Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4891 OF 2010
[Arising out of SLP [C] No.6736 of 2009]

Vinod Seth … Appellant

Vs.

Devinder Bajaj & Anr. … Respondents

**J U D G M E N T**

**R.V.RAVEENDRAN, J.**

Leave granted. Heard. The validity of a novel and innovative direction by the High Court, purportedly issued to discourage frivolous and speculative litigation is under challenge in this appeal. To understand the issue, it is necessary to set out the facts and also extract relevant portions of the plaint and the impugned orders of the High Court.

2. The appellant claims to be a builder-cum-real estate dealer. He filed a suit for specific performance of an oral agreement for "commercial collaboration for business benefits" allegedly entered by the respondents as the owners in possession of premises No.A-1/365, Paschim Vihar, New

Delhi, with him. He alleged in the plaint, that the following terms and conditions were orally agreed between the parties:

> "a) The defendants will apply to the DDA for conversion of the above property from leasehold to freehold and within 2-3 months the defendants will handover vacant physical possession of the above property to the plaintiff.
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> b) The plaintiff will reconstruct the above property from his own money/funds with three storeys i.e. ground floor, first floor and second floor.
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> c) Out of the said reconstructed three storeyed building, the plaintiff shall be entitled to own and possess the ground floor; and the first and second floors will be owned and possessed by the defendants.
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> d) Besides bearing the expenses of construction and furnishing etc. of the proposed three storeyed building, the plaintiff shall also pay a sum of Rs. 3,71,000/- to the defendants at the time of handing over possession of the above house for reconstruction.
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> e) Out of the agreed consideration of Rs.3,71,000/-, a sum of Rs.51,000/- was paid to the defendants in cash and the remaining consideration of Rs.3,20,000/- was to be paid to the defendants at the time of handing over possession of the above house for reconstruction. In token of the same a Receipt for Rs.51,000/- was duly executed by defendant No.1.
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> f) On getting conversion of the above property from leasehold to freehold, the above agreement/proposed collaboration of the property bearing No. A-1/365, Paschim Vihar, New Delhi and the above terms and conditions were to be reduced into writing vide an appropriate Memorandum Of Understanding to be duly executed by the parties i.e. the builder and the owners of the above property."

The appellant further alleged that in pursuance of the above, he paid a sum of Rs.51,000/- to first respondent in the presence of second respondent and two witnesses (Sanjay Kumar Puri and M.R.Arora) and that the first respondent executed the following receipt acknowledging the payment:

"RECEIPT/PART PAYMENT

Received a sum of Rs.51,000/- (Fifty one thousand only)
By Cash/Cheque Cash
From Sh. Vinod Seth S/o Sh. Sohan Seth R/o M-231 First Floor,
Guru Harikishan Nagar
Against Collaboration of Property No. A-1/365 Paschim Vihar

Signature (Devinder Bajaj)/10-6-04

3. The appellant alleged that the respondents failed to comply with the agreement and lingered over the matter on one pretext or the other; that the appellant came to know subsequently that the property stood in the name of the second respondent and not the first respondent; and that the appellant therefore issued a notice dated 9.3.2007 calling upon the respondents to comply with the legal formalities to facilitate the collaboration agreement. Alleging that respondents failed to comply, the appellant filed a suit on 30.6.2007 for specific performance. We extract below the relevant portion of the prayer:

"……to pass a decree of specific performance of Collaboration Agreement entered in between the parties on 10-6-2004, as per its terms and conditions in favour of plaintiff and against defendants specifying that :

a) the defendants to apply immediately with the DDA for conversion of the above property from leasehold to freehold and immediately after such conversion, the defendants will handover vacant physical possession of the suit property i.e. House No.A-1/365 Paschim Vihar Delhi to the plaintiff.

b) that the defendants to immediately apply by submitting building plan as per Annexure P-3 with the Authorities for sanction of the building plan.

c) the plaintiff will reconstruct the above property as three storeyed building as per site/building plan from his own money/funds within one year of handing over of possession by the defendants to the plaintiff and sanctioning of the building plan of the suit property.

