to an agreement for sale. The developer possibly acquires some interest in the property by reason of the development agreement. The developer may in certain exceptional circumstances, even acquire a right of specific performance.

Where a development agreement permitted the developer to retain a major portion of the total constructed area, it could not be said that the agreement did not create any right over the land in favour of the developer, as held by this Court in Partha Sarathi Ghosh Vs. Maa Construction & Ors. reported in AIR 2008 Cal 171 Para 19.

The judgment of this Court in Bhaskar Aditya Vs. Minati Majumdar & Ors. reported in AIR 2003 CAL 178 cited by Ms. Sethna, was, however, rendered in the particular facts of the case, where the developer had pursuant to the development agreement, amalgated plots, obtained sanction of plan, entered into contracts with intending buyers, commenced construction and even made over possession to some buyers.

Relying on Housing Development Corporatin Vs. Bibijan S Farid reported in 2007 (2) Bom CR 587 (paragraph 12) Ms. Sethna argued that

an agreement for entrusting work of development to a party with the added right to sell the constructed portion to flat purchasers is specifically enforceable. The judgment is clearly distinguishable on facts.

Ms. Sethna further submitted that an agreement that creates an interest in the land in favour of the developer, to the extent of the developer's allocation is not a mere agreement for development. Such a development agreement would be specifically enforceable. In support of her submission Ms. Sethna cited the Single Bench judgment of the Bombay High Court Arun P Goradia Vs. Manish Jaisukhalal Shah & Ors. reported in 2009 (2) Bom CR 360.

The aforesaid judgments of the Bombay High Court are contrary to the judgment of the Division Bench of this Court in Vipin Bhimani & Anr. Vs. Sunanda Das (supra).

The principle of proportionate ownership of land, without specifying ownership of the specific portion of the land appurtenant to the ownership of the flat as recognized by the West Bengal Apartment Ownership Act is well settled. The judgement of this Court in Sandip Kumar Sinha Vs. Nirmal Dutta & Ors. reported in 2004 (3) CHN 478, cited by Ms. Sethna, rendered in an entirely different factual situation is of no assistance to the plaintiff appellants.

A concluded and binding contract does not lose its character as a concluded and binding contract just because the contract contemplates the preparation and execution of a formal contract by which the agreement would be cast in legal phraseology, as held by the Supreme Court in

Kollipara Sriramulu Vs. T. Aswathanarayana & Ors. reported in (1968) 3 SCR 387 and by the Privy Council in Harichand Mancharam Vs. Govind Luxman Gokhale reported in 28 CWN 73 (PC) cited by Ms. Sethna.

As argued by Ms. Sethna, where the reading of a Memorandum of Understanding shows that the parties had set out whatever was agreed between them, and it was only formal legal documentation, which was to be done, to give it a former legal colour, the Memorandum of Understanding would be binding between the parties.

In Promotha Nath Roy Vs. Jagannath Kisore Lal Singh Deo reported in XVII CLJ 427, a Division Bench of this Court comprising of Sir Ashutosh Mookerjee and Beachcroft, JJ held:

> "The principle applicable to case of this description was lucidly stated by Lord Cottenham L.C. in the case of Great Western Railway Company v. Birmingham and Oxford Function Railway Company (3) : "It is certain that the Court will in many cases interfere and preserve property in status quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights."

In Promotho Nath Roy (supra) the Division Bench held that the Rule was that the Court would not permit the vendor to transfer his right to a third party, if there was a clear, valid contract. However, the Court also observed:-

> "It is true that the Court will not so interfere, if it thinks that there is no real question between the parties."

The Court would not interfere if it thought there was no real question

between the parties, but only on seeing that there was a substantial question to be decided, would protect the property. The judgment is not an authority for the proposition that an a negative covenant not to transfer the suit property should be enforced by injunction or the property should be preserved by interim injunction irrespective of whether there was a good prima facie case for specific performance of the agreement.

Ms. Sethna argued that, when parties, for valuable consideration, contract that a particular thing is not to be done, then all that a Court of equity has to do by way of injunction, is to say that which the parties have already said by way of covenant. No question of balance of conveyance or inconveyance arises in such a case, as held in Hampstead and Suburban Properties Limited Vs. Diomedous reported in (1975) 1 All ER 504.

Ms. Sethna submitted that where an injunction is sought in support of a development agreement, on the basis of a negative covenant, an order of status quo should be passed to protect the right of the developer in relation to its allocated area. When an injunction application is based on a negative covenant stipulated in the agreement, the developer may seek interim injunction for preservation of the status of the property. In this context Ms. Sethna cited Bimal Ghosh & Ors. Vs. Smt. Kalpana Majumdar reported in AIR 2007 Cal 293 and Partha Sarathi Ghosh Vs. Maa Construction & Ors. reported in AIR 2008 Cal 171.

