Manohar and Others Vs. Ramesh and Others

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Court : Mumbai Nagpur

Decided On : Mar-11-2016

Judge : A.B. Chaudhari

Appeal No. : Second Appeal No. 210 of 2013

Appellant : Manohar and Others

Respondent : Ramesh and Others

Advocate for Pet/Ap. : Shri. Anand Deshpande

Judgement :

Oral Judgment:

1. Being aggrieved by the judgment and decree 16th March 2013 passed by the learned District Judge9 Nagpur in Regular Civil Appeal No. 589/2012, setting aside the judgment decree dated 4.9.2004 passed by the learned Joint Civil Judge, Senior Division, Nagpur in Special Civil Suit No. 707/1995, the present Appeal has been filed by the appellants /original defendants in this Court.

2. At the time of admission, this Court had observed thus in last paragraph of its order dated 27th November, 2013:-

Considering the fact that the dispute between the parties is going on since the year 1992, it would be appropriate that final hearing of the Appeal is expedited and

it is accordingly expedited.

3. On the basis of the said order, an early hearing Application was filed. Accordingly, this Court had grated early hearing of the Appeal by order dated 7th August, 2014. When the Appeal was called out for final hearing on 13th August 2014, Shri K.K. Pillai Advocate for respondent no.1 (wrongly written as respondent no.2) sought an adjournment which was granted by this Court. Thereafter on 24.2.2016, Civil Application, being CA(s) No. 162/2016 for early hearing pursuant to the order dated 27th November, 2013 was moved and the Appeal was fixed for final hearing on 3rd March 2016 in the presence of Advocates for the parties. On 3rd March,2016, however, Mr K.K. Pillai, Adv. for respondent no.1 sought adjournment which was granted as per his convenience to 7th March, 2016 on which date, hearing of the Appeal commenced as per its serial number on the Board. But Advocate M.P. Suryawanshi h/for Mr. K.K. Pillai appeared in the midst and again mentioned for adjournment and hat was granted to 8th March 2016. On 8th March 2016, the respondent no.1Ramesh Patil (Phiske) appeared in person and filed an Application. This Court heard him and made a detailed order which is quoted here-in-below :

This is a part heard Second Appeal posted today for further hearing, particularly since Advocate M.P. Suryawanshi h/f Mr. K.K.Pillai, Advocate for respondent no.1 requested accordingly, after the arguments for the counsel for the appellants were heard on 7.3.2016. Today, Shri Ramesh Janrao Patil (Phiske)/respondent no.1, has appeared in-person. There is no appearance on behalf of respondent no.2 or his legal heirs.

This Appeal was heard on admission on 27th November, 2013 and was admitted by this Court (S.B. Shukre,J.) on certain questions, with interim orders therein. Lastly, in the said order this Court has observed that considering the fact that the dispute between the parties is going on since the year, 1992 it would be appropriate that final hearing of the appeal is expedited and it is accordingly expedited. Thereafter, on 7th August, 2014 this Court allowed the early hearing Application as per the aforesaid observations made by the coordinate Bench and posted the Second Appeal for hearing on 12th August, 2014, as per the consent of

the parties. However on 13th August,2014, Mr. K K Pillai learned Advocate appearing on behalf of respondent no.1 (wrongly written for respondent no.2) requested for adjournment, which was granted for a week. Thereafter on 24th February 2016, Civil Application No.162/2016 for early hearing was allowed and the Appeal was posted for final hearing on 3rd March 2016. On 3rd March 2016 Mr. K. K. Pillai, Advocate appearing for respondent no. 1 requested for time till 7th March 2016 on the ground that he was unwell. This Court accepted his request. As per his request, the Second Appeal was kept for hearing on 7th March, 2016. On 7th August 2016, now, it appears from the letter filed by respondent no.1 that Shri K K Pillai sent a registered letter dated 4th March 2016 to respondent no.1Ramesh Patil (Phiske), stating therein that on his request the High Court adjourned the Second Appeal to 7th March 2016 and he does not see any possibility of his recovering from ill-health by 7th March 2016 and, therefore, to take away the papers from him. Except his statement, there is no supporting document filed by Ramesh (respondent no.1). Be that as it may, the fact remains that at the request of Mr K.K.Pillai the Appeal was posted for hearing on 7th March 2016. On 7th March 2016 in the midst of hearing, Advocate Suryanwashi came and mentioned that Advocate K.K. Pillai could not be able to attend on 7th March 2016. However since the arguments had already started before arrival of Mr.Suryawanshi, Advocate, the arguments of the counsel for the appellants, were completed and the case was posted for hearing on the next date, in the presence of Mr Suryawanshi, on 8th March 2016 i.e. the next day. Now today, Ramesh/respondent no.1 as tendered an application for a suitable time to take services of an Advocate for defending his case. Learned counsel for respondent no.2 is absent though served. Heard Shri Ramesh Patil (Phiske) in person, who stated that he wants to engage an Advocate. He has stated in paragraph 2 of his Application that he would engage a lawyer within one week. Since this Appeal is part heard inasmuch as the arguments of the Advocate for the appellants were almost completed yesterday and the appeal was kept today for hearing as per the convenience of Shri K K Pillai, for respondent no.1/Ramesh, he is still asking for time to engage another Advocate. In my opinion, there should not be any difficulty in granting time for hearing but however since the matter is appeal is partheard and was almost completely heard yesterday, it cannot be adjourned for a longer

time. I therefore place this Appeal as part heard on 11.3.2016, to enable respondent no.1Ramesh Patil to engage an Advocate. It is made clear that in no case, even in the event of engagement of any Advocate by respondent no.1Ramesh Patil, this part heard Appeal would be adjourned on 11.3.2016.

Hence place the Second Appeal for final hearing, as part heard, on Friday, the 11th March 2016 at Sr.No.1.

In the above order, thus, three days time was granted till today by making certain observations. Today, on 11th March 2016, Prashant B.Mukund, (nephew of Mr. Ramesh Patil (Phiske)/respondent No.1 appeared and has invited my attention to Civil Application No. 246/2016, stating that respondent no.1 is a diabetic and is suffering from high blood pressure, along with the Doctor s certificate. In the light of the above orders and the last order dated 8th March 2016 giving till 11th March 2016 and particularly when the respondent no.1 was told that it was not possible to grant longer adjournment as the Appeal was partheard and time was granted from time to time, without making any further comments, hearing of the partheard Appeal was taken and completed. Thus, now, I proceed to dictate the judgment in the presence of Advocates for appellant and Mr.Prashant B.Mukund in the open Court.

FACTS

4. The respondent/plaintiff No.1Ramesh and Plaintiff No.2Baburao filed Special Civil suit No. 707/1995 in the Court of Civil Judge, Senior Division, Nagpur, for specific performance of contract dated 21.1.1991. It was averred in the Suit that the appellant/defendant Manohar had entered into an agreement on 21.1.1991 with Plaintiff No.2Baburao for sale of 5 acres of field out of survey No.86, area 9.01 acres; and Plaintiff No.2Baburao paid Rs. 50,000/as earnest to appellant/defendant Manohar out of total agreed consideration of Rs. 8,75,000/for five acres. The balance amount of Rs. 8,25,000/was to be paid as Rs. 2,00,000/(Rs. 2,50,000/in the agreement Exh. 47) to be paid by 31.1.1992; Rs.3,25,000/by 31.1.1993 and Rs. 3,00,000/by 30.1.1994. There was a mistake in writing Rs. 2,50,000/since actually it was Rs. 2,00,000/in the agreement Exh. 47. There was an oral partnership between the Plaintiff No.1Ramesh and Plaintiff No.2Baburao

for purchase of the suit property; but Plaintiff No.2Baburao backed out and executed assignment of the said agreement Exh. 47 in favour of Plaintiff No.1Ramesh on 12.11.1991, orally reduced to writing on 3.2.1992 which was a public notice of assignment and it was served by registered post acknowledgment due on defendant-Manohar on 5.2.1992. That was done in view of Clause (3) on page 3 of the agreement which stated that the sale will be registered either in the name of Plaintiff No.2Baburao or the other name suggested by him. After assignment in favour of plaintiff No.1Ramesh, Plaintiff No.2-Baburao was still made plaintiff, by way of abundant precaution and nothing more as assignment in favour of Ramesh took place orally on 12.11.1991.

