

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

% *Judgment delivered on: July 01, 2014*

+ **I.A. No.478/2011, I.A. No.6654/2011, I.A. No.6657/2011,
I.A. No.20809/2011, I.A. No.274/2012, I.A. No.15011/2010,
I.A. No.15012/2010 and CS(OS) 2277/2010**

SICPA INDIA PRIVATE LTD Plaintiff
Through Mr.C.Mukund, Adv. with Mr.Ashok
Kumar Jain, Adv.

versus

KAPIL KUMAR & ORS Defendants
Through Mr.Sandeep Sethi, Sr. Adv. with
Ms.Lakshmi Gurung, Adv. and
Mr.Sujeet Kumar Mishra, Adv. for
D-1 to D-3.
Mr.Maninder Singh, Sr. Adv. with
Mr.Vikas Arora, Mr.Manish,
Mr.Mohit Taneja, Mr.Varun and
Mr.Arpit Maheshwari, Adv. for D-
6.
Mr.T.K.Ganju, Sr.Adv. with
Mr.Salil Seth and Mr.Rajarshi
Bhuyan, Adv. for proposed D-7.
Mr.Arav Kapoor, Adv. for ICICI.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. By this order, I propose to decide the following application filed by the parties to the suit. The details of the same are mentioned below :

Applications filed by plaintiff :

- i. I.A. No.15011/2010 (Order XXXIX Rule 1 & 2 r/w S 151 CPC)

- ii. I.A. No.15012/2010 (Order II Rule 2 r/w S 151 CPC)
- iii. I.A. No.478/2011 (Order I Rule 10(2) CPC)
- iv. I.A. No.274/2012 (Order VI Rule 17 r/w S 151 CPC)

Applications filed by D-1 to D-3 :

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

2. The plaintiff on 2nd November, 2010 filed a suit for declaration and permanent injunction against the six defendants namely Mr.Kapil Kumar, Mrs.Ritu Kumar, M/s. Brushman (India) Ltd., ICICI Bank Ltd., DLF Ltd. and M/s. Genesis Finance Company Ltd. The reliefs claimed by the plaintiff in the suit are :

- (a) A decree of declaration is claimed in respect of the property in question claiming a second charge of the plaintiff and further that defendant Nos.4, 5 and 6 are bound to take note of the said second charge in their records.
- (b) Mandatory injunction directing defendant Nos.4, 5 and 6 to record in their books of account, the name of plaintiff as the second charge holder.
- (c) A decree of permanent injunction seeking restraint against the defendant Nos.1 and 2 from selling, transferring, conveying and/or creating third party interest in respect of the property in question.

3. Brief facts of the present case as per the plaint are that the plaintiff lent and advanced to defendant No. 3, i.e. M/s Brushman (India) Limited through its Managing Director, defendant No.1, a sum of Rs.5,00,00,000/- by way of a Loan Agreement dated 27th August,

2008. After expiry of the term of repayment, the defendant No.3 requested plaintiff to roll over the loan for a further period of three months in view of the fact that it was not in a position to repay the loan amount. Accordingly, a fresh loan agreement dated 27th November, 2008 was entered into. Again on expiry of three months, the defendant No. 3 was not in a position to re-pay, and so the loan was re-rolled for a further period of 124 days commencing from 27th February, 2009 with additional security, inter alia, by way of second charge over two suit properties situated at D-6/2, Vasant Vihar, New Delhi and another at Penthouse No. 1917-A (New No. 1923-A), DLF, Magnolias, Gurgaon. Defendants No.1 and 2 alongwith Mrs. Raj Rani executed letter of guarantees all dated 27th February, 2009 in favour of the plaintiff. The first charge of the suit properties was with ICICI Bank i.e. defendant No.4 in the present suit.

4. On the same day, the defendants No.1 and 2 also executed an agreement to sell dated 27th February, 2009 in respect of ground floor of the Vasant Vihar property in favour of the plaintiff and also executed a General Power of Attorney dated 27th February 2009 in favour of the plaintiff in respect of both the suit properties.

5. It is alleged in the plaint that defendants No. 1 and 2 took further loan from defendant No.6 against the suit properties, which they used to clear the dues of ICICI bank i.e. defendant No.4. Defendant No.6 is understood to have become the first charge holder of the aforesaid two suit properties. On expiry of the said 124 days, defendant No.3 was unable to repay debts. Various reminders were given to repay the loan amount together with accrued interest, however, no steps were taken to clear the dues of the plaintiff.

6. Plaintiff called up the depository participants of the company, namely Abhipra Capital to transfer shares of 10,00,000 of defendant No.1 and 8,75,000 of Mrs. Raj Rani in favour of the plaintiff. Plaintiff thereafter sold the shares pledged with it. 18,74,000 shares were sold upto 17th May 2010 for a sum of Rs.1,69,95,042/- and 1,000 equity shares were held by the plaintiff. Accordingly, as on 30th September, 2010, a sum of Rs.5,56,55,973/- remained due and payable by defendant No.1 to 3 to the plaintiff.

7. On 4th March, 2010, the plaintiff received a letter dated 23rd February, 2010 whereby the guarantors, defendants No.1 and 2 informed the plaintiff that they have got the buyer for Vasant Vihar property and it was suggested to the plaintiff that out of the sale proceeds, amount would be paid to ICICI Bank and M/s Genesis Finance Co. Ltd. (defendant No.6), respectively against loans taken for the Vasant Vihar property. A total of Rs.5 lacs would be re-paid to the plaintiff including the balance of Rs.2 lacs from the sale proceeds after repayment to ICICI Bank and M/s Genesis Finance Co. Ltd.

8. It is alleged in the plaint that the plaintiff did not give his consent to sell the suit properties and continued to demand its debt from defendants No. 1 to 3. Plaintiff by letters dated 9th March, 2010 and 6th April, 2010 called upon the defendants No.1 and 2 to produce relevant documents in respect of the said sale, if any. Thereafter, the plaintiff tried to contact the defendants No.1 to 3 but the said defendants neither attended the calls of the plaintiff nor met the plaintiff's representative. Plaintiff by letter dated 10th June 2010 conveyed to the defendants No.1 and 2 that the plaintiff be informed about the status of ownership of the suit properties, failing which

public notice would be published in the newspaper intimating the general public about the second charge over the suit properties created in favour of the plaintiff. Thereafter, plaintiff vide letter dated 6th July 2010 reiterated the statements made in the letter dated 10th June 2010, however, inspite of receipt of the said letters, defendants did not disclose the status of the suit properties.

9. Accordingly on 23rd July, 2010 a public notice was published in Hindustan Times in English and in Hindustan in Hindi. After the said publication, plaintiff received telephone calls from few persons intimating that they were negotiating for purchase of the suit properties from defendants No.1 and 2 and they wanted to verify the status of the properties. In view of the malafides of the said defendants, the plaintiff filed the present suit for injunction restraining the defendants No.1 and 2 from selling the suit properties in the market and from creating any third party interest thereupon.

10. The defendant No.4 is impleaded by the plaintiff for the reason that the suit properties are mortgaged as first charge. The defendant No.6 was added as a party, as the plaintiff came to know that defendants No.1 and 2 have taken loan from defendant No.6 and cleared the dues of defendant No.4. Defendant No.5, DLF Ltd., according to plaintiff, is also a necessary party as the defendants No.1 and 2 have purchased the property i.e. Penthouse No.1917A (New number 1923A) Magnolias, Gurgaon and that some amount is still due and payable by the defendants No.1 and 2 to the defendant No.5. The plaintiff approached the defendant No.5 to register the second charge of the plaintiff who refused to do so.

11. The suit was filed on 2nd November, 2010. The same was listed on 10th November, 2010. Summons and notice were issued to the defendants for 16th November, 2010. No interim order was passed. It was recorded in the order dated 16th November, 2010 that notice could not be issued. Fresh notices were issued for 9th December, 2010. On that date all defendants through their counsel appeared before the court. Defendants No.1 to 3 informed the court that in order to settle the accounts of both the defendants No.4 and 6, both the suit properties have been sold. The statement was also made by defendant No.6 that it has further sold the Vasant Vihar property to Mr.K.L. Chugh on 7th December, 2010 as he has to generate funds with a view to liquidate the loans of defendant No.1 to 3.