In Bimal Ghosh & Ors. Vs. Smt. Kalpana Majumdar (supra) a subsequent Division Bench reserved its comments on the views expressed by the earlier Division Bench in Vipin Bhimani & Anr. Vs. Sunanda Das (supra) and opined that the case before it was distinguishable on facts.

Partha Sarathi Ghosh Vs. Maa Construction & Ors. (supra) was also found distinguishable on facts. Both in Bimal Ghosh & Ors. Vs. Smt. Kalpana Majumdar (supra) and Partha Sarathi Ghosh Vs. Maa Construction & Ors. (supra) the Division Bench found that there was no prayer for specific performance but only a prayer for injunction to enforce a negative covenant. In this case, the suit is in effect and substance a suit for specific performance in view of the prayer for delivery of possession, declaration of the right of the plaintiff appellants to constrain and the injunction restraining the respondents from interfering with the right of the plaintiff appellants, to develop the suit property. A judgment is an authority for the proposition of law which is actually decided and not a proposition that might logically be deduced from the conclusion arrived at in the particular facts of a case.

In Vijaya Minerals Vs. Bikash Chandra Deb reported in AIR 1996 Cal 67 cited by Ms. Sethna, a Single Bench of this Court held that, where there is a negative covenant in the contract, in such case the question of balance of convenience and whether damages would be adequate remedy may become immaterial. The judgment was rendered in the particular facts and circumstances of that case, which are totally different. The judgment is clearly distinguishable.

Courts will generally grant a negative injunction to encourage a party in breach to keep to his contract. In special cases, it may be proper to maintain status quo irrespective of whether the relief granted at trial would include an injunction, particularly if the plaintiff had a right and the disruption caused by the defendant's action to the plaintiff's right was so

great that damages would not be an adequate remedy, as enunciated in Evans Marshall & Co. Ltd. Vs. Bertola SA & Anr. reported in (1973) 1 All ER 992.

The enforcement of the negative covenent in an agreement, would depend on various factors including the nature of the negative covenenat. Where a party has for consideration agreed not to do something, for a certain period of time irrespective of whether the contract subsists or is terminated, such a negative covenant may have to be enforced by injunction irrespective of the balance of covenience. For example a negative covenant in a joint venture, by which any of the parties thereto agree not to carry on business of a particular nature, which might injure the other, for a specific period of time after the main agreement comes to an end, or is terminated, may have to be enforced by injunction, if it is otherwise valid in law.

Where, however, the negative covenant is in furtherance of and related to the positive obligations in the agreement, as in this case, the Court would have to consider whether the applicant has prima facie been able to make out a good case for enforcement of those positive obligations and also weigh the balance of covenance before granting an interim order to enforce the negative covenant.

Mr. Talukdar rightly submitted that a developmental agreement does not and cannot create any interest in the property. Section 54 of the Transfer of Property Act, 1882, to which Mr. Talukdar referred provides 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 upward, or in the case of a reversion or other intangible thing, can be made only by a registered instruction.

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."

However, as argued by Ms. Sethna though a contract for sale does not create any interest in property, yet if there is a clear valid contract for sale, the property is in equity transferred to the purchaser by the contract, and the vendor then becomes a trustee and cannot be permitted to deal with the property so as to defeat the rights of the prospective vendee. We agree with the proposition laid down in Ghasiram Vs. Shankarlal & Ors. reported in AIR 1960 MP 3 cited by Ms. Sethna. However, in this case there was no sale agreement and it is doubtful whether principles relating to enforcement of a contract for sale could be extended to agreements that are only akin to a sale agreement.

The proposition that in case of a voidable contract, the party affected has a right to exercise its option to avoid legal relations created by the contract or to stand by the contract and insist on its performance, as reiterated in Ganga Retreat & Tower Limited Vs. State of Rajasthan reported in (2003) 12 SCC 91, cited by Ms. Sethna is unexceptionable. As argued by Ms. Sethna, once the aggrieved party exercises the option to abide by the contract, the right to avoid the contract would stand extinguished. The law expects the affected party to exercise its option promptly and

communicate it to the opposite party, for until the right of avoidance is exercised, the contract is valid and things done thereunder may not thereafter be undone. In the instant case, the question is, whether there was, at all, any firm binding contract still subsisting, that could be specifically enforced.

The Single Bench judgment of this Court in P. Poppan & Anr. Vs. Karia Gounder & Ors. reported in 2002 (2) CHN 40 relating to enforceability of an oral agreeemnt for sale of immovable property has no application to this case, where there is no agreement with the plaintiff appellants for sale of any immoveable property. In any case it is doubtful whether an oral agreement in respect of immovable property exceeding Rs.5,00,000/- can be specifically enforceable after enactment of Chapter XXC of the Income Tax Act, 1961 and in particular Section 269UC thereof.

