Vidur Impex and Traders Pvt Ltd and Ors. Vs.pradeep Kumar Khanna and Ors.

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Court : Delhi

Decided On : Jun-28-2017

Appellant : Vidur Impex and Traders Pvt Ltd and Ors.

Respondent : Pradeep Kumar Khanna and Ors.

Judgement :

$~ * + % IN THE HIGH COURT OF DELHI AT NEW DELHI CS (OS) 3195/2012 & I.A. NOS. 4433/2013, 12308/2013 & 16689/2013 Judgment Reserved on:

22. d December, 2016 Judgment Pronounced on:

28. h June, 2017 Vidur Impex And Traders Pvt Ltd and Ors. ..... Plaintiffs Through : Mr.Manoj, Mr.M.T. Reddy and Ms.Aparna Sinha, Advs. versus Pradeep Kumar Khanna and Ors. ..... Defendants Through : Mr.Sanjeev Anand, Mr.Yakesh Anand, Ms.Sonam Anand and Mr.Akshay Kapoor, Advs. for defendants no.1 (i) to (iii)/Khanna. Mr.Chetan Sharma and Mr.Jayant Bhushan, Sr. Advs. with Mr.Mandeep Singh Vinaik Adv. for defendant no.2/Tosh. Mr.C. Mukund and Mr.Vivek Anandh, Advs. for defendant no.4/Bhagwati CORAM: HON'BLE MR. JUSTICE G.S.SISTANI G.S.SISTANI, J.

I.A. Nos. 4433/2013 and 12308/2013 (both under S.151 of the Code by defendant No.2 & defendant No.1(i) to (iii) respectively) 1. Both these applications have been

filed under Section 151 of the Code of Civil Procedure, 1908 (briefly the Code) seeking dismissal of the present suit.

2. As there are numerous parties to the present suit, for the ease of reference, I shall refer to the plaintiffs/Vidur Impex & Traders Pvt. Ltd. and its sister concerns as Vidur; defendant nos. 1 (i) to (iii), being the CS (OS) 3195/2012 Page 1 of 95 legal heirs of Late Sh. Pradeep Kumar Khanna, as Khanna; defendant No.2/Tosh Apartments Pvt. Ltd. as Tosh; defendant No.3(i) and (ii), being the legal heirs of Late Sh. L.K. Kaul, as Kaul; and defendant No.4/Bhagwati Developers Pvt. Ltd. as Bhagwati.

3. During the pendency of this suit, Khanna and Tosh had preferred applications under Order VII Rule 11 of the Code, being I.A. No.608/2013 and I.A. No.2049/2013 respectively, seeking the rejection of the plaint. By an order dated 31.05.2013, the applications were allowed by this Court and the plaint was rejected as having been filed without disclosing any cause of action. The order dated 31.05.2013 passed by the single judge was assailed by the plaintiffs herein before the Division Bench in appeal [RFA (OS) 61/2013]..

4. Before the Division Bench, learned senior counsel for Tosh had made a statement that he does not press his application under Order VII Rule 11, but instead he would press I.A. No.4433/2013 pending before the Single Judge. Similarly, counsel for Khanna had also made a statement that he would not press his application under Order VII Rule 11, b ut instead he would file a fresh application under Section 151 for the dismissal of the suit. Based upon the statements, the Division Bench set-aside the order dated 31.05.2013 and remanded the matter back for adjudication of the applications under Section 151 of the Code. The order of the Division Bench dated 04.07.2013 reads as under: Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the respondent No.2 on instructions from the respondent No.2 submits that he does not press the application under Order VII Rule 11 CPC being I.A. No.2049/2013, but instead wishes to press his application under Section 151 CPC being I.A.No.4433/2013 before the learned Single Judge. CS (OS) 3195/2012 Page 2 of 95 5. Mr.Yakesh Anand, learned counsel appearing for respondent No.1 (i) to (iii)

on instructions submits that he does not press his application under Order VII Rule 11 CPC being I.A.No.608/2013, but instead he will be moving an application under Section 151 CPC for dismissal of the suit. In view of the aforesaid statements made by learned counsel for the parties, the present appeal does not survive for consideration and the same is disposed of accordingly. The judgment and order dated 31.05.2013 passed by the learned Single Judge is hereby set aside and the matter is sent back to the learned Single Judge for adjudication of the applications under Sections 151 CPC in the first instance. It is hoped and expected that the learned Single Judge will make an endeavour to decide the said applications as expeditiously as possible and thereafter decide the application under Order XXXIX Rules 1 and 2 CPC. In this backdrop, I.A. No.4433/2013 filed by Tosh and I.A. No.12308/2013 filed by Khanna, both for dismissal of the suit have been taken up for hearing.

6. Some basic facts are required to be noticed before the rival submissions of the parties can be noticed and considered.

7. Present suit has been filed seeking declaration, possession, injunction and for enquiry into damages in respect of the property bearing No.21, Aurangzeb Road, New Delhi (hereinafter referred to as the Suit Property).

8. The present case has a chequered history and is premised on a sale transaction between Khanna and Vidur in respect of the Suit Property.

9. The suit property was owned by one Late Sh. Pradeep Kumar Khanna at the relevant time and had been leased to the Sudan Embassy since 1962. Later in 1988, Late Sh. Pradeep Kumar Khanna executed an Agreement to Sell dated 13.09.1988 in favour of Tosh for sale of the suit property. The suit property was vacated by Sudan Embassy on CS (OS) 3195/2012 Page 3 of 95 12.05.1992 and the possession was taken over by one, Late Sh. L.K. Kaul. As per the case of Sh. Kaul, the property continued to be in his possession as a mortgagee in consideration of getting the property vacated from Sudan Embassy. Late Sh. Kaul continued to be in possession of the property as a caretaker until he was dispossessed by the receiver appointed by this Court on 18.09.2007.

10. In 1993, Tosh filed a suit, being CS (OS) 425/1993, before this Court for specific performance, damages and injunction based upon the Agreement to Sell dated 13.09.1988. Along with the suit, an application under Order XXXIX Rules 1 and 2 CPC was also filed. Summons in the said suit were issued on 10.02.1993 and by an interim order dated 18.02.1993 directed Late Sh. Kaul and Late Sh. Khanna not to transfer, alienate or part with possession in any manner or create third party rights in respect of the suit property; the interim order stands confirmed on 31.01.2000.

11. In 1997, during the pendency of CS (OS) 425/1993, Late Sh. Khanna executed an Agreement to Sell dated 19.02.1997 and in pursuance thereof, six separate Sale Deeds were executed in favour of the plaintiffs Vidur on 20.05.1997 and registered on 30.05.1997 for a cumulative amount of Rs. 2.88 crores. In the meantime, Vidur had further executed an Agreement to Sell dated 18.03.1997 in favour of Bhagwati for the suit property for a sum of Rs. 4.26 crores, out of which Rs. 3.05 crores have already been received.

12. In the same year, Bhagwati raised a claim against Vidur alleging that Vidur had failed to execute a Sale Deed in terms of the Agreement to Sell dated 18.03.1997. The dispute between Bhagwati and Vidur was referred to an Arbitral Tribunal consisting of one arbitrator, namely Dr. Devashish Kundu, Advocate of the Calcutta High Court. The Arbitrator CS (OS) 3195/2012 Page 4 of 95 passed an Award dated 07.01.1999 in favour of Bhagwati and directed Vidur to hand over vacant possession of the Suit Property to Bhagwati on or before 31.01.1999 and also to execute a Sale Deed after securing requisite permission and No Objection Certificate from the competent authorities. Simultaneously, Bhagwati was also directed to pay the balance consideration. The award rendered by the learned arbitrator has attained finality.

13. Meanwhile, Vidur filed another suit, being CS (OS) 1675/1997, before this Court alleging that Late Sh. Khanna had failed to deliver possession as per Sale Deeds dated 20.05.1997 and prayed inter alia for declaration, mandatory and perpetual injunction and possession. This suit was later transferred to the District Court and renumbered as CS6292011/97, which stands dismissed as withdrawn

after recording the statement of the counsel for the plaintiff therein/Vidur on 01.06.2011. The order dated 01.06.2011 reads as follows: 629/20
VIDUR IMPEX & TRADERS (P) LTD. VS. PRADEEP KUMAR KHANNA106-2011 Present : Sh Rajesh Mahendru, advocate for the plaintiffs. None for the proposed LRs of the deceased defendant. Counsel for the plaintiffs wants to withdraw the suit. Let this statement be recorded. Sd./- (NK Goel) ADJ-05 (WEST), THC106-2011 CS (OS) 3195/2012 Page 5 of 95 Statement of Sh Rajesh Mahendru, advocate for the plaintiffs. Without Oath I am the advocate for the plaintiffs in the present suit. Therefore, I am competent to make this statement on their behalf. The plaintiffs have instructed me to withdraw the present suit. Accordingly, I withdraw the suit. The same may be dismissed as withdrawn. RO & AC Sd./- Adv. (D-530/93) Sd./- (NK Goel) ADJ-05 (WEST), THC106-2011 Present : Sh Rajesh Mahendru, advocate for the plaintiffs. None for the proposed LRs of the deceased defendant. I have recorded the statement of the deceased defendant. In view of his statement, the present suit is dismissed as withdrawn. File be consigned to record room. Sd./- 1-6-11 (NK Goel) ADJ-05 (WEST), THC106-2011 (Announced in the open court) 14. During the pendency of the proceedings before the arbitral tribunal, an I.A. No.8145/1998 in CS (OS) 425/1993 and Contempt Petition 118/1998 were filed by Tosh alleging violation of the interim injunction order and further seeking an injunction against Late Sh. Khanna and Late Sh. Kaul from handing over/delivering the actual possession of the Suit Property to Vidur based upon the sale deed dated 20.05.1997. Late Sh. Khanna in his reply, contended that he had never executed the Sale CS (OS) 3195/2012 Page 6 of 95 Deeds.

15. Late Sh. Khanna had also instituted a suit, being CS (OS) 161/1999, before this Court again alleging that none of the sale deeds were executed by him and seeking a declaration of the Sale Deeds dated 20.05.1997 as null and void. Though the suit was filed through an advocate, namely Mr. Rakesh Saini, who continued to represent Late Sh. Khanna in the suit; later in 2001, an application (I.A. No.255/2001) was filed though another counsel, namely Mr. Bhupendra Pratap Singh, stating that the matter has been settled and the plaintiff therein/Khanna wished to withdraw the suit. Accordingly, on 10.01.2001, the application was allowed and the suit was dismissed as withdrawn.

16. Thereafter, the previous counsel representing Late Sh. Khanna filed an application (I.A. No.1537/2001) alleging that the withdrawal of the suit was manipulated by Vidur and prayed that Late Sh. Khanna may be directed to appear in person and make his statement. Before such a statement could be recorded, Sh. Khanna died on 12.01.2002 leaving a doubt as to the authenticity of the withdrawal application. Later the legal heirs of Late Sh. Khanna/defendants no.1(i) to (iii) also filed applications contending that the suit was never withdrawn by Late Sh. Khanna. The signatures on the withdrawal application were also sent to Forensic Science Laboratory (FSL) for verification to no avail as the FSL concluded that no express opinion can be given. The suit was never restored and the application of the legal heirs of Late Sh. Khanna has been withdrawn in view of the judgment of the Supreme Court in Vidur Impex and Traders Private Limited and Others v. Tosh Apartments Private Limited and Others.1 17. Coming back to 1999, Bhagwati filed an application for execution of 1 (2012) 8 SCC384CS (OS) 3195/2012 Page 7 of 95 the award dated 07.01.1999, which was allowed by a Single Judge of the Calcutta High Court vide order dated 17.08.2000 and a receiver was appointed to take possession of the suit property. The receiver, thereafter, on 19.1.2000 and 5.2.2001 visited Delhi and took symbolic possession of the Suit Property by putting his locks and seals on all its inner and outer gates.

18. It is also relevant to note that when Tosh gained knowledge about the Award of the Arbitrator and the order passed by the Calcutta High Court, Tosh filed I.A. No.625/2001 before this Court seeking a direction that they be restrained from taking possession in the garb of the order of the Calcutta High Court. Accordingly, Vidur and Bhagwati were restrained by a Single Judge of this Court by an ex parte ad interim injunction order dated 22.01.2001.

19. When the receiver appointed by the Calcutta High Court went to take possession of the Suit Property, Late Sh. Kaul filed another application2 not to dispossess him. On 08.02.2001, this Court restrained Vidur, Bhagwati and the receiver from taking possession of the Suit Property. Late Sh. Kaul also approached the Calcutta High Court, which made its orders subject to the orders of this Court vide order dated 15.02.2001.

20. As per the plaint, Vidur/plaintiffs claim to have learnt of CS (OS) 425/1993, pending before this Court upon notices being received in I.A. No.625/2001.

21. Thereafter, Vidur filed an application3 under Order I Rule 10 of the Code seeking impleadment in CS (OS) No.425/1993. This application was dismissed by a Single Judge of this Court vide order dated 26.05.2008. An appeal4 was preferred by Vidur before a Division 2 I.A. No.1211/2001 3 I.A. No.1861/2008 4 FAO (OS) No.324/2008 CS (OS) 3195/2012 Page 8 of 95 Bench, which was also dismissed on 20.02.2009. Thereafter, a Special Leave Petition,5 was filed before the Supreme Court of India; which has been dismissed by a detailed judgment dated 21.08.2012. The judgment of the Supreme Court has been reported as Vidur Impex.1 22. It may also be noticed that after the decision rendered by the Supreme Court dated 21.08.2012, Vidur filed a review petition 6 before the Supreme Court which has also been dismissed on 13.12.2012.

23. Meanwhile, upon an application7 filed by Tosh, a receiver was appointed by this Court on 03.09.2007 to take possession of the Suit Property from Late Sh. Kaul. Accordingly, the possession was taken on 18.09.2007. During the pendency of the disputes, Sh. Kaul has also died on 25.10.2011 and is being represented through his legal heirs, being defendants No.3 (i) and (ii) herein.

24. The present suit was instituted by Vidur, after the judgment of the Apex Court in Vidur Impex1, on 18.10.2012 with the following prayers: a) Decree for declaration that plaintiffs herein are the absolute joint owners in respect of land and property No.21, Aurangzeb Road, New Delhi-110001 by virtue of six registered Sale Deeds(a) Sale Deed dated 20/30.05.1997 executed & registered by Pradeep Kumar Khanna in favour of Vidur Impex & Traders Pvt. Ltd. (2) Sale Deed dated 20/30.05.1997 executed & registered by Pradeep Kumar Khanna in favour of Panchvati Plantation Pvt. Ltd. (3) Sale Deed dated 20/30.05.1997 executed & registered by Pradeep Kumar Khanna in favour of Haldiram Bhujia Bhandar Pvt. Ltd. (4) Sale Deed dated 20/30.05.1997 executed & registered by Pradeep Kumar Khanna in favour of Star Exim Pvt. Ltd. (5) Sale Deed dated 20/30.05.1997 executed & registered by Pradeep Kumar Khanna in favour of VKS Finvest Pvt. Ltd. and (6) Sale Deed dated 20/30.05.1997 executed & registered by

Pradeep Kumar Khanna in favour of Convenient Tours & Travels Pvt. Ltd.; 5 SLP (C) 11501/2009, later converted to CA5918 2012 6 Rev iew Petit ion (C) 2465/2012 7 I.A. No.8147/1998 in CS (OS) 425/ 1993 CS (OS) 3195/2012 Page 9 of 95 b) Decree for declaration that the defendant nos.1(i) to 1(iii) remained with no right, title and interest as the legal heirs of Pradeep Kumar Khanna since deceased in respect of and relating to the land and property No.21, Aurangzeb Road, New Delhi-110001 after the execution and registration of sale deeds in favour of the plaintiffs; c) Pass a decree of permanent injunction restraining defendant Nos.1(i) to 1(iii) from claiming themselves and representing themselves as owners of land and property No.21, Aurangzeb Road, New Delhi and/or from executing and registering any Sale Deed in favour of any third party or creating any third party interest or entering into any compromise of any nature whatsoever; d) Decree for recovery of possession in favour of the plaintiff and against the defendants and/or against their men, agents and associates be passed directing the defendants and/or the Court Receiver appointed by this Honble Court to quit, vacate and deliver the vacant possession of the property to the plaintiffs; e) An enquiry into damages be made by this Honble Court and after ascertaining the quantum of damages suffered by the plaintiffs, this Honble Court may be pleased to award damages for such sum as this Honble Court may deed fit and proper; -AND- f) Pass such further or other orders as this Honble Court may deed fit and property. (Emphasis Supplied) 25. In 2014, Tosh filed CS (OS) 864/2014 before this Court seeking a declaration that the Sale Deeds dated 20.05.1997 are null and void and their registration be cancelled. This suit is pending before this Court.