12. The plaintiff states that after filing of the suit, subsequent events and facts, which were not in the knowledge of the plaintiff, came to be in the knowledge of the plaintiff at the behest of the defendants, therefore, the plaintiff intends to place on record such subsequent facts and documents and seeks necessary additional reliefs by amending the plaint and to implead Mr.K.L. Chugh as defendant No.7 and seeks additional reliefs against him as the subsequent purchaser becomes a necessary party to be impleaded in the present suit. The plaintiff also seeks a relief in the proposed amended plaint that sale deed dated 7th December, 2010 be declared null and void and that the same is unenforceable as per averments made in the proposed plaint to this aspect. Though through court process the defendants were not served, but on the date of execution of sale-deed, they were aware about the pendency of suit in view of information given by the plaintiff by issuance of letter.

13. It is the case of the plaintiff that each relief being sought for by the plaintiff in the instant suit is based on defendants' breach of its contractual obligations under the three loan agreements dated 27th August 2008, 27th November, 2008 and 27th February, 2009, concerning recovery of money, as also agreement to sell dated 27th February, 2009, relating to sale of ground floor of the Vasant Vihar Property executed by defendant Nos.1 and 2 in favour of the plaintiff.

14. It is alleged in the plaint that the property at Penthouse No.1917-A, (New No.1923-A), DLF, Magnolias, Gurgaon is claimed to have been purchased by defendant No.6 before filing the suit as alleged in the written statements. Thus, the plaintiff is entitled to seek relief of recovery of money under the loan agreements as also relief of specific performance. The same was deferred by reserving liberty to pray for such reliefs by filing of an application under Order 2 Rule 2 CPC, being I.A.No.15012/2010, which was filed along with the suit reserving liberty to seek other reliefs including the relief of specific performance.

In the application, being I.A. No.478/2011, the plaintiff seeks impleadment of Mr.K.L. Chugh, subsequent purchaser of property at Vasant Vihar, vide sale deed dated 7th December, 2010 (proposed defendant No.7). While I.A. No.274/2012 is the application for amendment of the suit under Order 6 Rule 17 CPC which is also filed by the plaintiff at subsequent stage.

15. As per record only defendant No.6 has filed the written statement who has raised various preliminary submissions. The averments made in the written statement are totally opposite to the statement made in the plaint. The defendant No.6 has also filed the

original documents in support of its case. It is stated in the written statement that the suit of the plaintiff is totally misconceived, false, frivolous and not maintainable. The extract of averments made in the preliminary submissions is mentioned below : -

i) That Defendants 1 & 2 approached the answering defendant for availing loan facility in September 2006. After due diligence done by the answering defendant and negotiations, the answering defendant lent Rs 2,50,00,000/- (Two Crores Fifty Lacs only) to the Defendants No. 1 & 2 on mutually agreed terms and conditions and against the equitable mortgage of Pent House No. 1917-A (Now re-numbered as 1923-A) DLF Magnolias, Gurgaon vide loan agreement dated 26th September, 2006. The lien of answering defendant was also marked with DLF.

ii) That vide letter dated 1st September, 2007, the Defendant No.1 & 2 requested the answering defendant to release the property from lien as they were getting loan on better interest rates from ICICI Bank which was acceded to and released the original Flat Buyer agreement and also got its lien removed from DLF in favour of ICICI Bank however obtained pari-pasu charge from the borrower over the DLF property.

iii) That on 4th July, 2008 the Defendants No. 1 & 2 sought another loan from the answering defendant. After conducting due-diligence and after negotiations, the answering defendant lent Rs 83,00,000/- (Rupees Eighty Three Lacs Only) to the defendants No. 1 & 2 on mutually agreed terms and conditions and against the equitable mortgage of Basement of property No. D-6/2 Vasant Vihar, New Delhi. A separate loan agreement dated 4.7.08 was executed.

iv) The loan of the Defendants No. 1 & 2 was moving smoothly and against the DLF property on Rs 47.50 Lacs approx remained due. The defendant No.1 & 2 came to

get top up of the loan. Considering the past performance, the answering defendants advanced another sum of 172.25 Lacs thereby made the total loan amount against DLF property to Rs 2. 20 Crores. A supplementary loan agreement dated 1.10.08 was also executed in continuation of original loan agreement dated 26th September, 2006.

v) Thereafter the Defendants No. 1 & 2 became irregular in their repayments to the loan facility advanced by the defendant No.6 and finally in February 2010 approached the defendant No.6 disclosing that they are unable to service the ICICI loan facility and they are apprehending action by ICICI Bank against the DLF property for recovery of the loan amount. They disclosed that dues of DLF are also mounting and DLF is also threatening to cancel the allotment.

It was further informed that they have already taken loan upon the Ground Floor of D-6/2 Vasant Vihar Property from ICICI Bank and due to defaults, ICICI Bank is also likely to take action against the property for the recovery. The Defendants No. 1 & 2 again sought help of the defendant No.6.

vi) On inquiry by the defendant it came to light that the DLF has already cancelled the allotment of the Pent House due to non-payment of the installments totaling to about Rs 80 Lacs. Further the ICICI loan amount against the DLF property was about Rs 5.85 Crores which was also heading towards default. Further the dues payable to the Defendant for the loan taken against DLF property by the Defendants No. 1 & 2 were also to the tune of Rs 2.80 Crores.

That it was also confirmed that the loan liability of ICICI Bank in February 2010 against the Vasant Vihar property was Rs 5.40 Crores and the dues payable to the Defendant for the loan taken against Vasant Vihar

property by the Defendants No. 1 & 2 were also to the tune of Rs 1.33 Crores.

vii) It is contended that considering all the situation and calculating the odds and risk, the answering defendant agreed to help Defendants No.1 & 2 and decided to buy the Ground Floor and Basement of property D-6/2 Vasant Vihar, New Delhi for an agreed total sum of Rs 6.75 Crores. For the purchase of the basement and Ground floor the answering defendant paid Rs 6.75 Crores in following manner:

i) Rs 2 Lacs cash to the Defendants No. 1 & 2 against receipt dated 15th February, 2010.

ii) Rs 1.33 Crores towards repayment of dues of the answering defendant against the loan agreement dated 4th July, 2008.

iii) Taken over the loan liability of ICICI Bank against the Ground Floor of the Vasant Vihar property which was at Rs 5.40 Crores as on 15th February, 2010.

viii) Second Supplementary Loan agreement dated 24th February, 2010 in continuation of loan agreement dated 26th September, 2006 and supplementary loan agreement dated 1.10.08, the defendant paid Rs 80 Lacs to DLF and revived the allotment of the pent house. Further cleared the overdue installments of ICICI and also started paying the dues of ICICI Bank on behalf of the Defendants No. 1 & 2 to regularize the loan with a view to protect the property. It was agreed in the Second Supplementary Loan agreement dated 24th February, 2010 that the defendant shall be at liberty to dispose off the property at DLF till 31st May, 2010 and clear the upto date dues of defendant alongwith interest. Failing which, the defendant agreed to purchase the DLF property on mutually agreed price.

ix) That till 31st May, 2010 the defendant No.6 carried on paying the dues of ICICI Bank against the DLF property and also paid dues of DLF. Further to secure its interest, defendant No. 1 & 2 executed registered power of attorney dated 07th April, 2010 in favour of representative of Defendant No.6.

x) As the defendants No.1 & 2 could not sell the DLF property till 31st May 2010 as such finding no way out, the defendants No.1 & 2 offered to sell their DLF pent house property to the defendant. Finally, after negotiations the defendant finally agreed to purchase the DLF property on negotiated agreed price of Rs. 11, 51,00,000/- (Rupees Eleven Crores Fifty One Lacs Only). Towards the payment of the sale consideration, for the purchase of the DLF property the defendant paid Rs. 11.51 Crores in following manner:-

i) Rs 1 Lac cash to the Defendants No. 1 & 2 against receipt dated 15th July 2010.

ii) Rs 5.00 Crores towards repayment of dues of the answering defendant against the loan agreements dated 26th September, 2006, 1st October, 2008 and 24th February, 2010.

iii) Taken over the loan liability of ICICI Bank against the Ground Floor of the Vasant Vihar property which was at Rs 5.65 Crores as on 1st June,2010.

iv) Future dues payable to DLF were assessed at Rs. 85 Lacs.

xi) That for the sale-purchase of property at Vasant Vihar, agreement to sell dated 15th February, 2010 and Power of Attorney dated 15th February, 2010 were executed by defendants No. 1 & 2 in favour of the defendant No.6. Similarly for the sale-purchase of property at DLF agreement to sale dated 1st June 2010 and Memorandum of Understanding dated 1st June 2010

were executed by defendants No 1 & 2 in favour of the answering defendant.

