Mr. Raj A. Menda S/O Mr. Arjun M. Menda, ... vs Rani Rasamani Real Estate (R.R. Real ... on 8 June, 2007

Equivalent citations: ILR2007KAR2627, 2007(6)KARLJ349, AIR 2007 (NOC) 1911 (KAR.) = 2007 (4) AIR KAR R 560 (DB), 2007 (4) AIR KAR R 560, 2007 A I H C 2630, (2008) 1 CIVILCOURTC 69, (2007) 6 KANT LJ 349

Bench: S.R. Bannurmath, Subhash B. Adi

JUDGMENT

S. R. Bannurmath and Subhash B. Adi, JJ.

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1. This is an appeal against the judgment and decree dated 15th March 2006 in O.S. No. 3132/2004 on the file of the XXIV Addl. City Civil Judge, Bangalore (CCH-6).

2. Appellants were the plaintiffs before the trial Court. Suit is one for declaration,

(i) declaring, that the defendants, their men, agents or any one claiming through or under them are not entitled to sell, mortgage, lease, jointly develop or in any way alienate or part with the possession of the Page 1172 schedule property or to have any transaction of whatsoever nature in respect of schedule property with the third party except the plaintiffs;

(ii) grant an order of permanent injunction restraining the defendants, their men, agents or any one claiming through or under them from selling, mortgaging, leasing, jointly developing or in any way alienating or in any way parting with the possession of the schedule property of having transaction of whatsoever nature in respect of the schedule property with any third party except the plaintiffs therein.

(iii) direct the defendants to pay the cost of the suit and grant such further reliefs as the Court may deem fit.

3. Parties will be referred to as their ranking in the trial court.

4. The case of the plaintiffs is that:

> Plaintiff No. 1 is the Promoter, Shareholder and Director of the plaintiff Nos. 2 and 3 - Companies. Plaintiff No. 1 has represented other plaintiffs in all the transactions with the defendants. Plaintiffs are the reputed builders and they have put up several multi-storeyed buildings, complexes and Information Technology Parks and facilities having more than 10,00,000 sq.ft. of built up space in Bangalore and other cities in

India. Plaintiffs and their group of Companies have over the years acquired a very high reputation as developers and builders of IT parks of international standards. First defendant is a partnership firm and other defendants are the partners. Defendant Nos. 2 and 3, who are father and son, were representing the defendant No. 1 partnership firm and its other partners namely, other defendants, in all their transactions with the plaintiffs. In January 2000, the defendants approached the plaintiffs and informed the plaintiffs that the defendants are in the process of acquiring absolute ownership of 40 acres of land in Kadabeesanahalli Village, Varthur Hobli, Bangalore East Taluk and defendants wanted the plaintiffs to develop the said land, as the association of the plaintiffs with the development of the aforesaid land would not only enhance the value and marketability of the buildings to be put up on the aforesaid lands, but also would bring in other infrastructure facilities like road, water and sewerage. Defendants wanted the plaintiffs to develop the aforesaid lands by way of joint development, so that the aforesaid lands could be developed to the mutual benefit and profit of both the plaintiffs and defendants. In pursuance of the discussion and negotiations, defendant No. 1 on his own behalf and on behalf of the other defendants entered into an agreement dated 9.3.2000 with the first plaintiff, who entered into the said agreement, for and on behalf of the other plaintiffs. The subject matter of the said agreement is 40 acres of land in Kadabeesanahalli village, Varthur Hobli, Bangalore East Taluk, which hereinafter referred to as 'the schedule property'. Defendants from time to time acted upon the said agreement and had given a letter to the first plaintiff, whereunder they had sought assistance of the first plaintiff for meeting the cash flow requirement of the defendants.

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5. Plaintiffs have always been ready and willing to perform their obligations under the said agreement and the time was not essence of the contract. Defendants had not obtained the sale deeds in respect of the schedule property from their vendors, they sought time to deliver possession of the schedule property to the plaintiffs. Second defendant wrote a letter dated 13.4.2000 in this regard, wherein he held out an assurance that, the possession of the schedule property would be handed over by the end of May 2000. Plaintiffs immediately after agreement dated 9.3.2000 was executed, had spent their time, energy and money in getting the schedule property surveyed and in getting the sources of ground water identified and preparing the master plan in respect of the schedule property. Plaintiffs had incurred a total sum of Rs. 3,32,301/- in this regard. Plaintiffs would not have incurred the expenses but for the fact that, the defendants had agreed to let the plaintiffs to develop the schedule property into a Software Technology Park, plaintiffs were deeply concerned about the delay in performance of the defendants' obligation under the agreement dated 9.3.2000. Defendants by their letter dated 15.7.2000 expressed regret at their inability, to keep up the agreed time schedule with regard to delivering the suit schedule property to the plaintiffs for development. Defendants assured the plaintiffs that they would complete all the formalities by 10.8.2000 and sought time till then. Plaintiffs had already reached advanced stage of negotiation with their potential customers for providing IT facilities in the schedule property by June 2001 onwards and

they were extremely concerned about the delay in making available the schedule property for development into a software park, Plaintiff No. 1 by his letter dated 26.7.2000 made this apprehension known to the defendants. The second defendant by their letter dated Nil July 2000 acknowledged the plaintiffs' letter dated 26.7.2000 and requested the plaintiffs to ensure that, the schedule property was not acquired by the Government and that the plaintiffs should get the schedule property earmarked in the plans as being reserved for construction of IT Park. Plaintiffs being capable of approaching the Government of Karnataka for establishment of IT Parks in the schedule property could thereby save the schedule property from acquisition. Defendants knew that with the reputation of the plaintiffs as developers of IT Park, the lands of defendants would be saved from being acquired by the Government. The defendants also requested the plaintiffs to inform the Government about the agreement dated 9th March 2000 for development of the schedule property into a software park. The proposal of the plaintiffs for development of the schedule property into an IT Park involved investment of Rs. 100 Crores thereon was regarded as an important project and was recommended to the High Level Committee of the Karnataka Udyog Mitra. Several leading national newspapers including 'The Times of India' had carried reports about the plaintiffs' project on the schedule property. The plaintiffs were facing embarrassment with their clients, as the defendants had not completed the formalities for stalling the project on the schedule property. The plaintiffs by their letter dated 21.12.2000 brought these delays on the part of the defendants to Page 1174 the notice of the defendants and it is because of the past record of the plaintiffs in putting up IT Parks and because of the very high quality IT Parks of international standards that, the plaintiffs had planned to put up on the schedule property, the Government of Karnataka accorded 100% stamp duty exemption in respect of the transactions relating to the IT Park proposed to be put up on the schedule property.

6. The plaintiffs by their letters dated 7.3.2001 and 7.4.2001 informed the defendants about the proposed project on the schedule property and received the clearance from the Cabinet of Ministers of Government of Karnataka. The Bangalore Development Authority by letter dated 21.7.2001 informed the plaintiffs that, in order to consider the request of the plaintiffs for change of land use in respect of the schedule property, the plaintiffs were required to furnish the title deeds in respect of schedule property in the name of the defendants. Any delay in commencing the project would have exposed the schedule property to the danger of being acquired by the Governmental Agencies. The project that the plaintiffs had conceived and were endeavouring to put up on the schedule property was a very important IT Park in the view of the Government of Karnataka.