5. Plaintiff No.1Ramesh, the assignee, was and is still ready and willing to perform his part of the contract by paying balance consideration of Rs. 8,25,000/. He stated that the defendant-Manohar, however, turned dishonest and avoided receiving even the first payment of Rs. 2,00,000/which amount was tendered by him {Plaintiff No.1Ramesh on or about 20.1.1992 to defendant-Manohar). He then stated that the plaintiffs were advised to file a suit i.e. Regular Civil Suit No. 501/1992 against the defendant-Manohar in which mandatory injunction was sought asking the defendant-Manohar to comply with the terms and conditions of the agreement dated 21.1.1991 by accepting Rs.2,00,000/and to issue prohibitory injunction against him from dispossessing of the suit property. The Application (Exh. 5) for grant of temporary injunction was filed and was granted, but injunction order was reversed by the District Court in Appeal No. 302/ 1992 on 7.8.1993, with observation in paragraph 11 of the order that it was open for the plaintiffs to file suit for specific performance and claim appropriate reliefs against defendant-Manohar. The plaintiffs filed Civil Revision Application no. 794/1994 before the High Court which passed the order on 3.3.1995 accepting the request for withdrawal of the Revision Application to enable the plaintiffs to make appropriate Application for withdrawal of the suit (RCS No.501/1992), with liberty to file proper suit in appropriate and competent Court and, thus, dismissed the Revision as withdrawn. It is for this reason, the plaintiffs were constrained to file the suit for specific performance amongst other reliefs. The cause of action was stated to be on 19.8.1992 when defendant-Manohar filed written statement in RCS No. 501/1992 stating cancellation of agreement by Plaintiff No.2Baburao himself and

that it also arose on 30.1.1994 i.e. the last date of performance of the agreement. It was also stated in paragraph 11 of the Suit that the earlier RCS No. 501/1992 became infructuous and shall be withdrawn unconditionally by the plaintiff under Order 23 Rule 1 CPC.

6. The appellant/defendant-Manohar appeared and filed written statement and denied all the averments made in the plaint adverse to the interest of the defendant. He contended that the time was the essence of the contract. He also stated that the suit property as a matter of fact owned by his father-Natthuji and even according to the plaintiff was not partitioned and, therefore, his brother Dr. Prakash and other brother Kailash, were also having shares therein and, in fact, Dr. Prakash had filed RCS No. 343/ 1992 for partition {in the court of 4th Joint Civil Judge, Junior Division, Nagpur decided on compromise decree (Exh. 66) dated 1.1.1996}. It was thus stated that defendant-Manohar alone was not competent to enter into agreement. He denied that he had given any consent or had any knowledge about the assignment in favour of the Plaintiff No.1Ramesh by Plaintiff No.2 Baburao and there was no privity of contract between the Plaintiff No.1 Ramesh and defendant, and as a matter of fact, there was cancellation by both plaintiffs-Ramesh and Baburao by issuance of telegram on 22.1.1992 in which the refund of consideration of Rs. 50,000/was asked specifically. He therefore contended that in fact the plaintiffs themselves have cancelled the contract or agreement and therefore, no right to sue survived. There was a specific denial about any tendering of amount of Rs.2,00,000/by the plaintiff No.1Ramesh to the defendant or even an attempt to do so. With reference to RCS No.501/1992, it was specifically stated that the present suit is barred by provisions of Order 2 Rule 2 CPC in view of the filing of RCS No. 501/1992 and the bundle of facts constituting the same cause of action and that in CRA No. 794/1994 the High Court was not inclined to entertain the Revision Application but the plaintiff withdrew the same. RCS No.501/1992 was dismissed as infructuous without any liberty reserved in favour of the plaintiffs to prosecute the instant Civil Suit and, on the contrary, the plaintiffs did not turn up or to even seek liberty in that suit though the High Court allowed liberty to apply to the trial Court for leave to file a fresh suit. Nothing was done. There was no readiness and willingness on the part of the plaintiffs from their conduct nor was any money available with them. In the specific pleadings, it

was stated that the plaintiffs themselves cancelled the agreement asking for refund of money and accordingly money was withdrawn from Bank of India, via Cheque No. 7642 dated 25.1.92 from the account of his wife-Karuna but then the plaintiffs avoided to receive the amount though demanded by telegram dated 22.1.1998 (Exh.68). The contract was unenforceable because the suit land was notified for being acquired vide Notification dated 16.7.1981 for Nagpur Improvement Trust and, at any rate, the suit for partition filed by Dr. Prakash, the brother was pending in the court at that time.

7. The parties thereafter filed several documents and also went on trial after the issues were framed by the learned trial Judge. Oral evidence was adduced so also the documentary evidence. The learned trial Judge thereafter heard the parties and dismissed the Suit filed by the respondents/plaintiffs, answering almost all the issues against the respondents/plaintiffs. The respondents feeling aggrieved thereby filed an Appeal before the District Judge, Nagpur being Regular Civil Appeal No.589/2012 and the Court by the impugned judgment and decree dated 16th March, 2013 allowed the Appeal and decreed the Suit was that dismissed. Hence this Second Appeal.

SUBMISSIONS:

8. In support of the Appeal, learned counsel for the appellants invited my attention to the order of this Court dated 27th November, 2013, in which in all three substantial questions of law have been framed. He then submitted that two more questions may be framed regarding readiness and willingness and the frustration of the contract due to acquisition by Nagpur Improvement Trust and the partition Suit filed by brother of appellant Dr.Prakash against the defendant Manohar. Shri Anand Deshpande, learned counsel for the appellants then contended that the judgment of the trial Court is based on facts and evidence marshalled thoroughly by the trial Judge, after marking the demeanour of the witnesses and taking careful view of the entire matter and facts, and evidence on record as well as the legal position. According to him, for a measly sum of Rs. 50,000/without making any payment thereafter, out of the huge sum of Rs. 8,75,000/, the plaintiffs wanted to grab the valuable suit land of the defendant Manohar and, therefore, the trial