d) out of the said reconstructed three storeyed building the plaintiff shall be entitled to own and possess its ground floor only, and the first and second floors will be owned and possessed by the defendants.

e) besides to bear the expenses of construction etc. of the proposed 3 storeyed complete building, the plaintiff shall also pay a sum of Rs.3,20,000/- to the defendants at the time of handing over possession of the above house for reconstruction.

f) the defendants will not transfer the title or possession of the suit property till execution of the collaboration Agreement but after its execution, the defendants would be within their full rights to enjoy lawfully the title and possession of the first floor and second floor of the building.

g) the plaintiff will be fully entitled for the full title and possession of the ground floor of the building and the defendants would be left with no right, title or interest in the property of the ground floor of the building, however, he would not be entitled for any exclusive rights in the property of ground floor till the first and second floor of the building are duly constructed, as per the specifications and quality as that of the ground floor, and handed over to the defendants.

4. The respondents contested the said suit and filed a written statement denying the claim in toto. When the case came up for framing issues, a learned Single Judge of the High Court on perusal of the pleadings passed an interim order dated 2.12.2008, relevant portion of which is extracted below :

> "The agreement of such a nature, in common parlance known as collaboration agreement, requires detailed terms and conditions to be settled between the parties as to the quality of construction, time period, alternate accommodation, sharing of the expenses and space in the newly constructed building, etc. and *ordinarily specific performance of such agreements is difficult for the Court to supervise. In the present case all the terms of the agreement will have to be established by evidence, there being no document recording the same.*
>
> The plaintiff instituted the suit without any application for interim relief and notice was issued of the suit by the Joint Registrar and the suit has come up before the Court for the first time.
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> *The suit being with respect to an immovable property*, even in the absence of any interim order restraining the defendants from dealing with the property, *attracts Section 52 of the Transfer of Property Act and the pendency of the suit itself has a tendency of interference with the defendants' dealing with their own property and if at all the defendants are compelled to deal with the same, the defendants are likely to realize much less than the market value of the property, owing to the pendency of the said suit.*
>
> Prima facie, the likelihood of the plaintiff succeeding in the suit appears to be remote. Such agreements are not concluded and enforceable till detailed writing as aforesaid is executed. Even if the averment of the plaintiff of having paid Rs. 51,000/- to the defendants is established, the same would still not establish a concluded enforceable agreement. The suit cannot be dismissed at the threshold. The counsel for the plaintiff has also contended that in law it is permissible to have such an oral agreement. However, the defendants are likely to suffer considerably merely owing to the pendency of the present suit. *While nearly nothing of the plaintiff is at stake in pursuing the present suit, the defendants as aforesaid will be losers even if ultimately succeed. Courts cannot be silent spectators to the parties being put on such unequal footing.* The remedy of defendants suing the plaintiffs for damages caused to them, after succeeding in the present suit is not efficacious. *Affluent speculators in immovable*

> *properties cannot be permitted to misuse the process of the court to compel owners to transact with them only.* **In the circumstances, it is deemed expedient to direct the plaintiff to file an affidavit/undertaking to this Court to, in the event of not succeeding in the suit pay a sum of Rs. 25 lacs by way of damages to the defendants.** If the plaintiff is reasonably confident of the genuineness of his case, the plaintiff ought not to suffer any harm by giving such undertaking. The said amount has been arrived at because of the averments in the plaint that the plaintiff was to spend Rs. 20 lacs in development of the property and in lieu thereof was to become the owner of the ground floor of the newly constructed property.
>
> The plaintiff to file the affidavit in terms of above within four weeks from today. List on 27th January, 2009 for framing of issues."
>
> (emphasis supplied)

5. The appellant filed an intra-court appeal contending that every person has an inherent right to bring a suit of civil nature and there was no provision in law which enabled the Trial Court to impose such a condition on a plaintiff requiring an undertaking to pay Rs.25 lakhs by way of damages to defendants in the event of failing in the suit. He relied upon the following observations of this Court in *Abdul Gafur v. State of Uttarakhand* [2008 (10) SCC 97] :

> "Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute." (vide *Abdul Gafur v. State of Uttarakhand* [2008 (10) SCC 97]. In *Ganga Bai v. Vijay Kumar* [1974 (2)

> SCC 393] this Court had observed as under: "…… There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit, for its maintainability requires no authority of law and it is enough that no statute bars the suit."

