
(2015) 09 BOM CK 0089

In the Bombay High Court

Case No : Appeal No. 274 of 2015 in Notice of Motion No. 945 of 2013 in Suit No. 449 of 2013

La-Fin Financial Services Pvt. Ltd.

APPELLANT

Vs

IL and FS Financial Services Pvt. Ltd.

RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:

Banking Regulation Act, 1949 — Section 5
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 39, Order 39 Rule 39
Contract Act, 1872 — Section 23
Foreign Exchange Management Act, 1999 — Section 2
Insurance Act, 1938 — Section 2
Securities and Exchange Board of India Act, 1992 — Section 11, 19
Securities Contracts (Regulation) Act, 1956 — Section 31, 4, 4B, 4B(8)

Citation : (2015) 09 BOM CK 0089

Hon'ble Judges : V.M. Kanade, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Shekhar Naphade, Senior Counsel, Tushad Cooper, Arvind Lakhawal, Naresh Chedda and Pooja Shah i/b Dhruve Liladhar and Co., for the Appellant; Venkatesh Dhond, Sr. Counsel, Ashish Kamat, Shyam Kapadia, Gaurav Shah and Henna Dauylat instructed by Negandhi S

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J—Admit. By consent of parties, and at their request, the Appeal is taken up for hearing and final disposal.

2. This Appeal takes exception to the order dated 13th October, 2014 under which the learned Single Judge granted an interim injunction against the Appellant in terms of prayer clause (f) of the Notice of Motion, subject to the attachment levied by the Economic Offences Wing (EOW). It was further ordered that in the event the attachment levied by the EOW was raised, or the assets were released in the future by the EOW, the injunction granted by the impugned order would operate, pending the hearing and final disposal of the suit, till the

Appellant (Original Defendant) secures the suit claim by deposit of monies or furnishing of such security as may be approved by the Court. Considering that the Appellant was merely an investment company, the Court further ordered that in case its investments need to be altered or renewed, the same could be done after seeking a prior order of the Court in that regard.

3. The suit filed by the Respondent (Original Plaintiff) inter alia seeks specific performance of the Agreement/Letter of Undertaking dated 20th August, 2009 under which, according to the Respondent, the Appellant inter alia undertook and assured that they would buy back the Respondent's shareholding in a company called MCX Stock Exchange Ltd. ("MCS-SX"), a commodity exchange, on the terms and conditions, more particularly set out therein. It is in this suit that the above Notice of Motion was filed in which the impugned order is passed.

4. The impugned order is challenged before us only on three grounds:--

"(a) that the Agreement/Letter of Undertaking dated 20th August, 2009 (Exh. "B" to the plaint) is not a concluded contract and therefore, the prayer in the suit seeking specific performance cannot and does not arise. A sequitur to this argument is that if no specific performance can be granted, then there is no question of granting any interim relief in aid of the prayer for specific performance;

(b) in the alternative, and even assuming that the Agreement/Letter of Undertaking dated 20th August 2009 is a concluded contract, granting specific performance thereof would breach the provisions of the Securities Contracts (Regulations) (Manner of Increasing and Maintaining Public Shareholding in Recognised Stock Exchanges) Regulations, 2006 ("MIMPS Regulations") and would therefore be void under section 23 of the Contract Act, 1872. According to the Appellant, these Regulations stipulate that no person resident in India shall at any time, directly or indirectly, either individually or together with persons acting in concert, hold more than 5% of the equity share capital of any recognized Stock Exchange. In the present case, it is the argument of the Appellant that the shares which are the subject matter of the Letter of Undertaking dated 20th August, 2009 are of MCX-SX (a Commodity Exchange) and if the Appellant is asked to specifically perform this Agreement, the MIMPS Regulations would be breached because the Appellant would be construed to hold more than 5% of the equity share capital of MCS-SX. In other words, it is the contention of the Appellant that such an Agreement, if permitted, would defeat the provisions of law and would therefore be void under section 23 of the Contract Act, 1872; and

(c) that in any event, the relief that is granted by the impugned order is in the nature of attachment before judgment and no case of whatsoever has been made out for granting such a drastic relief against the Appellant."

For the sake of convenience, we shall refer to the parties as they were arrayed before the learned single Judge, the Appellant being the original Defendant, and

the Respondent being the original Plaintiff.