Mr. Talukdar submitted that the Memorandum of Understanding expired in 2000. Thereafter negotiations took place from time to time, which never materialized eventually. There was no subsisting agreement and as such no cause to enforce the negative covenant in an expired agreement.

Mr. Talukdar rightly argued that a negative covenant cannot be for perpetuity or for an indefinite period. If a negative covenant were to be for an indefinite period it would be unreasonable harsh and unenforceable. A negative covenant which puts a clog on the ownership of the owners of property for eternity is not sustainable in law.

Mr. Talukdar rightly argued that interim relief is always in aid of the main relief in the suit. The main relief that has been sought is for

development of the suit property, on the basis of the alleged oral agreement and the Memorandum of Understanding. If the main relief cannot be granted, no order of temporary injunction prayed for, can be granted.

As pointed out by Mr. Talukdar, in his affidavit, respondent M.P. Meharia has also stated that no agreement was ever entered into and only negotiations were going on and ultimately, the appellants after 1995 expressed their intention not to develop the suit property until and unless a proper development agreement, modifying some of the terms of the Memorandum of Understanding was executed. No agreement was executed after 19th October, 1994.

Mr. Jayanta Mitra appearing on behalf of the respondent Nos. 3 to 8, submitted that his clients have purchased the suit property from the respondent No.1 by a registered deed of conveyance dated 27th May, 2011 for a consideration of Rs.70 Crores. The said respondents are bona fide purchasers for value and without notice of any prior right claimed by the appellants.

As submitted by Mr. Mitra, the requirement of law with regard to subsequent transferees/purchasers having notice of any prior contract in respect of any property is contained in Section 3 of the Transfer of Property Act as also in Section 19(b) of the Specific Relief Act, 1963.

In view of the definition of 'notice' as contained in Section 3 of the Transfer of Property Act, notice of a fact may be actual when the person knows the fact. Notice may be constructive or may be imputed when, but for wilful abstention from an enquiry which the person ought to have made, or

gross negligence, he would have known of the fact.

Explanations (I) and (II) to Section 3 of the Transfer of Property Act to which Mr. Mitra referred, specifies the circumstances in which constructive notice may be imputed. Explanation (I) relates to a transaction in respect of immovable property and incorporates a deeming fiction by which any transaction concerning immovable property effected by way of a registered instrument shall impute notice of such transaction to the person acquiring such property or any part or portion thereof. Similarly, the second explanation also imputes constructive notice of title of the person in actual possession of such property. We agree with Mr. Mitra's submission that, for possession to operate as constructive notice, it is necessary that the person alleging that the subsequent transferee has notice of his existing title, must be in actual physical possession of the property, or atleast the major portion of the property.

Admittedly, the appellants were never in actual possession of the suit premises. As observed above, there is no material to substantiate the contention of the appellants of being in possession of even part of the suit property. There is not a scrap of acceptable evidence to show that either Anil Sinha or respondent M.P. Meharia took possession on behalf of the appellants as their agent as contended by the appellants. On the other hand there is evidence to the contrary in view of Respondent M.P. Meharia's denial as also the letter of Anil Kr. Sinha to the effect that he had voluntarily surrendered the portion of the suit premises occupied by him, upon receipt of consideration.

We agree with the view of Orissa High Court in Muralidhar Marwari Vs. Lalit Mohan Sahu & Ors. reported in AIR 1962 Orissa 86, the Patna High Court in Md. Mustafa Vs. Haji Md. Isa & Ors. reported in AIR 1987 Patna 5 and the Rajasthan High Court in Harakchand Vs. Sohnraj & Anr. reported in AIR 1990 Rajasthan 109 cited by Mr. Mitra that the principle of constructive notice cannot be extended to a case in which the person basing his claim on the basis of a prior agreement is only in possession of a small portion of the suit property.

The requirements of Section 3 are not met, if there is only a strong possibility that the transferees might have had knowledge or notice. The Section requires that a case should be made out with a certain degree of certainty, to show positively that the subsequent transferee had knowledge. The legal presumption of knowledge as contained in Section 3 arises from the ingredients of wilful abstention from enquiry and gross negligence, which are absent in this case.

Mr. Mitra rightly argued that the purpose of protection against the interest of a subsequent transferee, it is essential to prove the subsequent transferee had notice of an existing interest in respect of the property which has been dealt with. The notice must essentially be of a subsisting interest and/or existing obligation. This requirement is borne out from Section 19(b) of the Specific Relief Act. So, mere notice of negotiation having taken place in respect of the self same property cannot impute notice to the subsequent purchaser of the nature as required by Section 19(b).