26. During the pendency of the present suit, a settlement has been arrived at between Khanna and Tosh. Accordingly, they filed I.A. No.18222/2015 under Order XXIII Rule 3 of the Code in CS (OS) 425/1993, which was allowed on 01.09.2015 with a direction to the CS (OS) 3195/2012 Page 10 of 95 receiver to hand over possession to Tosh. Aggrieved by the compromise decree, Vidur had also filed a suit 8 before this Court inter alia praying that the decree be declared null and void; the same has also been dismissed as not maintainable on 24.11.2015. An appeal was preferred before a Division Bench of this Court in RFA (OS) 18/2016, which has been dismissed on 20.07.2016, with the following observations: 11. After considering the documents, pleadings and the suit records,

this court is of opinion that there is no infirmity in the impugned judgment. The earlier orders of this court and the judgment of the Supreme Court and decisively ruled on two issues: one that the present appellant/plaintiff had sought to belatedly enforce its rights, by filing an application in a pending suit. It had not approached the court in time, to seek relief, within the time stipulated in law. The second, and more important as well as damaging finding regarding the appellant, was its conduct. It had colluded with another party, i.e Bhagwati Developers in approaching the Calcutta High Court; it had also clandestinely entered into the agreement which it now relies upon, to put in the words of the Supreme Court were with a view to frustrate the rights of the parties in the pending suit, and defeat the interim orders made therein. As a result the plaintiffs, who had no right to enforce in the first place, in respect of the suit property, cannot complain that the compromise decree is the result of a fraud. (Emphasis Supplied) 27. In the present suit, as noticed earlier, two applications were filed, one by Khanna under Order VII Rule 119 and another by Tosh under Order VII Rule 11, 10 both seeking rejection of the plaint on various grounds. The applications were allowed by the Single Judge. The matter was carried in appeal by Vidur and as noticed in paragraphs 3 and 4 aforegoing, before the Division Bench, both Khanna and Tosh gave up 8 CS (OS) 3364/2015 9 I.A. No.608/ 2013 10 I.A. No.2049/2013 CS (OS) 3195/2012 Page 11 of 95 their applications under Order VII Rule 11 of the Code for preferring applications under S.

151. In this background, extensive arguments have been addressed by all sides. SUBMISSIONS OF KHANNA (Applicant in I.A. 12308/2013) 28. In the application I.A. No.12308/2013, Mr. Sanjeev Anand submits that the present suit is liable to be dismissed at the threshold itself and the suit being frivolous should be being nipped in the bud as held by the Supreme Court in the case of T. Arivandandam v. T.V. Satyapal and Anr..11 Judgment of the Supreme Court 28.1 While placing strong reliance on the judgment of the Supreme Court in Vidur Impex,1 Mr. Anand contends that the plaintiffs do not have a valid title or interest in the suit property as the transactions under which they claim to have acquired interest in the suit property did not confer any right. It is contended that a declaration has already been made by the Supreme Court on the claim made by the plaintiffs under the six registered sale deeds, which are the basis of the prayers in the present suit. In

particular, he refers to the following paragraphs of Vidur Impex1: 6. On 19-2-1997, Respondent 2 executed 6 agreements for sale in favour of the appellants for a total consideration of Rs 2.88 crores. In furtherance of those agreements, six sale deeds were executed and registered on 30-5-1997. In the meanwhile, the appellants executed agreement for sale dated 18-3-1997 in favour of Bhagwati Developers for a consideration of Rs 4.26 crores and received Rs 3.05 crores. 42. The appellants and Bhagwati Developers are total strangers to that agreement. They came into the picture only when Respondent 2 entered into a clandestine transaction with 11 (1977) 4 SCC467 pa ragraph 5 CS (OS) 3195/2012 Page 12 of 95 the appellants for sale of the suit property and executed the agreements for sale, which were followed by registered sale deeds and the appellants executed agreement for sale in favour of Bhagwati Developers. These transactions were in clear violation of the order of injunction passed by the Delhi High Court which had restrained Respondent 2 from alienating the suit property or creating third-party interest. To put it differently, the agreements for sale and the sale deeds executed by Respondent 2 in favour of the appellants did not have any legal sanctity. The status of the agreement for sale executed by the appellants in favour of Bhagwati Developers was no different. These transactions did not confer any right upon the appellants or Bhagwati Developers. Therefore, their presence is not at all necessary for adjudication of the question whether

... RESPONDENTS

1 and 2 had entered into a binding agreement and whether Respondent 1 is entitled to a decree of specific performance of the said agreement. That apart, after executing the agreement for sale dated 18-3-1997 in favour of Bhagwati Developers, the appellants cannot claim to have any subsisting legal or commercial interest in the suit property 44. In the present case, the agreements for sale and the sale deeds were executed by Respondent 2 in favour of the appellants in a clandestine manner and in violation of the injunction granted by the High Court. Therefore, it cannot be said that any valid title or interest has been acquired by the appellants in the suit property (Emphasis Supplied) [Note: appellants refers to Vidur; respondent no.1 is Tosh; respondent no.2 is Khanna; respondent no.4 is Kaul]. 28.2 Relying on the aforequoted observations, it has been contended that the Supreme Court has come to a clear conclusion and

finding that the transactions relied upon by the plaintiffs, i.e. the registered sale deeds, are a nullity. Further that they do not confer any right upon Vidur and it cannot be said that any valid title or interest has been acquired in the suit property. Based on the aforesaid findings of the Supreme Court, it has been urged by Mr. Anand that the plaintiffs have no right in the suit CS (OS) 3195/2012 Page 13 of 95 property which is binding on the parties, thus they would have no cause of action or locus standi to seek any declaration under Section 34 of the Specific Relief Act, 1963. He submits that under Section 34, for any person to seek a declaration he has to fulfil a pre-condition of having a subsisting right to the property in question. Suit being Barred by Law 28.3 The second contention of the learned counsel for Khanna is that the suit is barred by law as the plaintiffs are precluded from filing the present suit by Order XXIII Rule 1 (4) of the Code. He submits that Order XXIII Rule 1 enables a plaintiff to abandon his suit or a part thereof. Whenever he abandons his claim, he is presumed to have given up the reliefs sought by him and is precluded from instituting any fresh suit in respect of such subject matter. Learned counsel submits that in respect of the same subject matter and claim in the present suit, the plaintiffs had in 1997 filed a suit being CS (OS) No.1675/199712 (hereinafter referred to as the 1997 Suit) in this Court making the same claim/seeking the same relief, i.e. that they be declared owners of the suit property and be handed over its possession and the predecessor-in-interest of the defendants no.1(i) to (iii), i.e. Late Shri Khanna, be restrained from dealing with the property. 28.4 The 1997 Suit was transferred to the District Court because of the change in the pecuniary jurisdiction and was renumbered as CS6292011/97. Thereafter, the suit was withdrawn simplicitor by plaintiffs therein/Vidur on 01.06.2011. Drawing the attention of the Court to the order dated 01.06.2011, Mr. Anand submits that Vidur did not obtain leave to file a fresh suit and therefore, they are precluded from filing the present suit. In order to substantiate his arguments, Mr. 12 Later renu mbered as CS6292011/ 97 on being transferred to the District Court. CS (OS) 3195/2012 Page 14 of 95 Anand has sought to compare the relief claimed in the 1997 Suit and the present suit. 28.5 Learned counsel submits that a reading of the plaint of the 1997 Suit and the present suit, makes it clear that the subject matter of both the suits was the Suit Property and the plaintiffs were claiming to be declared its owners on the basis of

the purported six sale deeds, to be put in its possession, and mandatory and perpetual injunction. It is submitted that the plaintiffs having withdrawn the earlier suit and since no leave was granted or was sought by them to institute the fresh suit the present suit is barred under Order XXIII Rule 1 (4) of the Code. He supports his arguments by relying upon the judgments in Hulas Rai Baij Nath v. Firm K.B. Bass & Co13; Ranen Roy v. Prakash Mitra14; Upadhyay & Co. v. State of U.P. and Others15; and Jyoti Prashad & Ors. v. Nathu Ram.16 28.6 In respect of the additional prayer for damages made in the present suit, learned counsel submits that it is barred under Order II Rule 2. It is submitted that when the Vidur instituted the 1997 Suit they were also entitled to include a claim for damages, which they intentionally omitted to do and also did not seek leave of the Court to sue subsequently, therefore, the claim for damages in the present suit is barred by the provisions of Order II Rule 2 of the Code. Concealment 28.7 Mr. Anand submits that the plaintiffs have deliberately concealed this material fact of instituting the 1997 Suit and its withdrawal in the present suit; for this reason alone, Vidur is disentitled to any relief and the present suit is liable to be dismissed. It was obligatory on the part 13 (1967) 3 SCR886 AIR 1968 SC111 pa ragraph 2 14 (1998) 9 SCC689 pa ragraph 3 15 (1999) 1 SCC81 paragraphs 11 to 15 16 (2004) 78 DRJ573(DB): (2005) 116 DLT585(DB), paragraphs 7, 8, 11 and 12 CS (OS) 3195/2012 Page 15 of 95 of the plaintiffs to disclose to this Court the factum of having filed the earlier suit and its withdrawal and also produce the copy of the plaint and withdrawal order as the same are relevant having bearing on the maintainability of the present suit. The plaintiffs deliberately withheld this material fact and vital documents from this Court to gain advantage over the defendants and as such are guilty of playing fraud on this Court as well as on the defendants. The case of the plaintiffs, thus being based on falsehood requires to be summarily rejected at this stage itself. Limitation 28.8 The next contention of learned counsel for Khanna is that the present suit is barred by the law of limitation. Mr. Anand submits that the period of limitation for seeking both declaration and possession have expired and consequently, the present suit is not maintainable. 28.9 In respect of declaration, Mr. Anand submits that Article 58 of the Schedule to the Limitation Act stipulates that a suit to obtain any declaration has to be filed within three years from the time when the right to sue first accrues. It is submitted that for

the relief of declaration, period of limitation is to be construed only from the date when the right to sue first accrued and successive violation of the right will not give rise to a fresh cause of action as laid down by the Supreme Court in the matter of Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Another17; relevant paragraph is reproduced below: 30. While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word first has been used between the words sue and accrued. This would mean that if a suit 17 (2011) 9 SCC126 pa ragraphs 23 - 27 and 30 - 32 CS (OS) 3195/2012 Page 16 of 95 is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued. (Emphasis Supplied) 28.10 Additionally, learned counsel has also relied upon the decisions of the Apex Court in L.C. Hanumanthappa v. H.B. Shivakumar18 and State of Punjab & Anr. v. Balkaran Singh.19 Mr. Anand submits that once the time starts to run, it does not stop. 28.11 In order to show as to the date upon which the right to sue first accrued, learned counsel has drawn the attention of this Court to the averments made in paragraph 19 of the plaint in the 1997 Suit to show that the cause of action for seeking various reliefs claimed in the present suit including for declaration arose on 15.07.1997. Thus, the suit for declaration ought to have been filed within three years from that date and the present suit, filed in 2012, is hopelessly time barred. 28.12 Mr. Anand submits that even on the basis of the averments made in the plaint of the present suit it is apparent that the present suit is hopelessly time barred. The plaintiffs have themselves admitted in the plaint (paragraphs 11, 17 and

30) that the cause of action for filing the present suit first arose in the year 2001 when they came to know that the purported six Sale Deeds, i.e. the basis of their title, was being challenged. 28.13 Learned counsel submits that the suit for relief of declaration under Article 58 could be filed only within three years of 1997 and the present suit having been filed in 2012 is hopelessly time barred. It is 18 (2016) 1 SCC332 pa ragraphs 5, 7, 13, 14 and 29 19 (2006) 12 SCC709 paragraphs 15, 16 and 17 CS (OS) 3195/2012 Page 17 of 95 submitted that the plaintiffs have

pleaded subsequent purported cause of action on the passing of the Supreme Court Judgment on 21.08.2012, which is of no relevance and period of limitation is to be construed only from the date when the right to sue first accrued and successive violations will not give rise to fresh cause of action as laid down by the Supreme Court in the case of Khatri Hotels.17 28.14 Mr. Anand prior to making his submissions upon the relief of possession submits that once it is clear that the plaintiffs/Vidur are not entitled to declaration, all consequential reliefs, including possession and damages, would also be barred by limitation. In support of the submission, he relies upon paragraph 17 of the judgment in Balkaran Singh.19 28.15 In respect of relief for possession, learned counsel submits that as per Article 65, the period of limitation for filing a suit for possession based on title is 12 years and runs from the date when the possession of the defendants becomes adverse to the plaintiff. The possession of Mr. Khanna became adverse to the plaintiffs on the date of execution of the sale deeds and as such, the suit had to be filed within 12 years of 20.05.1997 and the present suit having been filed in 2012 is time barred. 28.16 Even otherwise, as per paragraph 19 of the plaint in the 1997 Suit, the purported cause of action arose on 15.07.1997 and therefore, the suit ought to have filed at least within 12 years of that date and the suit filed in 2012 is time barred. 28.17 Reliance is placed on in the judgment of the Kerala High Court in the case of Jose v. Ramakrishnan Nair Radhakrishnan and Ors.,20 the relevant paragraph of which reads as under:

20. 2003 SCC OnLine Ker 301: AIR2004 Ke r 16 CS (OS) 3195/2012 Page 18 of 95 to the decision 11. We may in this connection point out that Ext. B3 was executed in the year 1959. Suit was instituted only in the year 1982, after more than 23 years praying for recovery of possession. Claim was resisted stating that the suit itself was barred by law of limitation. Counsel for the plaintiff submitted that the suit is not barred by law of limitation since first defendant obtained possession of the property only in 1974. Reference was also made in Kumara Pillai v. Velappan Pillai (1968 Ker LT695. Period of limitation to file the suit starts from the date of Ext. B3. We have already held that Chempakakutty Amma was in possession of the property and therefore Ext. B3 was validly executed. This is a case where first defendant and the assignee are in possession of the properties for more than two decades and have effected valuable improvements in the

property. Since the property was already parted with under Ext. B3 the period of limitation has to be reckoned from the date of Ext. B3, that is 19-9-1959 and hence the suit is barred by law of limitation. Further since Ext. B3 was executed by the female daughter she is incompetent to execute Ext. A1 settlement deed dated 19-11-1959 and therefore to be ignored. Consequently we are of the view plaintiffs are not entitled to any of the reliefs prayed for in the suit. We therefore allow the appeal, set aside the judgment of the Court below. Parties would bear their respective costs. 28.18 Thus, it is contended by Mr. Anand that in view of the above position, the plaintiffs neither entitled to declaratory relief nor one of possession. (Emphasis Supplied) No locus standi 28.19 Mr. Anand submits that the plaintiffs have no locus standi to file the present suit as they have no existing right to the suit property; even according to their own pleadings in the plaint and as held by the Supreme Court Vidur Impex.1 28.20 It is submitted that the plaintiffs have themselves pleaded in the plaint that even prior to execution of the Sale Deeds dated 20.05.1997, they have on 18.03.1997 entered into an agreement for sale with Bhagwati. Bhagwati had also instituted arbitration proceedings against the CS (OS) 3195/2012 Page 19 of 95 plaintiffs seeking specific performance of the said agreement for sale along with possession of the suit property; the sole arbitrator has passed an award in favour of Bhagwati, which was sought to be executed before the Calcutta High Court. Since no challenge was made to the award, the said award has become final. He concludes that this had led to the Supreme Court to observe that Vidur has no subsisting legal or commercial interest. 21 28.21 Mr. Anand relying upon averments made by the plaintiffs themselves in paragraphs 5, 9 and 10 of the plaint, submits that it is the own case of the plaintiffs that they have divested themselves of their purported title and interest in the suit property in favour of Bhagwati. That being so, the learned counsel submits that the plaintiffs have no subsisting right in the suit property and, as such, no cause to seek any declaration under Section 34 of the Specific Relief Act. In view of the averments in the plaint, it is clear that the plaintiffs have no cause of action/cause to seek any of the reliefs sought in the present suit. No Trial Required 28.22 Learned counsel submits that no trial is required in the present matter. He submits that even the Supreme Court had proceeded treating the claim of Vidur, in respect of the existence of Sale Deeds, as correct and even then, had

come to the conclusion that Vidur had no title in the Suit Property. He submits that the factum of the passing of the injunction order, its violation, agreement to sell between Vidur and Bhagwati, award of the sole arbitrator, 1997 Suit, date of accrual of cause of action and the Supreme Court decision are not in dispute and therefore, there is no requirement of trial in the present suit.