Judge refused to exercise discretion to award specific performance of contract on a paltry amount of Rs. 50,000/. He then submitted that the agreement Exh.47 was never made with plaintiff No.1 Ramesh, but was allegedly made with Plaintiff No.2 Baburao and Baburao never had shown any seriousness even at the beginning i.e. at the time of payment of Rs.50,000/or at any point thereafter, to obtain the contract unto himself. The defendant Manohar had never agreed to sell the property to plaintiff No.1 Ramesh which is the admitted position; but on the basis of the alleged assignment by plaintiff-Baburao to plaintiff no.1 Ramesh without any consent or knowledge or advance knowledge of Manohar, the defendant, it was claimed that the plaintiff No.1Ramesh, being the alleged assignee, was entitled to claim specific performance. Mr.Anand Deshpande, learned Advocate then contended that this is wholly impermissible in law and the assignment cannot be given such a absurd meaning that plaintiff No.2 Baburao could have assigned the agreement without consent or knowledge of the defendant or without putting to defendant the choice of the person to be the assignee. It was, therefore, contended that there was absolutely no privity of contract between the Plaintiff No.1Ramesh and defendant-Manohar as the agreement Exh. 47 contains signature only of Baburao; and plaintiff No.1 Ramesh was nowhere in picture. Such a suit by plaintiff No.1 Ramesh with whom defendant Manohar had no agreement at all, could not even be filed. Such agreement cannot be enforced in the court of law. Learned counsel for the appellants then contended that the suit was clearly hit by the provisions of O. 2 R.2, CPC, and the law in respect of which has now been very well settled by the highest court of land. He then submitted that the plaintiffs never obtained any leave of the Court to file fresh suit for specific performance of contract though such a statement was made before the High Court in the Revision Application and the High Court accordingly permitted obtaining of leave. Surprisingly enough, according to him, when the earlier Suit i.e. RCS No. 501/1992 was called out for hearing on Application Exh. 28 for dismissal thereof, the plaintiffs did not apply for withdrawal with liberty to file another Suit and the Court held that the suit was infructuous and did not grant any leave or liberty. Therefore, subsequent suit was clearly barred by O.2 R.2, CPC. He then submitted that the suit in question was barred by law of limitation under Art. 54 of the Limitation Act. The learned lower Appellate Court committed a grave error in

law in sticking to date namely 30.1.1994 despite cancellation Exh.68 made or the refusal sensed by the plaintiffs with full consciousness ignoring the limitation started running from the point of cancellation/refusal. According to him, the learned lower Appellate Court also made a mistake in law in assuming that there should be refusal only in writing from the defendant and the Courts do not have power to find out whether there is a refusal or not, from the evidence on record. He submitted that the cancellation of the agreement was made by the plaintiffs themselves on 22.2.1992 under telegram-Exh. 68 and further the averments in RCS No.501/1992 themselves indicated that the plaintiffs fully understood clear refusal. Not only that, according to Mr Deshpande, the lower Appellate Court assumed that the suit for specific performance cannot be filed before the last date mentioned in the agreement despite cancellation/refusal at earlier point of time. The learned counsel for the appellants then contended that there was absolutely no readiness and willingness on the part of the plaintiffs to perform part of the contract inasmuch as no evidence of availability of money of Rs. 2 lakhs was adduced. There was also a inconsistency whether the money was actually tendered or tried to be tendered. He then contended that there was a suit filed by Dr. Prakash in respect of the very suit property and for partition separate possession that was pending in the Court and the finding recorded by the lower Appellate Court that suit filed by Dr. Prakash was fraudulent to deny the claim of the plaintiffs/respondents is nothing but a figment of imagination for which there were pleadings, issues nor any evidence on record. He then cited the following decisions for consideration:-

1) Virgo Industries (Eng) Pvt.ltd. vs. Venturetech Solutions Pvt.ltd. 2013(2) Mh.L.J. 535

2) Deva Ram and another vs. Ishwar Chand and another 1996 (1) Civil L.J. 343;

3) Dayaram Raghobaji Belsare vs. Vishrantibai George Lavet 1990 Mh.L.J. 227

4) SNP Shipping Services Pvt.ltd.and ors. vs. World Tanker Carrier Corpn : 2000 (2) Mh.L.J. 570.

5) Kamal Kishore Saboo vs. Nawabzada Hasan Khan : 2001 (4) Civil LJ 177;

6) Ashok Aggarwal vs. Bhjagwan Das Arora 2002 (1) Civil LJ 780.

7) H M Kumaraswamy vs. T.P.R. Rudraradhya AIR 1966 Mysore 215.

8) Protap Chandra Koyal vs. Kalicharan AIR 1963 Calcutta 468.

As stated earlier, the respondents remained absent despite repeated adjournments granted.

9. This Court had at the time of admission on 27th November, 2013 framed three substantial questions of law, as under :

1) Whether the first appellate Court was right and justified in holding that time limit to reckon the limitation to file the suit will start from 30.1.1994 ?

2) Whether the first appellate Court was justified in interpreting the document at Exh.47 i.e. an agreement of sale dated 21.01.1991, that it showed that 30/01/1994 was the date on which the sale deed was to be executed, when such term is not embodied in the said document?

3) Whether the first appellate Court was justified in overruling the objection of the defendant and finding of the trial court that the present suit is barred by the provisions of Order II Rule 2 of the Code of Civil Procedure? .

I would reframe those very questions and, in addition, two more questions, as under :-

(1) Whether the first Appellate Court committed an error in law in computing the limitation within the meaning of Art. 54 of the Limitation Act, from 30.1.1994 in the wake of detailed averments in paragraphs 3,4,5,6 in the plaint (Exh.71) in RCS No. 501/1992 (dismissed as infructuous on 29.11.1995 by order below Exh. 28), about the conscious understanding of denial to perform the contract on the own showing of the plaintiffs themselves with outer limit, namely, 5.2.1992 when defendant allegedly received public notice dated 3.2.1992 about assignment and alleged failed attempt to make payment of Rs. 2,00,000/on 30.3.1992 as the limitation of three years would in any case end on 4.2.1995, as against the suit that was filed on 10.7.1995?

(2) Whether the first Appellate Court committed serious error in interpreting that document Exh. 47 agreement of sale dated 21.1.1991, would partake the character of extending limitation for being computed from 30.1.1994 in the wake of limitation already having commenced from 5.2.1992 and also under Exh. 68 cancellation telegram by both plaintiffs dated 22.1.1992 ?

(3) Whether the first Appellate Court committed a serious error in holding that the suit in question was not barred by the provisions of Order 2 Rule 2 CPC in the wake of absence of leave, liberty, and the same cause of action on the bundle of same facts founded on Exh.47 agreement and not at all materially different and in the wake of nonuse of the liberty to apply to the trial Court for leave to file appropriate suit granted by the High Court on 3.3.1995 in CRA No. 794/1994?

(4) Whether the learned first Appellate Court committed an error in hastily holding that the plaintiffs were ready and willing to perform their part of the contract when absolutely no evidence was brought on record that the plaintiff No.1Ramesh had with him even for the first payment ready huge sum of Rs. 2 lakhs drawn from any known source to the satisfaction of the Court and in the light of the cancellation (Exh. 68) by both the plaintiffs and in the absence of any agreement with plaintiff no.1 Ramesh, much less with any legal or valid assignment?

(5) Whether the lower Appellate Court committed serious error in reversing the finding of fact recorded by the trial Judge about the acquisition of the suit land by Nagpur Improvement Trust and the partition suit filed by Dr. Prakash, being RCS No.343/1992 in respect of the very suit property rendering the contract under frustration ?

CONSIDERATION:

10. Heard learned counsel for the appellants. Seen the entire evidence oral as well as documentary. The trial Judge had framed the following issues in the suit:

	ISSUES	FINDINGS

1	Do plaintiffs prove that the father of plaintiff no. 1 and defendant jointly purchased field Survey nos. 79 and 86 on 31.07.1952?	In the affirmative
2	Do plaintiffs prove that defendant was allotted field No.86 in partition dated 18.07.1966?	In the affirmative
3	Do plaintiffs prove an agreement dated 21.01.1991 for total price Rs. 8,75,000 as alleged?	In the affirmative
4	Do plaintiffs prove that plaintiff no.2 paid Rs. 50,000/- as an earnest amount was to be paid on 30/01/1992, 30/01/1993 and 30/01/1994 as alleged?	In the affirmative
5	Do plaintiffs prove that defendant committed breach of contract?	In the negative
6	Do plaintiffs prove his willingness to perform part of the contract?	In the negative
7	Are plaintiffs entitled for decree sought ?	In the negative
8	Whether defendant proved that suit is not tenable and deserves to be dismissed as alleged?	In the affirmative
9	Who is the owner of field Survey no.86/2?	Defendant is the owner of Field Survey No. 86/2
10	Does defendant prove that plaintiff cancelled an agreement dated 21/01/1991?	In the affirmative
11	Does defendant prove that plaintiffs failed to perform the contract as alleged?	In the affirmative
12	Is the suit time barred?	In the affirmative
13	Is the suit barred by provisions of Order 2, Rule 2 of CPC ?	In the affirmative