In support of their claim that the respondent Nos. 3 to 8 were aware of

the purported interest of the plaintiff appellants in the suit property, the plaintiff appellants contended that the said respondents had not issued any prior public notice before purchase of the suit property. May be, an extremely cautious purchaser would have issued a notice before purchasing property. Mere omission to issue a notice might expose a purchase to the risk of entering into a transaction in respect of litigated property and/or encumbered property. However, notice of any pre-existing interest in the property cannot be inferred from omission to give notice. Mr. Mitra rightly argued that law does not require a purchaser issue to a public notice before purchase of property and omission to do so is of no consequence. Significantly, the plaintiff appellants also did not issue any notice warning prospective purchasers and/or contractees of any subsisting agreement. There were no signboards, hoardings or posters put up at the suit premises indicating that there was a development agreement with the plaintiff appellant No. 1 in respect of the suit property.

In support of their contention that the respondent Nos. 3 to 8 had notice of the arrangement with the plaintiff appellants, the plaintiff appellants pointed out that caveats had been filed through common lawyer representing respondent Romola Bhattacharjee and the purchasers apprehending that litigations might be initiated by the plaintiff appellants. Ms. Sethna also emphasised on the active involvement of P.S. Group, which according to the plaintiff appellants had been suppressed since Mr. Surendra Dugar had been informed of the development plans in 2000. Ms. Sethna also argued that elevation plans for development of the suit property prepared by M/s Innate Architect for the appellants on the joint instructions of the plaintiff appellants and respondent Meharia were hoisted on the

website of Abira Nirman Udyog Ltd.. Moreover, in the deed of sale dated 27th May, 2011 an amount of Rs.2 Crores was kept in escrow account with the advocates of the respondent Nos.3 to 8 which go to show that the respondents had knowledge of the interest of the plaintiff appellants in the suit property and were apprehending litigation to be filed by the plaintiff appellants.

Mr. Mitra rightly argued that none of the aforesaid circumstances are sufficient to impute constructive notice of any right of the appellants in the suit property. So far as the respondent Nos.3 to 8 are concerned as rightly argued by Mr. Mitra, the appellants have only alleged that the respondent Nos.3 to 8 were guilty of gross negligence, and had abstained from making any enquiry or search, which ought to have been made prior to purchase of the immovable property.

In Ahmedabad Municipal Corporation Vs. Haji Abdul Gafur Haji Hussenbhai reported in AIR 1971 SC 1201 cited by Mr. Mitra the Supreme Court held:

> "According to Section 3 of the Transfer of Property Act which is described as interpretation clause, a person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made or gross negligence he would have known it. There are three explanations to this definition dealing with three contingencies when a person acquiring immovable property is to be deemed to have notice of certain facts. Those explanations are.
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> "Explanation I. Where any transfer action relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in

one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that-

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder.

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act and (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.-Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.-A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud."

Now the circumstances which by a deeming fiction impute notice to a party are based, on his wilful abstention to enquire or search, which a person ought to make or, on his gross negligence. This presumption of notice is commonly known as constructive notice. Though originating in equity, this presumption of notice is now a part of our statute and we have to interpret it as such. Wilful abstention suggests conscious or deliberate abstention and gross negligence is indicative of a higher degree of neglect. Negligence is ordinarily understood as an omission to take such reasonable care as under the circumstances is the duty of a person of ordinary prudence to take. In other words it is an omission to

> do something which a reasonable man guided by consideration which normally regulate the conduct of human affairs would do or doing something which a normally prudent and reasonable man would not do. The question of wilful abstention or gross negligence and, therefore, of constructive notice considered from this point of view is generally a question of fact or at best mixed question of fact and law depending primarily on the facts and circumstances of each case and except for cases directly falling within the three explanations, no inflexible rule can be laid down to serve as a straight-jacket covering all possible contingencies. The question one has to answer in circumstances like the present is not whether the purchaser had the means of obtaining and might with prudent caution have obtained knowledge of the charge but whether in not doing so he acted with wilful abstention or gross negligence. Being a question depending on the behaviour of a reasonably prudent man, the Courts have to consider it in the background of Indian conditions. Courts in India should, therefore, be careful and cautious in seeking assistance from English precedents which should not be blindly or too readily followed.
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> .....

.....On the facts and circumstances of this case, therefore, we cannot hold that the plaintiff as a prudent and reasonable man was bound to enquire from the municipal corporation about the existence of any arrears of taxes due from the receivers."