7. In this connection, the defendants executed Power of Attorney in favour of plaintiff No. 1 interalia authorizing the plaintiff No. 1 for obtaining the change of land use of the schedule property to Software industry use. The Power of Attorneys are dated 23.7.2002, 31.7.2002, 13.8.2002, 22.8.2002 and 24.8.2002 executed by defendants. All the Power of Attorneys specifically state that, the exact area of the property covered by the power of attorney was to be ascertained on joint survey thereby meaning that, the defendants and the plaintiffs were to carry out the joint survey of the properties covered under these power of attorneys. The plaintiffs acting as the Power of Attorney holders of the defendants submitted applications to the Bangalore Development Authority for change of land use of the schedule property into Software Industry use. Plaintiffs were always keenly interested in developing the schedule property into an IT Software Park. Plaintiffs were in

continuous correspondence with the defendants in this regard. Plaintiffs took pains to prevent the laying of proposed public road by the BDA, which would have bisected the schedule property thereby adversely affecting the utilization of the schedule property. Several meetings were held in this connection. In this connection, one of the letters is dated 12.9.2002 written by defendants to the plaintiffs confirming the meeting held in Chennai. Obtaining of the clearance from the Government of Karnataka for the IT Software Park, helped the plaintiffs in obtaining permission and sanction from the Bangalore Water Supply and Sewerage Board. Because of the efforts of the plaintiffs and their corporate image and because of the clearances obtained by the plaintiffs in respect of the schedule property in terms of the desirability as one of the best places for putting up of IT Parks was increased. The defendants obtained the sale deeds in respect of different portions of the schedule property under various sale deeds Page 1175 dated 4.2.2000, 21.3.2000, 4.4.2000, 10.4.2000, 15.4.2000, 15.5.2000, 26.7.2000, 30.9.2000, 18.11.2000, 20.10.2000, 25.10.2000, 5.3.2001 and 20.11.2001.

8. After the plaintiffs added value to the suit schedule property in the manner mentioned above, the defendants became greedy and they were attempting to wriggle out of their contractual obligations towards the plaintiffs in respect of the schedule property with the intention of having transactions in respect of the schedule property with third parties. In this connection, plaintiffs got issued a public notice through their Advocates and also published a notice in 'The Times of India' dated 18.2.2004 and 'Prajavani' dated 27.2.2004. The defendants wrote a letter dated 21.2.2004 to the plaintiff No. 1, dishonestly denying the solemn agreement dated 9.3.2000. The plaintiffs after having acted upon agreement dated 9.3.2000 continuously for a period of 4 years, after having been the direct beneficiaries of the efforts of the plaintiffs in protecting the schedule property from being acquired, the defendants fraudulently chose to deny their obligations under the said agreement dated 9.3.2000. The defendants have taken false stand by contending that the agreement is still born and that the said agreement was inchoate and incomplete and was abandoned and there was novation of the said agreement.

9. On these allegations, plaintiffs alleged that the defendants have no right to transfer the property and also sought for permanent injunction.

10. An application was filed under Order XXXIX since the suit is filed in Summer Vacation, permission was sought by the plaintiffs to move the Vacation Trial Judge for entertaining the suit. I.A.I was filed under Order XXXIX Rule 1 and 2 CPC for grant of temporary injunction restraining the defendants, their men, agents, etc., from selling, mortgaging, leasing, jointly developing or in any way alienating or in any way parting with the possession of the schedule property in favour of third party except with the plaintiffs during the pendency of the suit.

11. Defendants-1, 2 and 4 to 15 have filed an application in I.A.III under Order XII Rule 6 read with Section 151 CPC, I.A.IV under Order XII Rule 6 read with Section 151 CPC, I.A.V under Order II Rule 2 and 3 and Section 151 of CPC, I.A.VI under Order XII Rule 6 read with Section 151 CPC. Defendant Nos. 1 to 15 also filed applications in I.As.11, 12 and 13 under Section 151 CPC, defendant No. 3 filed I.A.VII under Section 148 read with Section 148-A and Section 151 CPC, defendants-16, 17 and 18 filed I.A.14 under Order I Rule 10 Sub-rule (2) read with Rule 3 and further read with Section 151 of

CPC. Defendant Nos. 1 to 15 also filed I.A. No. 16 under Section 340 of Cr.P.C. read with Section 151 of CPC. Plaintiffs filed I.A.II under Order XXXVIII Rule 1 and 2 read with Section 151 CPC, I.A.VIII under Order XXXIX Rule 1 and 2 read with Section 151 CPC, I.A.IX under Order VI Rule 17 read with Section 151 CPC, I.A.X under Order 1 Rule 10 Page 1176 Sub-rule (2) read with Section 151 CPC, I.A.15 under Section 151 CPC, I.A.17 under Section 340 of Cr.P.C. read with Section 151 of CPC.

12. The Trial Court took up I.As.2 to 17 for consideration and on hearing the parties, framed the following points for consideration:

> 1. Have the present plaintiffs got locus standi to file this suit for declaration and injunction against the defendants on the basis of Memorandum of Understanding dated 9.3.2000?
>
> 2. Can the relief of injunction sought under I.As.2 and 8 by the plaintiffs be granted against defendants?
>
> 3. Can the amendment sought under I.A. No. 9 by plaintiffs be permitted?
>
> 4. Is it necessary to implead M/s. Cessna Garden Developers Ltd., as a party to the present suit?
>
> 5. Is it necessary to initiate criminal proceedings against either of the parties to this suit?

The trial court held that the plaintiffs have no locus standi to file the suit for declaration and injunction against the defendants on the basis of Memorandum of Understanding dated 9.3.2000. The trial Court held that the relief of injunction sought for in I.As.II and VIII filed by the plaintiffs against the defendants cannot be granted. Plaintiffs are not entitled to amend the plaint as prayed for in I.A.IX, M/s. Cessna Garden Developers Limited is not necessary party to be impleaded to the suit. It is also held that, it is not necessary to initiate criminal proceedings against either of the parties to the suit. With these findings, the trial Court allowed I.As.3, 4, 5, 6, 11 and 12 all filed by the defendants, dismissed the suit of the plaintiffs as not maintainable. I.As.2, 8, 9, 10, 15 and 17 filed by the plaintiffs were rejected. I.As.7, 13 and 14 filed by the defendants disposed of I.A. 16 filed by the defendants is rejected.

13. It is necessary to notice the relief sought for in the I.As., which are allowed by the trial court. In I.A.III, the following prayer is sought for by the defendants-1, 2 and 4 to 15:

> That for the reasons stated in the accompanying affidavit, this Court may be pleased to dismiss the suit as being ex-facie infractions and futile, and also on the basis of the specific, categorical and unambiguous admission of the Plaintiffs, in the interest of justice and equity.

I.A.IV is under Order XII Rule 6 is again by the defendants-1, 2 and 4 to 15, which reads as under:

That for the reasons stated in the accompanying affidavit, this Court may be pleased to dismiss the suit, in the interest of Justice and equity.

I.A.V is under Section 34 of the Specific Relief Act read with Order II Rule 2 & 3 filed by the defendants-1, 2 and 4 to 15 which reads as under:

That for the reasons stated in the accompanying affidavit, this Court may be pleased to dismiss the suit as not maintainable, in the interest of justice and equity.

Page 1177 I.A.VI is an application filed by defendants-1, 2 and 4 to 15 under Order XII Rule 6 for dismissal of the suit as not maintainable. I.A. No. 11 is filed by defendants-1 to 15 wherein the defendants have sought for dismissal of I.A. Nos. 2 and 8 filed by the plaintiffs as infructuous and futile. I.A. No. 12 is filed by the defendants-1 to 15 under Section 151 of CPC for dismissal of the suit as being ex-facie infructuous and futile.