29. Mr. Anand, thus, concludes that the continuance of the present suit 21 Supra n.1, paragraph 42 CS (OS) 3195/2012 Page 20 of 95 would amount to an abuse of the process of this Court and interest of justice requires that the present suit be dismissed at the threshold itself with exemplary costs. It is thus, prayed that the present suit be dismissed and the plaint be rejected and costs awarded to the defendants no.1 (i) to (iii) against the plaintiffs. SUBMISSIONS OF TOSH (Applicant in I.A. 4433/2013) 30. Mr. Sharma and Mr.Bhushan, learned senior counsels appearing for Tosh, while relying on I.A. No.4433/2013, submit that the present suit is liable to be dismissed at the threshold, broadly on the following grounds: (i) Deliberate concealment of prior litigation/ 1997 Suit right upto the Supreme Court; (ii) Withdrawal of an earlier Suit on same cause of action for similar reliefs without any leave and liberty;22 (iii) Adverse adjudication of locus and source of right by Supreme Court in Vidur Impex;1 and (iv) Suit being barred by the law of limitation. 30.1 In respect of the maintainability of the present application, learned senior counsels submit that the Supreme Court in the case of Shipping Corporation of India Ltd. v. Machado Brothers and Ors.23 has held that if continuation of a suit would amount to an abuse of the process of the Court and interest of justice requires that such suit should be disposed of as having become infructuous, an application under Section 151 CPC is maintainable. 30.2 The submissions in respect of the nature and scope of Vidur Impex1 are similar to the ones led by Mr. Anand. 22 Order XXIII Rule 1 (4) of the Code 23 (2004) 11 SCC168CS (OS) 3195/2012 Page 21 of 95 Concealment 30.3 Learned senior counsels further relies that in the case of Oswal Fats & Oils Ltd. v. Additional Commr. (Admn.), Bareilly Division, Bareilly and Ors.,24 wherein the Supreme Court came down heavily on the plaintiff therein for not disclosing the relevant document, terming such non-disclosure as part of strategy to keep the Court in the dark, the Apex Court held that such a conduct disentitles the plaintiff from grant of any relief, equitable or otherwise. 30.4 Learned senior counsel submit that the

filing of the previous suit [CS (OS) 1675/1997/1997 Suit]. and its withdrawal has been concealed from this Court and in CS (OS) 425/1993 right upto the Supreme Court, and on this ground alone, the suit is liable to be dismissed. They additionally rely upon M/s. Seemax Construction (P) Ltd. v. State Bank of India and another;25 Shiju Jacob Varghese & Anr. v. Tower Vision Ltd. & Ors.;26 S.P. Chengalvaraya Naidu v. Jagannath & Ors.;27 and Wheels India v. S. Nirmal Singh and Anr.28 Suit barred by Order XXIII Rule 1 (4) 30.5 In addition to concealment, learned senior counsel submit that the present suit would never have been maintainable if not for the concealment of the 1997 Suit. They submit that the courts have repeatedly held that once a suit has been withdrawn without reserving liberty under Order XXIII Rule 1 of the Code, another suit is not maintainable. He relies upon the decisions in Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and 24 (2010) 4 SCC728 pa ragraph 20 25 AIR1992 De l 197 26 MANU/DE/ 5662/2012:

196. (2013) DLT38527 (1994) 1 SCC128 2009 (41) PTC529(De l): ILR (2010) 2 Delh i 252 CS (OS) 3195/2012 Page 22 of 95 Ors.;29 Sopan Sukhdeo Sable v. Asstt. Charity Commr. and Ors.;30 Vineeta Sharma v. Rohit Sripat Singh;31 Vivek Ahuja v. Shyam Sunder & Ors.;32 Nirmal Singh v. Avtar Singh;33 and Jaideep Bajaj v. Shashi Bajaj & Anr.34 30.6 Learned senior counsel submit that the prayers in the 1997 Suit were the same as those in the present suit and, as such, the present suit cannot be maintained or sustained because it is based on the same cause of action. Limitation 30.7 Learned senior counsel next submit that the present suit is barred by limitation. They submit that the limitation for seeking possession is 12 years and as per the case of the plaintiffs themselves, Khanna was interested in denying possession way back in 1997 itself as is apparent from reading of the plaint in the 1997 Suit. 30.8 In respect of declaration, senior counsel submit that the limitation is 3 years from the accrual of cause of action and the same arises when the right of a party is denied. In the present scenario, the right of Vidur was definitely denied when Late Sh. Khanna had filed CS (OS) 161/1999 seeking declaration of the Sale Deeds dated 20.05.1997 as null and void. Therefore, the limitation for seeking declaratory relief has expired in 2002.

31. Accordingly, learned senior submit that the suit should be dismissed at the very threshold with heavy costs. SUBMISSIONS OF VIDUR/NON-APPLICANT29(1987) 1 SCC530 (2004) 3 SCC13731 (2000) 87 DLT41832 149 (2008) DLT66733 (1983) 4 DRJ4934 (2006) 90 DRJ138CS (OS) 3195/2012 Page 23 of 95 32. Mr. Manoj, learned counsel for the plaintiffs, has opposed the applications on the following grounds: Maintainability 32.1 First, that the applications are not maintainable. He substantiates his arguments by contending that the present applications, being under Section 151 of the Code, are not maintainable and accordingly, should be dismissed. 32.2 Mr. Manoj submits that the present applications are not maintainable as Section 151 cannot be used to defeat substantive rights of the plaintiffs without trial or following due procedure. It is submitted that the powers under Section 151 are subject to the following limitations: (i) S. 151 cannot be used when there is an express provision in the Code.35 36 (ii) S. 151 can only be used as a matter of procedure and not when it affects the substantive rights of the parties.37 (iii) S. 151 cannot be used to bypass the procedure established by law. 38 (iv) S. 151 cannot be used to short circuit a suit.39 32.3 Mr. Manoj has also submitted that reliance placed by the applicants on the judgments of the Supreme Court in Machado Brothers23 and Oswal Fats & Oils24 is misplaced as an application under Section 151 can be filed only in exceptional circumstances, where a suit rendered infructuous by subsequent events or where the plaintiff abuses the process by playing fraud upon the Court. In the present case, there is no subsequent event which can be said to have rendered the present 35 State of U.P. and Ors. v. Roshan Singh and Ors., (2008) 2 SCC488 paragraph 8 36 K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC275 paragraph 12 37 Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC527 paragraphs 21, 22, 27 and 43 38 State of Punjab v. Davinder Pal Singh Bhullar and Ors., (2011) 14 SCC770 paragraphs 60 and 64 39 Alk a Gupta v. Narender Kumar Gupta, (2010) 10 SCC141 paragraphs 27 - 30 CS (OS) 3195/2012 Page 24 of 95 suit infructuous. 32.4 Since the plaintiffs hold substantial property rights in the suit property, this right cannot be snatched away without trial or without following the due process. It is the stand of the plaintiffs that proper and effective adjudication after framing of issues would be mandatory in the present case. 32.5 Learned counsel for the plaintiffs has also opposed the present

applications on the ground that the same are barred under Order XXIII Rule 1 and also by the Principle of Issue Estoppel for the reasons that the grounds sought to be urged in the present applications filed under Section 151 had been raised in the earlier applications under Order VII Rule 11. Drawing the attention of this Court to the order of the Single Judge dated 31.05.2013, Mr. Manoj submits that all the grounds were raised and considered by the Single Judge. The applicants, Tosh and Khanna, had abandoned their applications under Order VII Rule 11 before the Division Bench and while seeking permission from the Division Bench to press their applications under Section 151 of the Code, no liberty was granted to re-agitate the same grounds. Simply because leave was granted to press applications under S. 151, that by itself cannot be construed as a permission to re-agitate the grounds already raised in the previous applications. In order to fortify his submissions, learned counsel has relied upon the decisions in Bhanu Kumar Jain v. Archana Kumar and Anr.40 and Aftab Ahmad and Anr. v. Nasiruddin and Anr.41 Supreme Court Judgment 32.6 Learned counsel for the plaintiffs further submits that and reliance on the observations made by the Supreme Court in the Vidhur Impex1 is 40 AIR 2005 SC626 (2005) 1 SCC787 pa ragraphs 30 - 31 41 AIR1977 De l 121, paragraph 8 CS (OS) 3195/2012 Page 25 of 95 misplaced as the sole issue which arose for consideration before the Apex Court was whether the present plaintiffs were entitled to be impleaded in a suit for specific performance, being CS (OS) No.425/1993. The ratio of the judgment is that parties in violation of injunction order are not entitled to impleadment in a suit for specific performance. Any observations made by the Supreme Court are not a declaration of law under Article 141 read with Article 136 of the Constitution of India qua the plaintiffs title. He submits that his stand is vindicated by the fact that the Apex Court did not issue any direction to cancel the registration of sale deeds in question. 32.7 Elaborating his argument, the counsel submits that any observations made by the Supreme Court on an issue neither considered nor decided cannot be binding. It is submitted that as per the provisions of Order XX Rule 4 (2) CPC, a judgment can be rendered only on the points for determination. He submits that the issue of title was not before the Supreme Court and thus, the Supreme Court could not have assumed the jurisdiction of a Trial Court. To this end, Mr. Manoj relies upon the judgments in Mohd. Mustafa v. Sri Abu Bakar and

Ors.42 and Balwant Rai Saluja and Anr. v. Air India Limited and Ors.43. 32.8 While delivering Vidur Impex1, the Supreme Court, in fact, did not take up the issue of title, and even otherwise, could not have taken up that issue, inasmuch as, that issue was not taken by the Division Bench and there was no appeal before the Supreme Court against the said decision. He submits that only law declared under Article 141, which shall be binding upon the parties, is in respect of impleadment. 32.9 Learned counsel submits that even the Supreme Court cannot ignore substantive provisions of law. In this regard, he submits that the 42 (1970) 3 SCC891 pa ragraph 6 43 (2014) 9 SCC407 pa ragraphs 22 - 27 CS (OS) 3195/2012 Page 26 of 95 observation no subsisting legal or commercial interest is contrary to substantive provisions of law. Relying upon Section 54 of Transfer of Property Act, 1882 and the judgment in Suraj Lamp and Industries Private Limited (2) v. State of Haryana and Anr.,44 Mr. Manoj submits that a mere agreement to sell in favour of Bhagwati cannot transfer any title in its favour. Learned counsel further submits that in Supreme Court Bar Association v. Union of India and Anr.,45 it has been held that even the Supreme Court cannot ignore substantive statutory provisions. 32.10 Learned counsel submits that a binding judgment is an abstraction of the principles only on aspects under consideration before the Court. The issue qua plaintiffs title was never raised, argued, considered or adjudicated. When the issue of title was not even considered, there cannot be any judgment on that aspect. By no stretch of imagination, can Vidur Impex1 be called a judgment qua the title of the plaintiffs. Thus, question of any judgment in personam cannot arise when there is no judgment on the title of the plaintiffs. 32.11 The counsel submits that a decision is binding on two legal principles, firstly, it operates as res judicata, i.e. the same parties cannot re-agitate the same issue and secondly, its ratio is followed as a precedent, i.e. Rule of Stare Decisis. When a question is not in issue, the decision would not operate as res judicata or as a binding precedent. It can only be treated as obiter dictum. Reliance is placed on the judgment in the case of Arun Kumar Aggarwal v. State of MP and Ors.,46 to submit that obiter dicta lacks the force of law as there is no full investigation or adjudication on that point. Counsel relies on Dalbir Singh and Ors. 44 (2012) 1 SCC656 pa ragraph 19 45 (1998) 4 SCC409 pa ragraphs 47 and 48 46 (2014) 13 SCC707 paragraphs 24 - 30 and 32 - 34 CS (OS) 3195/2012 Page 27 of 95 v. State of Punjab47 and

submits that general observations are only views and not a law. Counsel next relies on Krishena Kumar v. Union of India & Ors.48 and submits that concrete decision alone is binding on the parties and only the ratio decidendi has the force of law. In the cases of Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.49 and Dr. Nalini Mahajan & Ors. v. Director of Income Tax (Inv.) and Ors.,50 it has been held that a judgment has to be considered in the light of the questions before the Court. 32.12 Relying upon the aforegoing judgments, counsel submits that the only issue before the Supreme Court was regarding impleadment of Vidur in CS (OS) 425/1993. He submits that it was not even necessary to come to the conclusion that the sale deeds are void to deny impleadment. Learned counsel for the plaintiffs submits that the plaintiffs impleadment in a suit for specific performance was held to be totally unwarranted as the plaintiffs were not a necessary party to decide whether Tosh was entitled to a decree of specific performance. Normally, when a vendee pendente lite is impleaded, he comes in the place of the vendor, but here, that could not be the case as the vendor is denying the plaintiffs title. The settled law is that when the pendente lite purchaser claims title adverse to the vendor, he is not impleaded in a suit between the vendor and the person having a prior claim. 32.13 Learned counsel submits that the Supreme Court denied impleadment on two counts; first, transaction was entered in the teeth of injunction order and second, delay. The Supreme Court observed that as there was violation of injunction order, the sale deeds have no legal sanctity and thus, the same cannot be construed to be a finding that the 47 (1979) 3 SCC745 pa ragraphs 22 and 24 48 (1990) 4 SCC207 pa ragraphs 19 and 20 49 (1992) 4 SCC363 pa ragraph 39 50 (2002) 98 DLT525(DB), paragraph 93 CS (OS) 3195/2012 Page 28 of 95 sale deeds are void. He submits that had the Supreme Court decided the issue of title, it would have straightaway held that these sale deeds are void. But the Supreme Court stopped short of that and instead used the words no legal sanctity, meaning that the sale deeds are merely tainted having been executed in the teeth of injunction order. The counsel therefore submits that the only ratio decidendi that can be discerned from Vidur Impex1 is that a purchaser pendente lite in respect of a transaction, i.e. in violation of an injunction order, cannot be impleaded in anothers suit for specific performance. 32.14 Learned counsel for the plaintiffs submits that when the issue

of validity of the plaintiffs Sale Deeds is being considered by this Court, the judgment that holds the field is Thomson Press (India) Ltd. v. Nanak Builders and Investors Pvt. Ltd. and Ors.,51 wherein the Supreme Court has pronounced on the question of validity of sale deeds in violation of injunction order is contrary to the observation made in Vidur Impex.1 The ratio in Thomson Press51 is that sale deeds executed in violation of injunction order are not void but shall be governed by the principles of lis pendens. Emphasis is placed on Section 52 of Transfer of Property Act.52 Suit being barred by Law 32.15 Learned counsel also submits that the submission of the defendants that the present suit is barred under Order XXIII Rule 1 is misplaced as the same is not applicable in the present case. The said provision applies when the subject matter of the two proceedings is the same. Learned counsel for the plaintiffs further submits that the term subject matter has not been defined in the Code but the same has been construed as the same cause of action and relief in the judgments rendered in the 51 (2013) 5 SCC39752 Id., parag raphs 50 - 53 CS (OS) 3195/2012 Page 29 of 95 cases of Vallabh Das v. Dr. Madan Lal and Ors.;53 Kasarapu Sujatha and Anr. v. Veera Velli Veera Somaiah;54 The Kartar Singh and Ors. v. Shiv Rattandev Singh and Ors.;55 and Inbasagaran and Anr. v. S. Natarajan.56 32.16 Learned counsel submits that the prayers in the 1997 Suit were for possession and injunction, while the present suit is for declaration of title and consequential reliefs along with damages. He submits that even the cause of action is different in both the suits; therefore, order XXIII Rule 1 has no bearing on the present suit. Limitation 32.17 It is also contended by the learned counsel for the plaintiffs that the arguments of the defendants/applicants that the present suit is barred by limitation are without any force. 32.18 Learned counsel for the plaintiffs submits that the suit has been filed within the period of limitation. Counsel further submits that the plaintiffs primarily seek the reliefs of (i) declaration of title; and (ii) possession. 32.19 With regard to limitation for filing the suit for declaration of title is concerned, learned counsel relies upon Article 58 of the Limitation Act, as per which the period is three years from when the right to sue first accrues. Counsel further submits that the right to sue first accrues when there is clear and unequivocal threat to the right of the plaintiffs and the period of limitation would start running from that point only. In this regard, relying upon the fact that that the suit filed by Late Sh. Khanna in 1999 [CS

(OS) 161/1999]. was withdrawn on 10.01.2001 and based upon a Letter dated 25.01.2001, learned counsel submits that 53 (1970) 1 SCC761 pa ragraph 5 54 2008 (3) A LD525 2007 SCC On Line AP67655 AIR1996J&K3256 (2015) 11 SCC12 pa ragraphs 20 - 26 CS (OS) 3195/2012 Page 30 of 95 there was no challenge to the title of the plaintiffs. 32.20 In respect of possession, learned counsel submits that since the present suit is based on title, it would be governed by Article 65 of the Limitation Act and not Article 64. Counsel contends that no period of limitation is prescribed unless adverse possession by the defendant is asserted. It is further contended that the suit can be defeated only if the defendant is able to prove adverse possession of over 12 years. 32.21 Learned counsel submits that the limitation under Article 65 would begin only when the defendant-in-possession of the property asserts his rights against the plaintiffs. He submits that the burden is upon the defendants to prove adverse possession. It is further contended that in the present case, the defendants have failed to discharge their onus as admittedly, the Suit Property was with Late Sh. Kaul till 18.09.2007, when he was dispossessed in terms of the order dated 03.09.2007 by the receiver. In this regard, he submits that the plaintiffs being out of possession or the date of the Sale Deeds/ownership is irrelevant. 32.22 Mr. Manoj relies upon the decision in C. Natrajan v. Ashim Bai & Anr.57 for the proposition that Article 58 is not applicable and that since the burden under Article 65 is upon the defendants, it is imperative for an issue to be framed in that regard. In respect of clear and unequivocal Laxminarayan & Ors.58 threat, counsel relies upon Rukhmabai v. Lala 32.23 Further, relying upon Indira v. Arumugam and Anr.,59 learned counsel submits that unless defendant proves adverse possession, plaintiff cannot be non-suited. With regard to starting point of limitation under Article 65, learned counsel relies upon Annakili v. A. Vedanayagam 57 (2007) 14 SCC183 paragraphs 14 - 19 58 (1960) 2 SCR253 AIR 1960 SC335 pa ragraphs 53 and 54 59 (1998) 1 SCC614 pa ragraphs 4 and 5 CS (OS) 3195/2012 Page 31 of 95 and Ors.60 and Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors.61 33. Learned counsel for the plaintiffs/non-applicants concludes that in view of the aforegoing submissions, the applications should be dismissed as being frivolous. As an alternative, he submits that incase this court comes to the conclusion that in view of judgment in Vidur Impex1 the suit deserves to be dismissed, then the suit may be allowed to

proceed in respect of damages. REJOINDER ARGUMENTS OF APPLICANTS34 Mr. Anand in his rejoinder arguments has submitted on the following lines:

34. 1 In response to the submissions of the plaintiffs in respect of Principle of Issue Estoppel or the applications being barred by Order XXIII Rule 1, learned counsel submits that before the Division Bench, a consensus was arrived. It was agreed that all grounds urged in the applications under Order VII Rule 11 of the Code would be urged in the applications under Section 151 of the Code together with additional grounds, if any. 34.2 Drawing the attention of this court to the word instead used in the order dated 04.07.2013, learned counsel submits that the intention of the Division Bench is patent that all the grounds covered under Order VII Rule 11 could be urged again. To this end, he relies upon the definition of instead given in P. Ramanatha Aiyar, Advanced Law Lexicon, 4th Ed. 2013, Lexis Nexis as in the room of, in lieu of or in place of. They are expressions of substitution of one thing for another 60 (2007) 14 SCC308 paragraphs 24 to 26 61 (2009) 16 SCC517 paragraph 21 CS (OS) 3195/2012 Page 32 of 95 of equivalence. 34.3 In respect of the limitations of the powers of the court under Section 151, Mr. Anand submits that the only restriction is that there cannot be any express provision dealing with the matter and that the power is not contrary to or different from the procedure expressly provided in the Code as S. 151 cannot override express provisions. He relies upon the decisions in Manohar Lal Chopra;37 Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava and Ors.;62 K.K. Velusamy;63 Machado Brothers.64 34.4 In the present case, learned counsel for Khanna submits that since the objections of limitation and prohibition of Order XXIII Rule 1 required consideration of documents other than the plaint and accompanying documents, especially the plaint in CS (OS) 1675/1997 and its withdrawal order, these could not have been looked into under Order VII Rule 11. 34.5 In reply to the effect of the judgment of the Supreme Court in Vidur Impex;1 Mr. Anand accepts that matters collaterally and incidentally in issue are not ordinarily res judicata, but submits that there are exceptions to the rule. Learned counsel submits that is a particular issue was necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as directly and substantially in issue. He substantiates that if a judgment is based upon the decision on a particular issue, then the decision would be res judicata in

a later case. 34.6 Mr. Anand substantiates that if the record of the former trial shows that a judgment could not have been decided without deciding a particular 62 AIR 1966 SC1899 paragraph 5 63 Supra n.36, paragraph 12 (d) 64 Supra n.23, paragraph 20 CS (OS) 3195/2012 Page 33 of 95 issue, then it shall be considered to be decided for all future actions between the parties. Relying upon judgment in Sajjadanashin Sayed Md. B.E. Edr. v. Musa Dadabhai Ummer and Ors.,65 learned counsel concludes that the test to be applied is whether the court considers the adjudication of a particular issue as material and essential for its decision and if the answer is in the affirmative, then the particular issue will be treated as directly and substantially in issue. In Vidur Impex,1 Mr. Anand submits that the Supreme Court while deciding the issue of impleadment, the right of Vidur was considered and decided. He further relies upon the decisions of the Apex Court in Director of Settlements, A.P. and Others v. M.R. Apparao and Anr.66 and Union of India and Ors. v. Dhanwanti Devi and Ors.67 35. Mr. Sharma and Mr. Bhushan, learned senior counsel for Tosh, submit that the objections raised by the plaintiffs in respect of the maintainability of the present applications are without any justification owing to the extraordinary progression of the case and extraordinary circumstances that have prevailed. They submit on the following lines:

35. 1 Learned senior counsel submit that neither Roshan Singh35 nor K.K. Velusamy36 come to the aid of the plaintiffs. They further submit that Alka Gupta39 was delivered in a background where the scope of the two suits was different and therefore, the observations of the Supreme Court have no bearing on the present matter. 35.2 In response to the submission of the plaintiffs that substantive rights cannot be snatched away, learned senior counsels submit that substantive rights have already been settled inter se the parties. Additionally, he submits that it is futile to compare the peculiar facts of 65 (2000) 3 SCC350 pa ragraphs 10 - 19 66 (2002) 4 SCC638 pa ragraph 7 67 (1996) 6 SCC44 paragraph 9 CS (OS) 3195/2012 Page 34 of 95 the present case with any other precedent because of the sheer complicated manoeuvers that were adopted by Vidur to defeat the rights of the defendants and to defeat the orders of preservation of property of this Court. 35.3 Learned counsel for Tosh submits that the judgment of the Supreme Court in Vidur Impex1 being a judgment in personam and dealing

with the peculiar facts of this case has ruled upon the rights of the plaintiffs. The Supreme Court has unequivocally declared all rights of the plaintiffs to be a nullity.

36. I have heard the learned counsel for the parties and perused the pleadings, applications and various documents on record. The arguments urged on the part of the applicants/Khanna and Tosh are on the following lines: (i) The present applications are maintainable even after the Division Bench set-aside the order dated 31.05.2013 on the applications under Order VII Rule 11 of the Code; (ii) That the Supreme Court in Vidur Impex1 has given a conclusive finding that Vidur has no subsisting right in the suit property and the Sale Deeds dated 20.05.1997 have no legal sanctity; (iii) The present suit is barred by law as being hit by the provisions of Order XXIII Rule 1 (4) owing to withdrawal of previous suit by Vidur, being CS (OS) 1675/1997;12 (iv) The additional prayer of damages is barred by Order II Rule 2 of the Code; (v) The present suit is barred by limitation by application of Articles 58 and 65 of the Limitation Act, 1963; and (vi) The suit is liable to be dismissed at the threshold itself owing to gross concealment of previous suit on the part of plaintiffs in the CS (OS) 3195/2012 Page 35 of 95 present proceedings as well as CS (OS) 425/1993 right upto the Supreme Court.

37. The contentions of the plaintiffs/non-applicants summarized, in seriatim, are as follows: (i) The present applications under Section 151 of the Code are not maintainable owing to the limited scope of the provision; (ii) Substantial rights of the plaintiffs in the suit property cannot be snatched away without following the due process of law; (iii) Applications under Section 151 are not maintainable as being barred by the Principle of Issue Estoppel; (iv) The judgment of the Supreme Court in Vidur Impex1 was limited to impleadment application in CS (OS) 425/1993 and by no way effects the title of the plaintiffs herein; and (v) The present suit is neither barred by operation of Order XXIII Rule 1 nor by the law of limitation.

38. The facts of the present dispute have already been detailed in paragraphs 1 to 27 aforegoing. I also deem it appropriate to mention that after the factum of filing and withdrawal of previous suit 68 by Vidur was brought to the notice of this Court, the plaintiffs have filed an application, bearing I.A. No.16689/2013 seeking

amendment of the plaint to incorporate the same.

39. Since the submissions of the parties are multiple and diverse, it would be better to deal with them under separate heads. MAINTAINABILITY OF THE APPLICATIONS40 Whether the applications are maintainable is the first question which arises for the consideration of this Court. The applicants/ Khanna and 68 CS (OS) 1675/1997 (Later renu mbered as CS62920
on being transferred to the District Court) CS (OS) 3195/2012 Page 36 of 95 Tosh had initially filed applications under Order VII Rule 11 before this court, which were allowed by this Court on 31.05.2013. The order was challenged before the Division Bench, which set-aside the order upon the statements of the counsel for the applicants that they shall pursue applications under Section 151 of the Code.

41. Submissions of Mr. Manoj upon the maintainability of the applications are threefold: first, the scope of powers under S. 151 of the Code are limited; second, that substantial property rights of the plaintiffs cannot be snatched away; and third, the applications are barred by Principle of Issue Estoppel. On the converse, the applicants have vehemently contended that the present applications are maintainable.

42. No doubt the power of civil courts under Section 151 are very wide, but they are not derived from the Code, only recognised by it. Such powers are inherent in the court as a necessary colliery for rendering justice and the courts are vested with all powers to secure the ends of justice and prevent the abuse of its process.

43. The opening words, Nothing in this Code shall be deemed to limit or otherwise affect contained in S. 151 make it manifest that the inherent powers are not in any way controlled by the provisions of the Code. The power is limited only to the extent that its exercise should not be in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. If there are express provisions exhaustively covering a particular topic, then they might give an implication that no power shall be exercised in derogation to those provisions, in such circumstances resorting to S. 151 is not permissible. At the same time, the Supreme Court has also held that [w].hatever limitations are imposed by construction on the provisions of Section 151 of the Code, they do not control the

undoubted power of the Court CS (OS) 3195/2012 Page 37 of 95 conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the Court.69 44. A Full Bench of the Supreme Court in the case of Padam Sen & Anr. v. State of Uttar Pradesh70 had come to the conclusion that inherent power under S. 151 could not be exercised by the Additional Munsif to appoint a commissioner to seize the books of accounts of the plaintiff therein. The Apex Court observed as follows: 8. 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 Section 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. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code. In Ram Chand & Sons Sugar Mills,62 the Apex Court holding that S. 151 can be invoked as to secure ends of justice or prevent abuse in the absence of any express provision, when a director had failed to appear under Order XXIX Rule 3 of the Code. In coming to the said conclusion, the Court held that the power under S. 151 will not be exercised if its exercise is inconsistent with, or comes into conflict with, 45. any of the powers expressly or by necessary implication conferred by the other provisions of the Code.69 46. Similar observations have been in Roshan Singh35 wherein S. 151 was sought to be utilized as a provision of appeal in derogation of an express provision for appeal in U.P. Imposition of Ceiling on Land Holdings Act, 1960. The Apex Court was of the opinion that the same 69 Supra n.62, paragraph 5 70 (1961) 1 SCR884CS (OS) 3195/2012 Page 38 of 95 was impermissible and observed as follows: 7. The principles which regulate the exercise of inherent powers by a court have been highlighted in many cases. In matters with which the Code of Civil Procedure does not deal with, the court will exercise its inherent power to do justice between the parties which is warranted under the circumstances and which the necessities of the case require. If there are specific provisions of the Code of Civil Procedure dealing with the particular topic and they expressly or by necessary implication exhaust the scope of the powers of the court or the jurisdiction that may be exercised in relation to a matter, the

inherent powers of the court cannot be invoked in order to cut across the powers conferred by the Code of Civil Procedure. The inherent powers of the court are not to be used for the benefit of a litigant who has a remedy under the Code of Civil Procedure. Similar is the position vis--vis other statutes.

8. The object of Section 151 CPC is to supplement and not to replace the remedies provided for in the Code of Civil Procedure. Section 151 CPC will not be available when there is alternative remedy and the same is accepted to be a well-settled ratio of law. The operative field of power being thus restricted, the same cannot be risen to inherent power. The inherent powers of the court are in addition to the powers specifically conferred on it. If there are express provisions covering a particular topic, such power cannot be exercised in that regard. The section confers on the court power of making such orders as may be necessary for the ends of justice of the court. Section 151 CPC cannot be invoked when there is express provision even under which the relief can be claimed by the aggrieved party. The power can only be invoked to supplement the provisions of the Code and not to override or evade other express provisions. The position is not different so far as the other statutes are concerned. Undisputedly, an aggrieved person is not remediless under the Act. (Emphasis Supplied) In Davinder Pal Singh Bhullar,38 the Supreme Court observing that 47. the power under S. 482 of the Code of Criminal Procedure is analogous to S. 151 of the Code, again held that the powers can be used provided CS (OS) 3195/2012 Page 39 of 95 there is no prohibition for passing such an order under the provisions of Cr PC and there is no provision under which the party can seek redressal of its grievance.71 48. The Supreme Court in K.K. Velusamy36 held that the inherent power could be exercised to reopen evidence or recall witnesses for further examination or cross-examination even after arguments have commenced or even concluded. The Supreme Court after referring to numerous decisions, came to the following conclusions: 11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of

evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

12. The respondent contended that Section 151 cannot be used for reopening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that Section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of Section 151 has been explained by this Court in several decisions [see Padam Sen v. State of U.P. [AIR 1961 SC218: (1961) 1 Cri LJ322 , Manohar Lal Chopra v. Seth Hiralal [AIR 1962 SC527 , Arjun Singh v. Mohindra Kumar [AIR 1964 SC993 , Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargava [AIR 1966 SC1899 , Nain 71 Supra n.38, paragraph 59 CS (OS) 3195/2012 Page 40 of 95 1152]. , Jaipur Singh v. Koonwarjee [(1970) 1 SCC732 , Newabganj Sugar Mills Co. Ltd. v. Union of India [(1976) 1 SCC120: AIR 1976 SC Development Syndicate v. CIT [(1977) 1 SCC508:

1977. SCC (Tax) 2

AIR 1977 SC1348 , National Institute of Mental Health & Neuro Sciences v. C. Parameshwara [(2005) 2 SCC256 and Vinod Seth v. Devinder Bajaj [(2010) 8 SCC1: (2010) 3 SCC (Civ) 212].].. We may summarise them as follows: Mineral is not a (a) Section 151 substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is right and undo what is wrong, that is, to do all things necessary to secure the ends of justice and prevent abuse of its process. (b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of

justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances. (c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code. (d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature. CS (OS) 3195/2012 Page 41 of 95 (e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief. (f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court. (Emphasis Supplied) 49. From the aforegoing, it is clear that the inherent powers under S. 151 of the Code can be invoked only when its exercise is not inconsistent with some express provision or when a provision in the Code dealing with the aspect expressly or by necessary implication exhausts the scope of the powers of the Court. In the present case, what is to be seen is the interplay between Order VII Rule 11 and Section 151, i.e. whether Order VII Rule 11 exhausts the circumstances under which a suit may be dismissed prior to trial?.

50. Under Order VII Rule 11, the plaint may be rejected in certain circumstances including when the suit appears from a statement in the plaint itself to be barred by any law. The provision may only be invoked when the suit is barred from the pleadings filed by the plaintiff himself and the submissions of the defendant or any other material produced by the defendant cannot be looked into.72 72 See Arjan Singh & Ors. v. Union of India & Ors., AIR1987 De l 165, paragraph 12; Sopan Suk hdeo Sable and Ors. v. Asst. Charity Commissioner and Ors., (2004) 3 SCC137 Popat and Kotecha Property v. State Bank of India Staff Assn., (2005) 7 SCC510 paragraph 25; Hardesh Ores (P) Ltd. v. Hede and Company, (2007) 5 SCC614 paragraph 25 and 33; Wings Pharmaceuticals (P) Ltd. v. Praveen Bhasin, MANU/DE/ 3472/2016, paragraph 21 and Kuldeep Singh Pathania v. Bik ram Singh Jaryal, (2017) 5 SCC345 paragraphs 6 - 8 CS (OS) 3195/2012 Page 42 of 95 51. The question as to whether Order VII Rule 11 exhausts the powers of the Court to dismiss the suit/reject the plaint arose before a Single Judge of the Rajasthan High Court in Temple of Thakur Shri Mathuradassji v. Shri Kanhaiyalal & Ors.,73 wherein the appellant temple and some persons acting on its behalf had filed petition, suit and application, one after the other, in order to deny a party to the benefit of his decree. The case pertained to land, wherein the owner sought to get it vacated from the tenant/school, but the Temple and its associates initially filed a PIL, then a suit and ultimately an application under Order 21 Rule 97 of the Code to avoid the land from getting vacated even after a compromise had been effected between the owner and the tenant. In this background, the Trial Court had dismissed the suit after holding the same as an abuse of the process of law. Similar arguments were urged in respect of the limitations on the power of the Court to dismiss a suit qua the power in Order VII Rule 11; the Single Judge rejected the arguments and observed as follows: 16. Totality of the circumstances clearly shows that the plaintiffs filed the suit for taking benefit of procedure provided by the Civil Procedure Code and, therefore, submitted that plaint of the plaintiffs could have been rejected under Order 7 Rule 11 CPC. Under Order 7 Rule 11 CPC plaint can be rejected on the grounds mentioned in the Order 7 Rule 11 CPC like the suit is barred by law or it does not disclose the cause of action or proper court fees has not been paid even after order of the court. If the suit is abuse of process of the court and cannot be dismissed under Order 7 Rule 11

CPC then the court is not helpless and can accordingly invoke the powers under Section 151 CPC and can dismiss the suit under Section 151 CPC. Frivolous litigations are required to be nipped in the bud at the earliest possible stage otherwise no relief to the aggrieved party because of the reason that sole object of the frivolous 73 2008 (1) ILR (Ra j) 619:

2008. (3) W LC (Ra j) 534 CS (OS) 3195/2012 Page 43 of 95 litigation is to drag adversary in the litigation till it is dismissed consuming several years in trial. If court reaches to the conclusion that suit is frivolous from the totality of the facts brought on record or which have come on record then by not dismissing the suit at earliest, the court virtually declares that a frivolous suit can demand trial of suit and aggrieved party has no remedy against frivolous suit. If there are creases in the law or sometimes is left out or not specifically provided in statute then they are required to be ironed out by the courts by interpreting the law in a manner to advance the cause of justice and no party can be left with no remedy against frivolous suits. At the cost of repetition, it is observed that the continuation of frivolous suit against any person on the ground that it cannot be dismissed since there is no provision under Order 7 Rule 11 CPC is virtually denying an aggrieved party his right to crush the frivolous litigation without suffering the trial of suit. (Emphasis Supplied) 52. A Division Bench of this Court was also faced with a similar issue in Aniruddha Dutta & Ors. v. Bhawani Shankar Basu & Ors.,74 wherein the appellants had challenged the judgment of a Single Judge of this Court in two suits, both revolving around the exclusion of certain heirs from the will of one Ms. Nirod Bala Basu after lapse of 38 years. Dismissing the appeals, Justice Pradeep Nandrajog, delivering the opinion for the bench, observed as follows: 28. A Court of record has every inherent power to prevent the abuse of its process and Order 7 Rule 11 of the Code of Civil Procedure is not the complete reservoir of the power to nip a frivolous suit when it is still in the stage of infancy. The inherent powers of a Court of record, and we highlight that Section 151 of the Code of Civil Procedure does not confer, but saves the inherent power of a Court also constitutes the reservoir of the power of a Court of record to throw out vexatious suits. (Emphasis Supplied) 74 2012 (127) DRJ46(DB) CS (OS) 3195/2012 Page 44 of 95 53. Both Temple of Shri Mathuradassji 73 and Aniruddha Dutta74 have been accepted and followed in Keshav Chander Thakur

& Anr. v. Krishan Chander & Ors.75 Therefore, both this Court and the Rajasthan High Court have categorically held that Order VII Rule 11 is not the complete reservoir of power under which a frivolous suit may be nipped in the bud.