Mr. Mitra submitted that caveat had only been filed by respondent Romola Bhattacharjee immediately after the sale. The respondent Nos.3 to 8 did not file caveat immediately after the sale. Even otherwise, filing of a caveat after a transaction does not establish notice of any existing agreement, prior to or even at the time of the transaction.

Mr. Mitra also argued that there was no question of suppression of involvement of P.S. Group's activity on purchase since P.S. Group was not involved at the time of purchase but acquired shares in two of the purchaser companies subsequently and was inducted in the joint venture for development. In any event the alleged involvement of P.S. Group in the suit property prior to the purchase is a mere allegation and not supported by any documentary evidence.

The respondent Nos.3 to 8 have categorically denied the allegation that Surendra Dugar of P.S. Group was aware of the involvement of the plaintiff appellants in development of the suit property. Even assuming that there was any discussion as alleged between the plaintiff appellants and Surendra Dugar in 2000, there is no reason to suppose that Mr. Dugar would know the details of the Memorandum of Understanding. Mr. Surendra Dugar might have known that the Memorandum of Understanding was to expire in 2000. In any case the mention of the 1994 Memorandum of Understanding to Mr. Surendra Dugar cannot effect purchase by the respondent Nos. 3 to 8 of the suit property.

Mr. Mitra pointed out that the balance sheet of P.S. Group for the year ending on 31st March, 2011 did not contain any reference to the suit property. The suit property was purchased by the respondent Nos.3 to 8 on 27th May, 2011 i.e. after the year ending on 31st March, 2011. The Annual General Meeting was held in September, 2011, when the annual returns together with the Director's Report was presented. The Director's Report included events that had been taken place during the period 1st April, 2011 to September, 2011. The Director's report included a reference to the suit property as one of the upcoming projects only. The allegation of the plaintiff appellants that the balance sheet of P.S. Group for the year ending on 31st March, 2011 mentions about the said property is baseless.

Mr. Mitra denied that any plan prepared by M/s. Innate was hoisted by the respondent Nos.3 to 8. M/s. Innate allegedly prepared a plan in 2008. The respondent Nos. 3 to 8 purchased the suit property on 27th May, 2011. After one and half years of the purchase, the suit property was advertised in the website of Abira Nirman Udyog Ltd. on 7th November, 2012. Moreover, respondent M.P. Meharia also denied having handed over any such plan to the respondent Nos.3 to 8.

Mr. Mitra argued that Rs.2 Crores was kept in escrow since the sale deed dated 27th May, 2011 stated that portions of the property was occupied by the tenants. Rs. 2 Crores was kept in escrow for one particular portion of the property to be vacated through respondent Romola Bhattacharjee. Subsequently, the said amount along with interest was paid by Victor Moses & Co to respondent Romola Bhattacharjee after the tenant vacated the suit property. In any case, keeping money in escrow to meet contingencies cannot and does not establish that the respondent Nos.3 to 8 were aware of the Memorandum of Understanding with the plaintiff appellant No.1.

There is also substance in Mr. Mitra's argument that the plaintiff appellants had failed to establish their possession of the suit property or their existing title or interest therein. Admittedly, the plaintiff appellants were not in actual possession of the suit property. There was no registered agreement with the plaintiff appellants in respect of the suit property. The purported Memorandum of Understanding was unstamped, undated and unregistered document with a stipulation of six years only and expired in 2000. The Memorandum of Understanding was never revalidated thereafter. The power of attorney executed by respondent Romola Bhattacharjee in favour of Dilip Kumar Das, which was for six years from 19th October, 1994, had long expired.

As argued by Mr. Mitra, the plaintiff appellants had not been able to show any prima facie existing right title or interest in the suit property. The reliance by the plaintiff appellants upon an oral agreement of 1989 by way of amendment after more than a year and a half or the written Memorandum of Understanding dated 19th October, 1994 did not reveal any subsisting right.

There may be force in Mr. Mitra's argument that the plaintiff appellants have introduced a completely new case, by amendment, of being in possession of a portion of the property to claim the benefit of explanation (II) of Section 3 of the Transfer of Property Act. Be that as it may, the amendment has been allowed. It is for the plaintiff appellants to substantiate their case at the trial. However, as argued by Mr. Mitra, it is apparent and even admitted that the plaintiff appellants were

never in possession of the entire property. It is, in fact, apparent, that the plaintiff appellants were never in actual physical possession of any part of the suit property. The requirement of explanation (II) was not satisfied.

Mr. Mitra submitted and rightly that the case made out by the plaintiff appellants of being in possession of the suit property was not supported by any documentary evidence. Moreover, the case of possession has been contradicted by respondent M.P. Meharia who, it has been claimed by the appellants, was a partner of the development project and whose affidavit has been relied upon by the appellants.