5. Having set out the scope of challenge, and before it is dealt with by us, it would be necessary to set out a few facts. The Plaintiff is a company incorporated under the Companies Act, 1956 and inter alia carries on the business of lending and/or financing. It is a wholly owned subsidiary of Infrastructure Leasing and Financial Services Ltd. (IL & FS). The holding Company of the Plaintiff (IL & FS) in turn is promoted by leading banks/institutions and has a broad based shareholding of institutional shareholders such as State Bank of India, Life Insurance Corporation of India, Unit Trust of India, Central Bank of India etc. On the other hand, the Defendant is a private limited company whose 100% shareholding is held by one Mr. Jignesh Shah and Mrs. Rupal Shah. The Defendant is also the promoter of a company called Financial Technologies (India) Ltd. ("FTIL"). Mr. Jignesh Shah is and was at the relevant time also the Chairman and Group CEO of FTIL. FTIL, in turn, is the promoter of one Multi Commodity Exchange of India Ltd. ("MCX Ltd.") of which Mr. Jignesh Shah is and was at the relevant time a Vice-Chairman. MCX Ltd. alongwith FTIL are promoters and shareholders of MCX-SX (a commodity exchange) of which Mr. Jignesh Shah is again the Vice-Chairman. For the sake of convenience, all these entities are referred to as the MCX Group.

6. It is the case of the Plaintiff that prior to 20th August 2009, the Plaintiff held approximately 5% of the equity share capital of MCX Ltd. and pursuant to negotiations held between the Plaintiff and the MCX Group, it was agreed that (1) the Plaintiff would exit MCX Ltd.; (2) its investment in MCX Ltd. would be transferred to another investor (IFCI); (3) part of the proceeds realised therefrom would be used by the Plaintiff to purchase from MCX Ltd. 4,42,00,000 equity shares in MCX-SX (representing approximately 2.46% of its equity share capital); and (4) the Defendant (as a condition to the Plaintiff purchasing the said 4,42,00,000 shares of MCX-SX) would offer to buy or cause to be brought from the Plaintiff the said 4,42,00,000 shares at an agreed price and within an agreed period.

7. According to the Plaintiff, the aforesaid arrangement was formalised by the parties (a) by executing a Share Purchase Agreement dated 20th August, 2009 (SPA) between the Plaintiff, MCX Ltd. and MCS-SX under which the Plaintiff was to purchase 4,42,00,000 equity shares of MCX-SX and belonging to MCX Ltd.; (b) by the Defendant executing a Letter of Undertaking dated 20th August, 2009 inter alia undertaking an obligation to purchase the Plaintiff's shareholding in MCX-SX, either by itself or its nominees, at any time after a period of one year, but no later than three years from the date of the Plaintiff's investment, and on the terms and conditions more particularly set out in the said Letter. It is this Letter of Undertaking of which specific performance is sought.

8. On the basis of this Letter of Undertaking and relying upon the same, the Plaintiff, on 20th August, 2009 purchased from MCX Ltd. 4,42,00,000 shares of MCX-SX at a price of Rs. 36/- per share aggregating to an amount of Rs.

159,12,00,000/- (Rupees One Hundred Fifty Nine Crores Twelve Lakhs only).

9. On 20th November 2009, the Plaintiff received a notice from MCX-SX regarding an Extraordinary General Meeting that was to be held on 15th December, 2009. This EOGM was to consider a scheme of reduction of share capital of MCX-SX. On examination of this proposed scheme of reduction, the Plaintiff regarded the same as being prejudicial to its interest and therefore decided to vote against it. This was duly communicated by the Plaintiff to the MCX Group. According to the Plaintiff, this communication led to further communications, telephonic discussions and meetings which ultimately led to a satisfactory resolution with MCX Ltd., in its capacity as promoter of MCX-SX, addressing a letter dated 14th December, 2009 to the Plaintiff referring to the SPA as well as the Defendant's Letter of Undertaking dated 20th August, 2009.