14. The applications in I.As.2, 8, 9, 10, 15 and 17 filed by the plaintiffs are concerned, plaintiffs had sought for temporary injunction. In I.A. 2, 8 and 9, the plaintiffs had sought for amendment of the plaint, in I.A. No. 10, the plaintiffs had sought for impleading the subsequent purchaser, in I.A. No. 15, the plaintiffs had sought for holding notice of the application filed under Order I Rule 10 Sub-rule 2 of CPC to implead the proposed defendant M/s. Cessna Garden Developers Private Limited is duly served on the said proposed defendant. I.A. No. 17 is concerned, it is an application under Section 340 of Cr.P.C. for taking action against the defendants.

15. Trial Court considering the averments made in these applications found that, the only question that arises for consideration is, as to whether the plaintiffs have got locus-standi to seek declaration and permanent injunction against the defendants on the basis of memorandum of understanding dated 9.3.2000?

16. The trial court mainly considering the agreement dated 9.3.2000 and the legal notice dated 17.5.2004 issued by the defendants to Mr. Chandru Raheja of K. Raheja Group, Construction House 'B', II Floor, Opp. Khar Telephone Exchange, 623, Linking Road, Khar, Mumbai-400 052 and reply by Chandru L. Raheja dated 24.5.2004, held that, the Raheja Group of Companies had not nominated either plaintiff No. 1 or plaintiff No. 2 and in the light of defendants' notice dated 17.5.2004, the plaintiffs have not brought the suit either as nominees or representatives of Raheja Group of Companies and the Raheja Group of Companies has disowned the transaction with the defendants. On these findings, the trial Court held that, the suit is not maintainable, as the plaintiffs have no locus-standi to file the suit.

17. Trial Court also held that the suit schedule property has been already alienated before the suit is filed, the suit has become infructuous and the plaintiffs have no locus-standi to file the present suit

on the basis of Memorandum of Understanding dated 9.3.2000 and also held that the defendant No. 1 has accepted the plaintiff No. 1 in his capacity as representative of K. Raheja Group of Companies and whereas the plaintiffs have brought the suit on behalf of plaintiff Nos. 2 and 3 and there is no pleading that the Raheja Group of Companies has, either nominated or assigned their rights under the Memorandum of Understanding in favour of plaintiffs. It also held that the impleading of M/s. Cessna Garden Developers Limited is not necessary as the sale is prior to the filing of the suit. The application for amendment, also does not survive, as there is no concluded contract and the events, which are required to be happen have not taken place.

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18. On behalf of the appellants - plaintiff, Sri. Udaya Holla, learned Senior Counsel submitted that I.A.VII is filed by the defendants interalia seeking one month's time to file the written statement and the said application was filed on 26.5.2004. However, the defendants never filed the written statement and in turn, they filed several applications and the trial court without even considering I.A.VII has dismissed the suit by order dated 15.3.2006. In this regard, he submitted that there is no provision for dismissal of the suit at threshold, when the points arisen for consideration being mixed question of law and facts, the trial court was not justified in dismissing the suit barely on the allegation made by the defendants. The finding of the trial court that, the K. Raheja Group of Companies is a legal entity and therefore, the suit is not maintainable, is arrived without even there being any issue, straightaway the trial court holding that the Raheja Group of Companies is a legal entity and the suit is not filed on behalf of Raheja Group of Companies, is wholly erroneous. He further submitted that, plaintiff No. 1 as a Director of plaintiff Nos. 2 and 3 in his personal capacity had entered into Memorandum of Understanding on 9.3.2000 and it is supported by other documents such as Power of Attorneys and the correspondence between the plaintiffs and the defendants-1 and 2. Though these materials were on record, the trial court ignoring these materials, holding that the suit is not on behalf of the Raheja Group of Companies, has dismissed the suit, by holding that the Memorandum of Understanding is not by plaintiff No. 1 in his individual capacity, but is on behalf of Raheja Group of Companies. He also submitted that in order to appreciate the transaction, the trial court ought to have noticed the contents of the documents and not the form of the documents. The agreement is admittedly signed by the plaintiff No. 1 and it is also addressed to the plaintiff No. 1 and not Raheja Groups. He also submitted that the first plaintiff is entitled to assert his right in respect of suit schedule property being the shareholder and Director of the plaintiff Nos. 2 and 3 and he is also entitled to make plaintiff Nos. 2 and 3 as the beneficiaries of the rights under the Memorandum of Understanding.

19. In this regard, he relied on the Memorandum of Understanding and pointed out that the said Memorandum of Understanding is admittedly addressed to Raj A. Menda - plaintiff No. 1 and in the said agreement, joint development is proposed on the basis of 25% and 75% i.e., 25% of the defendants and 75% of the plaintiffs and Clause-15 of the Memorandum of Understanding provides for execution of conveyance either in favour of plaintiff No. 1 or in favour of nominees/assignees, as may be desired by the plaintiff No. 1 and the same is evident from Clause Nos. 18 and 19. He also pointed out from Clause-22 of the said Memorandum of Understanding, wherein the defendants have agreed to sign the final development agreement with a Company nominated by plaintiff No. 1,

which will be jointly filed for getting No Objection Certificate under Chapter XXC of the Income-Tax Act, 1961.

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20. Relying on these clauses and also letter dated 5th September 2000 written by Karnataka Udyog Mitra addressed to Sri. G. Gurucharan, Commissioner for ID and Director of industries and Commerce informing that M/s. Millennia Developers Pvt. Ltd. is a part of Raheja Group of Companies, who have more than 4 decades of experience in real estate development and claimed to have completed over 2500 projects and recommends for taking up the proposals before ensuing the High Level Committee meeting for approval and assistance. He also relied on a letter dated 21st December 2000 addressed by Millennia Developers Pvt. Ltd. to Kumaraswamy Reddy, the second defendant particularly in reference to the Memorandum of Understanding dated 9th March 2000 in respect of the suit schedule property. Also referred to the various correspondence informing that the Millennia Developers had kept the conversion application ready for the portions and requested for sending the copies of the latest khatha and tax paid receipts. He also referred to Power of Attorney executed by Konda Ramana Reddy, S/o Narasa Reddy in favour of Raj A. Menda - plaintiff No. 1 for carrying out the obligation under the memorandum of understanding.

He mainly submitted;

1) That the Memorandum of Understanding (for short 'MOU') dated 9.3.2000 is a concluded and enforceable contract.

2. The contract is entered into by the plaintiff No. 1 in his personal capacity and enforceable on his behalf and also on behalf of his nominee or assignee. The averments in the plaint never give rise to the trial Court to invoke the provisions of Order 12 Rule 6.

3. Plaintiffs have filed an application for amendment of the plaint and also for impleading of the alleged subsequent purchaser and in the light of the said application the reliefs sought for in the suit are enforceable and does not attract the provisions of Section 41(e) or Section 42 of the Specific Relief Act. The plaint averments clearly disclose the cause of action and it does not attract the provisions of Order 7 Rule 11(a).