Ms. Sethna had also emphasized on a contemporaneous document written by Anil Sinha to the Officer-in-Charge, Ballygunge Police Station. However, there is nothing to show that Anil Sinha was in possession on behalf of the appellants and in any case Anil Sinha had himself informed the Ballygunge Police Station that he had voluntarily surrendered possession to the respondent Nos.3 to 8.

Mr. Mitra finally argued, that to invoke a negative covenant in the Memorandum of Understanding, the person invoking the negative covenant was required to show that he had fulfilled all his obligations under the said agreement. The appellants had failed to discharge their obligations under Clauses 4(a) to 4(f) of the Memorandum of Understanding.

Mr. Mitra concluded that the appellants had failed to prove, even prima facie, any existing right or interest in the suit property. The plaintiff appellants had failed to prove their possession in respect of the suit property. Any enquiry expected of a reasonable or prudent purchaser could not have revealed the appellants' alleged interest in the suit property, as the appellants are not claiming under any registered document. The respondent Nos.3 to 8 cannot be deemed to have notice or have constructive notice of the appellants' alleged right in the suit property. Mr. Mitra argued that the aforesaid facts clearly establish that the respondent Nos.3 to 8 are bona fide purchasers for value and without notice of the right, if any, of the appellants in the suit property.

As argued on behalf of the respondents the instant suit is in effect and substance a suit for specific performance of a development agreement, even though it has been made to appear as a suit for enforcement of a negative covenant in the Memorandum of Understanding dated 19th October, 1994.

The negative covenant in the Memorandum of Understanding is only in furtherance of the positive obligations under the Memorandum of Understanding, as will be evident from the language and tenor of Clause 12 thereof incorporating the negative covenant, which is set out hereinbelow for convenience :-

> "12. The Developer shall not do or omit to do anything whereby the development of the said property is in any way affected or prejudiced. Likewise the Owner shall not do or omit to do anything whereby the development of the said property by the Developer is in any way affected or prejudiced. The Developer shall under no

> circumstances be entitled to transfer its interest in the MOU and likewise the Owner shall not under any circumstances transfer her interest in the said property in any manner."

As held by the Supreme Court in Her Highness Maharani Shantidevi P. Gaikwad Vs. Savjibhai Haribhai Patel & Ors. reported in JT 2001 (4) SC 43 cited by Mr. Talukdar, the grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act 1963 and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion should be exercised on sound and settled judicial principles. The Court may decline to decree specific performance, where it would be inequitable to do so.

In Ganesh Shet Vs. Dr. C.S.G.K. Setty And Ors. reported in 1998 (5) SCC 381 also cited by Mr. Talukdar, the Supreme Court held that in a suit for specific performance, the evidence and proof of the agreement must be absolutely clear and certain. While normally it is permissible to grant relief on the basis of what has transpired, from the evidence - even if not pleaded, provided there is no prejudice to the Opposite Party, such a principle is not applied in suits relating to specific performance. Where the defendant denies the contract as alleged and the evidence proves a contract, but different from that alleged by the plaintiff, the Court should refuse to grant a decree for specific performance.

In the instant case too, even if it is assumed that there were any subsisting agreement, such agreement was different from that alleged by the plaintiff appellants in view of various developments that had taken place in the meanwhile. There was a radical change in the nature of the agreement by reason of induction of new partners in the development project and in particular the decision to induct respondent Romola Bhattacharjee herself as a co-developer along with the plaintiff appellant No.1 and other co- developers like Arun Poddar. As per the initial agreement Romola Bhattacharjee had no role in the development of the suit property. It is true that in the instant case, the appellants have not prayed for a decree of specific performance. However, the grant of injunction as prayed for would in effect and substance amount to specific performance, since the respondents would have little option but to make over the suit property to the developer i.e. the appellant company.

In The Agriculture Produce Market Committee-Gondal & Ors. Vs. Shri Girdharbhai Ramjibhai Chhaniyara & Ors reported in JT 1997 (5) SC 591 cited by Mr. Talukdar, the Supreme Court deprecated grant of injunction under Section 37 of the Specific Relief Act, where there was no concluded contract that could be enforced, and the rights of the applicants for injunction were still in an embryo.

The question of whether a suit for specific performance of a contract for construction of a building was enforceable at the instance of a developer, fell for consideration of this Court in Vipin Bhimani & Anr. Vs. Sunanda Das (supra). A Division Bench of this Court, upon consideration of the provisions of the Specific Relief Act, 1963 and in particular Section 14 thereof, held that a developer could not seek specific performance of a development agreement. The same view was taken by another Division Bench of this Court in Sushil Kumar Agarwal Vs. Kalidas Sadhu (supra).