6. The Division Bench dismissed the appeal by the appellant, holding that the order of the learned Single Judge did not in any way contravene the said decision, on the following reasoning:

> "We see no contradiction in the aforesaid judgment and the impugned order. The learned Single Judge has not dismissed the suit. We also note the observations of the Supreme Court that even a frivolous suit can be bought before the court "at one's peril". All that the learned Single Judge has done at the stage of framing of issues, having prima facie found not much merit in the case of the appellant, considered it appropriate to impose certain terms and conditions.
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> We may notice that the provisions of Order 39 of the said Code deals with temporary injunctions and interlocutory orders. Order 39 Rule 2(2) authorizes the court to grant injunction on such terms as deems proper including giving of security. Thus, when the prayer for interim relief has to be granted, provision has been specifically made authorizing the court to make orders for keeping accounts, giving security or otherwise as the court thinks fit.
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> The appellant has conveniently not filed an interim application to avoid the rigour of such an order. Normally in a suit for specific performance and that too dealing with an immovable property, a party would seek interim protection. The appellant has not done so. It is an ingenious method of keeping a suit alive without claiming interlocutory relief and creating a cloud over a property in view of the provisions of Section 52 of Transfer of Property Act.
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> *We do think that the courts cannot look helplessly at such tactics and ignore the problem of huge docket, which arises on account of meritless claims being filed. The heavy docket does not permit early disposal of suits and thus parties may take advantage of keeping frivolous claims alive. We also cannot ignore the ground realities of the market which would persuade third parties to eschew dealing with such a property over*

*which there is a cloud during the pendency of the suit. It is this cloud of which the appellant can take advantage of to extract some money in case the relief is frivolous.*

**We also find that the appellant really cannot have any grievance since a condition has not been imposed to deposit any amount which would make the appellant be out of pocket. The condition is of a much lesser level of only an undertaking to compensate the respondent in case of failure in the suit and as the learned Single Judge has rightly observed that a party coming to court should reasonably be confident of the genuineness of its case.** The figure of Rs. 20 lakhs is based on the claim of the appellant as noticed by learned Single Judge. We may also add that Order XXV Rule 1 of the CPC gives power to the Court including suo moto power for the plaintiff to give security for payment of all costs incurred and likely to be incurred by the defendant. However, reasons for such an order are to be recorded. The costs include not only what is spent in the litigation but also the effect of the continuation of the suit on the plaintiff and, thus, as per the impugned order, for reasons recorded, the learned Single Judge has passed the order.

**We find that the course adopted by the learned Single Judge is not without sanction of law and there is merit in this approach looking to the ground realities mentioned aforesaid."**

**(emphasis supplied)**

7. The appellant has challenged the said decision in this appeal. This Court directed notice on 2.4.2009 on the special leave petition with the following observations :

"Though the order appears to be a just order, as it involves a serious question of law, we direct issuance of notice returnable in four weeks.

We however make it clear that there will be no order of stay in regard to the decision of the learned Single Judge affirmed by the division bench and if the petitioner fails to give an undertaking as ordered, he will not have the benefit of section 52 of Transfer of Property Act."

The respondents have remained *ex parte*. On the submissions of the appellant, the following question arises for our consideration :

(i) Whether a court has the power to pass an order directing a plaintiff in a suit for specific performance (or any other suit), to file an undertaking that in the event of not succeeding in the suit, he shall pay Rs.25 lakhs (or any other sum) by way of damages to the defendant?

8. We are broadly in agreement with the High Court that on the material presently on record, the likelihood of appellant succeeding in the suit or securing any interim relief against the defendants is remote. We may briefly set out the reasons therefor.