After purchasing the two properties, on 23.08.2010, the defendant fully and finally paid Rs.10, 84,53,097 (Rupees Ten Crores Eighty Four Lacs Fifty Three Thousand and Ninety-Seven only) to ICICI Bank obtained NOCs and got the original title deeds of Vasant Vihar and DLF property released. Further to secure its entitlement over the property, got its lien marked in records of DLF, in terms of requirements of DLF, replacing the name of ICICI.

xii) It is stated in the written statement that although the answering defendant has purchased the properties and had paid full and final consideration, but to minimize its cost, the sale deeds were not executed or got registered. Rather it was agreed that as and when the defendant No.6 desires, the Defendants No. 1 & 2 shall execute all the necessary documents either in favor of the answering defendant or in favour of its nominee at the sole discretion of the answering defendant.

Defendant No.6 located a buyer to sell the Ground floor and Basement of property D-6/2 Vasant Vihar, New Delhi and after negotiations, the deal was finalized on 11th October, 2010 and cheque was received from the prospective buyer however the formal agreement to sell for Rs 6. 75 Crores (Rupees Six Crores Seventy Five Lacs) was got executed on 21st October, 2010 by the defendant, from defendant No.1 & 2 directly in favour of Mr. K. L. Chugh S/o Mr. R. L. Chugh, R/o N-79, Panchsheel Park, New Delhi. A representative of the defendant signed the document as witness and confirming party of the agreement to sell.

xiii) That subsequently in terms of the agreement to sell dated 21st October, 2010, Sale Deed dated 7th December, 2010 was also got executed by the defendant from the defendants No. 1 & 2 directly in favour of Mr K.

L. Chugh S/o Mr R. L. Chugh, R/o N-79, Panchsheel Park, New Delhi regarding basement and ground floor of property bearing No. D-6/2, Vasant Vihar, New Delhi and a representative of answering defendant signed the document as witness and confirming party and all the payments received were simultaneously credited in the account of Defendant.

16. It was also mentioned in the written statement that the defendant No.6 was not at all aware about any loan or second charge upon the properties at Vasant Vihar or Gurgaon as alleged by the plaintiff. However a letter dated 11th October, 2010 was received by the said defendant issued by the plaintiff wherein a request was made by the plaintiff to the said defendant to provide the details of loan given to defendants No.2 to 3 by the said defendant and also to record the second charge of plaintiff upon the properties. The letter was duly replied by the defendant No.6 vide letter dated 27th October, 2010 and it was informed to the plaintiff that the two properties have been purchased by the defendant No.6 against due consideration. In view thereof, second charge of the plaintiff cannot be recorded against the two properties.

17. It is also alleged in the written statement that from the documents filed and relied upon by the plaintiff it is clear that vide letter dated 23rd February, 2010, the defendant No.1 to 3 have informed that the property Basement and Ground Floor of D-6/2, Vasant Vihar has already been sold for a sum of Rs 6.75 Crores and they are already looking for a buyer for Gurgaon property, who also attached therewith the cheque of Rs 5 Lacs as the surplus from the sale of Vasant Vihar property after clearing dues of defendant No. 4

and 6. Pursuant thereto the plaintiff wrote a letter to defendant No.1 to 3 dated 9th March, 2010 with the subject title "permission to sell". There was no protest or objection or condition indicated or mentioned by the plaintiff upon the defendants No.1 to 3 thereby showing their displeasure/non-permission to the defendants 1 to 3 about sale of the properties. Rather only information has been sought about the documentations regarding the sale.

18. By letter dated 13th March, 2010 the plaintiff has informed the defendants No.1 that the value of shares i.e. the security against which the loan of Rs.5 crores was extended is dropping and requested the defendant No.1 either to clear the dues otherwise the shares would be sold. From this letter it is absolutely clear that the suit properties were never pledged as security nor were they ever put under second charge with plaintiff and in fact all the documents regarding second charge upon the two properties and agreement to sell regarding the Vasant Vihar property are an afterthought and created ante dated to raise false claim upon the two properties in connivance with the defendant No.1 to 3 and the plaintiff. It is stated that the apprehension of the defendant No.6 further got strength from the letter dated 15th June, 2010 written by defendant No.5 DLF whereby it had refused to take cognizance of any back dated letter.

19. It is alleged that the plaintiff was fully aware about all the transactions but until the entire money is paid and cleared by the defendant No.6 by investing about Rs.18,26,00,000/- (Rupees Eighteen Crores and Twenty Six Lacs only) no letter or objection was raised by plaintiff before any authority or department or even with the defendant No.6. The property at Vasant Vihar was purchased on 15th

February, 2010 and the Gurgaon property was purchased on 1st June, 2010. The plaintiff is now seeking second charge alone without seeking any recovery from the borrowers. It is a collusive suit between the plaintiff and defendant No.1 to 3 which has been filed only to create problems with ulterior motives despite knowing fully well that no relief regarding recording of second charge can be made against an individual. As the defendants No. 1 & 2 are no more the owners of the suit property, the question of recording any charge upon the property does not arise.

20. After filing the suit, various pending applications have been filed by the parties, details of which are mentioned in para 1 of my order. The averments made in these applications and replies filed by the non-applicants are referred as under:

i) **I.A. No.478/2011 (Order 1 Rule 10(2) read with Section 151 CPC)**

This application has been filed by the plaintiff for addition of party i.e. Mr.K.L. Chugh. The main submissions made in the application are that when the matter came up for hearing, after the summons were served and notices were issued, on 9th December, 2010, the counsel for the defendants No. 1, 2 and 3 gave a statement that they have sold the property to defendant No. 6. The counsel for defendant No.6 stated that the Vasant Vihar property has been sold by them on 7th December 2010 to one Mr. Chugh. On the Court's direction, the counsel for the defendant No.6 vide email dated 21st December, 2010, conveyed to the counsel of the plaintiff the details of the buyer and the sale executed by defendant No.6 in favour of the buyer, Mr. Chugh. The details are as under:

Name of the purchaser: K L Chugh
Address : N- 79, Panchsheel Park, New Delhi-
110017
Date of Registry : 07/12/2010
Sale Consideration : Rs.6,75,00,000/- (Rupees Six Crores
Seventy Five Lacs Only)

It is stated in the application that the sale of the property by defendants No.1, 2 and 3 to defendant No.6 and by defendant No.6 to Mr. Chugh during the pendency of the suit has been objected to by the plaintiff and it is considered necessary that Mr.Chugh is made a party in the matter. It has been stated that Mr. Chugh is a necessary and proper party because the dispute involved in the matter cannot be finally adjudicated in his absence.

In his reply to the said application, Mr. Chugh stated that he met defendant Nos. 1 and 2 through a property agent from whom he bonafidely purchased the property being the Ground Floor and Basement of D-6/2, Vasant Vihar, New Delhi on 7th December, 2010 for a consideration of Rs.6.75 Crores pursuant to an Agreement to Sell dated 21st October 2010 and he is in the possession of the same.

It has been stated that the defendants No.1 and 2 had stated that they had cleared title without any encumbrance, charge or lien. In fact the original title deeds were in possession of defendants No.1 and 2, which were shown to him at the time of entering into the agreement to sell. He purchased the property from defendants No.1 and 2 and not from any other party as claimed by the plaintiff in his application.

It has been stated that as claimed by the plaintiff, had the property been mortgaged to the plaintiff, the original title deeds of the same ought to have been in the plaintiff's possession. The property has been bought by him in good faith and for consideration after due diligence.

ii) I.A. No. 6654/2011 (u/O 1 R. 10 r/w S.151 CPC)

The above application has been filed by defendants No.1 to 3 for deletion of names of defendants No.4 to 6 as being neither proper nor necessary parties to the suit. It has been stated that various loan agreements have been executed between the plaintiff and defendants No. 1 to 3, however, defendants No. 4 to 6 are not parties to the said agreements and have no privity of contract with the plaintiff. They are referred to as proforma parties in the plaint itself. Defendants No. 4 to 6 have wrongly and falsely been made parties only with a view to put undue pressure upon defendants No.1 to 3. Therefore, the names of defendants No. 4 to 6 be deleted from the array of parties as being neither proper nor necessary parties for proper adjudication of the disputes.