In Vinod Seth Vs. Devinder Bajaj & Anr reported in JT 2010 (8) SC 66 cited by Mr. Talukdar, the Supreme Court expressed doubt as to whether an oral agreement coupled with token payment was specifically enforceable.

In Sitac Private Ltd. Vs. The Statesman Ltd. reported in 1995 (I) CHN 502, a Division Bench of this Court affirmed the Single Bench decision, which is reported in 1988 (1) CHN 383 and held:-

> "It takes us to the next question, even if there was any concluded contract whether in the circumstances of this case the plaintiff appellant is entitled to a decree for specific performance. Ordinarily, the Court, as a general rule, will not enforce specific performance of a building contract, the prosecution of which the Court cannot superintend; not only on the ground that damages are generally in such cases an adequate remedy, but also on the ground of the inability of the Court to see that work is carried out. But to this general rule, there is an recognised exception. A plaintiff can bring himself within that exception if he can show three things. Firstly, the building work, the performance of which he seeks to enforce, is defined by the contract; that is to say, the particulars of the work are sufficiently defined and ascertained to enable the Court to know exactly what the work to be done really is. Secondly, the plaintiff must have a substantial interest in having the contract performed, and that the interest is of such a nature that damages will not be an adequate compensation for the non-performance of the contract. Thirdly, the defendant has obtained from the plaintiff by means of the contract the possession of the land on which the work is to be done."

In the instant case, admittedly the appellants were not in possession of the suit property in its entirely. There is no material at all to substantiate the contention of the appellants of being in possession of part of the suit premises through Anil Sinha or through respondent M.P. Meharia. There is not a scrap of paper to show that Anil Sinha or respondent Meharia was inducted into the suit premises by the appellants or that the appellants permitted the respondent No.1 to occupy the portion of the suit premises vacated by HSBC.

The Memorandum of Understanding, which was to be valid for about 6 years, contemplates the execution of a formal development agreement. No formal agreement was executed, incorporating details, even after over 16 years. The power of attorney executed by the respondent Romola Bhattacharjee in favour of a clerk of respondent M.P. Meharia, Dilip Kumar Das was valid only for a period of six years.

On the other hand, there were further discussions and negotiations between the plaintiff appellants and/or their representatives and respondent Romola Bhattacharjee and/or her representatives for execution of an agreement. A new co-developer, Arun Poddar was inducted in the scene. It also appears there were differences between respondent Romola Bhattacharjee, represented by her husband and the plaintiff appellants with regard to request of the former for security deposit of Rs.10 crores. Discussions also ensued with regard to her insistence on construction of her bungalow separate in all respects including entrance, sewerage, water connection which meant loss of FAR in

respect of the other building/buildings to be constructed.

The plaintiff appellants apparently did not, at any point of time refute the claim of respondent Romola Bhattacharjee for enhanced security deposit but expressed their difficulty in making such payment, having regard to several factors, including expenditure already incurred and being incurred and in fact agreed to put in security deposit of Rs.5 crores.

The conduct of the plaintiff appellants, who did not in course of the meetings, refute the claim to enhancement of security deposit, but only sought reconsideration, also shows that negotiations relating to the development agreement were at a nascent and/or embryonic stage as held by the Court below. There was no firm definite subsisting agreement, as would appear from the minutes of meetings held in May, 2010, annexed with the pleadings of the plaintiff appellants. These minutes were according to the plaintiff appellants forwarded by respondent M.P. Meharia to the plaintiff appellants. The plaintiff appellants have not in their pleadings in this Court or in their pleadings in the Court below, refuted the correctness of the minutes as recorded by respondent, M.P. Meharia.

We are of the view that the Memorandum of Agreement executed in 1994, which contemplated execution of formal development agreement, expired by efflux of time. There was intention to enter into fresh formal agreement for which negotiations went on even 10 years after expiry thereof, but on fresh terms and conditions which never materialised. The Learned Court below rightly found that negotiations had been in a nascent or embryonic stage and refused interim injunction.

Pursuant to the Memorandum of Understanding of 1994, the appellants had, in anticipation of a formal development agreement, acted to their detriment. The formal agreement never materialised. The appellants spent a huge amount of time and money for which the appellants are, in our prima facie view, liable to be compensated.

The learned Court below very rightly observed that a party who seeks the equitable relief of temporary injunction would have to show that the essential ingredients for grant of injunction were satisfied, that is, there was a strong prime facie case, the balance of convenience was in favour of grant of temporary injunction and irreparable loss and injury would be caused by refusal of the prayer for temporary injunction.

The learned Court below very rightly observed the object of interlocutory injunction was to protect the party seeking injunction against injury by violation of his rights, for which he could not be adequately compensated. The need for such protection had, however, to be read against the corresponding need of the defendant to be protected against the injury resulting from his having been prevented from exercising his legal rights for which he could not adequately be compensated.