8.1) It is doubtful whether the collaboration agreement, as alleged by the appellant, is specifically enforceable, having regard to the prohibition contained in section 14(1) (b) and (d) of the Specific Relief Act, 1963. The agreement propounded by the appellant is not an usual agreement for sale/transfer, where the contract is enforceable and if the defendant fails to comply with the decree for specific performance, the court can have the contract performed by appointing a person to execute the deed of sale/transfer under Order XXI Rule 32(5) of the Code of Civil Procedure ('Code' for short). The agreement alleged by the appellant is termed by him

as a commercial collaboration agreement for development of a residential property of the respondents. Under the alleged agreement, the obligations of the respondents are limited, that is, to apply to DDA for conversion of the property from leasehold to freehold, to submit the construction plan to the concerned authority for sanction, and to deliver vacant possession of the suit property to the appellant for development. But the appellant/plaintiff has several obligations to perform when the property is delivered, that is, to demolish the existing building, to construct a three-storeyed building within one year in accordance with the agreed plan, deliver the first and second floors to the respondents and also pay a token cash consideration of Rs.3,71,000/-. The performance of these obligations by appellant is dependant upon his personal qualifications and volition. If the court should decree the suit as prayed by the appellant (the detailed prayer is extracted in para 3 above) and direct specific performance of the "collaboration agreement" by respondents, it will not be practical or possible for the court to ensure that the appellant will perform his part of the obligations, that is demolish the existing structure, construct a three-storeyed building as per the agreed specifications within one year, and deliver free of cost, the two upper floors to the respondents. Certain other questions also will arise for consideration. What will happen if DDA refuses to convert the property

from leasehold to freehold? What will happen if the construction plan is not sanctioned in the manner said to have been agreed between the parties and the respondents are not agreeable for any other plans of construction? Who will decide the specifications and who will ensure the quality of the construction by the appellant? The alleged agreement being vague and incomplete, require consensus, decisions or further agreement on several minute details. It would also involve performance of a continuous duty by the appellant which the court will not be able to supervise. The performance of the obligations of a developer/builder under a collaboration agreement cannot be compared to the statutory liability of a landlord to reconstruct and deliver a shop premises to a tenant under a rent control legislation, which is enforceable under the statutory provisions of the special law. A collaboration agreement of the nature alleged by the appellant is not one that could be specifically enforced. Further, as the appellant has not made an alternative prayer for compensation for breach, there is also a bar in regard to award of any compensation under section 21 of the Specific Relief Act.

8.2) The appellant claims to be a builder and real estate dealer. If the appellant entered into a collaboration agreement orally with numerous details as set out in the plaint (extracted in Para (2) above) and could secure

a receipt in writing for Rs.51,000/-, nothing prevented him from reducing the said terms of the alleged collaboration agreement in the form of an agreement or Memorandum of Understanding and have it signed by the owners of the property. No reason is forthcoming as to why that was not done.

8.3 The property stands in the name of second respondent (Defendant No.2), but she did not sign the receipt. There is nothing to show that the second respondent participated in the alleged negotiations or authorized her husband-the first respondent to enter into any collaboration agreement in respect of the suit property. The receipt is not signed by the first respondent as Attorney Holder or as the authorized representative of the owner of the property. From the plaint averments it is evident that appellant did not even know who the owner was, at the time of the alleged negotiations and erroneously assumed that first respondent was the owner. The execution of a receipt for Rs.51,000/- by the first respondent even if proved, may at best make out a tentative token payment pending negotiations and finalization of the terms of an agreement for development of the property.

8.4) The agreement is alleged to have been entered on 10.6.2004. But the plaintiff issued the first notice calling upon defendants to perform, only on 9.3.2007 and filed the suit on 30.6.2007. There was no correspondence or demand for performance, in writing, prior to 9.3.2007, even though the alleged agreement was a commercial transaction.