14	What order	See the operative order herein.
	ADDITIONAL ISSUE	FINDINGS
5A	Does defendants prove that the agreement dated 21.01.1991, stands frustrated and became impossible to perform the part of contract because of acquisition of some portion of the suit land by the state, by virtue of notification dated 16/08/1994?	In the affirmative

The lower Appellate Court framed the following points for determination in the Appeal:

	POINTS	FINDINGS
i.	Whether plaintiff proved that he was ready and willing to perform his part under contract?	In affirmative
ii.	Whether suit is barred by limitation?	In negative
iii.	Whether suit is barred by provisions of Order 2 Rule 2 of Code of Civil Procedure?	In affirmative
iv.	Whether defendant is sole owner of suit property?	In affirmative
v.	Whether agreement dated 21.01.1991 get frustrated by acquisition of the land?	In negative
vi.	Whether plaintiff is entitled for specific performance?	In affirmative
vii.	What order and Reliefs ?	Appeal allowedas per final order.

CONSIDERATION:

11. The story of the case begins with the agreement Exh. 47 dated 21.1.1991 and it is necessary to note that Exh. 47 consists of three pages. Page No.1 is on Stamp of Rs.10/No. 12100 dated 19.1.1991; Page No.2 is on Stamp of Rs.10/No. 28319 dated 11.01.1991 in the name of plaintiff No.2 Baburao only. There is no signature of plaintiff No.1 Ramesh on this agreement anywhere and it is only Baburao (Plaintiff No.2) whose signature appears on page no.3. It is strange to note that the plaintiffs examined only plaintiff No.1Ramesh and no other witness to prove the happenings in regard to Exh. 47 as Ramesh was a rank stranger to Exh.47 dated 21.1.1991.Even Plaintiff no.2Baburao was not examined.

It is an admitted fact that the agreement (Exh.47) was not at all with the plaintiff No.1Ramesh, but was only with Plaintiff No. 2Baburao. However, reliance was placed on the alleged assignment appearing on page 3 of the agreement. After payment of Rs. 50,000/on the date of agreement i.e. 21.1.1991 to defendant-Manohar, plaintiff No.1Ramesh stated that Plaintiff No.2Baburao did not want to honour the agreement due to his weak financial position and inability to raise the huge money in the sum of Rs. 8.25 lakhs and that, therefore, due to their oral partnership, plaintiff No.2Baburao orally on 12.11.1991 assigned the agreement in favour of Plaintiff No.1Ramesh which was reduced to writing on 3.2.1992 (Exh.48) and sent to defendant by registered post acknowledgment due which he received on 5.2.1992 (Exh.49). The plaintiff No.1 Ramesh, then, alleged that he issued a telegraphic notice Exh.53 to the defendant informing him that he was avoiding to accept Rs. 2Lakhs as per the agreement (Exh. 47) since 13th January, 1992. Exh. 53 telegram reads as under :

Dated : 31.1.1992 :

You are avoiding to accept the amount Rs. 2 lakhs against agreement 21.1.1991. Avoiding since 13th January,1992. Held responsible for losses and legal activities.

Kathawate and others

Sender: R.J. Patil

(Plaintiff No.1)

As stated earlier, Exh. 48assignment shows that on 12.11.1991, plaintiff No.2Baburao had orally made assignment in favour of plaintiff No.1Ramesh and, therefore, plaintiff No.2Baburao had moved away from the transaction, but the telegram(Exh. 53) shows that both had alleged that from 13.1.1992 defendant-Manohar was avoiding to accept the amount of Rs. 2 lakhs. Thus, at least on the date of Exh. 53 i.e. 31.1.1992, both had become aware that the defendant-Manohar was in no mood to go ahead with the contract. It is pertinent to note at any rate that the question of accepting money, much less Rs. 2 lakhs, from plaintiff No.1Ramesh from 13.1.1992 onwards did not arise because the alleged assignment dated 3.2.1992(Exh.48) was made known to defendant-Manohar for the first time on 5.2.1992 and, therefore, it was idle to contend that defendant-Manohar was not willing to accept Rs. 2 lakhs from Plaintiff No.1Ramesh from 13.1.1992 till the date of telegram dated 31.1.1992 for want of any privity of contract or knowledge of assignment. Be that as it may, the plaintiffs-Ramesh and Baburao lodged RCS No. 501/1992 (Exh. 57) in the Court of Civil Judge, Sr.Dn. Nagpur, in February,1992. In that suit, they averred thus, in paragraphs 3,4,5 and 6:-

3. That, due to some unavoidable circumstances the plaintiff no.2 transferred the agreement in the name of plaintiff no.1 on 12.11.1991 and given all the rights vested in the plaintiff no.2 to the plaintiff no.1. As per the agreement the plaintiff no.1 is ready to purchase the 5 acres land out of total land @ Rs.1,75,000/per acre. The plaintiff no.2 had received all the amount invested by him in the original agreement. Therefore, he has no interest in further transaction and therefore he is not claiming any relief as he is joined as a proforma plaintiff to prove the averments made in the plaint. The plaintiff no.2 informed the defendant regarding the transfer of agreement in the name of plaintiff no.1 vide notice dated 3.2.91. The plaintiff no.2 also issued two telegraphic notice to the defendant. The plaintiff no.1 also issued one telegraphic notice stating therein and calling upon the defendant to accept Rs. 2,00,000/against the agreement dated 21.1.1991. The plaintiff no.1 was/is ready to pay the amount of Rs. 2,00,000/as per the agreement dated 21.1.1991, but it is the defendant who is avoiding to accept the amount as per the agreement. The plaintiff No.1 is still ready to perform his part of contract, but the defendant had/has trying to avoid his responsibility.

4. That, it is reliably learnt that the defendant is trying to transfer the said suit property to another person by way of sale or mortgage even though the agreement to sell dated 21.1.92 is valid up to 30.1.1994. Hence it is necessary in the interest of justice to restrain the defendant from transferring the suit property in any manner whatsoever to anybody except the plaintiff no.1. It is further necessary to restrain the defendant from interfering with the lawful possession of the plaintiff no.1 on the suit property. It is further necessary to direct the defendant to comply the agreement dated 21.1.1991 and to accept the amount of Rs.2,00,000/as per the clause of agreement.

5. That, the plaintiff no.1 have approached the defendant on number of occasion so as to complete all necessary formalities to expedite the matter so as to complete the terms and conditions of the agreement. The plaintiff no.1 is always ready and wiling to perform his part of contract in getting the sale deed executed in their favour and he is trying his level best to do so to complete the transaction as per agreement. But the defendant is avoiding on one or the other pretext.

6. That, under such circumstances and from the allegations made hereinabove, it is very much clear that the defendant has no mind to cooperate with the plaintiffs to execute the sale deed as per terms and conditions of an agreement dated 21.1.1991. The defendant is avoiding. The defendant is avoiding to make the attempt in extending his cooperation and by doing so, there is every possibility that, he may sale the property to some other persons for higher consideration. If it is done the plaintiff no.1 shall have to suffer great irreparable loss. The plaintiff have tried their level best to settle the matter amicably, but to no effect and as such is/are constrained to file the instant suit.