10. In view of this letter dated 14th December 2009, the Plaintiff voted in favour of the scheme of reduction of capital and which was thereafter accorded approval by the Company Court on 12th March, 2010. In view of this scheme of reduction, the Plaintiff's shareholding in MCX-SX became just below 5% and warrants were issued in favour of the Plaintiff for the shares that were extinguished. As assured and undertaken, these warrants were purchased by MCX Ltd. on 20th March, 2010. Therefore, presently, the Plaintiff holds 2,71,65,000 equity shares of MCX-SX representing just under 5% of its equity share capital.

11. After all this was done, on 23rd August 2010, the Plaintiff received a letter from MCX-SX inter alia stating that FTIL had informed MCX-SX that the obligations of the Defendant under its Letter of Undertaking dated 20th August, 2009 (and of which specific performance is sought) had become infructuous and stood superseded upon the scheme of reduction having been approved by the Company Court. This letter further stated that in purported compliance with the directions issued by this Court in Writ Petition No. 1440 of 2010 filed by MCX-SX against SEBI (order dated 10th August, 2010), the Board of Directors of the Defendant had passed a Resolution dated 12th August, 2010 declining to honour any buy back or other similar arrangements.

12. The stand taken in this letter was of course refuted by the Plaintiff in its reply dated 10th September, 2010. In its letter, the Plaintiff reiterated that the fundamental premise on which the Plaintiff had purchased the shares of MCX-SX was on the basis that the Defendant would buy back these shares as stipulated in the Defendant's Letter of Undertaking dated 20th August, 2009. The Plaintiff therefore categorically refuted the contention of MCX-SX that the obligation cast upon the Defendant to buy back the shares of MCX-SX pursuant to its Letter of Undertaking dated 20th August, 2009 had become infructuous or superseded. After this letter, there was no response from the Defendant or any other member of the MCX Group.

13. As stated earlier, under the Letter of Undertaking dated 20th August 2009, the Defendant had undertaken to purchase the Plaintiff's shareholding in MCX-

SX after a period of one year but not later than three years from the date of the Plaintiff's investment, at a price more particularly set out in the said Undertaking. In view of this, and since the period of three years was to expire on 19th August 2012, the Plaintiff by its letter dated 3rd August 2012 stated that it would like to sell its entire shareholding of 2,71,65,000 equity shares which the Defendant was obliged to purchase or cause to be purchased, and requested the Defendant to indicate the specific procedure by which it would fulfill its commitment.

14. In reply thereto, the Defendant sought to rescind from its obligations under the Letter of Undertaking on various grounds as more particularly set out in the said letter. The basic grounds taken in the said letter were that (a) the Letter of Undertaking was void under law and unenforceable in light of the alleged prohibition contained in the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporation) Regulations, 2012 ("SECC Regulations") which replaced the MIMPS Regulations and imposed a bar on holding equity in excess of limits prescribed therein; this prohibition made the undertaking impossible to perform; and that there was no obligation on the Defendant to purchase the said shares as the same were to be purchased at its "sole discretion"; (b) the obligation to buy the shares of MCX-SX from the Plaintiff stood extinguished by reason of the scheme of reduction approved by the Company Court and to which consent was accorded by the Plaintiff.

15. Thereafter, further correspondence took place between the parties and finally on 15th April, 2013 the Plaintiff informed the Defendant that the Defendant owed an amount of Rs. 161,99,03,280/- to the Plaintiff as on 31st March, 2013 as per the Letter of Undertaking dated 20th August, 2009 and requested the Defendant to remit the same to the account of the Plaintiff. This, of course, was refuted by the Defendant and hence the present suit, in which the Plaintiff has inter alia sought specific performance of the Letter of Undertaking dated 20th August, 2009.

16. In this factual background, Mr. Naphade, learned senior counsel appearing on behalf of the Defendant, sought to urge that the Letter of Undertaking dated 20th August, 2009 did not constitute a concluded contract and therefore there was no question of granting any specific performance thereof. He submitted that if the final relief of specific performance could not be granted, there was no question of granting any interim relief in aid of the final relief. According to Mr. Naphade, on a proper reading of the Letter of Undertaking, it was clear that it was only an "offer" to purchase the Plaintiff's shareholding in MCX-SX, which offer was withdrawn on 23rd August, 2010 before it was accepted by the Plaintiff in the year 2012, and therefore, did not amount to a concluded contract. According to Mr. Naphade, when the suit was filed by the Plaintiff in June 2013, there was no subsisting "offer" and for this reason alone no relief could have been granted to the Plaintiff in the suit or the Notice of Motion. The impugned order was therefore liable to be set aside on this ground alone, was the