9. We also agree with the High Court that having regard to the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882 ('TP Act' for short), the pendency of the suit by the appellant shackled the suit property, affected the valuable right of the second defendant to deal with the property in the manner she deems fit, and restricted her freedom to sell the property and secure a fair market price from a buyer of her choice. When a suit for specific performance is filed alleging an oral agreement without seeking any interim relief, the defendant will not even have an opportunity to seek a prima facie finding on the validity of the claim. Filing such a suit is an ingenious way of creating a cloud over the title to the suit property. Such a suit, filed in the Delhi High Court, is likely to be pending for a decade or more. Even if a defendant-owner asserts that his property is not subject to any agreement and the said assertion is ultimately found to be true, his freedom to deal with the property as he likes or to realize its true market

value by sale or transfer is adversely affected during the pendency of the suit. The ground reality is that no third party would deal with a property in regard to which a suit for specific performance is pending. This enables an unscrupulous plaintiff to cajole and persuade a defendant to sell/give the property on plaintiff's terms, or force the defendant to agree for some kind of settlement. It is these circumstances which persuaded the High Court to find some way to do justice, leading to the impugned direction. Having broadly agreed with the High Court in regard to the factual position and the adverse consequences of the suit, the question that remains is whether in such a situation, the High Court could have issued the impugned interim direction.

10. Every person has a right to approach a court of law if he has a grievance for which law provides a remedy. Certain safeguards are built into the Code to prevent and discourage frivolous, speculative and vexatious suits. Section 35 of the Code provides for levy of costs. Section 35A of the Code provides for levy of compensatory costs in respect of any false or vexatious claim. Order 7 Rule 11 of the Code provides for rejection of plaint, if the plaint does not disclose a cause of action or is barred by any law. Order 14 Rule 2 of the Code enables the court to dispose of a suit by

hearing any issue of law relating to jurisdiction or bar created by any law, as a preliminary issue. Even if a case has to be decided on all issues, the court has the inherent power to expedite the trial/hearing in appropriate cases, if it is of the view that either party is abusing the process of court or that the suit is vexatious. The court can secure the evidence (examination-in-chief) of witnesses by way of affidavits and where necessary, appoint a commissioner for recording the cross examination so that it can dispose of the suit expeditiously. The court can punish an erring plaintiff adopting delaying tactics, by levying costs under Section 35B or taking action under Order 17 Rules 2 and 3 of the Code. Apart from recourse to these provisions in the Code, an aggrieved defendant can also sue the plaintiff for damages, if the suit is found to be based on a forged or false document, or if the suit was vexatious or frivolous.



11. There are also two other significant provisions in the Code having a bearing on the issue. We may refer to them :

11.1) Section 95 provides that where in any suit in which an arrest or attachment has been affected or a temporary injunction granted, the suit of the plaintiff ultimately fails and it appears to the court that there was no reasonable or probable ground for instituting the suit, and the court may

upon an application by the defendant, award against the plaintiff, such amount not exceeding Rs.50,000/- as it deems a reasonable compensation to the defendant for the expense or injury caused to him. It further provides that an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction. In other words, if a suit is field without sufficient grounds and in such a suit the plaintiff obtains an interim order of arrest, attachment or temporary injunction, the court can grant compensation up to Rs. 50,000 on application by the defendant. Three things are implicit from this provision. The first is, if no interim order (of arrest, attachment or injunction) is obtained by the plaintiff, the court cannot grant any compensation to defendant. The second is that the compensation awardable by the court cannot exceed Rs.50,000/. The third is that if a plaintiff does not secure an interim order of arrest, attachment or temporary injunction but merely files a suit on insufficient or false grounds the remedy of the defendant, if the defendant wants any compensation (other than costs and exemplary costs under Section 35 and 35A of the Code), he has to file a separate suit.

11.2) Order XXV Rule 1 of Code provides that at any stage of a suit, the court may either on its own motion or on the application of any defendant

order the plaintiff for reasons to be recorded, to give security for the payment of all costs incurred or likely to be incurred by the defendant.

12. But the Code, nowhere authorizes or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to defendant, when the plaintiff's suit is still pending, without any application by defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract between the parties which requires the appellant to furnish such undertaking. None of the provisions of either TP Act or Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. In short, law does not contemplate a plaintiff indemnifying a defendant for all or any losses sustained by the defendant on account of the litigation, by giving an

undertaking at the time of filing a suit or before trial, to pay damages to the defendants in the event of not succeeding in the case.