In the reply to the said application, the plaintiff stated that the presence of defendants No.4 to 6 has become necessary and now the plaintiff is seeking reliefs against the defendants No.4 to 6 also, in view of subsequent facts brought on record.

iii) I.A. No. 6657/2011 (u/S. 8 of Arbitration and Conciliation Act, 1996)

The above mentioned application is also filed by defendants No.1 to 3 for reference of the disputes in the present suit to arbitration. It is stated that various loan agreements were executed

by the plaintiff and defendants No. 1, 2 and 3, wherein there is a clause providing for arbitration. Since the present suit is seeking enforcement of an obligation as enumerated in the loan agreement which clearly and specifically provides for arbitration in case of any dispute arising out of the agreement, the present suit be dismissed and the parties be relegated to arbitration in terms of contractual provisions.

In the reply to the said application, the plaintiff stated that the arbitration agreement is between the plaintiff and defendant No.3. However, the subject-matter of the present suit cannot be referred to arbitration because the parties are different and the reliefs are being sought against third parties who are not parties to the Arbitration Agreement.

iv) I.A. No. 20809/2011 (u/O 7 R. 11 r/w S.151 CPC)

Yet another application filed by defendants No.1 to 3 for rejection of the present suit. It is stated by the defendants No.1 to 3 that since the document relied upon by the plaintiff (loan agreement dated 27th February, 2009) for claiming second charge on the immovable properties is unregistered and the same is inadmissible in evidence. The suit by the plaintiff based on the unregistered document involving interests in immovable property is barred by law and is therefore liable to be rejected. It is stated that if the suit is for the alleged cause of action of non-payment of dues, then the remedy for the same is a suit for recovery, which the plaintiff has not claimed. The plaintiff is rather seeking to enforce recovery by means of injunction. Such a cause of action is not permissible under the law. It is also stated that for recovery of dues, the plaintiff is required to pay

ad valorem court fee. The plaintiff is seeking to avoid the payment of court fee by not filing a suit for recovery.

In reply filed by the plaintiff to the said application, the contentions of the defendants have been denied.

v) I.A. No. 274/2012 (Order 6 Rule 17 r/w S.151 CPC)

This is an application filed by the plaintiff for amendment of the plaint to bring on record the subsequent developments in the matter.

It is the case of the plaintiff that certain cause of action arose post issuance of summons in the matter and certain information has not been provided by the defendants despite direction by this Court. Defendants' attempts were not to give full information to the plaintiff, and suppressing complete information in the process delaying entire progress and trial of the suit.

In view of the subsequent developments, the plaintiff has filed the instant application to amend the plaint in terms of para 17 of the application.

In the reply to the said application, the defendants No. 1 to 3 have stated that the proposed amendments are not legally maintainable and sustainable in the eyes of law. If the proposed amendments are allowed, it will change the whole character and nature of the existing suit which is for "permanent injunction" into a suit for "specific performance and/or recovery" and thus constitutionally and fundamentally changing the nature and character of the suit".

It is stated that plaintiff has filed the application only after the defendants filed an application under Order 7 Rule 11 CPC seeking rejection of the plaint on various grounds. It is only an attempt to

overcome the objection raised by the defendants and to take away the legal rights of the defendants.

In the reply filed by defendant No.6, it has been stated that in case the plaintiff is permitted to amend his suit, it would change the entire colour of the suit. The plaintiff is trying to introduce a new case which was not his case in the original plaint by converting his suit of injunction into a suit for declaration and specific performance and also for a recovery.

The other two applications have been filed by the plaintiff, one I.A. No.15012/2010, under Order II Rule 2 CPC, the details of which are already mentioned and second I.A. No.15011/2010 filed along with plaint is for stay, wherein an ex-parte order was not passed, however, after service of the defendants, status quo order was passed on 9th December, 2010.

As some of the facts in the main suit and pending applications are common, the same are being considered together.

21. Mr.C.Mukund, the learned counsel appearing on behalf of plaintiff, has made various submissions which are outlined as under:

- a) That the correct position is that when the suit and interim application were first time listed before court on 10th November, 2010, the summons and notice were issued for 16th November, 2010. But the same were not issued and defendants could not be served, however, the complete sets of paper-book were privately sent to all the defendants by speed posts which were served. An affidavit of service was filed on 12th November, 2010.

- b) That the matter was listed on 16th November, 2010 and the Court issued notice and fixed 9th December, 2010 for hearing. The plaintiff collected the notices from the Court, the Registry and caused the same to be served upon the defendants. The plaintiff filed an affidavit of service dated 6th December, 2010 by giving details of service. According to the plaintiffs, prior to execution and registration of sale deed dated 7th December, 2010 by the defendants No.1 and 2 in favour of Mr.K.L. Chugh, all the defendants were duly served with the notices issued by this Court and inspite of knowing about the plaintiff case and pendency of suit, the defendants No.1, 2, 3 and 6 caused the sale deed to be executed and registered in favour of Sh.K.L. Chugh, of property bearing No.7, Panchsheel Park, New Delhi-110017.
- c) That even before filing of the suit, the plaintiff caused paper publications to be published in the newspaper both in English and Hindi version of Hindustan Times, English and Hindustan in Hindi informing the general public at large that the said two properties are mortgaged properties in favour of the plaintiff and in view of the default committed by the defendants No.1, 2 and 4, not to deal with or purchase, or enter into any arrangement in respect of the said properties in any manner. The copies of the paper publications have been filed along with the list of documents. Mr.Chugh has purchased the property, which is the subject matter, from defendants No.1 and 2 as he has admitted in his criminal complaint filed by him. The defendant No.6 was never the

owner of the property. All the papers allegedly filed by the defendant No.6 in support of its submissions are not genuine and cannot be relied upon. The stand taken by the defendant No.6 is contrary to the statement made by Mr.Chugh.

- d) That the new purchaser of the property namely K.L. Chugh is therefore a necessary and proper in the present proceedings. The plaintiff states that presence of Mr.K.L. Chugh, the new purchaser of the suit property before this Court is necessary in order to enable this Court to effectively and completely adjudicate upon and settle all the questions involved in the suit and to avoid multiplicity of judicial proceedings, confliction of judicial decisions and to save costs of parties. As such the plaintiffs have filed this application for addition of Mr.K.L. Chugh as one of the defendants in the suit.
- e) That the Vasant Vihar property has been sold by defendant No.1 to 3, 4 and 6 in connivance with each other to Mr.K.L. Chugh, who is a necessary party. All the defendants and Mr. Chugh were aware about the pendency of suit on the date of execution of sale deed i.e. 7th December, 2010. It was done deliberately two days prior to the next date fixed by the court on 9th December, 2010 in order to frustrate the rights and claims of the plaintiff and in normal case, the said transaction ought not to have been done when the suit is pending and the defendants were aware about it.

f) That it is necessary that Mr.K.L. Chugh be impleaded as defendant No.7 and the plaintiff application under Order 6 Rule 17 CPC for amendment of plaint and relief be allowed in view of subsequent events. It is argued by Mr.Mukund that the plaintiff in the matter has already filed an application under Order II Rule 2 CPC along with plaint being IA No.15012/10 in which the notice was issued on 10th November, 2010 reserving liberty to seek other relief including the relief of specific performance. As Mr.K.L. Chugh is the subsequent purchaser of the property by sale deed dated 7th December, 2010 therefore the application under Order 6 Rule 17 CPC is liable to be allowed. The plaintiff is merely bringing the additional fact and events and prayers are to be added in view of change of circumstances.

22. The following decisions are referred by Mr.Mukund in support of his submissions:

Under Order 1 Rule 10 CPC

- i. ***Amit Kumar Shaw and another vs. Farida Khatoon and another***, AIR 2005 SC 2209.
- ii. ***Razia Begum vs. Sahebzadi Anwar Begum and others***, AIR 1958 SC 886.
- iii. ***M/s Aliji Monoji & Co. vs. Lalji Mavji and others***, AIR 1997 SC 64.
- iv. ***Savitri Devi vs. District Judge, Gorakhpur and Others***, (1999) 2 SCC 577.
- v. ***Khemchand Shankar Choudhary and another vs. Vishnu Hari Patil and others***, AIR 1983 SC 124.

Under Order VII Rule 11 CPC

- i. ***M/s. Texem Engineering vs. M/s. Texcomash Export***, ILR (2011) IV Delhi 176.
- ii. ***D. Ramachandran vs. R.V. Janakiraman and others***, AIR 1999 SC 1128.

Under Section 8 of the Arbitration and Conciliation Act

- i. ***Booz Allen and Hamilton Inc. vs. SBI Home Finance Limited and Others***, (2011) 5 SCC 532 (Paras 48.3, 51 & 52).