54. Even the Supreme Court has accepted that suits may be dismissed under Section 151 in Machado Brothers.23 The appellant therein had appointed the respondent as steamship agents and later terminated the agency, which was challenged before the the City Civil Court, Chennai. During the pendency of the suit, another termination notice was issued and as such, the cause of action of the first suit eclipsed and the suit became infructuous. In this background, the application under S. 151 was filed for dismissal of the suit. The Trial Court dismissed the application, which was upheld by the High Court and the applicants approached the Supreme Court by filing a SLP. The Apex Court allowed the petition holding that incase the cause of action disappeared subsequent to the admission of the suit, the court had the inherent power to dismiss the suit under S.

151. One of the contentions which was raised by the respondent therein related to the power under Order VII Rule 11, was that if the plaint showed the existence of a cause of action on the date of filing of the same, subsequent disappearance of cause of action would not make the suit bad or infructuous.76 The contention did not find favour with the Supreme Court, which came to the conclusion that the application was maintainable and the suit before the City Civil Court was to be dismissed. The relevant paragraphs read as under:

75. 211 (2014) DLT149(DB):

2014. (143) DRJ330(DB), paragraphs 38 - 42 76 Supra n.23, paragraph 14 CS (OS) 3195/2012 Page 45 of 95 20. From the above, it is clear that if there is no specific provision which prohibits the grant of relief sought in an application filed under Section 151 of the Code, the courts have all the necessary powers under Section 151 CPC to make a suitable order to prevent the abuse of the process of court. Therefore, the court exercising the power under Section 151 CPC first has to consider whether exercise of such power is expressly prohibited by any other provisions of the Code and if there is no such prohibition then the court will consider whether such power should be exercised or not on the basis of facts

mentioned in the application. 31. For the reasons stated above, we are of the opinion that continuation of a suit which has become infructuous by disappearance of the cause of action would amount to an abuse of the process of the court, and interest of justice requires that such suit should be disposed of as having become infructuous. The application under Section 151 CPC in this regard is maintainable. (Emphasis Supplied) 55. From the aforegoing, it is clear that the Apex Court has also accepted that Order VII Rule 11 is not exhaustive and frivolous suits may be dismissed as nipped in the bud by relying upon S. 151 of the Code.

56. Therefore, both this Court and the Rajasthan High Court have categorically held that Order VII Rule 11 is not the complete reservoir of power under which a frivolous suit may be nipped in the bud. The view has been accepted by the Supreme Court in Machado Brothers.23 Even otherwise, I am of the view that the Court cannot be helpless and be forced to continue a vexatious suit, which is an abuse of its process, merely because the same cannot be rejected under the Order VII Rule 11.

57. In the present scenario, the objections of limitation, suit being barred by Order XXIII Rule 11 and the effect of the judgment of the Supreme Court in Vidur Impex1 could not have been entertained in an CS (OS) 3195/2012 Page 46 of 95 application under Order VII Rule 11; therefore, the present applications are maintainable. This is primarily for the reason that the scope of Order VII Rule 11 is limited and the court can only go into the contents of the plaint and accompanying documents; while adjudication of such objections other documents need to be gone into. This was also the reason that the applicants made statements before the Division Bench that they shall not press the applications under Order VII Rule 11, but prefer applications under S. 151 of the Code.

58. Mr. Manoj, learned counsel for the plaintiffs, has also relied upon Alka Gupta39 to submit that S. 151 cannot be used to short circuit a suit. The case does not come to the aid of the plaintiffs/non-applicants as the Supreme Court was dealing with a case where the Trial Court had dismissed the suit as being an abuse of the process of the Court after the issues had been framed, but while doing so, the Court had relied upon unexhibited documents and dismissed the suit

merely on the weakness of the case of the plaintiff or unscrupulousness of the plaintiff. 77 That is not the case in the present case as the filing of the 1997 Suit and its withdrawal have not been denied. Further, in view of the judgments in Temple of Thakur Shri Mathuradassji,73 Aniruddha Dutta,74 Keshav Chander Thakur75 and Machado Brothers23 the present applications are maintainable and the courts are vested with the power to dismiss a frivolous suit under S. 151 if it is of the opinion that the suit is an abuse of the process of law.

59. I am also unable to accept the submissions of the plaintiffs that substantive rights cannot be snatched away under Section 151 of the Code7879 for the reason that the present case is not where the 77 Supra n.39, paragraph 34 78 Supra n.37, paragraph 21 79 Vinod Seth v. Devinder Bajaj & Anr., (2010) 8 SCC1 paragraph 28 CS (OS) 3195/2012 Page 47 of 95 substantive rights of the plaintiffs would be affected. If any of the objections raised to the maintainability of the suit hold true, the plaintiffs would not have substantive rights in the first place.

60. The final objection raised by the non-applicants/plaintiffs for non-maintainability of the application is that the same are barred by the provisions of Order XXIII Rule 1 of the Code or the Principle of Issue Estoppel. Mr. Manoj has submitted that once the grounds had been urged in the applications filed under Order VII Rule 11 of the Code and the applications given up as not pressed, the same cannot be urged again under the present applications. I am unable to accept the submission of the learned counsel as when the previous applications were heard by this Court, the Learned Single Judge observed that such contentions could not be gone into as it required analysis of averments and documents beyond the plaint. This is also evident from the judgment dated 31.05.2013 of this Court, wherein it was held that as per the plaint, the cause of action was said to have arisen after the observations of the Supreme Court in Vidur Impex1 which is impermissible in law (paragraph 23). The Single Judge had also expressly stated that whether or not the observations made by the Supreme Court in respect of the sale deed being relied upon by the plaintiffs herein to get a declaration of title in their favour operate as res judicata or not is not the question to be considered and decided by this Court at the stage of consideration of applications under Order VII Rule 11 C.P.C. Therefore, the contentions urged by the applicants being outside

the scope of adjudication of applications under Order VII Rule 11 of the Code, the question of prohibition of Order XXIII Rule 1 or Principle of Issue Estoppel do not arise.

61. Even the judgments cited by the learned counsel for the plaintiffs do CS (OS) 3195/2012 Page 48 of 95 not come to his aid. In Bhanu Kumar Jain,40 the Supreme Court was dealing with the dichotomy of a regular appeal and an appeal from an application filed under Order IX Rule 13 of the Code arising out of a common ex parte decree. In such a background, Justice S.B. Sinha delivering the opinion for the Bench held that the grounds once urged in application under Order IX Rule 13 and thereafter, settled in appeal could not be urged again in a regular appeal; however, the grounds which could not have been urged in applications under Order IX Rule 13 of the Code could be urged in the subsequent appeal. 80 This judgment, instead of assisting the plaintiffs, further forties my view that the contentions outside the scope of Order VII Rule 11 can be considered under S. 151 of the Code. Even without the prohibition of principle of Issue Estoppel, the restriction is inherent in S. 151 of the Code as it cannot be used when there is an express provision under the Code exhaustively dealing with the scenario.

62. Further in Aftab Ahmad,41 a Single Judge of this Court held that [o].nce an application has been presented claiming a relief and it is not pressed and is dismissed, a subsequent application is barred. These observations do not aid the plaintiffs as in the case, the appellant had made an application for striking out the defence of the tenant before the Rent Controller alleging certain defaults, allowed it to be dismissed for non-prosecution and later filed another application again for striking out the defence on the basis of the very same defaults. 81 That is not the case with the present applications, the scope of the present applications is different and therefore, the judgment of this Court in Aftab Ahmad41 does not aid the case of the plaintiffs.

63. Moreover, the Court cannot loose track of the fact that the Single Judge 80 Supra n.40, paragraphs 37 - 39 81 Supra n.41, paragraph 1 CS (OS) 3195/2012 Page 49 of 95 had decided applications under Order VII Rule 11 of the Code in favour of the applicants and the plaintiffs had filed an appeal before the Division

Bench. The order sheets of the appeal4 show that the appeal was hotly contested. During the hearing of the appeal, parties agreed to a consent order. The appellant/plaintiff herein agreed that the applicants would not press the applications under Order VII Rule 11 of the Code, but would press/file applications under Section 151 of the Code. No objection was raised that such applications would not be maintainable and incase the plaintiff/appellant had raised such an objection, there would have been no reason for the applicants to agree for such an order, more particularly when the Single Judge had decided the applications under Order VII Rule 11 of the Code in their favour and no prudent person would give up the favourable order.

64. Therefore, the present applications are maintainable. JUDGMENT OF THE SUPREME COURT65 The next aspect to be considered, which has been hotly contested by the parties, is the effect of the judgment of the Supreme Court in Vidur Impex,1 i.e. whether the Supreme Court has sealed the fate of the plaintiffs/Vidur by deciding the issue of title?.

66. All three contesting parties have made numerous submissions and cited multitude judgments. It would be appropriate to deal with judicial authorities cited by the parties first.

67. The first set of judgments relied upon by the counsel for the plaintiff is Mohd. Mustafa42 and Balwant Rai Saluja.43 In Mohd. Mustafa,42 the Supreme Court was dealing with a situation where the High Court had given a contradictory finding as to the nature of suit properties; on one hand, they were held to be properties of the father of the appellant and CS (OS) 3195/2012 Page 50 of 95 on the other the claim of the appellant that the suit was bad for partial partition based upon the very same properties was denied. In this background, the Supreme Court allowing the appeal, held that the findings arrived at by the High Court were without proper pleadings and necessary issues the same cannot bind any of the parties to the suit though it does indicate the serious injustice that is likely to happen to the appellant because of the defective pleadings (paragraph 4). The observations were in the background of an application seeking amendment of written statement by the defendant/appellant therein. These observations cannot be taken to be laying any

absolute principle of law as to what amounts to res judicata; the observations were limited to the purposes of the amendment application.

68. A Full Bench of the Apex Court in Balwant Rai Saluja43 was dealing with the ratio of SAIL and Ors. v. National Union Waterfront Workers and Ors.,82 i.e. whether the Constitution Bench in SAIL82 had dealt with the status of workmen engaged in statutory canteens through contractors could be treated as employees of the principal establishment. While rejecting the contention of the appellant employees, Justice H.L. Dattu held that SAIL82 judgment cannot be said to have decided the issue as firstly, the issue did not even remotely arise and the summation of law in paragraph 107 could not be said to be law declared by the Court under Article 141. After referring to numerous judgments on the issue, the Court summarized as follows: 26. In our view, the binding nature of a decision would extend to only observations on points raised and decided by the Court and not on aspects which it has neither decided nor had occasion to express its opinion upon. The observation made in a prior decision on a legal question which arose in a manner not requiring any decision and which was to an extent unnecessary, 82 (2001) 7 SCC1CS (OS) 3195/2012 Page 51 of 95 ought to be considered merely as an obiter dictum. We are further of the view that a ratio of the judgment or the principle upon which the question before the Court is decided must be considered as binding to be applied as an appropriate precedent.

27. The Constitution Bench in SAIL case, decided on the limited issue surrounding the absorption of contract workers into the principal establishment pursuant to a notification issued by the appropriate Government under Section 10 of the Contract Labour (Abolition and Regulation) Act, 1970. The conclusion in para 125 of SAIL case, inter alia, states that on issuance of a notification under Section 10(1) of the Contract Labour (Abolition and Regulation) Act, 1970 passed by the appropriate Government would not entail the automatic absorption of contract workers operating in the establishment and the principal employer will not be burdened with any liability thereof. The issue surrounding workmen employed in statutory canteens and the liability of principal employer was neither argued nor subject of dispute in SAIL case. Therefore, in our considered view the decision on which reliance was placed by the learned counsel does not assist him in the facts

of the present case. (Emphasis Supplied) 69. Therefore, the Supreme Court held that any observations on topics which were neither before the Court nor had the occasion to express its opinion thereupon cannot be said to have precedential value as they remain mere orbitur.

70. Both the applicants and non-applicant have relied upon the judgment of the Supreme Court in Arun Kumar Aggarwal,46 wherein the Division Bench was dealing with the effect of a stray line in the order of the Special Judge, Katni, while rejecting the closure report, in respect of seeking sanction under S. 19 of the Prevention of Corruption Act, 1988. The relevant portion of the order of the Special Judge reads as under: 32. Therefore matter may be taken up seeking necessary sanction to prosecute the accused persons Raghav Chandra, CS (OS) 3195/2012 Page 52 of 95 Shri Ram Meshram and Shahjaad Khan to prosecute them under Section 13(1)(d), 13(2), Prevention of Corruption Act, 1988 and under Section 120-B IPC and for necessary further action, case may be registered in the criminal case diary. (Emphasis Supplied) 71. The High Court had allowed revision petition holding that the aforequoted portion of the order of the Special Judge was infact a direction to the sanctioning authority to sanction the prosecution of the accused persons, which is impermissible in law. The Supreme Court reversed the decision of the High Court holding that the line was merely an observation or remark and could not be treated as a direction of the Court. The relevant paragraphs of the judgment of the Apex Court read as under: 24. At this stage, it is pertinent to consider the nature and scope of a mere observation or obiter dictum in the order of the Court. The expression obiter dicta or dicta has been discussed in American Jurisprudence 2d, Vol. 20, at p. 437 as thus: 74. Dicta Ordinarily, a court will decide only the questions necessary for determining the particular case presented. But once a court acquires jurisdiction, all material questions are open for its decision; it may properly decide all questions so involved, even though it is not absolutely essential to the result that all should be decided. It may, for instance, determine the question of the constitutionality of a statute, although it is not absolutely necessary to the disposition of the case, if the issue of constitutionality is involved in the suit and its settlement is of public importance. An expression in an opinion which is not necessary to support the decision reached by the court is dictum or obiter dictum. Dictum or obiter dictum is distinguished from the holding

of the court in that the so-called law of the case does not extend to mere dicta, and mere dicta are not binding under the doctrine of stare decisis. As applied to a particular opinion, the question of whether or not a certain part thereof is or is not a mere CS (OS) 3195/2012 Page 53 of 95 dictum is sometimes a matter of argument. And while the terms dictum and obiter dictum are generally used synonymously with regard to expressions in an opinion which are not necessary to support the decision, in connection with the doctrine of stare decisis, a distinction has been drawn between mere obiter and judicial dicta, the latter being an expression of opinion on a point deliberately passed upon by the court. (emphasis supplied) Further at pp. 525 and 526, the effect of dictum has been discussed: 190. Decision on legal point; effect of dictum In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said to be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation the case decided, are seldom completely investigated as to their possible bearing on other cases. Nevertheless courts have sometimes given dicta the same effect as holdings, particularly where judicial dicta as distinguished from obiter dicta are involved. to 25. According to P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn., 2005), the expression observation means a view, reflection; remark; statement; observed truth or facts; remarks in speech or writing in reference to something observed. 26.Wharton's Law Lexicon (14th Edn., 1993) defines the term obiter dictum as an opinion not necessary to a Judgment; an observation as to the law made by a Judge in the course of a case, but not necessary to its decision, and therefore, of no binding effect; often called as obiter dictum, a remark by the way. 27.Black's Law Dictionary, (9th Edn., 2009) defines the term obiter dictum as: CS (OS) 3195/2012 Page 54 of 95 Obiter dictum.-A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). - Often shortened to dictum or, less commonly, obiter. Strictly speaking an obiter dictum is a remark made or opinion expressed by a judge, in his decision upon a cause, by the way-that is, incidentally or

collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the Judge or court merely by way of illustration, argument, analogy, or suggestion. In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as dicta, or obiter dicta, these two terms being used interchangeably. 28.Words and Phrases, Permanent Edn., Vol. 29 defines the expression obiter dicta or dicta thus: Dicta are opinions of a Judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the Judge himself; obiter dicta are opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects; it is mere observation by a Judge on a legal question suggested by the case before him, but not arising in such a manner as to require decision by him; obiter dictum is made as argument or illustration, as pertinent to other cases as to the one on hand, and which may enlighten or convince, but which in no sense are a part of the judgment in the particular issue, not binding as a precedent, but entitled to receive the respect due to the opinion of the Judge who utters them; discussion in an opinion of principles of law which are not pertinent, relevant, or essential to determination of issues before court is obiter dictum. 29. The concept of dicta has also been considered in Corpus Juris Secundum, Vol. 21, at pp. 309-12 as thus: 190. Dicta a. In general CS (OS) 3195/2012 Page 55 of 95 A dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication; an opinion expressed by a Judge on a point not necessarily arising in the case; a statement or holding in an opinion not responsive to any issue and not necessary to the decision of the case; an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties; or an opinion of a Judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the Judge himself. The is generally used as an abbreviation of obiter dictum which means a remark or opinion uttered by the way. term dictum Such an expression or opinion, as a general rule, is not binding as authority or precedent within the stare decisis rule, even on courts inferior to the court from which such expression

emanated, no matter how often it may be repeated. This general rule is particularly applicable where there are prior decisions to the contrary of the statement regarded as dictum; where the statement is declared, on rehearing, to be dictum; where the dictum is on a question which the court expressly states that it does not decide; or where it is contrary to statute and would produce an inequitable result. It has also been held that a dictum is not the law of the case, nor res judicata. 30. The concept of dicta has been discussed in Halsbury's Laws of England, 4th Edn. (Reissue), Vol. 26, Para 574 as thus: 574. Dicta.-Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose in hand are generally termed dicta. They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a Judge are known as obiter dicta, whilst considered enunciations of the Judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed Judicial dicta. A third type of dictum may consist in a statement by a Judge as to what has been done in other cases which have not been reported. CS (OS) 3195/2012 Page 56 of 95 Practice notes, being directions given without argument, do not have binding judicial effect. Interlocutory observations by members of a court during argument, while of persuasive weight, are not judicial pronouncements and do not decide anything. 31. In MCD v. Gurnam 101]., and Karnataka SRTC v. Mahadeva Shetty [(2003) 7 SCC197, this Court has observed that: Kaur [(1989) 1 SCC 12. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority. 32. In State of Haryana v. Ranbir [(2006) 5 SCC167, this Court has discussed the concept of the obiter dictum thus: 13. A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla [(1976) 2 SCC521 . It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See Karnataka SRTC v. Mahadeva Shetty [(2003) 7 SCC197:

2003. SCC (Cri) 1722]. .) 33. In Girnar Traders v. State of Maharashtra [(2007) 7 SCC555 this Court has held: 53. Thus, observations of the court did not relate to any of the legal questions arising in the case and, accordingly, cannot be considered as the part of ratio decidendi. Hence, in light of the aforementioned judicial pronouncements, which have well settled the proposition that only the ratio decidendi can act as the binding or authoritative precedent, it is clear that the reliance placed on mere general observations or casual expressions of the court, is not of much avail to the respondents. 34. In view of the above, it is well settled that obiter dictum is a mere observation or remark made by the court by way of aside while deciding the actual issue before it. The mere casual CS (OS) 3195/2012 Page 57 of 95 statement or observation which is not relevant, pertinent or essential to decide the issue in hand does not form the part of the judgment of the Court and have no authoritative value. The expression of the personal view or opinion of the Judge is just a casual remark made whilst deviating from answering the actual issues pending before the Court. These casual remarks are considered or treated as beyond the ambit of the authoritative or operative part of the judgment. (Emphasis Supplied) 72. The Supreme Court in Dalbir Singh47 was considering the ratio of the Division Bench in Rajendra Prasad v. State of U.P.83 The majority opinion given by Justice Krishna Iyer, speaking for himself and Justice Desai, held that Rajendra Prasad83 had held that the special reasons for imposing death penalty should relate to the criminal and not to the crime. Justice A.P. Sen in his dissenting opinion observed that Rajendra Prasad83 did not lay down any legal principle of general applicability. He observed that every decision could be divided into three parts: (i) findings of material facts, direct and inferential; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of (i) and (ii).