13. We will next examine whether the power to make such an order can be traced to Section 151 of the Code, which reads: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." As the provisions of the Code are not exhaustive, section 151 is intended to apply where the Code does not cover any particular procedural aspect, and interests of justice require the exercise of power to cover a particular situation. Section 151 is not a provision of law conferring power to grant any kind of substantive relief. It is a procedural provision saving the inherent power of the court to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. It cannot be invoked with reference to a matter which is covered by a specific provision in the Code. It cannot be exercised in conflict with the general scheme and intent of the Code. It cannot be used either to create or recognize rights, or to create liabilities and obligations not contemplated by any law.

13.1) Considering the scope of Section 151, in *Padam Sen v. State of Uttar Pradesh* (AIR 1961 SC 218), this Court observed:

> "The inherent powers of the court are in addition to the powers specifically conferred on the court by the Code. They are complementary to those powers and therefore it must be held that *the court is free to exercise them for the purposes mentioned in S.151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."*
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> xxx xxx xxx
>
> The inherent powers saved by S.151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. *These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party."*
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> (emphasis supplied)

13.2) In *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* – AIR 1962 SC 527, this court held :

> "…..that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in S.151 itself. But those powers are not to be exercised when their exercised may be in conflict with what had been expressly provided in the Code or against the intentions of the legislature."

13.3) In *Ram Chand and Sons Sugar Mills Pvt. Ltd.v. Kanhayalal Bhargav* - AIR 1966 SC 1899 this court reiterated that the inherent power of the court is in addition to and complementary to the powers expressly conferred under the Code but that power will not be exercised if its exercise is

inconsistent with, or comes into conflict with any of the powers expressly or by necessary implication conferred by the other provisions of the Code. Section 151 however is not intended to create a new procedure or any new right or obligation. In *Nainsingh v. Koonwarjee* – AIR 1970 SC 997, this Court observed:

> "Under the inherent power of Courts recognized by Section 151 CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code…."

13.4) A suit or proceeding initiated in accordance with law, cannot be considered as an abuse of the process of court, only on the ground that such suit or proceeding is likely to cause hardship or is likely to be rejected ultimately. As there are specific provisions in the Code, relating to costs, security for costs and damages, the court cannot invoke Section 151 on the ground that the same is necessary for ends of justice. Therefore, we are of the view that a court trying a civil suit, cannot, in exercise of inherent power under section 151 of the Code, make an interim order directing the plaintiff to file an undertaking that he will pay a sum directed by the court to the defendant as damages in case he fails in the suit.

14. The direction to the plaintiff to furnish an undertaking to pay Rs.25 lakhs to defendants in the event of losing the case, is an order *in terrorem.* It is made not because the plaintiff committed any default, nor because he tried to delay the proceedings, nor because he filed any frivolous applications, but because the court is *unable to find the time to decide the case* in view of the huge pendency. (The division bench has supported the order of the learned Single Judge on the ground that 'the heavy docket does not permit early disposal of suits and thus parties may take advantage of keeping frivolous claims alive'). Such an order, punishing a litigant for approaching the court, on the ground that the court *is not able to decide the case expeditiously,* is unwarranted, unauthorized and beyond the power and jurisdiction of the court in a civil suit governed by the Code. Such orders are likely to be branded as judicial highhandedness, or worse, judicial vigilantism.



15. We appreciate the anxiety shown by the High Court to discourage land-grabbers, speculators, false claimants and adventurers in real estate from pressurizing hapless and innocent property owners to part with their property against their will, by filing suits which are vexatious, false or frivolous. But we cannot approve the method adopted by the High Court which is wholly outside law. In a suit governed by the Code, no court can,

merely because it considers it just and equitable, issue directions which are contrary to or not authorized by law. Courts will do well to keep in mind the warning given by Benjamin N. Cardozo in *The Nature of the Judicial Process* : (Yale University Press -1921 Edition Page 114) :

> "The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in social life".