Under Order II Rule 2 CPC

- i. ***Virgo Industries (Eng.) Private Limited vs. Venturetech Solutions Private Limited***, (2013) 1 SCC 625 (Para 8).

Under Section 52 of the Transfer of Property Act

- i. ***Thomson Press (India) Limited vs. Nanak Builders and Investors Private Limited and Others***, (2013) 5 SCC 397 (Paras 16, 26, 30 & 45).
- ii. ***Guruswamy Nadar vs. P. Lakshmi Ammal (dead) Through LRs and Others***, (2008) 5 SCC 796 (Paras 6, 7, 8, 9 & 13).
- iii. ***Jayaram Mudaliar vs. Ayyaswami and Others***, (1972) 2 SCC 200 (Paras 13, 14, 43 & 44).

23. Mr.Sandeep Sethi, learned Senior counsel appearing on behalf of the defendants No.1 to 3, Mr.Maninder Singh, learned Senior counsel appearing on behalf of the defendant No.6 and Mr.T.K. Ganju, learned Senior counsel appearing on behalf of the proposed defendant No.7, have made their submissions at great length and their main argument is that when the suit itself is not maintainable,

the question of considering the prayer made in the applications for amendment and impleadment does not arise.

It is common argument of all the defendants that there is no cause of action for the plaintiff to file the present suit which is not maintainable and if the suit itself is not maintainable, the amendment in the plaint and prayer for impleadment of additional party is not called for. As far as proposition of law, as laid down in the judgments referred by the plaintiff, is concerned, they are not disputing the same. They submit that in an appropriate case such relief(s) can be granted. But in the present case, the plaintiff is not entitled for relief claimed in the suit. The said decisions do not help the case of the plaintiff.

24. From the record and original documents filed by the defendant No.1, it is evident that Mr.Chugh had purchased the property after availing a loan from Standard Chartered Bank. The said bank had also carried out due diligence for the said property. It would be apparent from above that the Agreement to Sell dated 21st October, 2010 was prior to the suit filed by the plaintiff. Mr.Chugh had paid the sale consideration to defendant Nos.1 and 2 as recorded in the sale deed in the following manner :

S.No.	Cheque/Draft No.	Date	Drawn on Bank	Amount
1.	327861	11.10.2010	Standard Chartered Bank, Greater Kailash-I, New Delhi	10,00,000
2.	327863	21.10.2010	Standard Chartered Bank, Greater Kailash-I, New Delhi	90,00,000
3.	099094	02.12.2010	Standard Chartered Bank, Greater Kailash-I, New Delhi	3,25,00,000
4.	465421	30.11.2010	Standard Chartered Bank,	2,50,00,000

			Narain Manzil, Barakhamba Road, Delhi	
			Total	6,75,00,000

The original title deeds of the said property were with defendant Nos.1 and 2 who handed over the same to Mr. Chugh. The said title deeds are now lying with Standard Chartered Bank against the loan granted to Mr. Chugh. It shows that at no point of time during the purchase of the said property Mr.Chugh had any knowledge about the present suit and/or any of the transactions alleged in the suit between the plaintiff and defendants No.1 and 2. The suit was filed on 2nd November, 2010 which was listed before Court first time on 10th November, 2010. Before filing of suit, Mr.Chugh already initiated various steps to get the loan sanctioned. Mr. Chugh apparently came to know about the filing of the suit and litigation between the parties at the later stage. According to him, he came to know about the same when the copy of application, being I.A. No.478/2011 under Order 1 Rule 10 CPC, was served. As soon as he got to know about the present suit and alleged transactions between defendant Nos.1 and 2 Mr. Chug filed a complaint with the Economic Offences Wing, Crime Branch, New Delhi on 6th April, 2011 against defendants No.1 and 2 who had concealed the loan transactions and other documents executed by them with the plaintiff from Mr. Chugh.

25. In the plaint, the plaintiff sought the reliefs restraining the defendants No.1 and 2 from selling, transferring and creating third party interest of the suit properties and for declaration that the defendants No.4 to 6 are second charge of the plaintiff and

mandatory injunction against them. It has come on record that before filing of suit in view of the deal finalized on 11th October, 2010 the agreement to sell dated 21st October, 2010 was already executed with regard to the property of ground floor and basement of D-6/2, Vasant Vihar, New Delhi. The cheque was received from Mr.Chugh, prospective buyer.

26. In the light of above mentioned facts and circumstances, it is to be considered by this Court as to whether the suit filed by the plaintiff is maintainable against the defendants No.4 to 6 or the plaintiff has now any cause of action against them and whether the plaintiff is entitled to relief of impleadment of Mr.Chugh and consequently amendment of plaint.

27. The present suit is in the nature of suit for declaration/injunction wherein plaintiff has prayed for a decree for declaration that the properties No.D-6/2, Vasant Vihar, New Delhi and Pent House No.1923-A, DLF Magnolia, Gurgaon are under the second charge of the plaintiff. The plaintiff's claim of second charge over the properties is based on the loan agreement dated 27th February, 2009 who is also seeking enforcement of purported agreement to sell dated 27th February, 2009.

28. It is not denied by the plaintiff that the document relied upon by the plaintiff (loan agreement dated 27th February, 2009) for claiming second charge on the immovable properties is unregistered document. The suit is admittedly filed on the basis of unregistered document involving interest in immovable property.

29. A charge can be created under Section 100 of the Transfer of Property Act, 1882 and all the provisions which apply to simple

mortgage shall also apply to the creation of any charge. A simple mortgage is defined under Section 58 (B) of the Transfer of Property Act, 1882 wherein without delivering possession of the mortgage property, the mortgagor binds himself personally to pay the mortgage money and in the event of this default the mortgage property can be sold. Under Section 59 of the Transfer of Property Act, 1882 every mortgage other than the mortgage by deposit of title deeds (i.e. equitable mortgage) can be affected only by a registered instrument signed by the Mortgagor and attested by the two witnesses. It is admitted in the present case, that the charge has not been registered. Under Section 17(B) of the Registration Act, registration of charge is compulsory and in absence of registration, the charge cannot be enforced. Reliance in this regard can be placed on the case of ***M.L. Abdul Jabbar Sahib vs. H. Venkata Sastri and Sons & Ors.***, AIR 1969 SC 1147, and relevant paras 12 and 15 of the same are reproduced as under:

“12. As to the second question, the argument on behalf of the respondents is that Section 100 of the Transfer of Property Act attracts Section 59 and that a charge can be created only by a document signed, registered and attested, by two witnesses in accordance with Section 59 where the principal money secured is Rs. 100 or upwards. The High Court accepted this contention following its earlier decisions in *Viswanadhem v. Menon* and *Shiva Rao v. Shanmugasunderaswami* and held that the security bond was invalid, as it was attested by one witness only. We are unable to agree with this opinion. Section 100 is in these terms:

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the

transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provision hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

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

15. If a charge can be made by a registered instrument only in accordance with Section 59, the subsequent transferee will always have notice of the charge in view of Section 3 under which registration of the instrument operates as such a notice. But the basic assumption of the doctrine of notice enunciated in the second paragraph is that there may be cases where the subsequent transferee may not have notice of the charge. The plain implication of this paragraph is that a charge can be made without any writing.”

30. The said document purporting to create a charge would also require to be executed on a stamp paper of requisite value under the provisions of Stamp Act which has not been done. A document, which is not adequately stamped in accordance with law, cannot be looked into for any purpose whatsoever. In the case of **Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana & Anr.**, (2012) 1 SCC 656, (SLP (C) No.13917/2009, dated 11th October, 2011), it was observed:

“15. In the earlier order dated 15.5.2009, the objects and benefits of registration were explained and we extract them for ready reference :

"15. The Registration Act, 1908, was enacted with the intention of providing orderliness, discipline and public notice in regard to transactions relating to immovable property and protection from fraud and forgery of documents of transfer. This is achieved by requiring compulsory registration of certain types of documents and providing for consequences of non-registration.

16. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future 'any right, title or interest' whether vested or contingent of the value of Rs.100 and upwards to or in immovable property.

17. Section 49 of the said Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affecting such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

18. Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected

to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

Registration of documents makes the process of verification and certification of title easier and simpler. It reduces disputes and litigations to a large extent."