73. Justice Sen held that for the purposes of the parties, (iii) is the material element which determines their rights and liabilities; while (ii) is the precedent, i.e. the ratio decidendi.

74. A Constitution Bench of the Supreme Court in Krishena Kumar48 was seized in the question whether D.S. Nakara and Ors. v. Union of India84 had held that both pension retirees and PF retirees formed a homogenous class preventing any

further classification among them. 83 (1979) 3 SCC64684 (1983) 1 SCC305CS (OS) 3195/2012 Page 58 of 95 Justice K.N. Saikia, answering the question in the negative, he ld that the doctrine of precedent is limited to what was necessarily involved in the decision. The relevant paragraphs read as under:

19. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain propositions wider than the case itself required. This was what Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees [(1882) 7 App Cas 2

46 LT826(HL)]. and Lord Halsbury in Quinn v. Leathem [1901 AC495 5

17 TLR749(HL)]. . Sir Frederick Pollock has also said : Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision. 20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alon e binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the words of Halsbury (4th edn., Vol. 26, para

573) The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio

decidendi of the case. If more reasons than one CS (OS) 3195/2012 Page 59 of 95 75. are given by a tribunal for its judgment, all are taken as forming the ratio decidendi. 33.Stare decisis et non quieta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 14 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it, unless considerations of public policy demand it. But in Nakara it was never required to be decided that all the retirees formed a class and no further classification was permissible. (Emphasis Supplied) In the often-quoted judgment in Sun Engineering,49 the Supreme Court was interpreting the scope of reassessment of escaped income under S. 147 of the Income Tax Act, 1961. The High Courts had rendered contradictory decisions relying upon one line observations made in CIT v. V. Jagan Mohan Rao.85 Few High Courts opined that the entire assessment is reopened by relying upon the observation to the effect that the previous under-assessment is set aside and the whole assessment proceedings start afresh; while other High Courts opined that reassessment is confined only to escaped income relying upon the observation that it was the duty of the Income Tax Officer to levy tax 85 (1969) 2 SCC389CS (OS) 3195/2012 Page 60 of 95 on the entire income that had escaped assessment during that year. Upholding the latter opinion, the Supreme Court held that it is impermissible to pick out a word or sentence from the judgment. The relevant portion reads as under: right 39. Of course, in the reassessment proceedings it is open to an assessee to show that the income alleged to have escaped assessment has in truth and in fact not escaped

assessment but that the same had been shown under some inappropriate head in the original return, but to read the judgment in Jagan Mohan Rao case as if laying down that reassessment wipes out the original assessment and that reassessment is not only confined to escaped assessment or under assessment but to the entire assessment for the year and start the assessment proceedings de novo giving to an assessee to reagitate matters which he had lost during the original assessment proceeding, which had acquired finality, is not only erroneous but also against the phraseology of Section 147 of the Act and the object of reassessment proceedings. Such an interpretation would be reading that judgment totally out of context in which the questions arose for decision in that case. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete law declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings. In Madhav Rao Scindia v. Union of India [(1971) 1 SCC85: (1971) 3 SCR9 this Court cautioned: It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

CS (OS) 3195/2012 Page 61 of 95 76. A Division Bench of this Court in Nalini Mahajan50 in respect of (Emphasis Supplied) precedential value of decisions, observed as follows: 92. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. (See Union of India v. Dhanwanti Devi, (1996) 6 SCC44 93. In Commissioner of Income Tax v. K. Ramakrishnan, 202 ITR997 it has been stated: The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament, (See the judgment of Lord Reid in the appeal from the above decision-Goodrich v. Paisner,

[1957]. AC65(HL) at page 88). We have to remember that the words in a judgment are not used after weighing the pros and cons of all conceivable situations that may arise. They constitute just the reasoning of the judges in the particular case, tailored to a given set of facts and circumstances. What is made relevant and binding is only the ratio decidendi and no more. The careful drafting-perhaps with reference to analogous statues-the multiple reading in the Legislature and the discussion which go behind the making of a statute inject a certain degree of sanctity and definiteness of meaning to the words used by the Legislature. The same cannot be said of a judgment which deals only with the particular fact situation on hand. It will be too much to ascribe and read precise meaning to words in a precedent which the Judges who wrote them may not have had in mind at all. Equally, it is not possible to impute an intent to render a decision on a point which was not before them and which they never intended to deal with, even though such as inference may seem to flow logically from the ratio decidendi of the case. That was why it was stated by Lord Halsbury LC in Quinn v. Leathern, [1901]. AC495(HL), at page 506: .. there are two observations of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole CS (OS) 3195/2012 Page 62 of 95 law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all. (Emphasis Supplied) 77. A Full Bench of the Andhra Pradesh High Court in Commissioner of Endowments, A.P. Hyderabad & Anr. v. All India Sai Seva Samaj,86 after considering numerous authorities on the topic held as under:

78. to 43. A decision, having regard the aforementioned authoritative pronouncements of the Apex court must, thus, be read in the context what has been rendered. A decision as is well known cannot be read as a statute. The ratio must be culled out from a decision upon reading the judgment in its entirety and

not in isolation. It is further well settled that a point which has not been considered in a decision shall not be an authority therefore. In State of Haryana v. Ranbir,87 a Division Bench of the Apex Court was confronted with an observation made in Namdi Francis Nwazor v. Union of India and Anr.88 as to whether incriminating material found in a bag being carried amounted to a search mandating compliance of S.50 of the Narcotic Drugs and Psychotropic Substances Act. In Namdi Francis Nwazor88 it was observed that if that person is carrying a handbag or the like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 of the Act.89 The Division Bench in Ranbir87 held the same to be an orbitur as the facts before the 86 (2001) 6 A LD747 (2001) 6 A LT539 paragraphs 37 - 43 87 (2006) 5 SCC16788 (1998) 8 SCC53489 Id., parag raph 3 CS (OS) 3195/2012 Page 63 of 95 Court in Namdi Francis Nwazor88 did not warrant such observations as the bag in question therein was not being carried but had already been checked in and the accused was later called back for the search (paragraph 11). The Division Bench went on to hold it was not necessary for the Bench in Namdi Francis Nwazor88 to make any further observation and therefore, the view being unnecessary was a mere orbitur.

79. Justice M. Jagannadha Rao giving the opinion for the Division Bench of the Supreme Court in Sajjadanashin Sayed65 held that the Courts must decide the plea of res judicata on legal principles rather on vague grounds by adjudicating as to whether a particular issue was directly and substantially in issue in the previous proceedings. The relevant portion reads as under:

725. that it Secundum (Vol. 50, para determine when particular 17. American jurists and courts have also found difficulty but they have tried to lay down some tests. It is conceded in Corpus Juris is sometimes difficult to issue determined is of sufficient dignity to be covered by the rule of estoppel. It is said that estoppel by judgment does not extend to any matter which was only incidentally cognizable or which came collaterally in question, although it may have arisen in the case and have been judicially passed on (per Taft, J.

in North Carolina Railroad Co. v. Story [45 S Ct 5

268 US288:

69. L Ed 959 (1924)].). But this rule does not however prevent a judgment from constituting an estoppel with reference to incidental matters necessarily adjudicated in determining the ultimate Jurisprudence (Vol. 46, Judgments, para 422), too says: Under this rule, if the record of the former trial shows that the judgment could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between in Hoag v. New Jersey [356 US464:

78. S Ct 8

2 L Ed 2d 913 (1958)].), quoting Restatement, 68(1)]. and Developments in the Law - Res Judicata (1952) 65 Harv. (Per Harlan, J.

point. American the parties. vital Judgments [para CS (OS) 3195/2012 Page 64 of 95 L. Review 818 (820). [See also Collateral Estoppel by Judgment by Prof. Scott (1942), Harv. L. Review 1.].

18. In India, Mulla has referred to similar tests (Mulla, 15th Edn., p. 104). The learned author says: a matter in respect of which relief is claimed in an earlier suit can be said to be generally a matter directly and substantially in issue but it does not mean that if the matter is one in respect of which no relief is sought it is not directly or substantially in issue. It may or may not be. It is possible that it was directly and substantially in issue and it may also be possible that it was only collaterally or incidentally in issue, depending upon the facts of the case. The question arises as to what is the test for deciding into which category a case falls?. One test is that if the issue was necessary to be decided for adjudicating on the principal issue and was decided, it would have to be treated as directly and substantially in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case (Mulla, p. 104). One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue (Ishwer Singh v. Sarwan Singh [AIR 1965 SC948 and Syed Mohd. Salie Labbai v. Mohd. Hanifa [(1976) 4 SCC780: AIR 1976 SC1569). We are of the view that the above summary in Mulla

is a correct statement of the law.

19. We have here to advert to another principle of caution referred to by Mulla (p. 105): It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue. Nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. Which of the matters are directly in issue and which collaterally or incidentally, must be determined on the facts of each case. A material test to be applied is whether the issue material and essential for its decision. the court considers the adjudication of 80. In M.R. Apparao,66 a Full Bench of the Supreme Court held as under: (Emphasis Supplied) CS (OS) 3195/2012 Page 65 of 95 7. So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has declared law it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An obiter dictum as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. (Emphasis Supplied) In Dhanwanti Devi,67 a Full Bench of the Supreme Court was dealing 81. with a submission of the parties that the judgment in Union of India v. Hari Krishan

Khosla90 lacked binding force as being per incuriam in conflict with Satinder Singh v. Umrao Singh & Anr.91 Rejecting the contention and holding that there was no conflict between the judgments, Justice K. Ramaswamy held as under: 9. Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, we will 90 1993 Supp (2) 149 91 AIR 1961 SC908CS (OS) 3195/2012 Page 66 of 95 dispose of the objection raised by Shri Vaidyanathan that Hari Krishan Khosla case is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates-(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject- matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial

decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. CS (OS) 3195/2012 Page 67 of 95 82.

10. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents. (Emphasis Supplied) In Oriental Insurance Co. Ltd. v. Meena Variyal and Ors.,92 it has been held that the orbitur of the Supreme Court may be binding on the High Courts in the absence of any direct pronouncement on that question.93 83. From the aforegoing conspectus of judgments, the broad principles which can be culled out are: (i) The ratio decidendi of a decision of a Court alone is binding and not mere orbitur dictum. The only exception is that the orbitur of the Supreme Court is binding upon subordinate courts in the absence of any direct pronouncement on the aspect. Otherwise, orbitur carries only persuasive value. (ii) Not everything said by a judge is binding, it is only points which were raised and decided by the Court and not aspects which were never before the Court as the same constitute mere orbitur. (iii) The prime test to ascertain whether a particular issue was decided is that of necessity, i.e. whether the issue was directly in issue and not collaterally or incidentally in issue. (iv) If a particular expression or opinion was not necessary and was made only by the way, the same would be orbitur and not 92 (2007) 5 SCC428 pa ragraph 26 93 Also see National Insurance Company Limited v. Geeta Bhat and Ors., (2008) 12 SCC426CS (OS) 3195/2012 Page 68 of 95 binding. (v) It must also be remembered that it is not permissible to dissect a single line from a judgment as judgments are tailored to a particular set of facts. Accordingly, all observations should be adjudged in their context and not isolated therefrom.

84. Now, we must proceed to cull out the ratio of the judgment of the Supreme Court in Vidur Impex.1 The Supreme Court was faced with two appeals [CA59182012 filed by Vidur and CA59172012 filed by Bhagwati].; the first concerning the impleadment of Vidur in CS (OS) 425/1993 and the second in respect of appointment of receiver by this Court. From the present proceedings, this Court is only concerned with the first appeal filed by Vidur.

85. The Supreme Court noticed that Vidur had sought impleadment after more than 11 years of the execution of the Sale Deeds dated 20.05.199794 and the fact that Vidur had pleaded that they had become the absolute owner of the property by virtue of the sale deeds as well as the benefit of the doctrine of lis pendens. The Court furthered noticed that Tosh had raised the objections of delay, no locus standi and that the transactions entered into between the Respondent 2 [Late Sh. Khanna]., the appellants [Vidur]. and Bhagwati Developers were ex facie illegal and on the basis of such transactions the appellants did not acquire any right or interest in the suit property.95 86. After noticing the facts, the Supreme Court has recorded the following submissions made on behalf of the appellants therein/Vidur in paragraph 25: (i) Vidur was unaware of the transaction and pending litigation between Tosh and Khanna; 94 Supra n.1, paragraph 19 95 Id., parag raph 20 CS (OS) 3195/2012 Page 69 of 95 (ii) They were bona fide purchasers of the Suit Property; and (iii) The Agreement to Sale in favour of Bhagwati did not result in alienation of the Suit Property and that Vidur had a subsisting right in the Suit Property.

87. While the learned senior counsel for Tosh before the Supreme Court argued on the following lines:96 (i) That the Agreement for Sale and the Sale Deeds between Vidur and Late Sh. Khanna had no legal sanctity; (ii) Such alienation, in violation of the injunction order, was a nullity and such transaction did not create any right in favour of Vidur or Bhagwati to be impleaded in the Suit; and (iii) Vidur had no subsisting right after execution of the Agreement to Sale in favour of Bhagwati.

88. Thereafter considering the law on impleadment, including lis pendens, the Supreme Court came to the following conclusions in paragraphs 42 to 44: (i) Vidur

and Bhagwati were aliens to the litigation pending between Khanna and Tosh [CS (OS) 425/1993].. (ii) They entered the foray upon execution of the Agreements to Sale and Sale Deeds in their favour and between them. (iii) Since these transactions were in clear violation of the injunction order passed by this Court, they did not have any legal sanctity and did not confer any right upon the appellants [Vidur]. or Bhagwati Developers. (iv) Vidur had no subsisting right in the Suit Property after execution of the Agreement of Sale in favour of Bhagwati.

89. It was the findings in (ii), (iii) and (iv) above that led the Supreme 96 Id., parag raph 27 CS (OS) 3195/2012 Page 70 of 95 Court to come to the conclusion that the presence of Vidur or Bhagwati was not at all necessary.97 The Apex Court went on to hold that the application for impleadment was highly belated and Vidur had knowledge of the lis pending between Khanna and Tosh for years.

90. Accordingly, it is clear that the adjudication of the nature of the right of Vidur and Bhagwati in the Suit Property was deemed necessary by the Supreme Court of India and in this background, it had observed that the sale transactions did not have any legal sanctity and did not confer any right in the Suit Property. It cannot be said that the findings were mere orbitur not affecting the rights of Vidur/plaintiff. Such a judicial pronouncement can neither be ignored nor taken lightly by any judicial forum in India. Therefore, I am of the view that the Supreme Court has sealed the fate of the plaintiffs and the present suit is liable to be dismissed on this ground alone.

91. Another reason I am unable to accept the submissions of the learned counsel for the plaintiff/non-applicant is that Vidur had preferred a review petition before the Supreme Court, it could have easily sought a clarification as to the nature of the observations, but they failed to do so.

92. Mr. Manoj had also submitted that even the Supreme Court cannot ignore substantive provisions of law. To this end he had cited Suraj Lamp,44 Supreme Court Bar Association45 and Thomson Press.51 None of the judgments come to the aid of the plaintiffs as this Court does not have the jurisdiction to scrutinize a judicial pronouncement of the Apex Court; even otherwise, I do not find any conflict with substantive provisions of law.

93. These applications are to be allowed on this ground alone. 97 Id., parag raph 42 CS (OS) 3195/2012 Page 71 of 95 BAR OF ORDER XXIII RULE1(4) 94. The next contention of the applicants is that the present suit is barred owing to the provision of Order XXIII Rule 1 (4) of the Code. The issue is premised on the scope and subject matter of the 1997 Suit filed by Vidur before this Court and later transferred to the District Court. The factum of filing of the 1997 Suit and its withdrawal has not been denied by Vidur, on the contrary, they have filed an application, being I.A. No.16689/2013, to incorporate the same.