They stated the cause of action in Paragraph no.8 thus:-

8. That, the cause of action for filing the suit arose on 21.1.91 when plaintiff no.2 and defendant entered into an agreement of sale, thereafter plaintiff no.2 transferred the agreement of his, in favour of plaintiff No.1. Then plaintiff issued the notice dated 3.2.92 and telegraphic notice to the defendant. The cause of action is continuous one within the jurisdiction of this Hon ble Court and as such this Hon ble Court has jurisdiction to try the suit.

They then made prayers as under :

i) to grant mandatory injunction against the defendant directing him to comply as per terms and conditions of an agreement dated 21.1.1992 by 28 accepting Rs.2,00,000/;

ii) to issue prohibitory order against the defendant restraining him from disposing of the suit property till the decision of suit;

iii) any other relief which this Hon ble Court deems fit under the circumstances of the case be granted in favour of the plaintiffs;

iv) Cost of the suit be saddled on the defendant.

12. From the perusal of the averments in the plaint and the prayers, it is explicitly clear that the defendant-Manohar was avoiding to accept Rs. 2 lakhs and was avoiding his responsibility; and not only that, the defendant-Manohar was trying to transfer the suit property to other person/s and that is why the plaintiffs understood that it was necessary to restrain the defendant from doing so, as vide paragraph 6, defendant-Manohar had no mind to cooperate with the plaintiffs to execute the sale-deed and there was every possibility that he would sell the property to some other person/s for a higher consideration, in which case they would suffer losses and that the cause of action from all the above events arose on 3.2.1992 and telegraphic notice Exh.53 dated 31.1.1992. It is in the background of the pleadings that they sought mandatory injunction to comply with the agreement-Exh. 47 and also injunction from disposing the suit property. These prayers and the averments are clear enough that both the plaintiffs fully and consciously understood that defendant-Manohar was in no mood to honour the agreem entExh. 47 and had blown refusal. Now, at this stage, it is very important to note another telegram-Exh. 68. Though plaintiff No.1 Ramesh has denied of sending of such telegram, the same has been duly proved and in the cross-examination instead of denying, he states that he did not remember issuing such a telegram. There is no reason to ignore the certified copy of this telegram Exh. 68 and, in fact, the same has been accepted by the Courts below as the evidence. I also agree that Exh. 68 has been duly proved and will have to be read in evidence. It is interesting to note that this

telegram-Exh. 68 is dated 22.1.1992 addressed to defendant-Manohar (M. N. Dhawad) and it is sent by Plaintiff No.1/ R.J.Patil, as sender. The telegram reads thus:

Return Rs. Fifty thousand within 24 hours, against the agreement dated 21.1.1991. No interest bargain, as in litigation. Held responsible losses.

Kathawate and others

Sender

R.J. Patil

(Plaintiff No.1)

The telegram, thus, clearly shows that Kathawate and others obviously means Plaintiff No.1Ramesh wanted back Rs. 50,000/that was paid against agreement dated 21.1.1991 (Exh. 47), meaning thereby that both of them had decided to cancel the agreement Exh. 47. It is thus, clear from the above evidence that the Plaintiffs in terms understood that defendant-Manohar was refusing to honour the agreement Exh. 47 and the plaintiffs wanted their Rs. 50,000/back from defendant-Manohar i.e. to have the agreement Exh. 47 recalled. With these facts duly proved on record, there can be no manner of doubt that the contract stood recalled or revoked or cancelled at the hands of the plaintiffs due to overt acts of clear refusal by defendant-Manohar as understood by the plaintiffs themselves and that is why they went to the Court by means of R.C.S. No. 501/1992.

13. The lower Appellate Court has, however, completely ignored above factual position, relied on last date 30.1.1994 in Exh. 47agreement and held that the contract subsisted till 31.1.1994 and held that the limitation would, therefore, consequently start from 30.1.1994. I think the lower Appellate Court clearly landed in serious error. It is interesting to note that similar were the facts in the case decided by the Hon ble Apex Court in Virgo Industries(Eng) Pvt.Ltd. Vs. Venturetech Solutions Pvt.Ltd.:2013 (2) Mh.L.J.536) and I quote from paragraph nos.3,4,13,14,15, as under:-

3. The respondent in the two appeals, as the plaintiff, instituted C.S No. 831 of 2005 and C.S. No. 833 of 2005 before the Madras High Court seeking a decree of permanent injunction restraining the appellant (defendant) from alienating, encumbering or dealing with the plaint schedule properties to any other third party other than the plaintiff. The aforesaid relief was claimed on the basis of two agreements of sale entered into by the plaintiffs and the defendant both on 27.7.2005 in respect of two different parcels of immovable property consisting of land and superstructures built on plot No. 65 (old No.43) and plot No. 66 (old No.42), Second Main Road, Ambattur Industrial Estate, Chennai. In each of the aforesaid suits the plaintiff had stated that under the agreements of sale different amounts were paid to the defendants, yet, on the pretext that restrictions on the alienation of the suit land were likely to be issued by the Central Excise Department on account of pending revenue demands, the defendants were attempting to frustrate the agreements in question. In the suits filed by the plaintiff it was also stated that as the period of six months fixed for execution of the sale deeds under the agreements in question was not yet over, the plaintiff is not claiming specific performance of the agreements. The plaintiff, accordingly, sought leave of the court to omit to claim the relief of specific performance with liberty to sue for the said relief at a later point of time, if necessary. The two suits in question, i.e., C.S. Nos. 831 and 833 of 2005 were filed by the plaintiff on 28.8.2005 and 9.9.2005 respectively.

4. Thereafter on 29.5.2007, O.S. Nos. 202 and 203 were filed by the plaintiff in the Court of the District Judge, Tiruvallur seeking a decree against the defendant for execution and registration of the sale deeds in respect of the same property and for delivery of possession thereof to the plaintiff.

13. A reading of the plaints filed in C.S. Nos. 831 and 833 of 2005 show clear averments to the effect that after execution of the agreements of sale dated 27.7.2005 the plaintiff received a letter dated 1.8.2005 from the defendant conveying the information that the Central Excise Department was contemplating issuance of a notice restraining alienation of the property. The advance amounts paid by the plaintiff to the defendant by cheques were also returned. According to the plaintiff it was surprised by the aforesaid stand of the defendant who had

earlier represented that it had clear and marketable title to the property. In paragraph 5 of the plaint, it is stated that the encumbrance certificate dated 22.8.2005 made available to the plaintiff did not inspire confidence of the plaintiff as the same contained an entry dated 1.10.2004.

14. The averments made by the plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along-with the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

15. Furthermore, according to the plaintiff, which fact is also stated in the plaints filed in C.S. Nos. 831 and 833, on the date when the aforesaid two suits were filed the relief of specific performance was premature inasmuch as the time for execution of the sale documents by the defendant in terms of the agreements dated 27.7.2005 had not elapsed. According to the plaintiff, it is only after the expiry of the aforesaid period of time and upon failure of the defendant to execute the sale deeds despite the legal notice dated 24.2.2006 that the cause of action to claim the relief of specific performance had accrued. The above stand of the plaintiff found favour with the High Court. We disagree. A suit claiming a relief to which the plaintiff may become entitled at a subsequent point of time, though may be termed as premature, yet, can not per se be dismissed to be presented on a future date. There is no universal rule to the above effect inasmuch as the question of a suit being premature does not go to the root of the jurisdiction of the Court as held by this Court in Vithalbhai (P) Ltd. v. Union Bank of India. In the aforesaid case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless there is a

mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event , the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act , 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts.