31. It is apparent in the present case that the defendant No.6 purchased the Gurgaon property on 1st June, 2010. Mr.Chugh has purchased the Vasant Vihar property on 7th December, 2010. There was no interim order on that date. From the correspondences available on record, which is not denied by the plaintiff, it is clear that the plaintiff was aware about the said transaction. The plaintiff while drafting the plaint has vaguely made its statement in this respect and is trying to take the shelter of the application filed by the plaintiff under Order II Rule 2 CPC. It is settled law that by application of the second part of Section 100 of the Transfer of Property Act a charge is not enforceable against a bonafide transferee of the property for value without notice of the charge. In the present case, no steps were taken by the plaintiff to recover the loan amount from

defendants No.1 to 3. The suit is merely filed for declaration. No proposed amendment in the plaint is for alternative prayer for recovery from the defendants No.1 to 3.

32. As regard the relief sought by the plaintiff for enforcement of purported agreement to sell dated 27th February, 2009, Clauses 3 and 4 of the said agreement provide as under:

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

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

33. It is argued by Mr. T.K. Ganju, learned Senior counsel appearing on behalf of proposed defendant No.7 that the said relief is neither maintainable nor available to the plaintiff. The suit property in question has been sold to Mr. Chugh vide registered Sale Deed dated 7th December, 2010. In fact, an agreement to sell was also executed on 21st October, 2010 before the filing of the suit in question. Further, in terms of Section 41 (e) and (g) of the Specific

Relief Act, 1963 such an injunction cannot be granted. The said provisions provide as follows :

“41.(e) An injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

41(g). An injunction cannot be granted to prevent the continuing breach in which the plaintiff has acquiesced.”

It is submitted that the said agreement to sell dated 7th December, 2010 is not enforceable. Even assuming such agreement to sell was enforceable, the plaintiff has acquiesced in its breach by impliedly consenting for sale of property to third party, intimation of which was conveyed to it by defendant Nos.1 and 2 through their letter dated 24th February, 2010. If the suit filed by the plaintiff is not maintainable, the same would not be maintainable even on the basis of the amendment application as the specific performance of the alleged agreement to sell cannot be enforced by the plaintiff in terms of Clause 3 of the aforesaid agreement as it is not the case of the plaintiff nor have they pleaded that they have paid, cleared or settled their dues of ICICI Bank and therefore, the plaintiff has no right to enforce the agreement to sell. Further, in the alternative in terms of clause 4 of the agreement to sell, third party rights have been created with knowledge of the plaintiff and ultimately the suit property has been sold and conveyed to Mr.Chugh for a valuable consideration. Mr. Chugh is a bonafide purchaser of the suit property. The proposed application under Order VI Rule 17 CPC filed by the plaintiff seeking amendment is hence strongly opposed on the reasons that the present suit is malafide attempt by the plaintiff to defeat the rights

and cloud the title of Mr.Chugh in the said property without any justification.

34. It is evident from the documents filed by the plaintiff that the plaintiff was fully aware of the fact that with effect from 24th February, 2010, when an intimation was sent to him by defendants No.1 & 2 regarding the sale of the suit property for the price of Rs.6.75 crores, the plaintiff never objected to the said sale. The said sale was, therefore, with the knowledge and implied consent of the plaintiff. The plaintiff as a reasonable and prudent person ought to know that several third party rights would have been created over the suit property. Thus, being aware of the fact that as early on 24th February, 2010, third party rights over the suit property have been created, the present application for amendment was filed in January, 2012 seeking specific performance of its agreement to sell dated 27th February, 2009 and further reliefs for cancellation of the sale deed in favour of Mr.Chugh.

35. On a perusal of Clause 3, it is clear that right of plaintiff to enforce the Agreement to Sell would arise only if the plaintiff settles the outstanding dues of ICICI Bank. The dues of ICICI Bank admittedly were about Rs.5.40 crores against the said property at Vasant Vihar. The plaintiff under Clause 3 of the said Agreement cannot seek enforcement of the said Agreement unless and until the outstanding dues of ICICI Bank are first paid, cleared or settled, which were approximately Rs.5.40 crores in February, 2010. The plaintiff has not settled and/or paid the said dues of ICICI Bank. Neither there is averment in the plaint nor even in the proposed amended plaint to this effect.

36. Upon intimation about sale of Vasant Vihar (Ground and Basement) property vide defendant's letter dated 28th February, 2009 plaintiff did not raise any protest about its sale or offered to enforce the said agreement to sell by offering to pay dues of ICICI Bank. The intention of the plaintiff was neither to offer to settle dues of ICICI Bank and enforce the said agreement to sell nor to raise any protest to the sale being affected by the defendants to Mr.Chugh. The plaintiff, having chosen not to enforce the agreement to sell when offered in February, 2009 by not settling the dues of ICICI Bank cannot now take a U turn and try to enforce the same without having to fulfill its obligation of settling the account of ICICI Bank which has been paid by the proposed buyer i.e. defendant No.6. Through this declaratory suit the plaintiff is trying to assert its limited right without actually fulfilling its obligations under the agreement. Unless and until the plaintiff pays the outstanding dues to ICICI Bank, plaintiff could not have enforced the said agreement to sell. The plaintiff waited for the dues of ICICI to be paid which were eventually paid by Defendant No.6 and the Vasant Vihar property became unencumbered then it filed declaratory suit which clearly lacks cause of action.

37. The plaintiff was fully aware of its limited rights over the property, (as ICICI Bank was the first charge holder of the suit property), especially in view of the fact that the major amount of sale proceeds would go to the first charge holder i.e. ICICI Bank as explained in the letter of defendant dated 23rd February, 2010, the plaintiff chose not to resist the proposed sale and willingly encashed the two bank drafts submitted by the defendants.

38. In Clause 4 of the said agreement to sell dated 27th February, 2009, it is provided that if defendants No.1 and 2 get a better price than the consideration agreed between the plaintiff and the defendant No.1 (i.e. more than Rs.5.75 crores), the defendant Nos.1 and 2 are entitled and authorized for contracting and selling the suit property without recourse to the plaintiff to whom only an intimation is required to be sent in respect of such a sale. It is admitted case of the plaintiff that on 23rd February, 2010, the defendant Nos.1 to 3 sent a letter intimating the plaintiff that they have found a buyer for Ground Floor and Basement of Vasant Vihar property for a net consideration of Rs.6.75 crores and after paying Rs.5.40 crores to ICICI Bank and other loans, a sum of Rs.5 lac was remitted to the plaintiff by a cheque drawn on HDFC Bank. The plaintiff in reply to the said letter, vide their letter dated 9th March, 2010 did not object to the sale and also encashed the cheque of Rs.5 lac, thereby conveying their implied acceptance of the sale by the defendants No.1 to 3 of the said suit property. In terms of Clause 4 of the agreement to sell, only intimation to the plaintiff was to be given, there was no obligation to take the consent of the plaintiff. The plaintiff did not raise any objection to the said sale by their letter dated 9th March, 2010. By another letter dated 13th March, 2010 issued by plaintiff to defendant No.1 still no objection to the sale was raised by plaintiff. The demand was raised that the value of the securities are below their outstanding amount payable by defendant No.1. Even by letter dated 27th October, 2010, the defendant No.6 had informed the plaintiff having purchased both properties from the defendants No.1 and 2 against consideration and refused to record the charge.

The correspondences exchanged between the parties are extracted as under:

“KK/SICPA/2009-2010
Dated February 23, 2010
M/S SICPA (INDIA) LIMITED
308-312, MERCANTILE HOUSE,
15, K. G. MARG,
NEW DELHI-110001.

Kind attn. of Mr. Vij please

Dear Sir,

SUB: Permission for property sale.

This has reference to the loan agreement dated 27th February, 2009 executed between SICPA India Ltd and Brushman (India) Limited, wherein apart from other securities, second charge on properties located at D-6/2 Ground Floor, Vasant Vihar, New Delhi-110057 and penthouse No. 1917-A, DLF Magnolias, Gurgaon both in the name of Kapil Kumar s/o late sh Kanwal Krishan and Rittu Kumar w/o Kapil Kumar were offered as per the loan agreement. Relevant documents were submitted to you as mentioned in the loan agreement.

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

We have found a buyer for Vasant Vihar property and have taken a token advance against the same, for a total Net consideration of Rs 675 Lacs (ground plus basement combined). Out of this, a sum of Rs 540 Lacs (appx) has to be paid to ICICI Bank various loans running against the Vasant Vihar property while Rs 133 Lacs has to be paid to M/s Genesis Finance Co. Ltd. Towards the loan running against the basement. This leaves a sum of Rs 2.00 Lacs (appx) balance with us to be repaid to you. However, as a goodwill gesture, we are remitting you a sum of Rs 5 Lacs (payable vide D/D No. 020507 dated 15th February, 2010 for Rs 2 Lacs and No. 020508 dated 15th February, 2010 for Rs 3.00 Lacs,

both drawn in your favour on HDFC Bank). You are aware of the financial crunch at our end and we are sure that this gesture of remitting you more amount than what is left out of sale proceeds shall not go unappreciated by you. In light of the above, you are requested to kindly accord your permission to sell the Vasant Vihar property and also confirm that the Agreement to sell entered with you against the same and the Power of attorney/Will submitted against the same is treated as cancelled.