95. Closely related to this argument, is the argument in respect of claim of damages in the present suit. The plaintiffs/non-applicants have contended that even if the present suit fails to the extent of declaration, injunction and possession of the Suit Property, the suit should be allowed to continue in respect of damages. Per contra, the applicants have contended that even the claim of damages shall be barred as being hit by the provisions of Order 2 Rule 2 of the Code.

96. The relevant portion of Order XXIII Rule 1 reads as follows: 1. Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court. (3) Where the Court is satisfied,- (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim CS (OS) 3195/2012 Page 72 of 95 with liberty to institute a fresh suit in respect of the subject- matter of such suit or such part of the claim. (4) Where the plaintiff- (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. (Emphasis Supplied) 97. Sub-rule (1) gives the plaintiff an unqualified right to withdraw from any suit, subject to the only caveat where the

defendant has become entitled to a relief in his favour.13 While withdrawing his suit and subject to the satisfaction of the Court that any of the conditions of sub - rule (3) are met, the plaintiff may seek leave to file a fresh suit in respect of the same subject matter or any part of the claim. If the plaintiff fails to seek leave or is rejected, he is precluded from bringing a fresh suit in respect of the same subject matter or that part of the claim.14 98 The rule is based in public policy and has been extended in its application to writ petitions under Article 226 of the Constitution99 as well as special leave petitions before the Supreme Court. 15 The rationale for the rule is that no defendant should be vexed twice for the same cause of action. At the same time, it is the duty of the plaintiff to consolidate all his claims in respect of one cause of action in one suit and avoid multiplicity of proceedings.100 The intention of the legislature was to limit the parties to one round of litigation. The bar of Order XXIII Rule 1 (4) has also been held to be applicable to suits where the previous suits are withdrawn after filing of the subsequent 98 Supra n.33, paragraph 5 99 Supra n.29, paragraph 6 - 9 100 See Order II Ru le 2 of the Code and Supra n.32, paragraph 7 CS (OS) 3195/2012 Page 73 of 95 suit.16 98. The primary condition for any suit to be barred by the provisions of sub-rule (4) is that the subsequent suit should be in respect of the same subject matter or such part of the claim. It is settled that in cases pertaining to property, the term subject matter does not mean the property. A Division Bench of the Supreme Court in Vallabh Das53 had explained the meaning of the term subject matter. The respondent/plaintiff therein had filed the first suit claiming partition from his adoptive father, which was withdrawn; while the second suit was filed for eviction of a trespasser from the property which had devolved upon him. In this background, rejecting the contention of the appellant/defendant that the second suit was barred by Order XXIII Rule 1, Justice Hegde held as under: 5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal

arises is in respect of the same subject- matter that was in litigation in the previous suit. The expression subject-matter is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR42Bom 155]. the expression subject-matter in Order 23 CS (OS) 3195/2012 Page 74 of 95 of the Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words subject-matter means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR39Mad 987]. that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject- matter as the first suit. (Emphasis Supplied) In Kasarapu Sujatha,54 the Andhra Pradesh High Court held that where 99. the cause of action of filing the two suits is different, the second suit cannot be said to be barred by the provisions of Order XXIII Rule 1. The Single Judge was hearing a second appeal preferred by the defendants in the original suit wherein it was contended that the suit was barred by Order XXIII Rule 1. The Court rejected the objection on the ground that the first suit was filed for injunction simplicitor, whereas the second suit was for declaration of title, injunction and recovery of the portion of the property which had been trespassed and encroached upon by the defendants. The defendants had failed to show that the encroaching structures were present at the time of filing of the first suit and therefore, the suit was not barred by either Order II Rule 2 or Order XXIII Rule 1. Accordingly, the appeal filed by the defendants was dismissed.

100. A Single Judge of the Jammu and Kashmir High Court in Kartar Singh55 held that where the capacity in which the plaintiff was suing in the two suits was different and the description of land in question was different, though the land in

the second suit was included in the first suit, the subsequent suit could not be said to be in respect of the same CS (OS) 3195/2012 Page 75 of 95 subject matter to be hit by Order XXIII Rule 1.

101. In Jyoti Prashad,16 a Division Bench of this Court has held that the courts in ascertaining the subject matter of a suit must not be restricted to the form and headings, they must go to the substance of the prayers in the two suits to determine as to whether they are identical or different. Justice Vijender Jain, giving the opinion for the Court, held as under: 7. Mr.Issar has contended that there were different prayers and cause of action was different for filing the two suits, therefore, the provisions of Order 23 Rule 1(4) will not be applicable. We have reproduced prayer clause of both the suits above. It cannot be said that in the sum and substance the prayers sought in the both the suits were not identical. The Court cannot go merely to the form or headings, Court must go to the substance of the prayer to determine as to whether the prayers are identical or different. Cause of action will also depend on the prayers sought in the suit as relief claimed and the cause of action are on the basis of which relief cannot be granted or rejected to the plaintiffs and for the purposes of cause of action of the facts pleaded have to be looked as a bundle of facts in the collective capacity which give right to a claim. Each fact cannot be looked into isolation. We entirely agree with the reasoning of the learned single Judge that if the relief claimed in subsequent suit though not expressly stated but was implicit in the previous plaint by the reason of the bundle of fact pleaded constitute the same for the cause of action, the plaintiff certainly would be disbarred from claiming the relief in a subsequent suit based on the same bundle of facts. In the present suit, the cause of action for filing the suit by the appellant was the same. The appellant claimed joint ownership of the house through their father and the relief claimed in both the suits were exactly the same. (Emphasis Supplied) 102. Order II Rule 2 stipulates that whenever the plaintiff omits to sue a portion of the cause of action on which the suit is based by relinquishing the cause of action or a part of it, then he is precluded CS (OS) 3195/2012 Page 76 of 95 from suing in respect of such portion subsequently. The provision may apply in conjunction with Order XXIII Rule 1 as a bar to subsequent suits where the cause of action is the same, but the plaintiff has sought additional reliefs in the subsequent suit.

103. In Vineeta Sharma31 the defendant had filed an application under Order XXXIX Rule 4 of the Code wherein it came to the notice of this Court that the plaintiff therein had previously filed and withdrawn two suits before the District Court. In both the suits before the District Court, the plaintiff had sought a decree restraining the tenant from making any further payment to the defendant and to pay the entire rent to the plaintiff for the remaining period of lease or till the plaintiff had realised her share, being half of the rent that had accrued; along with a restraint order against the defendant from renewing the lease deed or to enter into any other kind of transaction in respect of the properties. In the subsequent suit, which was before the Single Judge of this Court, the plaintiff had sought partition, rendition of accounts and injunction in respect of a property which was also in question before the District Courts. Justice Vikramajit Sen holding that the cause of action of the suits was the same as the basis was same, i.e. the defendant had rendered the plaintiff destitute and homeless and was denying her due share in the property; the prayers of injunction and rendition of accounts would have arisen at the time of filing of previous suits and therefore, were barred under Order II Rule 2. Further the plaintiff was held to be guilty of forum shopping and could not have filed the suit without seeking leave of the District Court while withdrawing the previous suits.

104. A coordinate bench of this Court in Jaideep Bajaj34 has held that when a previous suit for injunction in respect of a property was withdrawn CS (OS) 3195/2012 Page 77 of 95 without reserving liberty, a subsequent suit could not have been filed for partition and cancellation of relinquishment deed in respect of the same property as being barred by the provisions of Order II Rule 2 and Order XXIII Rule 1 of the Code. The relevant paragraphs read as under: 7. Order 2 Rule 2 (2) CPC provides that if the plaintiff omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of portion so omitted. The plaintiff's claim for partition basically depends upon his prayer for cancelling the relinquishment deed dated 18.4.2002. Unless the relinquishment deed is cancelled the plaintiff can lay no claim on any part of the suit property. Although cancellation of relinquishment deed is shown as prayer (b) and partition as prayer (a), the principal relief is cancellation of relinquishment deed. He did not make this claim in the previous suit. In the previous suit he alleged that the defendant had not fulfilled

her part of the agreement leading to the relinquishment and is now proceeding to take possession and also to get her name mutated. The cause of action in the previous suit was in no way different from the cause of action in the present suit. Nothing has happened after the filing of that suit giving rise to any fresh grounds for filing a fresh suit. As mentioned earlier, the pleadings are almost identical but for the prayer. In the previous injunction against dispossession and against mutation. He could but omitted to pray for cancellation of the relinquishment deed and the memorandum of understanding which he is seeking now. In the earlier suit the plaintiff did not seek leave of the court to resolve his right the relinquishment deed. His second prayer for partition also must fail because this prayer squarely depends upon the first prayer of cancellation of the deed. The suit, therefore, is utterly barred by Order 2 Rule 2 CPC and has to be dismissed on that ground. the relief of cancellation of suit he only prayed for to sue for 9. As the contents of the two plaints have been narrated above, the subject matter of the two suits is the same. The subject matter is the plaintiff's grievance in respect of relinquishment deed and the memorandum of understanding. According to him CS (OS) 3195/2012 Page 78 of 95 he executed the relinquishment deed on the understanding that defendant No.1 will pay a sum of Rs. 56 lakhs and the defendant was trying to take advantage of the documents and was attempting to dispossess the plaintiff by getting her name mutated in the municipal records (the relinquishment deed on record does not mention any understanding of payment of any money). Since the subject matter of the two suits is the same and the first suit has been withdrawn without any leave to file a fresh suit on the same subject matter the present suit is also hit by Order 23 Rule 1 (4)(b) of CPC. (Emphasis Supplied) 105. From the aforegoing discussion, it is clear that the provisions of Order XXIII Rule 1 of the Code are attracted when the subject matter in both the suits is the same. The term subject matter does not mean the identity of the property in question; but it refers to the right sought to be enforced in the property and further the cause of action and the relief claimed therein.

106. Order XXIII Rule 1 of the Code may apply in conjunction with Order II Rule 2 of the Code where the plaintiff had failed to sue in relation to part of the cause of action of the previous suit. It again stipulates the cause of action to be identical in both the suits.

107. In Inbasagaran,56 the Supreme Court was dealing with a situation where the first suit filed by the plaintiff was filed seeking injunction against the defendant from illegal dispossession, while the plaintiff had sought specific performance of the agreement for sale in respect of the same property once the condition precedent had been fulfilled. The Court held that for the subsequent suit to be barred under Order II Rule 2, the cause of action should be the same.101 Observing that cause of action consists of a bundle of facts which will be necessary for the plaintiff to prove in order to get relief from the court, the Supreme 101 Also see Gurbux Singh v. Bhoorala, AIR 1964 SC1810 paragraph 6 CS (OS) 3195/2012 Page 79 of 95 Court came to the conclusion that the subsequent suit was not barred as being based on a different cause of action.

108. The term cause of action means every fact which will be necessary for the plaintiff to traverse in order to support his right to the judgment. 102 109. From the aforegoing, the question which arises is whether the cause of action of the 1997 Suit and present suit is identical or different?.

110. On going through the plaints filed in the present suit and the 1997 Suit, it is clear that both plaints are structurally and materially similar; the only difference in the present suit relates to the mentioning of CS (OS) 425/1993 and the impleadment application filed by Vidur therein. Even the paragraph pertaining to cause of action is similar. Paragraph 19 of the 1997 Suit reads as under: 19. The cause of action for filing the present suit first accrued on when the plaintiff in pursuance of the sale deed obtained title in respect of the said property and also obtained possession thereof. The cause of action further arose on 15.7.97 when the defendant inspite of demand failed to vacate the portion marked A. The cause of action is continuing day to day and no part of it is barred by limitation. 111. The paragraph states that the cause of action arose upon title being acquired and the possession being deprived. Paragraph 30 of the present suit is on similar lines, which reads as under: 30. The cause of action for the present suit is a continiance [sic: continuing]. cause of action which arose on and from 20 th day of May 1997 and on 30th day May 1997 when Pradeep Kumar Khanna executed and registered Sale Deeds in favour of the plaintiffs after taking full consideration. Till the year 2001 the Plaintiff were not informed about any challenge to their title. In the year

2001, the Plaintiffs came to learn about the pendency of Suit No.425/93, which proceedings only for specific performance of agreement entered into between M/s. Tosh 102 See Read v. Brown, (1888) LR22QBD128(CA) and Mohd. Khalil Khan v. Mahbub Ali Mian, AIR 1949 PC78CS (OS) 3195/2012 Page 80 of 95 Apartments Pvt. Ltd. and Mr. Khanna in which suit Tosh Apartment Pvt. Ltd. and L.K. Kaul filed applications against the plaintiffs being I.A. No.625/2001, I.A. No.9576/2001. During the period from 2001 till 2008, the plaintiffs were contesting the aforesaid applications. In the year 2008, the Court in Suit No.425/1993 passed an order for evidence to be filed. Thereupon, in the year 2008 the plaintiffs filed an application for impleadment in Suit No.425/1993, which was rejected vide Order dated 26.05.2008 and the Appeal thereof was rejected by Order dated 20.02.2009 and the Special Leave Petition was dismissed on 21.08.2012, wherein the Honble Supreme Court of India refused to implead the plaintiff as necessary party in Suit No.425/1993. The cause of action is continuing as the threat to the Plaintiffs right, title and interest qua the suit property continues unabated. 112. Even in the present suit the plaintiffs have derived their title from the Sale Deeds dated 20.05.1997 and are aggrieved by the denial of possession by Khanna. Both the suits are premised in the ownership in the Suit Property having been transferred pursuant to the Sale Deeds and possession of the property being denied to the plaintiffs. The rejection of the impleadment application by this Court or dismissal of SLP by the Supreme Court cannot give rise to a fresh cause of action. Accordingly, it is clear that the cause of action in both the suits was identical.

113. From the perusal of paragraphs 26 and 28 of the plaint, it is evident that the plaintiffs have claimed damages owing to loss occasioned by being deprived of the Suit Property despite payment of the entire sale consideration. The claim is based on the same cause of action as the 1997 Suit and the plaintiffs having failed to sue in the previous suit are precluded from claiming them today. Accordingly, the claim for damages shall be deemed to have been relinquished under the provisions of Order II Rule 2. CS (OS) 3195/2012 Page 81 of 95 114. The next aspect to the considered is as to the prayers in the 1997 Suit and the present suit. For ready reference, I deem it appropriate to reproduce the prayers in the previous suit and the present suit below: Prayer in 1997 Suit [CS (OS) 1675/1997 later CS6292011/97]. a) A decree of declaration that the defendant, his agents,

employees or anyone acting under him have no right to occupy, possess and hold the property marked A in Blue colour in the plan annexed hereto and also stated in schedule the plaint. filed with a) b) Prayer in Present Suit/ [CS (OS) 3195/2012]. and registered Sale in for declaration Deed executed Deed executed Decree that plaintiffs herein are the absolute joint owners in respect of Land and Property No.21, Aurangzeb Road, New Delhi-110001 by virtue of six registered Sale Deeds dated (1) 20/30.05.1997 and registered by Pradeep Kumar Khanna favour of Vidhur Impex & Traders Pvt. Ltd. (2) Sale Deed dated 20/30.05.1997 executed by Pradeep Kumar Khanna in favour of Panchvati Plantation Pvt. Ltd. dated (3) 20/30.05.1997 and registered by Pradeep Kumar Khanna in favour of Haldiram Bhujia Bhandar Pvt. Ltd. (4) Sale Deed 20/30.05.1997 executed by Pradeep Kumar Khanna in favour of Star Exim Pvt. Ltd. (5) Sale Deed 20/30.05.1997 executed by Pradeep Kumar Khanna in favour of VKS Finvest Pvt. Ltd.; and dated (6) 20/30.05.1997 and registered by Pradeep Kumar Khanna in favour of Convenient Tours & Travels Pvt. Ltd. Decree for declaration that the defendant Nos.1(i) 1(iii) remained with no right, title and Deed executed registered Sale dated and dated and Sale registered to CS (OS) 3195/2012 Page 82 of 95 Prayer in 1997 Suit [CS (OS) 1675/1997 later CS6292011/97]. Prayer in Present Suit/ [CS (OS) 3195/2012]. the interest as legal heirs of Pradeep Kumar Khanna since deceased in respect of and relating to the land and property No.21, Aurangzeb Road, New Delhi- 110001 after the execution and registration of sale deeds in favour of the plaintiffs. b) An order of mandatory the directing injunction defendant (i) to handover the vacant and peaceful possession in respect of said remaining portion of the property described in the Schedule-A herein annexed and also as shown in Blue ink in the plan annexed hereto. the (ii) defendant handing over the possession, if necessary, direction be issued by this Honble Court to appoint any person the Bailiff to comply with the order passed by this Honble Court as prayed in (b)(i) with the help of police. in default of including c) A of his decree restraining perpetual the injunction defendant, servants, agents, employees and/or anyone acting under him from transferring or letting out or creating in any manner third party interest and the nature or character of the changing from d) Decree for recovery of possession in favour of the plaintiff and the defendants and/or against against their men, agents and associates be passed directing the the Court

defendants Receiver this Honble Court to quit, vacate and deliver the vacant possession of the property to the plaintiffs. appointed and/or by and c) Pass a decree of permanent injunction restraining defendant nos.1(i) to 1(iii) from claiming themselves representing themselves as owners of land and property No.21, Aurangzeb Road, New Delhi and/or from executing and registering any Sale Deed in favour of any third party or creating any third party interest or CS (OS) 3195/2012 Page 83 of 95 Prayer in 1997 Suit [CS (OS) 1675/1997 later CS6292011/97]. portion marked A in Blue ink manner whatsoever. any in d) Award costs of the present proceedings in favour of the plaintiffs and against the defendant. Prayer in Present Suit/ [CS (OS) 3195/2012]. entering into any compromise of any nature whatsoever. e) An enquiry into damages be made by this Honble Court and after ascertaining the quantum of damages suffered by the plaintiffs, this Honble Court may be pleased to award damages for such sum as this Honble Court may deem fit and proper. (Emphasis Supplied) 115. It has been held that the court should not be limited to the form and headings and should go into the sum and substance of the prayers. 16 A meaningful reading of the prayers would reveal that the reliefs sought are identical. In both the suit, the plaintiffs/Vidur have sought a declaration of title, possession and perpetual/permanent injunction in respect of the Suit Property. Since, the prayers are also identical in substance, it is clear that the subject matter of the two suits is identical. Therefore, the present suit is barred by Order XXIII Rule 1 (4).