21. In support of his contention, learned Senior Counsel relied on the M.O.U. and pointed out that it is an agreement for joint development, with 75% share and 25%. The scheme is to develop a Software Technology Park. He referred to Clause 15 of the said MOU and pointed out that this clause requires the defendants to execute conveyance either in favour of plaintiff No. 1 or in favour of his nominee or assignee as may be desired by plaintiff No. 1. He also relied on Clause 18 and submitted that this clause also require the defendant to sign all the required papers for obtaining approval/sanction from the competent authorities in connection with the development work as envisaged in the agreement either in favour of plaintiff No. 1 or in favour of the nominee. Then pointed out Clause 22 and submitted that final development agreement would be with the company nominated by plaintiff No. 1, which will be jointly filed for getting No Objection Certificate under

Chapter XXC of the Income-tax Act, 1961. He further pointed out Page 1180 that, K Raheja Group is not a legal entity. Relying on these clauses learned Senior Counsel submitted that, the cumulative effect of the terms of agreement establishes that plaintiff No. 1 in his personal capacity had entered into an agreement and submitted that this is clear from the document namely, letter dated 9th March, 2000 by defendant No. 1 in favour of plaintiff No. 1. He also referred to the letter dated 5th September 2000 written by Karnataka Udyog Mitra addressed to the Commissioner for ID & Director of Industries & Commerce with a copy to 2nd plaintiff, wherein the proposal of the 2nd plaintiff for development of software technology park is referred and the Karnataka Udyog Mitra has requested for taking up the proposal of 2nd plaintiff before the ensuing high level committee for approval and assistance. He relied on the letter dated 21st December 2000 written by the 2nd plaintiff signed by plaintiff No. 1 addressed to defendant No. 2 wherein the MOU dated 9.3.2000 is referred and a request is made to complete the land acquisition of phase one before 31st December 2000. Further informing that application for conversion of the land for non agricultural use and requested for the latest khatha and tax paid receipt. Similarly a letter dated 7th March 2001 written by the 2nd plaintiff signed by plaintiff No. 1 addressed to 2nd defendant for convening meeting to discuss various issues regarding the projects. Another letter dated 7th April 2001 addressed to the partner of the 1st defendant signed by plaintiff No. 1. Another letter dated 3rd December 2001 addressed to the partner of 1st defendant written by 2nd plaintiff in connection with the status on acquisition of Survey Nos. 17/3, 13/1 and 12/1. He also relied on the power of attorneys executed by the defendants to carry the project work. Relying on these documents and also relying on the averments made in para 6 of the plaint submitted that MOU dated 9.3.200 was entered into between defendant No. 1 on its own behalf and for and on behalf of the other defendants with plaintiff No. 1 who entered the said agreement for and on behalf other plaintiffs. He submitted that in connection with the project, plaintiffs have spent an amount of Rs. 3,32,301/- to get the land surveyed and they had also discussions with various authorities for securing permission and further submitted that because; of the reputation of the plaintiff, Government had granted exemption from the provisions of the Stamp Act and further the sanctions and permissions are given.

22. In this regard he also submitted that the MOU is enforceable and binding on the defendants. He relied on the judgment reported in AIR 1933 Privy Council 29 in the matter of Currimbhoy & Co. Ltd. v. L.A. Creet and Ors. and submitted that, where the documents or letters relied on as constituting a contract, contemplating the execution of a further contract between the parties, it is a question of construction, whether the execution of the further contract is a condition or term of bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. He submitted that it is under the MOU all the terms are agreed and finalised including respective sharing and it is a transaction already concluded subject to execution of the final documents.

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23. He also relied on another judgment reported in AIR 1944 Bombay 76 in the matter of Rmachandra Lalbhai and Anr. v. Chinubhai Lalbhai and referring to Bead Note (k) submitted that even in case where certain details ought to be worked out, but not mentioned, agreement does not become uncertain. Details can be settled by consent of parties. He also relied on another decision in

the matter of Kollipara Sriramulu (dead) by his legal representative v. T. Aswatha Narayana (dead) by his legal representative and Ors. which reads thus:

> The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.

24. Relying on these judgments, he further submitted that just because of formal contract is required to be executed at a latter stage does not prevent the binding bargain between the parties. The preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. When the parties did intend to go ahead with the contract and act in furtherance of the same and agree to bind themselves is a concluded contract even though the formal finalising the document is to be executed.

25. He submitted that K. Raheja Group is not a legal entity and plaintiff No. 1 in his personal capacity has entered into the MOU and he has right and the parties have agreed that under the MOU documents would be executed in the name of plaintiff No. 1 or his nominee or assignee or the company assignee. He further submitted that when the contract is in the personal capacity of plaintiff No. 1 when K. Raheja Group is not a legal entity the series of correspondence and admission on the part of the defendants, it is not now open to the defendants to contend to the contrary.

26. In this regard he submitted that the alleged legal notice dated 17.5.2004 addressed to one Chandru Raheja and the reply of said Chandru Raheja dated 24th May 204 has no bearing on the contract. Chandru Raheja is neither a party to the contract nor a person authorised on behalf of plaintiff No. 1 nor has any right to speak on the contract. He also pointed out that, fact that, in the reply of Chandru Raheja dated 24.7.2004 it is alleged that they are not aware of the MOU is a clear indication that it is not Chandru Raheja or the said company which has entered into MOU and it is only plaintiff No. 1 in his individual capacity had entered into the said contract.

27. In order to maintain an application under Order 12 Rule 6 where admissions of fact are required to be made either in the pleading or Page 1182 otherwise, whether orally or in writing, in such event the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, may make such order or given such judgment as it may think fit, having regard to such admissions. He further submitted that this provision is reproduction of the English Rules, where in order to expedite the grant of relief without going for the trial, the rule is made, provision is made to pass such order or judgment on the basis of the admission of the parties. But the said provision cannot be invoked, when there is serious dispute in law and on facts. In this regard he further submitted that in this case there is no admission either in the pleadings or otherwise.

28. He also submitted that suit will not become infructuous merely on the ground that the defendants have sold the property before filing of the suit. He further submitted that the power

conferred on the Court under Rule 12 Rule 6 for passing orders or judgment must be on clear admission, and based on unequivocal admission of parties even in case where admission is made, if the Court finds that it is not justifiable to grant decree, the Court may decline. When the facts are complicated and disputed, the Court cannot invoke the provisions of Order 12 Rule 6 to pass orders. He also submitted that admission must be capable of it being worked out and it must be complete by itself, defendants have not pointed out as to what are the admission on the part of the plaintiff, except relying on the legal notice issued on behalf of the defendants to one Chandru Raheja and the reply of Chandru Raheja. Reading of both the documents does not give rise for an admission on the part of the plaintiffs and they cannot be used to invoke the provisions of Order 12 Rule 6, as Chandru Raheja is neither a party to the MOU nor he has authority to speak on behalf of the plaintiffs.

29. Even on the question, that the properties were sold even before suit is filed, learned Senior Counsel submitted that the nature of prayer sought for by the plaintiff and in the light of the application filed by the plaintiff for amendment of plaint and also for impleading the purchaser in the suit, the suit does not become infructuous. He further submitted that, admittedly the allege sale are subsequent to the MOU if the rights flow from the MOU the purchaser is bound by the said agreement. He further submitted that these questions are required to be gone at the trial. There is no question of the trial Court proceeding to invoke the provision of Order 12 Rule 6. In this regard he further relied on the following judgments:

1. 1997 AIHC 2417 (Calcutta)-

Ballygunge Properties Development Corporation v. Shree Shree Anandamoyee Charitable Society and Ors.

2. Nagubai Ammal and Ors. v. B. Shama Rao and Ors.

3. 1989 (3) KLJ 65 Janardhan Jog v. Srikrishna and Ors.

4. B.S. Viswanath v. Chandikabven J. Mehta Page 1183

5. State Bank of India v. Midland Industries and Ors.

6. Simla Wholesale Mart, v. Baishnodas Kishori Lal Bhalla and Ors.

7. AIR 1962 Jammu & Kashmir 66 Union of India v. Feroze and Co.

8. Sitaram Motilal Kalal v. Santanuprasa Jaishanker Bhattr

9. Sri Chand Gupta v. Gulzar Sing and Anr.

10. Mayar (H.K.) Ltd. and Ors. v. Owners & Parties, Vessel M.V. Fortune Express and Ors.

30. Relying an these judgments learned Senior Counsel submitted that before the Court could act under Order 12 Rule 6 must find out that admission is clear and unambiguous and admission by itself is complete and capable of being worked out. The Learned Judge cannot based on his opinion invoke Order 12 Rule 6 to pass orders or judgment just because he feels. Whether the plaintiffs succeed or not is not a ground to reject the plaint or to grant a decree.