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

We also take this opportunity to inform you that the bank restructuring is still in progress. Bankers had appointed a stock auditor to conduct stock valuation, as a prerequisite to the restructuring process. The process of physical stock taking at major locations has been completed and the required information has been passed on to the stock auditors subsequently. We expect the stock audit report to be finalized/submitted to bankers by first/second week of March, 2010. Subsequently, the bank shall proceed further in the matter. Photocopy of letters received from stock auditors are enclosed for your reference.

As regards the GDR issue, we had already submitted our application for in-principle approval to various stock exchanges in December 2009 itself. Certain queries are raised by the stock exchanges and the necessary documentation is underway. The offering circular (prospectus) is more or less complete. We need to appoint the legal counsel for the issue (in India & abroad) and after receiving the in-principle approval from the stock exchanges, we shall be in a position to open the issue.

We trust you shall find yourself updated on various issues and request you to kindly grant us permission/confirmations as requested by us with regards to Vasant Vihar property immediately.

Regards
For BRUSHMAN (INDIA) LIMITED

KAPIL KUMAR
MANAGING DIRECTOR
Enc: As above”

“SIL/BIL/SS/2010/001
March 09, 2010

Mr. Kapil Kumar,
Managing Director,
Brushman (India) Limited,
B-95/3, Phase-1, Naraina Industrial Area,
New Delhi-110028.

Sub : Permission for property sale.

Dear Sir,

This has reference to your letter no. KK/SICPA/2009-10 dated 23.02.2010 as personally delivery by you in our office on 04.03.2010 on the abovesaid subject.

For consideration of your request, please provide us attested copy of the following documents:

1. Conveyance Deed/Agreement to sell for Vasant Vihar Property.
2. Request letter written to ICICI Bank and Genesis Finance Co. Ltd for settlement of the loan, including pre-payment etc and their response.

Thanking you,

For SICPA India Ltd.

Sujoy Sengupta
Dy. General Manager (F & A)”

“SIL/BIL/SS/2010
April 06, 2010

Mr. Kapil Kumar,
Managing Director,
Brushman (India) Limited,
B-95/3, Phase-1,
Naraina Industrial Area,
New Delhi-110028.

Sub : Permission for property sale.

Dear Sir,

This is further to our letter no. SIL/BIL/SS/2010/001 dated March 09, 2010 sent through Registered AD.

We are yet to receive the attested copies of the following documents which were requested in our aforesaid letter.

1. Conveyance Deed/Agreement to Sell for Vasant Vihar property.
2. Request letter written to ICICI Bank and Genesis Finance Co. Ltd for settlement of the loan, including pre-payment etc. and their response.

Would appreciate if the above said documents are expedited.

Thanking you,
For SICPA India Ltd.

Sujoy Sengupta
Dy. General Manager (F & A)

CC : Mrs. Ritu Kumar
w/o Mr. Kapil Kumar
61/18, Ramjas Road,
New Delhi-110005.”

“27th October, 2010

To,
Sh. Sujoy Sengupta
Dy. General Manager (F & A)
SICPA India Private Limited
308-312, Mercantile House,
15, Kasturba Gandhi Marg,
New Delhi-110001.

Reference: Letter dated 11.10.2010 bearing No.
SIPL/GFCL/SS/2010

Subject: Reply to the refereed letter.

Sir,

We wish to inform you that we have purchased the DLF Magnolias property and Vasant Vihar property from the borrowers against due consideration as such there is no possibility of recording your second charge.

Thanking you.

Yours truly,

For M/s Genesis Finance Company Limited.

(Vinod Tayal)
Vice-President.”

39. As per the agreement to sell, there was no permission required from the plaintiff for the defendants to sell the Vasant Vihar property so long as they got better price than the agreed price. There was no objection from the plaintiff even after the defendants had kept the plaintiff informed vide letter dated 23rd February, 2010. The plaintiff without demur encashed the demand drafts given by the defendants.

40. The suit was filed initially for permanent injunction and for mandatory injunction, declaration and regarding registration of the charge of the plaintiff with respect to the suit property in the records of defendants No.4 to 6. Thus, the suit was with respect to reliefs sought to be claimed by the plaintiff under the Loan Agreement dated 27th February, 2009 under which, the plaintiff claimed a charge over the suit property. The proposed amendments now seek to change the nature and character over the suit by claiming declaration and cancellation of the sale deed in favour of Mr.Chugh, possession of the property from Mr.Chugh, decree for specific performance of the agreement dated 27th February, 2009 and in alternative decree for recovery of an amount of Rs.8,50,36,918/-. The fact that the said reliefs would alter the nature and character of the suit cannot be denied.

41. It is necessary to refer the prayer made in the proposed amended plaint filed along with the application under Order 6 Rule 17, being IA 274/2014. The prayer is as under:

“a) Leave be granted under Order 2 Rule 2 of CPC;

b) Decree for permanent injunction restraining the defendant Nos.1 & 2 and their men, agents and associates from selling, transferring, conveying and/or creating third party interest or creating any interest of any nature whatsoever in respect of the (a) Land and property at D-6/2, Vasant Vihar, New Delhi and (b) Property at Penthouse No.1917-A (New No.1923-A), DLF, Magnolias, Gurgaon and/or in respect of any rights relating to the said properties;

c) Decree for Declaration that the properties No.(a) D-6/2, Vasant Vihar, New Delhi and (b) Pent House No.1917-A (New No.1923-A), DLF, Magnolias, Gurgaon are under the Second charge of the plaintiff and Defendant Nos.4, 5 & 6 are bound to take note of the fact and to keep the records in their Books that both the aforesaid properties are under Second Charge of the Plaintiff;

d) Mandatory Injunction directing the Defendant Nos.4, 5 & 6 to record in their Books of Accounts the name of the Plaintiff as Second Charge Holder, the first charge thereof was with the Defendant No.4.

(e) Decree for Declaration that the Sale Deed dated 07.12.2010 as also the agreement to sale dated 21.10.2010 by the defendant Nos.1 and 2 selling the property situated at D-6/2, Vasant Vihar, New Delhi in favour of the defendant No.7 Mr.K.L. Chugh is bad, illegal, void and unenforceable in law as a consequent whereof cancel the Sale Deed;

(f) Decree for specific performance of agreement for sale dated 27.02.2009 in favour of the plaintiff inter alia directing the defendant Nos.1 & 2 to execute and register

Sale Deed in respect of ground floor of land and property No. D-6/2, Vasant Vihar, New Delhi.

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

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

Alternatively,

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

42. The decision in the case of **Revajeetu Builders and Developers vs. Narayanaswamy and Sons and Ors.**, (2009) 10 SCC 84 is referred in this regard. Relevant paras 58 and 63 to 65 read as under:-

“58. In **B.K. Narayana Pillai v. Parameshwaram Pillai and Anr.** (2000) 1 SCC 712, a suit was filed by A for recovery of possession from B alleging that B was a licensee. In the written statement B contended that he was a lessee. After the trial began, he applied for amendment of the written statement by adding an alternative plea that in case B is held to be a licensee, the licence was irrevocable. The amendment was refused.

63. The Courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

64. In ***Ganga Bai's case*** (supra), this Court has rightly observed:

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court.

COSTS:

65. The Courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. The imposition of costs is an important judicial exercise particularly when the courts deal with the cases of amendment. The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive.

(i) At what stage the amendment was sought?

(ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pre-trial or post-trial stage;

(iii) The financial benefit derived by one party at the cost of other party should be properly calculated in terms of money and the costs be awarded accordingly.

(iv) The imposition of costs should not be symbolic but realistic;

(v) The delay and inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs.

(vi) In case of appeal to higher courts, the victim of amendment is compelled to bear considerable additional costs.

All these aspects must be carefully taken into consideration while awarding the costs.”