116. To conclude, the applicants succeed on this count as well, the present suit is barred by the provisions of Order XXIII Rule 1 (4) and even the additional prayer for damages is barred as having been relinquished under Order II Rule 2 of the Code. LIMITATION117 The next ground urged by the applicants is that the present suit is liable to be dismissed as having been filed beyond the period of limitation. The first bone of contention between the parties is whether Article 58 or Article 65 of the Schedule to the Limitation Act, 1963 will govern CS (OS) 3195/2012 Page 84 of 95 the present suit.

118. Simply put, if Article 58 is to apply, the period of limitation shall be three years from the date on which the right to sue first accrues; but if Article 65 applies, the period would be substantially longer, i.e. 12 years from when the possession

became adverse.

119. In C. Natrajan57 the Supreme Court has unequivocally held that in the suit which has been filed for possession, as a consequence of declaration of the plaintiffs title, Article 58 will have no application.103 I may also take note of a recent decision of a coordinate bench of this Court in Ashok Kumar v. Mohd. Rustam & Anr.104 wherein a coordinate bench of this Court, after considering numerous judicial pronouncements, held as follows: 16. Article 58 of the Schedule to the Limitation Act, for the relief of declaration, undoubtedly provides limitation of three years from the date when the cause of action accrues. However I am of the opinion that once the plaintiff, besides suing for declaration of title also sues for recovery of possession of immovable property on the basis of title, the limitation for such a suit would be governed by the limitation provided for the relief of possession and not by limitation provided for the relief of declaration. To hold otherwise would tantamount to providing two different periods of limitation for a suit for recovery of possession of immovable property based on title i.e. of three years if the suit besides for the said relief is also for the relief of declaration of title and of twelve years as aforesaid if no relief of declaration is claimed. A relief of declaration of title to immovable property is implicit in a suit for recovery of possession of immovable property based on title inasmuch as without establishing title to property, if disputed, no decree for the relief of possession also can be passed. Thus, merely because a plaintiff in such a suit also specifically claims the relief of declaration of title, cannot be a ground to treat him differently and reduce the period of limitation available to him from that provided of twelve years, to three years. Supreme 103 Supra n.57, paragraph 14 104 2016 SCC OnLine Del 466: MANU/ DE/0197/ 2016 CS (OS) 3195/2012 Page 85 of 95 Court in Anathula Sudhakar Vs. P. Buchi Reddy (2008) 4 SCC594held (i) where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession is the remedy; (ii) where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession; (iii) a cloud is said to arise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown.

17. I am supported in my aforesaid view by: A. Ghanshyamdas Vallabhadas Gujrathi Vs. Brijraman Rasiklal MANU/MH/0449/1984 where a Division Bench of the High Court of Bombay negatived the contention as found favour with the learned Additional District Judge in the impugned order and held that the main relief being of possession, and declaration being an ancillary relief, the proper Article of the Limitation Act would be Article 65 and not Article 58 of the First Schedule; B. State of Maharashtra Vs. Pravin Jethalal Kamdar (2000) 3 SCC460where it was held that the factum of the plaintiff besides the relief of possession having sought declaration also is of no consequence and in such a case the governing article of the Schedule to the Limitation Act is Article 65; C. Mechineni Chokka Rao Vs. Sattu Sattamma MANU/AP/0751/2005 where the High Court of Andhra Pradesh reiterated that to a suit based on title but claiming declaration of title to the suit property with consequential relief of possession, Article 65 would apply and Article 58 would have no application; Article 58 applies only to a case where declaration simpliciter is sought i.e. without any further relief; the 89th Report of the Law Commission recommending for amendment of Article 58 by adding the words "without seeking further relief after the word "declaration" in the first column of Article 58, so as to avoid any confusion was also noticed; D. Ashok Kumar Vs. Gangadhar AIR 2007 AP145where the High Court of Andhra Pradesh again held that a suit for declaration of title and consequential relief of possession filed within twelve years from the date when the defendant dispossessed the plaintiff cannot be held to be barred by limitation; CS (OS) 3195/2012 Page 86 of 95 E. C. Natrajan Vs. Ashim Bai (2007) 14 SCC183where it was held that if the suit has been filed for possession as a consequence of declaration of the plaintiffs title, Article 58 will have no limitation; F. Boya Pareshappa Vs. G. Raghavendra Nine MANU/AP/3549/2013 where the High Court of Andhra Pradesh while reiterating the earlier view further reasoned that Part V of the Schedule to the Limitation Act specifically deals with category of suits relating to immovable property and having regard to the categorisation made in the Schedule, the limitation provided in Article 65 in Part V is to prevail over Article 58 contained in Part III; it was further reasoned that under Section 27 of the Limitation Act, the right in immovable property stands extinguished after the expiry of the period prescribed for filing of suit for possession thereof; therefore, if the period

falls short of the requisite period of 12 years, the right over an immovable property will not get extinguished; thus when a person has a right over an immovable property which right is not extinguished, he can lay the suit in respect of immovable property, even praying for the relief of declaration, at any time within the period of 12 years at the end of which only his right would get extinguished; therefore declaratory suits pertaining to immovable property are governed by Articles 64 and 65 and not by Article 58 of the Act; G. Seetharaman Vs. Jayaraman (2014) 2 MWN (Civil) 643 where also it was held that a title over immovable property cannot extinguish unless the defendant remains in adverse possession thereof for a continuous period of 12 years or more and therefore Article 65 of the Schedule to the Limitation Act applies to a suit for declaration of title and for recovery of possession of immovable property. (Emphasis Supplied) 120. From C. Natrajan57 and Ashok Kumar104 it is clear that the limitation period for such a composite suit, claiming both declaration of title and possession, the period of limitation shall be computed as per Article 65 and not as per Article 58.

121. Since Article 58 is inapplicable to the present suit, the judgments in CS (OS) 3195/2012 Page 87 of 95 Khatri Hotels,17 L.C. Hanumanthappa18 and Balkaran Singh19 do not have any bearing on the present lis.

122. Under Article 65 it is settled law that the period of limitation starts from when there is a clear and unequivocal threat to the right claimed by the plaintiff. 105 An ineffective or innocuous threat may not be sufficient to start the period of limitation; the threat gives rise to a compulsory cause of action if it effectively invades or jeopardizes the right claimed by the plaintiff.58 Prior to the suit being held to be barred by Article 65, it is necessary that the possession of the defendant must be shown to be adverse to the plaintiff. Merely because the defendant is in possession is not sufficient, such possession must be hostile to the plaintiff.59 61 106 123. The present applications are to be decided upon the touchstone of the aforegoing well-settled law. It is to be seen as to from what date would the period of limitation commence. I am of the view that the right of Vidur/ plaintiffs herein to seek possession of the Suit Property arose upon the execution of the Sale Deeds dated 20.05.1997. The relevant recitals and clauses of one of the Sale Deed are reproduced below: AND WHEREAS the said property was let out to Sudan

Embassy in 1963 who [sic: which]. vacated the same and handed over its peaceful possession to the Vendor herein on 12.05.1992. Thereafter nobody was inducted by the Vendor in the said premises but in the meanwhile, a portion of it is occupied by some unauthorised occupant. AND WHEREAS thus the Vendor is the absolute owner and in the possession of said property. He is in actual physical possession of part of the property and is in legal possession of the remaining part of the property which is in unauthorised occupation of the occupants. The Vendor is fully empowered and competent to sell and dispose of the said property at his 105 Supra n.57, paragraph 19 106 Supra n.60, paragraph 29 - 30 CS (OS) 3195/2012 Page 88 of 95 discretion. No other person has any right, title or interest of any nature whatsoever in the said property. 2. That the physical possession of vacant portion and legal possession of occupied portion of the said property has been handed over by Vendor to Vendee and Vendee has taken over the same, occupied and assumed the physical and legal possession. 13. That hereinafter, the Vendee shall be entitled to recover possession from the occupants and shall also be entitled to recover damages for unauthorised use and occupation, whether pertaining to past, present or future and further shall be entitled to retain the possession so recovered. If need be or so required by the Vendee, the Vendor shall also give further authorisation by way of Power of Attorney or otherwise in the name of the nominee of the Vendee for this purpose. (Emphasis Supplied) Note: Vendor refers to Late Sh. Pradeep Kumar Khanna and Vendee refers to Vidur Impex and Traders Pvt. Ltd./ plaintiff No.1.

124. All the Sale Deeds executed in favour of the plaintiff companies are identical in all material aspects. From the aforegoing extract, it is clear that the plaintiffs knew that the possession was not with Late Sh. Khanna, but with some unauthorised occupant, the phrase which one would assume refers to Late Sh. L.K. Kaul. Though the Sale Deeds state that partial possession was with Khanna and was handed over to Vidur, it is an admitted position before this Court that Late Sh. L.K. Kaul was in possession of the Suit Property since its vacation by Sudan Embassy until he was evicted by the receiver appointed by this Court on 18.09.2007.

125. The possession for the whole period remained neither with Khanna nor with Vidur. Late Sh. Kaul, being the defendant-in-possession, was continuously asserting his right as adverse to both Khanna and the CS (OS) 3195/2012 Page 89 of 95 plaintiffs. As per clause 13 of the Sale Deed extracted above, Vidur was specifically authorised to recover possession from Kaul. Therefore, it is clear that there was a clear and unequivocal threat to the title of the plaintiffs from the date of execution of the Sale Deeds, i.e. 20.05.1997, as since then the defendant-in-possession continued to assert his right adverse to the plaintiffs herein.

126. The plaintiffs have, during the course of the arguments, have relied upon the withdrawal of CS (OS) 161/1999 on 10.01.2001 and a Letter dated 25.01.2001 to show that Late Sh. Khanna had accepted the execution of the Sale Deeds and that the plaintiffs were his successors- in-interest. Per contra the heirs of Sh. Khanna/ defendant No.1(i) to (iii) have denied the withdrawal as well as the execution of the of the said Letter. Be that as it may, the authenticity of the withdrawal and execution of the Letter are questions of evidence and cannot be gone into at this stage. Even if, the same are taken to be authentic, the same have no bearing as Khanna was admittedly not in possession of the Suit Property, both do not extend the limitation period as the possession remained to be hostile. I am affirmed in my view by the judgment of the Madras High Court in Bhagyathammal v. Dhanabagyathammal and Ors.107 127. Even the plaintiffs do not seem to subscribe their own view as the plaintiffs continued to prosecute the 1997 Suit well after the acceptance of their title by Vidur in 2001 till 2011.

128. Further paragraph 30 of the present plaint, disclosing the cause of action, which has been extracted in paragraph 110 aforegoing, specifically states that the cause of action arose on and from 20th day of May 1997 and on 30th day of May 1997 when Pradeep Kumar 107 AIR1981 Mad 303 paragraph 10 CS (OS) 3195/2012 Page 90 of 95 Khanna executed and registered Sale Deeds in favour of the plaintiffs after taking full consideration. Since that date, the possession remained to be hostile to the right of the plaintiffs sought to be enforced today. The pendency of CS (OS) 425/1993, the impleadment application filed therein, the rejection thereof, the dismissal of appeal and the dismissal of the SLP cannot give rise to any fresh cause of action.

129. In the 1997 Suit, it had been averred by the plaintiffs themselves that the cause of action to file the suit arose on 15.07.1997, when Khanna failed to hand over possession of the Suit Property. As per the plaintiffs themselves this was a clear and unequivocal threat to their right, giving rise to a cause to file a suit. If the averment is taken to be true, the period of limitation has expired on 14.07.2009.

130. Therefore, I am of the view that the compulsory cause of action to file the present suit arose on 20.05.1997 or latest on 15.07.1997, as per the own showing of the plaintiffs. The Suit Property has been in hostile possession ever since and accordingly, the 12 years statutory limitation period as per Article 65 would expire on 19.05.2009 or latest on 14.07.2009, while the present suit has been filed on 18.10.2012, well after the expiry of the limitation period.

131. Thus, the suit is liable to be dismissed as being barred by limitation. CONCEALMENT132 The final contention raised by the applicants is that the present suit is liable to be dismissed owing to gross and blatant suppression of the filing of the 1997 Suit by the plaintiffs which disentitles them to any relief, equitable or otherwise. CS (OS) 3195/2012 Page 91 of 95 133. Though authorities upon the subject are multitudinous, I may refer to a few. In S.P. Changalvaraya Naidu27 the Supreme Court, while dealing with a case where a release deed was suppressed, came down heavily upon the such tactics of litigants. It observed that the non-mentioning and non-production of the release deed amounted to playing fraud upon the court and concluded that: 6. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party. 134. A coordinate bench of this Court in Shiju Jacob Varghese26 has held that S. 151 of the Code may be utilized to throw out vexatious cases premised upon fraud in order to prevent the abuse of the processes of the court.

135. The Apex Court in Oswal Fats & Oils Ltd.24 has held that the court is duty bound to deny relief to persons mischievously approaching it with unclean hands. The relevant portion reads as under: 20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn

obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. 136. One may also refer to M/s Seemax Constructions;25 R. v. Kensington CS (OS) 3195/2012 Page 92 of 95 Income Tax Commr.;108 State of Haryana & Ors. v. Karnal Distillery Co. Ltd. and Ors.;109 Vijay Kumar Kathuria (Dr.) v. State of Haryana and Ors.;110 Welcom Hotel v. State of A.P.;111 G. Narayanaswamy Reddy v. Govt. of Karnataka;112 Agricultural and Processed Food Products v. Oswal Agro Furane;113 Union of India v. Muneesh Suneja;114 Prestige Lights Ltd. v. SBI;115 Sunil Poddar v. Union Bank of India;116 K.D. Sharma v. SAIL;117 G. Jayashree v. Bhagwandas S. Patel;118 Dalip Singh v. State of U.P.;119 and Sripal v. South Delhi Municipal Corporation.120 137. Any person who approaches the Court is duty bound to come with clean hands disclosing all relevant particulars and documents. If any document which has a material bearing upon the suit and is within the knowledge of the plaintiff, he should disclose the same. Failure to do so would disentitle him from any relief whatsoever. The Court in such a scenario should summarily dismiss such cases.

138. The plaintiffs in the present case are guilty of suppressing the filing and withdrawal of the 1997 Suit which, the aforegoing discussion would show, had a material bearing upon the suit. Had the quantum of filing of the suit been disclosed, this Court might have been reluctant in even issuing notice to the defendants. Yet, precious judicial time has been wasted by the hearing of the suit and even the defendants have been 108 (1917) 1 KB486(DC&CA) 109 (1977) 2 SCC431110 (1983) 3 SCC333111 (1983) 4 SCC575112 (1991) 3 SCC261113 (1996) 4 SCC297114 (2001) 3 SCC92115 (2007) 8 SCC449116 (2008) 2 SCC326117 (2008) 12 SCC481118 (2009) 3 SCC141119 (2010) 2 SCC114120 2017 SCC OnLine Del 7522 CS (OS) 3195/2012 Page 93 of 95 harassed for years.

139. Only after the concealment was pointed out, did the plaintiffs have in an unrepentant manner moved an application under Order VI Rule 17 of the Code121 seeking amendment of the plaint by mentioning the 1997 Suit. In the application, no rationale has been given for concealing the 1997 Suit, it merely states that the 1997 Suit has no material bearing on the present suit and that the same is sought to be included by way of abundant caution and to facilitate the course of adjudication. I deprecate such conduct of the plaintiffs and such a practice should not be encouraged. The case should have been dismissed as vexatious on this ground alone, but I have also decided the applications on merits in order to give a quietus to the matter. CONCLUSION140 I sum up my findings as under: (i) The present applications are maintainable under Section 151 as none of the provisions of the Code expressly or by necessary implication exhaust or limit the inherent power of this Court; (ii) The judgment of the Supreme Court in Vidur Impex1 has sealed the fate of the plaintiffs herein holding the Sale Deeds as having no legal sanctity conferring no title upon the plaintiffs and Vidur having no subsisting right in the Suit Property; (iii) The present suit is barred by the provisions of Order XXIII Rule 1 owing to the withdrawal of the 1997 Suit without seeking liberty to file afresh; (iv) The additional relief of damages sought in the present suit is barred as having been relinquished under Order II Rule 2 of the 121 I.A. No.16689/2013 CS (OS) 3195/2012 Page 94 of 95 Code; (v) The present suit is liable to be dismissed as having been filed after the expiry of the period of limitation on 18.10.2012, when the limitation period elapsed on 19.05.2009 or best on 14.07.2009; and (vi) The plaintiffs/Vidur are guilty of concealing and suppressing the filing and withdrawal of the 1997 Suit from this Court and therefore, are not entitled to any relief.

141. Consequently, the applications are allowed; the suit is dismissed as being an abuse of process of this Court. I.A. No.16689/2013 (under O. VI Rule 17 of the Code by plaintiffs) 142. In view of the order passed in I.A. Nos. 4433/2013 and 12308/2013, no further orders are required. The application is dismissed. CS (OS) 3195/2012 143. In view of the order passed in I.A. Nos. 4433/2013 and 12308/2013, the suit is dismissed. JUNE28h , 2017 // G.S.SISTANI, J.