We are in full agreement with the finding of the learned Court below that Section 42 of the Specific Relief Act does not confer any right to claim injunction to prevent the breach of a negative covenant. Section 42 confers a discretion on the Court to grant an injunction to perform a negative agreement even though it is unable to compel specific performance of the affirmative agreement.

To cite an example, an agreement to render service on the basis of technical know-how, data, drawings, plans and specifications provided by the principal, may not be specifically enforceable. However, even though such an agreement to render service were not specifically enforceable, any negative covenant in the agreement preventing the other party from utilising technical know-how, data, drawings, plans and specifications etc. provided by the principal may be enforced by injunction.

Similarly, even if a development agreement were not specifically enforceable at the instance of a developer as held in Vipin Bhimani Vs. Sunanda Das (supra) any negative covenant in the development agreement, preventing the owner from using drawings, plans etc. prepared by the developer might be enforced by injunction.

The Court has complete discretion to decide whether or not to grant injunction to prevent breach of a negative covenant, having regard to the facts and circumstances of the case. Needless to mention that the discretion cannot be exercised arbitrarily, but in accordance with law, in consonance with principles of justice and fair play, taking into account the prima facie case the balance of convenience and the question of whether the applicant for injunction can monetarily be compensated for the breach alleged.

Prima facie, the appellants are entitled to return of all amounts paid by them to and/or on behalf of respondent Romola Bhattacharjee with interest, and also to reimbursement of all amounts spent by them, in connection with the Memorandum of Understanding, apart from damages. In the aforesaid circumstances, in our view, the learned Court below, rightly declined the prayer of the appellants for interim relief.

For grant of interim relief, the Court is required to weigh the balance of convenience by considering which party will be more prejudiced - the applicant for interim relief, by refusal to grant interim relief, if the suit ultimately succeeds, or the opposite party opposing interim relief, by grant of interim relief, if the suit ultimately fails.

The agreement for development was a commercial venture so far as the plaintiff appellants were concerned. If the suit ultimately succeeds the suit property would have to be delivered to the plaintiff appellant No.1 for development. Demolition of the existing buildings would enure to the benefit of the appellants. Any construction that might have been made would also have to be removed. Even otherwise, the plaintiff appellant No.1 could be monetarily compensated by award of suitable damages.

On the other hand, the respondent Nos.3 to 8 who have outright paid Rs.70 crores and purchased the suit property, apparently without notice of any prior agreement would suffer irreparable prejudice if construction is delayed, having regard to the weak prima facie case for enforcement of the Memorandum of Understanding in view of the judgment of the Division Bench in Vipin Bhimani Vs. Sunanda Das (supra), which is binding on this Bench, which is a Bench of co-ordinate strength.

In any case, in terms of the Memorandum of Understanding, construction was to commence within six years. It is true that in development agreements, time might not be of essence. However, six years cannot be extended to fifteen years, in the absence of specific agreement extending the time. Perhaps respondent Romola Bhattacharjee should have formally cancelled the Memorandum of Understanding and returned the consideration received by her before transferring the suit property to third party. When, even after almost 17 years, even building plans had not been made ready and sanctioned an injunction as prayed for cannot be granted on the assumption that the Memorandum of Understanding was binding and in subsistence.

Prima facie the Memorandum of Understanding as expired by efflux of time and is even otherwise, for reasons discussed above, no longer specifically enforceable. If the appellants are not entitled in law to enforcement of the Memorandum of Understanding, no useful purpose will be served by grant of interim relief.

The judgement of the Court below, is long and reasoned. The reasoning for refusing interim order is in our view perfect. There is no infirmity at all in the judgement and order under appeal, which calls for interference of this Court.

The discrepancies and/or inconsistencies emphasised by Ms. Sethna are, in our view, minor if not hyper-technical and no inconsistencies to warrant interference of this Court. The Memorandum of Understanding had expired by efflux of time. After expiry of the Memorandum of Agreement there was some negotiations which never fructified into a binding contract.

In the absence of any subsisting binding contract, there could be no question of injunction as prayed for by the plaintiff appellants. Any observations and/or prima facie findings at the interlocutory stage, including observations and/or findings, if any, with regard to whether security deposit was liable to be forfeited, are of no consequence.

The appeal is, therefore, dismissed.

There will stay of operation of the operative part of this judgment and order of a period of two weeks from date.

Let photostat certified copy of this judgment and/or order, if applied for, be supplied to the learned advocates appearing for the parties expeditiously subject to compliance of requisite formalities.

(INDIRA BANERJEE, J.) I Agree (ANINDITA ROY SARASWATI, J.)