31. He also submitted that the MOU being a concluded contract entered into by plaintiff No. 1 in his personal capacity with the defendants and capable of being enforceable does not attract the provisions of Section 41(e) of the Specific Relief Act and submitted that the provisions of Section 41(e) is to prevent the breach of contract, of which the performance would not be specifically enforced. In this case the contract is capable of being enforceable the provisions of Sections 41(e) and 42 of the Specific Relief Act are not attracted. He also submitted that the relief sought for in the suit and in the light of the amendment application and impleading application, provisions of Sections 41(e) and 42 are not applicable as thee is no injunction sought for to perform negative agreement. Learned Senior Counsel further submitted that, the trial Court has neither consider the scope of Order 12 Rule 6 of CPC nor has consider the provisions of Order 7 Rule 11 of CPC or has consider as to how the suit is liable to be dismissed. The entire judgment is based on surmises and conjunctions and not based on any admission either in the pleading or otherwise between the parties. The reliance placed by the trial Court on the legal notice dated 17.5.2004 and reply to the same dated 24.5.2004 shows that, the trial Court without application of mind based on its opinion has tried to apply the provisions of Order 12 Rule 6 of CPC even without giving any finding as to what are the unequivocal admission on the part of the plaintiff or as to how the suit becomes Page 1184 infructuous or not maintainable. The whole approach of the trial Court in dismissing the suit is not in consonance with the procedure much less under Rule 12 Rule 6 of CPC.

32. Sri Batra, learned Counsel for the defendants mainly submitted as under.

1) The suit is not maintainable in law as plaintiffs 2 and 3 are not parties to the MOU, plaintiff No. 1 has singed the MOU on behalf K. Raheja Group and not in his individual capacity

2) The suit has become infructuous as the relief sought for by the plaintiff do not survive for consideration in view of the transfer of the suit schedule properties in favour of a third party by the defendants before the suit is filed

3) In the light of the suit having become infructuous and in the light of the relief sought for by the plaintiffs, the suit is liable to be dismissed under Order 12 Rule 6 of CPC on the basis of the averments made in the plaint.

4) No injunction can be granted under the provisions of Section 41(e) and 42 of the Specific Relief Act.

5) The contract is not concluded and enforceable.

33. In support of his contention Sri Batra relied on the MOU dated 9.3.200 and pointed out that the said MOU is entered by plaintiff No. 1 on behalf of K. Raheja Group and not in his individual capacity or personal capacity. He further submitted that MOU is signed by plaintiff No. 1 on behalf of M/s K. Raheja Group. In this regard he referred to the legal notice issued on behalf of the defendants on 17.5.2004, wherein defendants have specifically called upon M/s K. Raheja Group to show as to how the suit could be filed on behalf of plaintiffs 2 and 3 by plaintiff No. 1 and in this regard he referred to the reply of K. Raheja Group dated 24th May 2004 and pointed out that K. Raheja Group is not aware of the MOU dated 9.3.2000 and they sought for copy of the same. Relying on the notice and reply, Sri Batra submitted that MOU is not signed by plaintiff No. 1 in his personal capacity. K. Raheja Group has denied the said MOU and the rights of plaintiff No. 1. The suit is filed by the plaintiff is ex facie is not maintainable in law and submitted that the suit filed by the parties who are not parties to the MOU is not maintainable. In this regard he also relied on the plaintiffs' public; notice published in the newspaper dated 18.2.2004 and submitted that in response to the said public notice on 21.2.2004 defendants had caused reply and informed that they are owners in exclusive possession of the entire suit schedule properties and also informed that the public notice is totally false and misfeasen and called upon the learned Counsel who issued public notice to disclose the names of his clients. Further on 28.2.2004 defendants issued another public notice calling upon the public not enter into any transaction in respect of the suit schedule properties, in response to which plaintiffs counsel sent a reply without disclosing the names of his Page 1185 clients. He further submitted that for the said reply another notice was sent on 9.3.2004 for which also there was reply dated 20.3.2004 referring to these correspondence, Sri Batra submitted that, the fact that the learned Counsel representing the plaintiffs did not disclose the names, is clear, that plaintiff No. 1 was taking advantage of the same to file suit on behalf of plaintiffs 2 and 3 who have no right whatsoever under the alleged MOU.

34. He also pointed out from the MOU that it is not a concluded contract, does not confer any right, title or interest on plaintiff No. 1 as the final contract would come into existence only after parties signing the final development agreement as per Clause 22 of the MOU. He also relied on Clause 19 and further submitted that the contract would come in to existence only after defendants acquired the title to the property as such the MOU cannot be deemed as a contract conferring any right on the parties. Nor it will give rise for a future contract. He also submitted that since there is no acquisition of the property on the date of MOU the question of entering into the said MOU does not arise. He also submitted that the letter dated 9th March 2000 is addressed to plaintiff No. 1 and in the capacity as representative of K. Raheja Group and submitted that no money is paid under the MOU.

35. He further submitted that admittedly the suit is not for specific performance. The alleged MOU and the relief sought for is asking for performance of negative agreement which is hit by the provisions of Section 41(e) and 42 of the Specific Relief Act. He further submitted that, even on the alleged MOU no suit is filed for seeking enforcement of the alleged right. Thus the suit as brought is also not tenable in law. He also pointed out from the sketch annexed to the MOU which shows the area of the land as approximate 16 acres whereas the suit is in respect of 40 acres of land.

36. He referred to para 6 of the pliant and submitted that, the suit is not brought by plaintiff No. 1 in his personal capacity but it has been brought on behalf of plaintiffs 2 and 3. He pointed out that

total false submission has been made by the plaintiffs in para 6, inter alia stating that plaintiff No. 1 has entered into MOU for and on behalf of other plaintiffs, when the document itself makes it clear, that plaintiffs 2 and 3 are not parties nor it was entered into on their behalf. By referring to para 6 learned Counsel submitted that, the suit as brought is on the face of it, is not maintainable as plaintiffs are not parties to MOU.

37. The schedule of the properties mentioned in the plaint Survey Nos. 41, 42 and 43 are not part of the schedule properties. He also relied on the another suit filed by plaintiff No. 1 in O.S. 5122/2004 based on another MOU and the orders passed by the trial Court on IA No. 1 rejecting temporary injunction, confirmed by this Court in MFA 3266/2005. He also submitted there is consensus ad idem. He further submitted that if the title is to be approved at a latter stage and nothing has happened in pursuance of the Page 1186 MOU, it cannot be termed as a concluded contract, if the MOU is subject to approval, it is not a concluded contract and there is no question of enforcing the same.

38. He submitted that from the pleading it is clear that plaintiff admits that, the plaintiff's suit is not for specific performance and it is only a suit for declaration that the defendants have no right to alienate, as such negative relief cannot be granted under Sections 41(e) and 42 of the Specific Relief Act and further the pleading makes it clear that the plaintiffs have admitted that the relief sought for cannot be granted and the trial Court has justified in rejecting the suit.