The High Court can certainly innovate, to discipline those whom it considers to be adventurers in litigation, but it has to do so within the four corners of law.

16. This case reminds us of the adage: "Hard cases make bad law". Black's Law Dictionary defines a 'hard case' thus : "A law suit involving equities that tempt a judge to stretch or even disregard a principle of law at issue --- hence the expression "Hard cases make bad law". Justice Holmes explained and extended the adage thus : (See his dissenting opinion in *Northern Securities Co. v. United States* 193 (1903) US 197) :

> "Great cases, like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what

> previously was clear seem doubtful, and before which even well settled principles of law will bend."

This is certainly a hard case. The High Court should have resisted from laying down a 'bad law', which will be treated as a precedent and will result in similar directions by courts, wherever they feel that suits are not likely to succeed. It would encourage, in fact even force, the losing party to file an appeal or further appeal against the final decision in the suit. This is because no plaintiff would like to undertake to pay a large sum as damages, nor would a defendant like to miss a chance to receive a large sum as damages. Such orders would also tempt and instigate both the parties to make attempts to succeed in the suit by hook or crook, by adopting means fair or foul. If litigants are to be subjected to such directions *in terrorem*, the litigant public will be dissuaded from approaching courts, even in regard to bona fide claims. Such orders may lead to gradual loss of faith in the judiciary and force litigants to think of extra-judicial remedies by seeking the help of underworld elements or police to settle/enforce their claims thereby leading to break-down of rule of law. No order or direction of the High Court, even if it is intended to deter vexatious and frivolous litigation, should lead to obstruction of access to courts.

17. We may also examine the matter from another angle. Can the court insist upon the plaintiff to give an undertaking to pay compensation to defendant on the event of dismissal of the suit, irrespective of the reasons for the dismissal of the suit? If the plaintiff furnishes such an undertaking and proceeds with the suit and is able to establish the oral agreement as pleaded by him, but the court dismisses the suit either because it holds that the prayer is barred under section 14(1)(b) and (d) of the Specific Relief Act, or because it decides not to exercise discretion to grant specific performance under section 20(2) of the Specific Relief Act, should the plaintiff be made liable to pay Rs.25 lakhs as compensation to the defendants?

18. The attempt of the Division Bench to support the order of the learned Single Judge with reference to Order XXV Rule 1 of the Code is clearly erroneous. The said provision, as noticed above, only enables the court to require the plaintiff to furnish security for payment of costs incurred or likely to be incurred by the defendant.

19. If the High Court felt that the prayer in the suit was vexatious or not maintainable, it could have considered whether it could reject the suit under Order 7 Rule 11 of the Code holding that the plaint did not disclose the

cause of action for grant of the relief sought or that the prayer was barred by section 14(1)(b) and (d) of the Specific Relief Act. Alternatively, the court could have framed issues and heard the issue relating to maintainability as a preliminary issue and dismiss the suit if it was of the view that it had no jurisdiction to grant specific performance as sought, in view of the bar contained in section 14(1)(b) and (d) of the Specific Relief Act. If it was of the prima facie view that the suit was a vexatious one, it could have expedited the trial and dismissed the suit by awarding appropriate costs under section 35 of the Code and compensatory costs under section 35A of the Code. Be that as it may.

20. Having found that the direction of the High Court is unsustainable, let us next examine whether we can give any relief to defendants within the four corners of law. The reason for the High Court directing the plaintiff to furnish an undertaking to pay damages in the event of failure in the suit, is that Section 52 of the Transfer of Property Act would apply to the suit property and the pendency of the suit interfered with the defendant's right to enjoy or deal with the property. Section 52 of TP Act provides that during the pendency in any court of any suit in which any right to immovable property is directly and specifically in question, the property cannot be

transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose. The said section incorporates the well-known principle of *lis pendens* which was enunciated in *Bellamy v. Sabine* [1857 (1) De G & J 566] :