It is thus clear from the above decision and particularly paragraph 15 above, that there is no question of waiting for expiry of the due date of performance. In such a situation when the intentions of the defendant are manifest with his overt acts, not to honour the agreement, it was wholly illegal for the lower Appellate Court to hold that the limitation which started running vide Exh.53 dated 31.1.1992, Exh.57 plaint in February,1992 and Exh.68 dated 22.1.1992 and from the understanding of the plaintiffs themselves by filing the suit and cancellation telegram-Exh. 68, the limitation would remain in suspension till 30.1.1994 by virtue of Exh. 47. It is also pertinent to note that in his evidence plaintiff No.1 Ramesh vide paragraph 3 of his evidence stated that the time was not the essence of the suit agreement dated 21.1.1991. Article 54 first part of the Limitation Act would not apply if it is the case of the plaintiffs that the time was not essence of the contract and then, in that event, second part would have application that the performance is refused. However, the lower Appellate Court landed in conundrum and gave the benefits to the plaintiffs of both parts of Article 54 which is impermissible in law. That apart, in the wake of cancellation by both the plaintiffs Exh. 68, in the first place, there was no cause of action for filing the suit for specific performance and, at the most, there was cause of action for obtaining refund of Rs. 50,000/as claimed in Exh. 68. Further, the plaintiffs did not seek any declaration qua Exh. 68 cancellation that it was false, concocted or not binding on the plaintiffs for any reason, in order to remove the obstacle Exh.68, they ought to have sought a declaration to that effect in the suit. But then admittedly Exh. 68 was their own creation. In this connection, it would be appropriate to quote Paragraph Nos. 32, 32.(1)(i) 36 and 37 of the

Apex Court judgment in the case of I.S.Sikandar vs. K. Subramani and others : 2014 (1) SCALE 1:-

32. After perusal of the impugned judgment of the High Court and the questions of law framed by Defendant 5 in this appeal, the following points would arise for determination of this Court:

32.1(i) Whether the original suit filed by the plaintiff seeking a decree for specific performance against Defendants 14 in respect of the suit schedule property without seeking the declaratory relief with respect to termination of the agreement of sale vide notice dated 28.3.1985, rescinding the contract, is maintainable in law ?

36. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the agreement of sale was terminated as per notice dated 28.3.1985 and thus there is termination of the agreement of sale between the plaintiff and Defendants 14 w.e.f. 10.4.1985.

37. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed-by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.

The plaintiffs or the Court could not have ignored the Exh. 68 cancellation of Exh. 47 agreement as it was a legal filibuster in the way.

To sum up, the substantial questions Nos.(1) and (2) above, therefore, will have to be answered in the affirmative together.

As to Question No.3 :

14. I have already quoted the relevant paragraphs from R.C.S. No.501/1992 that was earlier filed by the plaintiffs in February 1992. In that suit, an application for grant of temporary injunction filed by the plaintiffs was allowed by the learned trial

Judge which was challenged in Misc. Civil Appeal before the District Judge, Nagpur who had set aside the order below Exh.5 and rejected the injunction Application Exh.5. The plaintiffs went to the High Court against the lower Appellate Court s judgment by filing Civil Revision Application No. 794/1994. Since the High Court did not want to entertain the Revision, it passed the order at the behest of the plaintiffs counsel on 3.3.1995, as under :-

Hon ble R.M.Lodha, J. (as then he was):

After arguing this Revision Application for some time, Mr.B.S.Wankhede submits that he has instructions to withdraw this Revision Application and he would also make an appropriate application for withdrawal of the suit with liberty to file proper suit in appropriate and competent court.

2. Consequent to the prayer Revision Application is dismissed as withdrawn.

After the above order was passed, one would naturally expect the plaintiffs to take steps to obtain liberty from the Court where RCS No.501/1992 was filed. Instead, the defendant-Manohar filed an Application (Exh.28) in that suit for dismissal of the suit. Strangely enough, the plaintiffs did not at all appear in that suit and did not file any application for grant of liberty to file fresh suit and ultimately that Court allowed the Application Exh. 28 and observed thus in paragraph 3 and 4 of its order as under :

3. The say from other side was called. Despite the opportunities no say as such was filed. The learned counsel for the plaintiff Mr. Dhande is present when the order was in dictation. He submitted that the plaintiff is not responding the call to file the say on this application. In the open court Mr.Dhande, Adv. submitted that special civil suit is filed on the basis of agreement dated 21.1.91 However, he is unable to file any reply in absence of his client. Hence, he submitted that the necessary order may be passed.

4. At one hand, the defendant is submitting the certain facts on the basis of record mentioning the numbers of the proceedings. The plaintiff is not filing reply to this application. It is pertinent to note that the plaintiff is not responding even the call of

Mr Dhande, Adv. I can understand problem with Mr. Dhande Adv. The plaintiff is keeping silence all the while he is not filing his reply. I treat silence on the part of plaintiff as consent to this application. The plaintiff had already knocked the door of Civil Judge, Sn.Dn, by filing Special Civil Suit No. 707/1995. The cause of action in the instant case now does not survive, suit itself become infructuous. With this observation, I allowed this application and proceed to the order below Exh.1.

The Court thus dismissed that suit as infructuous. There was no occasion to consider any application seeking liberty to file fresh suit as the plaintiffs despite opportunities by that court chose not even to bother to contact their Advocate or go to the Court and file application. The entire bundle of facts and cause of action and the prayers in RCS No.501/1992 and the present suit will carefully show that the same facts and cause of action was pleaded but there was a deliberate and clear omission to amend their RCS No.501/1992 for specific performance of contract and/or to ask for liberty to file a fresh suit in terms of the order dated 3.3.1995. Thus, the plaintiffs did not use the liberty granted by the High Court as above. The learned lower Appellate Court, however, held that the cause of action in the earlier suit was different and therefore, O. II R.2 CPC would not apply. The decision of the Apex Court in this context on the facts of the present case is fully identical in the case of Virgo Industries (supra). At this stage, I quote paragraph nos.3,4,6,9,10,11,12,13,14,15 and 16:-

3. ...The respondent in the two appeals, as the plaintiff, instituted C.S No. 831 of 2005 and C.S. No. 833 of 2005 before the Madras High Court seeking a decree of permanent injunction restraining the appellant (defendant) from alienating, encumbering or dealing with the plaint 41 schedule properties to any other third party other than the plaintiff. The aforesaid relief was claimed on the basis of two agreements of sale entered into by the plaintiffs and the defendant both on 27.7.2005 in respect of two different parcels of immovable property consisting of land and superstructures built on plot No. 65 (old No.43) and plot No. 66 (old No.42), Second Main Road, Ambattur Industrial Estate, Chennai.

4. Thereafter on 29.5.2007, O.S. Nos. 202 and 203 were filed by the plaintiff in the Court of the District Judge, Tiruvallur seeking a decree against the defendant for

execution and registration of the sale deeds in respect of the same property and for delivery of possession thereof to the plaintiff.

6. The High Court, on consideration of the cases of the parties before it, took the view that on the date of filing of C.S. Nos. 831 and 833 of 2005 the time stipulated in the agreements between the parties for execution of the sale deeds had not expired. Therefore, the cause of action to seek the relief of specific performance had not matured. According to the High Court it is only after filing of the aforesaid suits and on failure of the defendants to execute the sale deeds pursuant to the legal notice dated 24.2.2006 that the cause of action to seek the aforesaid relief of specific performance had accrued. The High Court, accordingly, took the view that the provisions of Order II Rule 2 (3) of the CPC were not attracted to render the subsequent suits filed by the plaintiff i.e. O.S. Nos. 202 and 203 non-maintainable. The High Court also took the view that the provisions of Order II Rule 2 (3) of the CPC would render a subsequent suit not maintainable, only, if the earlier suit has been decreed and the said provisions of the CPC will not apply if the first suit remains pending.

9. ... In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit.