39. He also submitted that, in the light of the denial of the MOU by K. Raheja Group and the MOU produced by the plaintiff being on behalf of K. Raheja Group and the suit being based on the said document, is not maintainable. He further submitted that the suit is for declaration that defendants have no right to alienate the suit schedule properties, in view of the properties having been sold prior to the filing of the suit by the defendants, the suit has become infructuous and no relief could be granted in the suit. In this regard he relied on the following judgments:

1. AIR 1988 Bombay 157-

Taprogge Gesellschaft MBH, v. IAEC India Ltd.,

2. 2003 AIR SCE 174 Saleem Bhai and Ors. v. State of Maharashtra and Ors.

3. I.T.C. Limited v. Debts Recovery Appellate Tribunal and Ors.

4. AIR 1941 Bombay 247, New Mofussil Co. Ltd., and Anr. v. Shankerlal Narayandus Mundade

2. AIR 1955 Calcutta 210 Baijnath v. Kshetrahari Sarkar and Ors.

and submitted that, when contract is entered into by parties who are not a party to the suit, the suit by third party will not give cause of action and further submitted that an application under Order 12 Rule 6 can be filed at any stage of the suit, it is not necessary for the defendants to file written statement and then make a prayer. In this regard he also relied on the orders passed by the trial

Court in O.S. 5122/2004 on 17.2.2005 and confirmed in MFA 3226/2005 dated 1.8.1005 and dismissal of S.L.P thereof.

40. He also strongly relied on the judgment of the Division Bench of this Court reported in 2006 K.L.J. page 23. He submitted that when the contract is subject to approval of a title cannot be treated as concluded contract and when vendors have not become owners, the agreement on their behalf Page 1187 cannot be treated as a contract enforceable. Sri Batra further submitted that in the light of the pleading and the documents produced and in the light of the position of law, the trial Court by appreciating the documents, found that it is a case where the suit is filed by the plaintiffs who are not party to the suit documents have no locus standi to file suit.

41. In the light of the rival contentions the points that arise for consideration are:

> 1) Whether the trial Court justified in dismissing the suit by exercising the discretionary power?
>
> 2) What is the scope of Order 12 Rule 6?
>
> 3) Whether the trial Court has justified in dismissing the suit as not maintainable?

In order to appreciate the rival contentions it may be useful to refer the I.As which are allowed by the trial Court. The trial Court has passed a common order on I.As 2 to 17 I.As 3, 4, 5, 6, 11 and 12 filed by the defendants have been allowed holding that the suit is not maintainable, in this regard the prayer in I.A 3, 4, 6, 11 and 12 is required to be noticed. I.A No. 3 is filed by defendants 1, 2, 4 to 15 under Order 12 Rule 6 read with Section 151 CPC inter alia seeking for dismissal as under:

> That for the reasons stated in the accompanying affidavit, this Court may be pleased to dismiss the suit as being ex-facie infructuous and futile, and also on the basis of the specific, categorical and unambiguous admission of the Plaintiffs

42. The allegations of the defendants in support of their prayer is that, the plaintiffs have admitted that, if the defendants alienate the suit schedule properties the suit will be defeated and become infructuous. In the light of the plaintiffs admission that the suit would become infructuous if the suit schedule property is alienated the suit schedule properties having been sold on 24.4.2004 for consideration of Rs. 25 crores to third party. The suit has become infructuous.

43. IA No. 4 is also filed under Order 12 Rule 6 read with Section 151 CPC in which it is prayed as under:

> This Court may be pleased to dismiss the suit as not maintainable.
>
> The allegations in support of the prayer in the application, is that, plaintiffs are not part of K. Raheja Group, that K. Raheja Group has not assigned or nominated the plaintiffs and the plaintiffs have no case whatsoever, and have not shown any

semblance of right under the MOU. In support of this applications they relied on the notice issued on behalf of defendants dated 17.5.2004 and the reply of K. Raheja Group dated 24.5.2004.

IA No. 5 is filed under Section 34 of the Specific Relief Act read with Order 11 Rules 2 and 3 and Section 151 of CPC inter alia for dismissing the suit as not maintainable. In support of this prayer plaintiffs have sought for negative covenant as per Clause 17 of the MOU. Relying in furtherance negative covenant Page 1188 at Clause 17 of the MOU, such the relief cannot be granted under Section 34 of the Specific Relief Act.

IA No. 6 is again filed under Order 12 Rule 6 for dismissal of the suit as not maintainable inter alia alleging that Clause 17 of the MOU being subject to termination and the negative covenant being limited only to the duration of the said MOU. To enforce negative covenant, the MOU itself is nonest, non binding and is still born and the relief claimed is inconsistent with Clause 22 of the MOU.

IA No. 11 is filed under Section 151 CPC for dismissal of I.As 2 and 8 for interim orders.

IA No. 12 is again fled under Section 151 CPC for dismissal of the suit.

44. Thus from the averments made in I.As 3, 4, 5, 6, 11 and 12 it is clear that the defendants have sought for dismissal of the suit mainly on the ground that plaintiffs are not party to the MOU and they are not entitle to seek relief under negative covenant which is limited in operation, that the suit has become infructuous by virtue of the sale deed executed by the defendants much prior to the suit is filed. In this regard defendants have relied on the averments of the plaint wherein plaintiffs have sought for declaration declaring that defendants have no right to alienate the property except with the plaintiff and for injunction restraining defendants from alienating the property and in support of the said prayer it is alleged that if defendants alienate the property, the suit becomes infructuous and in this regard defendants have produced the sale deed dated 24.4.2004 and the transfer of Khatha of the suit schedule property. Relying on these documents it is alleged that the suit has become infructuous. The other averments are that K. Raheja group has not filed suit and K. Raheja has admitted in its reply dated 24.5.2004 and the suit is filed by the plaintiffs who are not party to the MOU. The suit under Section 34 of the Specific Relief Act is not maintainable.

45. In the light of the rival contentions it is useful to look into the findings of the trial Court. The trial Court mainly relied on the MOU dated 9.3.2000 and has held that, the said MOU is by the 1st plaintiff as representative of K. Raheja Group and K. Raheja Group in its reply dated 24.5.2005 has denied the MOU. By relying on this documents, the trial Court has found that 1st plaintiff has not entered into the MOU with the 1st defendant in his individual capacity and has entered into the same as representative of K. Raheja Group and the suit is not filed by K. Raheja Group or nominees or representative of K. Raheja Group. The trial Court has also held that plaintiffs have no locus standi to file the suit on the basis of MOU dated 9.3.2000 and the suit has also become infructuous as the suit schedule properties have been sold before the suit is filed.

46. The suit can be dismissed on various grounds namely the suit is filed in a wrong court, the plaint could be returned under the provisions of Order 7 Rule 10 subject to order under Order 7 Rule 10A. Under Order 7 Rule 11 plaint can be rejected on the ground, such as it does not disclose Page 1189 the cause of action or is under valued and the plaintiffs have failed to correct the valuation within the time fixed or the suit is insufficient stamp and the plaintiffs have failed to supply the requisite stamp paper within the time fixed by the Court or where suit appears from the statement in the plaintiff to be barred by any law.

47. The suit can be decreed under Order 8 Rule 10 when party fails to present written statement called for by the Court, or under Order 12 Rule 6 i.e., judgment on admissions.

48. The Trial Court has allowed the applications mainly by exercising its discretionary power under Order 12 Rule 6 of CPC. It is useful to refer to the said provision.

Judgment on admissions.-(1) Where admissions of act have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such older or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under Sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced This rule is reproduction of Order 3 Rule 6 of the English Rules as it then existed, which enabled the party at any stage of the suit to move for a judgment on admission which has been made by other party to get rid of the remedy of the suit as to which there is no controversy. Order 12 Rule 6 was inserted in the CPC with the object and reasons as set out in the provision itself, where the claim is admitted the Court gets jurisdiction to render a judgment for plaintiff and pass a decree on the admitted claim. The object of rules is to enable the party to obtain speedy judgment at least to the extent of the relief to which according to the admission of the defendants, plaintiff is entitle where party has made plain admission entitling the other party to succeed. The provision would apply whenever there is clear admission of facts on the face of it and which will be impossible a party making such admission to succeed.