> "It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

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

21. The principle underlying section 52 of TP Act is based on justice and equity. The operation of the bar under section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit. The appellant-plaintiff has alleged that he is a builder and real estate dealer. It is admitted by him that he has entered into the transaction as a commercial collaboration agreement for business benefits. The appellant has further stated in the plaint, that under the collaboration agreement, he is required to invest Rs. 20 lakhs in all, made up of Rs.16,29,000/- for construction and Rs.3,71,000/- as cash consideration and that in lieu of it he will be entitled to ground floor of the new building to be constructed by him at his own cost. Treating it as a business venture, a reasonable profit from

such a venture can be taken as 15% of the investment proposed, which works out to Rs.3 lakhs. Therefore it would be sufficient to direct the respondents to furnish security for a sum of Rs. 3 lakhs to the satisfaction of the court (learned Single Judge) as a condition for permitting the defendants to deal with the property during the pendency of the suit, under Section 52 of the TP Act.



The need for reform :

22. Before concluding, it is necessary to notice the reason why the High Court was trying to find some way to protect the interests of defendants, when it felt that they were being harassed by plaintiff. It made the impugned order because it felt that in the absence of stringent and effective provision for costs, on the dismissal of the suit, it would not be able to compensate the defendants for the losses/hardship suffered by them, by imposing costs. If there was an effective provision for levy of realistic costs against the losing party, with reference to the conduct of such party, the High Court, in all probability would not have ventured upon the procedure it adopted. This draws attention to the absence of an effective provision for costs which has led to mushrooming of vexatious, frivolous and speculative civil litigation.

23. The principle underlying levy of costs was explained in *Manindra Chandra Nandi v. Aswini Kumar Acharaya* – ILR (1921) 48 Cal. 427 thus:

> "We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. * * * * The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."

In *Salem Advocate Bar Association v. Union of India* [2005 (6) SCC 344] this after noticing that the award of costs is in the discretion of the court and that there is no upper limit in respect of the costs awardable under Section 35 of the Code, observed thus:

> "Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35 (2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the

> transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

23. The provision for costs is intended to achieve the following goals :

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

24. At present these goals are sought to be achieved mainly by sections 35,35A and 35B read with the relevant civil rules of practice relating to taxing of costs. Section 35 of the Code vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules, including the rules in force in Delhi provide each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs. We are informed that in Delhi, the advocate's fee in regard to suits the value of which exceeds Rs.5 lakhs is : Rs.14,500/- plus 1% of the amount in excess of Rs.5 lakhs subject to a ceiling of Rs. 50,000/-. The prevalent view among litigants and members of the bar is that the costs provided for in the Code and awarded by courts neither compensate nor indemnify the litigant fully in regard to the expenses incurred by him.

25. The English civil procedure rules provide that a court in deciding what order, if any, to make in exercising its discretion about costs should have regard to the following circumstances: (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment made into court or admissible offer to settle made by a party which is drawn to the courts attention. 'Conduct of the parties' that should be taken note by the court includes : (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. Similar provisions, with appropriate modifications may enable proper and more realistic costs being awarded. As Section 35 of the Code does not impose any ceiling the desired object can be achieved by the following : (i) courts levying costs, following the result, in all cases (non-levy of costs should be supported by reasons); and (ii) appropriate amendment to Civil Rules of

Practice relating to taxation of costs, to make it more realistic in commercial litigation.

26. The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs.3,000/-. This requires a realistic revision keeping in view, the observations in *Salem Advocates Bar Association (supra*). Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay.

27. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions

relating to costs and compensatory costs contained in Section 35 and 35A of the Code.

**Conclusion**

26. In the result, we allow this appeal in part, set aside the order of the Division Bench and Learned Single Judge directing the plaintiff-appellant to file an affidavit undertaking to pay Rs. 25 lakhs to defendants-respondents in the event of failure in the suit. Instead, we permit the defendants-respondents under section 52 of TP Act, to deal with or dispose of the suit property in the manner they deem fit, in spite of the pendency of the suit by the plaintiff, subject to their furnishing security to an extent of Rs. Three lakhs to the satisfaction of the learned Single Judge.



……..J.
(R V Raveendran)

New Delhi;
July 5, 2010.

……..J.
(R M Lodha)