10. The object behind enactment of Order II Rule 2 (2) and (3) of the CPC is not far to seek. The Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been

claimed for a good reason. A later suit for such relief is contemplated only with the leave of the Court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons. The situations where the bar under Order II Rule 2 (2) and (3) will be attracted have been enumerated in a long line of decisions spread over a century now.

11. .... It will be wholly unnecessary to enter into any discourse on the true meaning of the said expression, i.e. cause of action, particularly, in view of the clear enunciation in a recent judgment of this Court in the Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman v. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee[5]. The huge number of opinions rendered on the issue including the judicial pronouncements available does not fundamentally detract from what is stated in Halsbury s Law of England, (4th Edition). The following reference from the above work would, therefore, be apt for being extracted here-in-below:

Cause of Action has been defined as meaning simply a factual situation existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. Cause of action has also been taken to mean that particular action the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action."

12. In the instant case though leave to sue for the relief of specific performance at a later stage was claimed by the plaintiff in C.S. Nos. 831 and 833 of 2005, admittedly, no such leave was granted by the Court. The question, therefore, that the Court will have to address, in the present case, is whether the cause of action for the first and second set of suits is one and the same. Depending on such answer as the Court may offer the rights of the parties will follow.

13. .... The plaintiff, therefore, seriously doubted the claim made by the defendant regarding the proceedings initiated by the Central Excise Department. In the aforesaid paragraph of the plaint it was averred by the plaintiff that the defendant

is finding an excuse to cancel the sale agreement and sell the property to some other third party. In the aforesaid paragraph of the plaint, it was further stated that in this background, the plaintiff submits that the defendant is attempting to frustrate the agreement entered into between the parties.

14. The averments made by the plaintiff in C.S. Nos. 831 and 833 of 2005, particularly the pleadings extracted above, leave no room for doubt that on the dates when C.S. Nos. 831 and 833 of 2005 were instituted, namely, 28.8.2005 and 9.9.2005, the plaintiff itself had claimed that facts and events have occurred which entitled it to contend that the defendant had no intention to honour the agreements dated 27.7.2005. In the aforesaid situation it was open for the plaintiff to incorporate the relief of specific performance along-with the relief of permanent injunction that formed the subject matter of above two suits. The foundation for the relief of permanent injunction claimed in the two suits furnished a complete cause of action to the plaintiff in C.S. Nos. 831 and 833 to also sue for the relief of specific performance. Yet, the said relief was omitted and no leave in this regard was obtained or granted by the Court.

15. ... In the aforesaid case this Court has taken the view that whether a premature suit is required to be entertained or not is a question of discretion and unless there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event , the Court must weigh and balance the several competing factors that are required to be considered including the question as to whether any useful purpose would be served by dismissing the suit as premature as the same would entitle the plaintiff to file a fresh suit on a subsequent date. We may usefully add in this connection that there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming the relief of specific performance to wait for expiry of the due date for performance of the agreement in a situation where the defendant may have made his intentions clear by his overt acts.

16. The learned Single Judge of the High Court had considered, and very rightly, to be bound to follow an earlier Division Bench order in the case of R.Vimalchand and M.Ratanchand v. Ramalingam, T.Srinivasalu and T. Venkatesaperumal

(supra) holding that the provisions of Order II Rule 2 of the CPC would be applicable only when the first suit is disposed of. As in the present case the second set of suits were filed during the pendency of the earlier suits, it was held, on the ratio of the aforesaid decision of the Division Bench of the High Court, that the provisions of Order II, Rule 2(3) will not be attracted. Judicial discipline required the learned Single Judge of the High Court to come to the aforesaid conclusion. However, we are unable to agree with the same in view of the object behind the enactment of the provisions of Order II Rule 2 of the CPC as already discussed by us, namely, that Order II Rule 2 of the CPC seeks to avoid multiplicity of litigations on same cause of action. If that is the true object of the law, on which we do not entertain any doubt, the same would not stand fully sub-served by holding that the provisions of Order II Rule 2 of the CPC will apply only if the first suit is disposed of and not in a situation where the second suit has been filed during the pendency of the first suit. Rather, Order II, Rule 2 of the CPC will apply to both the aforesaid situations. Though direct judicial pronouncements on the issue are somewhat scarce, we find that a similar view had been taken in a decision of the High Court at Allahabad in Murti v. Bhola Ram[1894) ILR 16 All 165] and by the Bombay High Court in Krishnaji v. Raghunath[AIR 1954 Bom, 125].

I have no doubt in my mind that the above decision of the Apex Court in which the Hon ble Apex Court considered the earlier decisions on facts as well as on law, has a vigorous application to the issue in question. There is one more decision of the Supreme Court on O.2 R.2 in the case of Deva Ram and another vs. Ishwar Chand and another : 1996(1) Civil LJ 343, and I quote paragraph Nos. 11,12,14 and 16 from the said judgment which reads thus :

11. We will deal with Order 2 Rule 2 of the Civil Procedure Code first. It provides as under:

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

Relinquishment of part of claim.

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

Omission to sue for one of several reliefs.

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

12. A bare perusal of the above provisions would indicate that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the court in one suit as Order 2 Rule 2 is based on the cardinal principle that the defendant should not be vexed twice for the same cause.

14. What the rule, therefore, requires is the unity of all claims based on the same cause of action in one suit.

16. In view of the above, what is to be seen in the instant case is whether the cause of action on the basis of which the previous suit was filed, is identical to the cause of action on which the subsequent suit giving rise to the present appeal, was filed. If the identity of causes of action is established, the rule would immediately become applicable and it will have to be held that since the relief claimed in the subsequent suit was omitted to be claimed in the earlier suit, without the leave of the court in which the previous suit was originally filed, the subsequent suit for possession is liable to be dismissed as the appellants, being the defendants in both the suits, cannot be vaxed twice by two separate suits in respect of the same cause of action.

There is also a decision of Delhi High Court in the case of Kamal Kihsore Saboo vs. Nawabzada Hasan Khan : 2001 (Vol.4) Civil Law Journal 177 and I quote the following paragraphs from the said judgment:

3. The appellant herein filed Suit No.863/98 which was a suit for permanent injunction against the respondent herein in the Court of Senior Civil Judge, Delhi.

4. While this suit was pending, appellant filed another Suit No.93/99 (out of which present appeal arises). This suit was for specific performance of the contract and the appellant prayed for decree of specific performance of Agreement to Sell dated 5th January, 1991 thereby directing the respondent to transfer the ownership of the suit properties in the name of the appellant by duly executing and registering Sale Deed and to attorn the tenants therein in favor of the appellant after due intimation to such tenants.

5. By the impugned judgment dated 28th May, 1999, learned Additional District Judge had been pleased to reject the plaint on the ground that this suit was barred by the provisions of Order II Rule 2 of Code of Civil Procedure. It is held that the cause of action for a suit for specific performance had arisen when the first suit, namely, Suit No. 863/98 was filed and, therefore, the appellant should have included this relief in the said suit itself. By omitting to do so, the appellant had precluded himself from suing for this relief afterwards and, therefore, the second suit was not maintainable.

6. The learned counsel for the appellant in challenging the reasoning of the learned trial Court submitted that the cause of action at the time of filing the first suit was not same on which the instant suit for specific performance was filed. His submission was that the respondent was trying to sell the properties to some third party and the appellant had no option but to file the suit for injunction at that point of time, seeking restraint order against the respondent from selling the properties to third party. It is only in the written statement filed in the first suit that the intention of the respondent became clear to the effect that he did not want to sell the properties to the appellant and that is why appellant filed the second suit for specific performance.