49. Thus it is clear that, the admission under Rule 12 Rule 6 must be plain, unequivocal and clear and positive and it must be complete by itself by which the party making such admission will not succeed in the suit.

50. The existence of MOU dated 9.3.2000 is not in dispute. Plaintiff No. 1 has singed the MOU is also not in dispute. The question is whether plaintiff No. 1 has signed the MOU in his personal capacity or on behalf of K. Raheja Group is a matter which is required to be considered. The documents MOU, no doubt states that, Raja A. Menda, K. Raheja Group and in this regard defendants have relied on the reply given by one Chandru Raheja. The said Chandru Raheja has denied the MOU. Whether the legal notice issued by the defendants and the reply of Chandru Raheja by itself constitute admission on the part of the plaintiff, that the MOU is on Page 1190

behalf of K. Raheja Group and not by plaintiff No. 1 in his personal capacity. It is useful to refer to the averments in the reply given by Chandru Raheja which reads as under:

> I am surprised to receive your letter because neither myself nor any of my group members are aware of the purported M.O.U. referred to in your letter under reference.
>
> This reply only shows that, Chandru Raheja is not a party to the M.O.U. nor he is a signatory to the said document nor he is aware of the MOU. Whether his reply would amounts to admission on the part of the plaintiffs to the effect that the M.O.U. on behalf of K. Raheja Group and the suit is not filed by K. Raheja Group. If the M.O.U. is admitted and if the Chandru Raheja denies the existence of M.O.U. it only shows that K. Raheja Group has not entered into the M.O.U. Then the question arises is, as to whether the said M.O.U. is by plaintiff No. 1 or by the plaintiffs. In the objections statement filed by the plaintiffs to I.A No. 4 at para 7 it is stated as under:
>
> The first plaintiff has entered into the agreement dated 09.03.2000 in his person capacity and in the capacity of a director of the other plaintiffs. K. Raheja Group, is not a legal entity. The first plaintiff herein has entered into the said agreement dated 09.03.2004 on his own behalf and on behalf of the 2nd and 3rd plaintiff companies, of which he is a director.
>
> Plaintiffs have categorically denied that K. Raheja Group referred to in the M.O.U. is not a legal entity, this coupled with the reply given by Chandru Raheja that they are not aware of the existence of the M.O.U. makes it clear that, though a reference is made to K. Raheja Group in the M.O.U. it is not K. Raheja Group as legal entity has entered into the M.O.U. but plaintiff No. 1 has signed the M.O.U. with reference to K. Raheja Group. At this stage reference of K. Raheja Group which is stated to be not a legal entity, it may not be possible to hold that the plaintiffs have admitted that K. Raheja Group has entered in to the M.O.U. and plaintiff No. 1 has acted as a representative.

51. The fact that, plaintiff No. 1 has addressed letters to various authorities and has made reference to plaintiffs 2 and 3 is also evident from the correspondence. Clause 15 of the M.O.U. provides for execution of conveyance in favour of plaintiff No. 1 or in favour of nominees or assignees. In this regard it is useful to refer some correspondence between the parties. Defendant No. 1 on 9th March 2000 has addressed a letter to plaintiff No. 1 and has referred to K. Raheja Group and M.O.U. dated 9.3.2000 is not disputed. He has addressed another letter dated 13.4.2000 to M/s K. Raheja Group. Letter dated 21st December 2000 is by plaintiff No. 1 as director of second plaintiff is addressed to the 2nd defendant. In the said letter also M.O.U. dated 9.3.2000 is referred. Similarly on 7.3.2001 another letter is addressed by plaintiff No. 1 on behalf of plaintiff No. 3 to 2nd defendant. There are correspondence Page 1191 showing plaintiff No. 1 is director of K. Raheja Group and also as a director of M/s Millennia Developers Private Limited. These documents clearly show the existence of M.O.U. between the plaintiff No. 1 as K. Raheja Group and the defendants. Parties have admitted

the M.O.U., sometimes plaintiff No. 1 has addressed himself as director of K. Raheja Group sometime has addressed as director of 2nd plaintiff. The fact that correspondence between the parties was there in connection with the M.O.U. and when the plaintiffs have stated that K. Raheja group is not a legal entity, and when Chandru Raheja in his reply dated 24.5.2004 has not owned the M.O.U. either on his behalf for on behalf of K. Raheja Group, at this stage it cannot be safely be held that, there is clear admission on the part of the plaintiffs more particularly when plaintiff No. 1 is not a party to the said correspondence.

52. In order to invoke the provision of Order 12 Rule 6 it is well established that, the exercise of discretion of Court in passing a decree or judgment on admission, at the first place, such relief cannot be claimed by the plaintiffs as of right. In exercising the discretion, the Court has to satisfy its judicial consensus on such discretion, admission must be clear, unequivocal, unconditional, unambiguous so that it may not be necessary for the Court to wait till the determination of other questions and the defendants making such admission have no right of defence at all and there is no possibility to succeed in the suit and the admissions must be taken as a whole and not in part. Order 12 Rule 6 requires an absolute admission which could workout by itself and it is not proper to make a decree under the said provision, if the admission is not absolute and incapable of being worked out by itself. This Court as well as the Apex Court time and again have held that in order to pass a decree under Order 12 Rule 6 admission must be complete and sufficient to pass partial decree. When there is no clear admission and if the admission is sought to be drawn is based on inference, it cannot be construed as absolute admission in terms of Order 12 Rule 6 and the said provision cannot be invoked.

53. Though many judgments are relied by the learned Senior Counsel for the plaintiff on the question of Order 12 Rule 6 it would not be necessary to refer to each one. However the principle enunciated in all the judgments is that, there has to be absolute, clear unequivocal admission which is complete and sufficient and which works out by itself and there is no possibility of success by a party making such admission.

54. In our view the trail Court was not justified in invoking Order 12 Rule 6, merely on the basis of the reply given by one Chandru Raheja on behalf of K. Raheja Group when the plaintiffs have denied that the K. Raheja is a legal entity, reply of Chandru Raheja is of no assistance, for dismissing the suit at this stage. This matter is required to be decided based on the evidence.

55. Scope of Order 12 Rule 6 is not meant to grant or refuse a decree on the basis of the opinion that may formed by the court without there being a clear and unambiguous admission.

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56. Learned Counsel for the respondents has vehemently contended that there is no concluded contract and in this regard he had referred to the judgment reported in AIR 1941 Bombay 247 referred to supra and submitted that negotiations between the parties for the sale of certain property, some of the terms of sale were to be settled between the parties and the vendor afterwards sent the vendee to his solicitor, for settling other terms, receiving the earnest money and drawing up

a draft agreement and an engrossment on that draft, and the further terms were settled, the earnest money was received by the solicitors and a draft of agreement was prepared, the agreement was engrossed in due course, but before it could be signed by the vendee, the vendor declined to proceed in the matter. Under the said circumstance the Bombay High Court held that the agreement arrived at between the parties at the first interview only contemplated execution of the engrossed draft in solicitors' office and was not a concluded agreement between the parties which could be enforced.

Similarly he relied on the judgment reported in 1995 Calcutta page 210 cited supra which relates to the question as to whether there was such a binding contract or whether the parties were of one mind on all material terms of the contract at the time it is said to have been finalised between them and whether they intended that the matter was closed and concluded between them.