43. In the case of ***Bharat Karsondas Thakkar v. M/s. Kiran Construction Co. & Ors.***, AIR 2008 SC 2134, it was observed as under:

“21. Having carefully considered the submissions made on behalf of the respective parties, and the decisions cited on their behalf, we are of the view that the Division Bench of the High Court erred in law in allowing the amendment of the plaint sought for by the respondent No.1 herein as the plaintiff in the suit. Even if the bar of limitation is not taken into account, the plaintiff, namely, the respondent No.1 herein, is faced with the ominous question as to whether the amendment of the pleadings could have at all been allowed by the High Court since it completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement of sale entered into between its assignee and the vendors of the assignees. Along with that is the other question, which very often raises its head in suits for specific performance, that is, whether a stranger to an agreement for sale can be added as a party in a suit for specific performance of an agreement for sale in view of Section 15 of the Specific Relief Act, 1963. The relevant provision of Section 15 with which we are concerned is contained in clause (a) thereof and entitles any party to the contract to seek specific performance of such

contract. Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of "parties to the agreement". The appellant also does not come within the ambit of Section 19 of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in Kasturi's case (supra). While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, Their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character."

44. In the case of ***State of Madhya v. Union of India***, AIR 2012 SC 2518, it was observed as under:

"19. Finally, the original plaint proceeds that the exercise of power by the Central Government by passing the impugned Notifications dated 02.11.2004 and 04.11.2004 under Sections 58(3) and 58(4) of the MPR Act was arbitrary, unjust and unfair and had resulted in serious anomalies in the apportionment of assets and liabilities. In our view, after praying for such relief, if the amendment as sought for by the plaintiff is allowed and the plaintiff is permitted to challenge the vires of the said provisions, then the very basis on which the plaintiff is claiming its right to apportionment of assets, rights and liabilities of the undivided Board will cease to be in existence and the entire suit of the plaintiff will be rendered infructuous. Moreover, it is settled principle of law that leave to defend to amend will be refused if it introduces a totally different, new and inconsistent case or challenges the fundamental character of the suit."

45. There is no force in the submission of learned counsel appearing on behalf of plaintiff that proposed defendant No.7 Mr.Chugh was aware about pendency of suit at the time of

purchasing the property as before filing of suit, he had already entered into an agreement and received part of loan amount from the bank.

46. The proposed amendment, if read carefully, on the face of it fundamentally changes the basic nature and character of the suit and cannot be allowed.

47. The relief of specific performance of the agreement to sell and other consequential reliefs such as declarations, cancellation and injunctions under the Specific Reliefs Act are equitable reliefs and discretionary in nature. It is well settled principle of law that reliefs under the Specific Reliefs Act are not available to a party who is guilty of laches and/or has not come to the court with clean hands. In the present case, the plaintiff is guilty of gross laches and delay in as much as his knowledge of third party rights in the suit property were brought to his notice on 24th February, 2010 and the proposed application for amendment has been filed in January, 2012.

48. In the course of arguments, the learned counsel for the plaintiff sought to rely heavily on the principle of *lis-pendens* under Section 52 of Transfer of Property Act. It is pertinent to mention that the doctrine of *lis-pendens* does not invalidate the title over the property, but would only make it subject to the result of the suit.

49. With regard to the decision referred by the learned counsel appearing on behalf of the plaintiff in the case of **Thomson Press (India) Limited** (Supra), in the said case, the sale of the property was made in violation of the injunction order and the purchaser had made an application for being impleaded in the suit. Such an application was dismissed by the High Court and at para 54 of the said judgment,

it was upheld as the correct order in terms of Order 1 Rule 10 CPC. This is not the situation in the present case. The transferee i.e. Mr.Chugh does not wish to be impleaded as a party to the present suit being innocent and bonafide purchaser. The ratio of the said case is not applicable to the facts of the present case.

50. The Apex Court in the case of ***Virgo Industries (Eng.) Pvt. Ltd.*** (Supra) considers the object and intent behind the enactment of Order 2 Rule 2 of CPC, whereafter holds that the rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits. The said decision, while observing that the cause of action in the latter suit must be the same as in the first suit, reiterates that there is no requirement for ascertaining the true meaning of expression; “cause of action” and in the process, goes on to hold that foundation for relief of permanent injunction amongst others, furnishes a complete cause of action to the plaintiff in suing for relief of specific performance as well.

51. The case of ***Virgo Industries (Eng.) Pvt. Ltd.*** (supra) has no applicability to the facts of this case. In the said case, the prayer under Order II Rule 2 CPC was not granted. The Court also held that the relief of specific performance was premature on the date of filing of the suit and there is no bar to file a suit claiming a relief which the plaintiff has become entitled to at subsequent point of time. In the present case, the relief of specific performance, if any, admittedly was available to the plaintiff at the time of filing of the suit as any relief under Order II Rule 2 CPC is to be given by the Court on such grounds which are pleaded in their application and if the Court is satisfied that the reasonable grounds existed for not claiming a relief

immediately, relief under Order II Rule 2 CPC may be given. The application of the plaintiff under Order II Rule 2 CPC does not contain any ground whatsoever to seek such a leave. The plaintiff has not even argued the application.

52. The case of ***Guruswamy Nadar vs. Lakshmi Ammal (D) through LRs and Ors*** (supra) only discusses the effect of *lis-pendens* and the only question that was argued was whether the principle of *lis-pendens* will be applicable or section 19 of the Specific Relief Act will have overriding effect. The Supreme Court held that the principle of *lis-pendens* will apply. However, the question as to whether the purchaser who has purchased after the filing of the suit is a necessary party to the suit for specific performance was not decided. The case has no application to the facts of the present case.

53. The case of ***Jayaram Mudaliar vs. Ayyaswami and Ors.*** (supra) pertains to a sale of joint family property and the effect of such sale during the pendency of the suit. There is no decision on the question as to whether a transferee pendent-lite is a necessary party and can be impleaded at the instance of the plaintiff.

54. It is not denied by the plaintiff that various loan agreements were executed between the plaintiff and defendants No.1 to 3. Even agreement to sell was between them. The defendants No.4 to 6 are not parties to the agreements and have no privity of contract with the plaintiff. In the plaint, the defendant No.6 is mentioned as proforma party. Thus, there is no cause of action against the defendants No.4 to 6. From the entire gamut of the matter, this Court is of the view that the relief sought by the plaintiff against the said defendants, i.e.

defendants No.4 to 6 is barred by law. Therefore, for the reasons mentioned above, the suit against the defendants No.4 to 6 is not maintainable and no cause of action exists against them. The prayer made in the application, being I.A. No.6657/2011 filed by defendants No.1 to 3, is partly allowed.

55. It is also not disputed by the plaintiff that loan agreements contain an arbitration clause which provides for enforcement of an obligation as enumerated in the agreement in case of any dispute arising out of the agreement. The arbitration clause in the loan agreement dated 27th February, 2009 is as under:

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

56. The plaintiff has not taken any steps for arbitration. The plaintiff has also not filed the suit for recovery of loan amount against the defendants No.1 to 3. In the amendment application an alternative prayer is sought that a decree be passed against them for sum of Rs.8,50,36,918/- who have not denied the fact of having received the loan amount from the plaintiff. An existence of arbitration clause has not been denied by the plaintiff. It was merely stated that the subject matter of the present suit cannot be referred to arbitration because there are parties other than defendants No.1 to 3 against whom the

reliefs are being sought, which is permissible against the third party i.e. defendants No.4 to 6 and proposed defendant No.7 who cannot become parties to the arbitration proceedings. The suit is the most appropriate remedy. As the suit is already held not to be maintainable, therefore, the prayer made in the application, being I.A. No.6654/2011, is allowed.

57. The relief with regard to declaration of the second charge and the mandatory injunction as per paragraph 1 (a) and 1 (b) above cannot be claimed against defendants No.4 to 6. The suit in respect thereof is not maintainable.

58. The suit of plaintiff therefore for the relief of declaration and mandatory injunction in respect of the second charge is clearly not maintainable against defendants No.4 to 6 and proposed defendant No.7. The plaint is liable to be rejected as the same is barred by law.

59. As far as the suit against the defendants No.1 to 3 is concerned, the loan amount is recoverable as per law. Since there is an arbitration clause in the agreement which is not denied by the plaintiff, the plaintiff has to take the necessary steps for invoking the arbitration under the provisions of Arbitration and Conciliation Act, 1996. The suit against the defendants No.1 to 3 cannot continue in the presence of arbitration clause.

60. In view of the same, the plaint is rejected. All interim orders are vacated. The pending applications are also disposed of accordingly.

61. No costs.

(MANMOHAN SINGH)
JUDGE

JULY 01, 2014