8. From the aforesaid averments in plaint in the first suit filed by the appellant, it is clear that appellant had pleaded that the respondent was not adhering to the terms of Agreement to Sell. With intention to cheat and defraud the appellant he was not performing his part of the contract. He had not done the needful in spite of legal

notice dated 24th June, 1996. Not only this, even it was pleaded that he was trying to sell the properties to some other party. Thus according to the averments contained in the said plaint itself cause of action for seeking relief of specific performance had ripened as according to the appellant respondent had failed to perform his part of the contract. Still the appellant chose to file the suit claiming relief of permanent injunction only when on the basis of aforesaid bundle of facts, he could also claim the relief of specific performance as well. Once he omitted to claim the relief of specific performance, second suit for this relief is clearly not maintainable in view of provisions of subRule3 of Rule2Order II of CPC which read as under:

10. The circumstances did not change between the first suit and the second suit. In fact second suit is also based on same averments.

In the light of the above factual matrix, I think the plaintiffs miserably failed in making use of the liberty granted by the High Court on 3.3.1995 and the reasons perhaps could be of course by way of imagination that the plaintiffs did not have the balance huge amount of Rs.8.25 lakhs. I therefore answer Question No.3 in the affirmative and hold that the Special Civil suit No. 7071995 was clearly barred by the provisions of O. II R. 2, CPC and was not maintainable.

As to the assignment the following is relevant portion from the agreement Exh. 47:-

Thus the sale will be completed and it will be registered either on the name of second party (Baburao/Plaintiff no.2) or the other name suggested by second party.

The meaning of the word suggest as per Oxford Dictionary is put forward for consideration and as per Webster Dictionary to bring or put forward for consideration or approval.

It is clear from the reading of the above that the second party Baburao was supposed to suggest the other name obviously to none other than defendant-Manohar. There are no pleadings or evidence on record that second party-Plaintiff

No.2 Baburao had suggested Plaintiff No.1Ramesh s name to the defendant-Manohar for assignment. Plaintiff No.2 Baburao or any Panch witness on Exh.47 or Exh.48 had not entered into the witness box to show that he had suggested to the defendant the name of plaintiff no.1 to defendant-Manohar for assignment nor Plaintiff No.1 Ramesh deposed to that effect. Thus, in the absence of any indication about the legal assignment in terms of the contract, it is difficult to agree with the Courts below that the assignment could readily be inferred as per clause 3 of the agreement particularly because there is pleading and evidence from defendant-Manohar that he did not know anything and had not given any consent for alleged assignment in favour of plaintiff No.1Ramesh nor he was given suggestion accordingly in the cross-examination

The reliance in the case of Shyam Singh vs. Daryao Singh : AIR 2004 SC 348 placed by the Courts below does not appear to be sound. A careful reading of the facts of Shyam Singh s case (supra) shows that vide paragraph 3 there was an unequievocal term in the agreement for assignment that defendants 2 to 4 had sold their right to obtain reconveyance of sale in favour of the plaintiff specifically in the name of the plaintiff which is not the case at hand. On the contrary, in the instant case, it was for plaintiff No.2Baburao to put forward for approval the name of second party (in this case plaintiff No.1 Ramesh) before defendant-Manohar and then only upon his agreement or approval there could be legal and valid assignment.

It is then important to note that Exh. 68telegram was issued by both the plaintiffs Ramesh as well as Baburao, asking for refund of the money of Rs. 50,000/in relation to agreement Exh. 47 meaning cancellation of the agreement itself within 24 hours which showed that both of them were not ready and willing to pay further huge sum of Rs.8,25,000/and obtain the sale deed. That apart, the lower Appellate Court held that the plaintiffs were ready and willing to perform their part of the contract and that an amount of Rs. 2 lakhs was offered by plaintiff No.1 Ramesh to defendant-Manohar and that therefore he was ready and willing. A careful reading of the evidence of Ramesh will show that under the telegram Exh. 53 dated 31.1.1992, he stated that he had informed defendantManohar that he was avoiding to accept Rs. 2 lakhs from 13.1.1992 when as earlier stated, defendant-

Manohar came to know about the assignment Exh. 48 for the first time on 5.2.1992. That apart, the pleadings and evidence of Ramesh does not show a word as to when and how and in what manner and what place and by what mode and in whose presence and on what particular date/s the amount of Rs 2 lakhs was offered to defendant-Manohar. Not only that plaintiff Ramesh did not at all depose in his evidence as to whether he had Rs. 2 lakhs with him and from what source and whether he had withdrawn an amount of Rs. 2 lakhs. Therefore, his bald evidence that he offered of Rs. 2 lakhs particularly when the same was denied by the defendant Manohar in his evidence takes one nowhere. The amount of Rs. 2 lakhs in the year 1991 was a very big amount and one cannot presume the availability thereof so easily. Heavy burden lay on the plaintiff no.1 Ramesh to prove before the Court through bank statement or otherwise about the availability of Rs. 2 lakhs with him right from 13.1.1992 till his telegram or at any time thereafter. However, there were no such pleadings nor evidence and he remained satisfied by his parol evidence that too blissfully vague. In my opinion, the readiness and willingness to perform the part of his contract particularly when huge amount of Rs. 8,25,000/was the balance and Baburao had withdrawn Exh. 47 due to his financial difficulties there was hardly any scope to say so. It appears that plaintiff No.1Ramesh was only interested in getting injunction to simply lock the property rather than having specific performance in the earlier Suit No.501/1992 which leads one to believe that plaintiffs were not at all ready and willing to perform their part of the contract and had in fact no money with them. This is crystal clear from his following evidence :-

3.....The defendant also authorised to get the aforesaid 5 acres land assessed for nonagricultural purposes and also carved out and demarcated plots to sell the same to the prospective purchasers. The balance amount of Rs. 8,25,000/was to be paid as shown in the Agreement by selling the plots. The entire balance amount of Rs. 8,25,000/was agreed to be paid upto 30.1.1994 and the sale deed should be executed thereafter as per the convenience of both the parties. Thus the time was not the essence of the suit agreement dated 21.1.1991. .....

The above part of the evidence to collect the money by sale of plots and then pay to defendant-Manohar is not to be found in the agreement-Exh. 47.

In view of the above, the Question No.4 will have to be answered in the affirmative, which I do.

As to Question No.5 :

15. The learned trial Judge held that Dr. Prakash, the brother of defendant-Manohar had filed Regular Civil Suit No. 343/1992 for partition and separate possession including the suit property in this suit and that remained pending. The Appellate Court however held that the said suit was brought in order to defeat the claim of the plaintiffs for which there is neither any pleading nor evidence nor it was anybody s case to that effect. The finding to that effect by the lower Appellate Court is clearly by way of tangent. It is a fact that Dr. Prakash, defendant-Manohar and third brother Kailash had share in the suit property as is evident from suit decree Exh.66. Therefore, there was clear difficulty in passing any decree for specific performance against defendant-Manohar in respect of the estate belonging to the joint family. Apart from that, there was a notification by the Government of Maharashtra for acquisition of some part of the suit land for N.I.T. which is also a fact proved on record. Hence, question No.5 will have to be answered in the affirmative.

16. The upshot of the above discussion is that the present Second Appeal will have to be allowed. In the result, I pass the following order.

ORDER

1) Second Appeal No. 210/2013 is allowed.

2) The impugned judgment and decree dated 16.03.2013 in Regular Civil Appeal No.589/2012 made by the learned District Judge9, Nagpur, is set aside and the Special Civil Suit No. 707/1995 filed by Respondent Nos. 1 and 2 is dismissed.

3) The judgment of decree dated 04.09.2004 in Special Civil Suit No. 707/1995 made by the learned Joint Civil Judge, Senior Division, Nagpur, is restored.

4) No order as to costs.

5) Under the circumstances, the judgment is stayed for a period of twelve weeks from today.