57. Relying on this judgment learned Counsel for the defendant submitted that, where there is a concluded contract or not, it can be decided at the time when they finalised. He submitted that, the M.O.U. is not a contract which is concluded and it cannot be enforced. As noticed earlier, from the terms of the M.O.U. certain terms are agreed to between the parties and final agreement was to be executed at a latter stage. The Privy Council in a decision reported in AIR 1933 Privy Council 29, has held that whether the document or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction, whether the execution of the further contract is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through could be a binding contract, at this stage to dismiss the suit under Order 12 Rule 6 and to hold that the terms of M.O.U. are not concluded contract without the trial would be beyond the scope of Order 12 Rule 6 of C.P.C. as held by the Privy Council that whether it is desired by the parties as to the manner in which the transaction already agreed to will in fact go through or not which is required to be considered on the basis of the evidence and not at the threshold under Order 12 Rule 6. In similar circumstances the Apex Court in the judgment reported in AIR 1968 SC 1028 has observed thus:

> The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not Page 1193 establish the proposition that they cannot be bound by a previous agreement.
>
> The Apex Court following the judgment of the Privy Council has held that, if the party wishes to convey formal agreement does not amount to, that they are not bound by the previous agreement. Whether party entitled to have further documents on the terms agreed or not it is too early to express any view. The trial Court without looking into the scope and ambit of Order 12 Rule 6 has proceeded to dismiss the suit as not maintainable. In fact the order of the trial Court is contrary to the provision of Order 12 Rule 6. There is no scope for dismissal of the suit as not maintainable. Order 12 Rule 6 meant for a decree of a suit where defendants make admission. Invoking of provisions of Order 12 Rule 6 by the trial Court is totally misconceived.

58. In regard to Section 41(e) and Section 42 of the Specific Relief Act is concerned, it is not in dispute that, in this case, plaintiffs have filed application in IA No. 9 under Order 6 Rule 17 wherein plaintiffs have sought for amendment of plaint for incorporation of various pleadings including prayer for specific performance of the agreement. Plaintiffs have also filed an application in IA No. 10 under Order 1 Rule 10(2) inter alia to implead M/s Cessna Garden Developers Pvt. Ltd., as party to the suit. The trial Court nowhere has discussed these two applications, however it rejects the said applications and has only noticed the prayer made by the plaintiffs for declaration and the sale deed executed by defendants in favour of Cessna Garden Developers Pvt. Ltd., on 24.4.2004. If the relief sought for in I.As 9 and 10 is to be granted, the suit will not become infructuous, M.O.U. is dated 9.3.2004, and the sale deed is dated 24.4.2004, admittedly sale is after the said M.O.U. In our opinion, dismissal of the suit as having be come infructuous is not justified. If those prayers are allowed the question as to whether the prayers sought for can be granted or not is a matter depends on the evidence. Further no reasons are given by the trial Court to reject I.A Nos. 9 and 10. We find from the order passed by the trial court that, the trial Court was in great hurry to hold that the suit is not maintainable, that too without appreciating the scope of Order 12 Rule 6. We do not even understand as to how the trial Court could give a finding in exercise of its power under Order 12 Rule 6, that the plaintiffs have no locus standi or the suit is not maintainable, that is not the scope of Order 12 Rule 6 of C.P.C.

59. Learned Counsel for the defendants has relied on various judgment namely AIR 1988 Bombay 157 cited supra particularly para 30. It may be necessary to notice that, in the said case plaintiff was not a party to the contract and he cannot maintain a suit. In this case such question does not arise. In these circumstances the said decision cannot be made applicable to the facts and circumstances of this case. He has also relied on another decision reported in 2003 AIR SCR 179. This decision relates to seeking dismissal of the suit under Order 7 Rule 11 at any stage and there is no requirement of filing of a written statement, this decision may not be Page 1194 relevant for the purpose of this case, as it is not the case of the plaintiffs. The another decision referred to by learned Counsel for the defendants is the judgment reported AIR 1988 SC 634 and had referred to para 27, wherein the Supreme Court has held that mere repetition of words of Order 7 Rule 11 does not prima facie justifiable.

60. Learned Counsel for the defendants very strongly relied on the decision of this Court reported in 2006 Vol. 6 KLJ 23 in the matter of Salarpuria Properties and Builders Private Limited, Kolkata v. M.S. Ramaiah Developers and Builders (Private) Limited, Bangalore wherein this Court has observed that, on the date of agreement, it is not certain as to which company in the group, would he purchaser, no consensus as to who will be the purchaser of land, and held that the agreement cannot be regarded as concluded contract. Under the facts and circumstances of the said case, it is found that one Salarpuria group consists of 8-10 companies and on the date of agreements parties did not arrive at a consensus who will be the purchaser of the land, by referring to Section 16 of the Special Relief Act, this Court observed that, contract cannot be enforced in favour of a person, as the agreement cannot be regarded as concluded contract, as there was no certainty about the purchaser. Admittedly the Division of this Court decided the matter on the basis of the judgment and decree of the trial Court which was based on evidence.

61. No doubt, whether there is certainty in the contract or not is a matter which is required to gone into by the trial Court. At this stage while deciding applications, the trial Judge to go into the question to find out whether there is a concluded contract or not, whether parties entitled to have a further contract in the matter amounts to concluding the issue without trial, all these matters which could be established only by regular trial and not at the stage of considering the applications. As such it is not correct on the part of the trial Court to give a finding, whether the M.O.U. is concluded contract or not, whether it is enforceable or not, it is sufficient to hold that it does not become admission for dismissal of the suit, or suit could be dismissed on the basis of the allegations made in other application. The approach of trial court in dismissing the suit is totally misconceived.

62. Learned Counsel for defendants has also pointed out another decision of the same Bench and referring to para 40, wherein this Court has observed that even in case of valid agreement, plaintiff is required to establish that he is always willing and ready to perform his part of contract and to consider the conduct of the plaintiff, we cannot apply the said decision to the facts and circumstances of the present case, as we have indicated that, it is not a stage where we can go into the said question of readiness and willingness even before the trial. The decision reported in 2006 Vol 5 KLJ 510 in the matter of E. Jayaram and Anr. v. Lakshmi alias Bhagyalakshmi and Anr. the learned Single Judge of this Page 1195 Court has held that when specific performance is not available granting of injunction does not arise. Learned Counsel for the defendants has also relied on another decision reported in the matter of Ganesh Shet and Ors. v. Dr. C.S.G.K. Setty and Ors. referring to Head Note (C) submitted that, the Supreme Court has declined to give permission to the plaintiff to amend the plaint to plead that there was a concluded contract. As observed by us earlier, dismissal of suit based on evidence and dismissal of suit in exercise of the discretion under Order 12 Rule 6 are two different things, if on evidence if the Court is to give finding, certainly the judgment referred to by the learned Counsel for the defendants can be made use of, but at this stage giving finding on disputed question of facts, is not permissible. Though many other judgments are referred to by the learned Counsels, in our view most of them are not relevant.

In the light of the above discussion, this appeal is allowed. The order dated 15th March 2006 in O.S. No. 3132/2004 on the file of the XXIV Addl.City Civil Judge, Bangalore (CCH-6) passed on I.A. Nos. 2 to 17 is hereby set aside. Consequently, I.A. Nos. 2 to 8 and 11 to 17 stand rejected. The trial Court is directed to reconsider I.A. Nos. 9 and 10 filed by the plaintiffs for amendment of the plaint and also for impleading of the proposed defendant on merits. However, no order as to the costs.