submission of Mr. Naphade. In support of the contention that there was no concluded contract between the parties, Mr. Naphade also relied upon a decision of a Division Bench of this Court in Writ Petition No. 213 of 2011, MCX Stock Exchange Ltd. v. SEBI & Ors. decided on 14th March, 2012. This Writ Petition was essentially filed by MCX-SX against SEBI and others because SEBI had rejected the application filed by MCX-SX for permission to undertake the business as a Stock Exchange, other than for the Currency Derivative Segment. This order of SEBI was passed under section 4 of the Securities Contracts (Regulation) Act, 1956 read with sections 11 and 19 of the Securities Exchange Board of India Act, 1992. According to Mr. Naphade, the Letter of Undertaking dated 20th August, 2009 (and which is the subject matter of the present suit) was also considered in the said decision and the Division Bench, according to Mr. Naphade, has held that there was no concluded contract between the Plaintiff and the Defendant herein. In this regard he placed reliance on paragraphs 77 and 104(vii) of the said decision. We must mention here that neither the Plaintiff nor the Defendant were party to Writ Petition No. 213 of 2011.

17. In the alternative to the above argument, Mr. Naphade submitted that even assuming that the Letter of Undertaking dated 20th August, 2009 was a concluded contract between the parties, even then no specific performance could be granted of the same. He submitted that the current shareholding of the Plaintiff in MCX-SX is just under 5%. He submitted that the MIMPS Regulations, which were prevailing at the relevant time, and which have now been substituted by the SECC Regulations, clearly stipulate that no person resident in India shall at any time, directly or indirectly, either individually or together with persons acting in concert, hold more than 5% of the equity share capital of any recognized Stock Exchange. He submitted that in the present case, the Defendant is the promoter of FTIL and in turn, FTIL is the promoter of MCX Ltd. FTIL and MCX Ltd. are both promoters and shareholders of MCX-SX. In view of this admitted position, he submitted that if the Defendant is asked to specifically perform the Letter of Undertaking and purchase the Plaintiff's shareholding in MCX-SX, then the provisions of the MIMPS Regulations and the SECC Regulations would be breached as the shareholding of the Defendant, FTIL and MCX Ltd., if taken together, would be far more than 5%. These entities would be taken to be acting in concert, as they were all connected, was the submission of Mr. Naphade. In these circumstances, Mr. Naphade submitted that this Letter of Undertaking had become impossible to perform and therefore there was no question of granting specific performance in relation to the same. In this regard, Mr. Naphade placed reliance on Regulation 8(1) of the MIMPS Regulations and Regulation 17(2) of the SECC Regulations, which really are *pari materia* in its terms.

18. It was lastly submitted by Mr. Naphade that in any event, the relief sought for and granted by the learned single Judge in the above Notice of Motion was in the nature of attachment before judgment and the facts in the present case did not warrant such a drastic order whereby the Defendant was virtually restrained

from carrying on any business. Mr. Naphade invited our attention to prayer clause (f) of the Notice of Motion which was granted by the learned Judge and which according to Mr. Naphade virtually brought the Defendant's business to a standstill. He submitted that there was no averment in the plaint or in the affidavit in support of the Notice of Motion which would warrant granting such a drastic relief and no case for attachment before judgment had been made out by the Plaintiff. In this regard, Mr. Naphade invited our attention to the provisions of Order 38 Rule 5 of the Code of Civil Procedure, 1908 and also relied upon a decision of the Supreme Court in the case of Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders, (2008) 106 CLT 1 : (2007) 3 SCALE 419 : (2008) 2 SCC 302 : (2007) 12 SCR 409 Mr. Naphade, relying upon paragraphs 4 to 6 of this decision contended that bald and vague averments are not sufficient to grant relief under Order 38 Rule 5 of the CPC, 1908. Mr. Naphade also relied upon a decision of a Division Bench of this Court (D.K. Deshmukh and Anoop V. Mohta JJ) in the case of Swan Mills Ltd. v. Dhirajlal @ Dhirubhao Babaris and others¹ and contended that in a suit for a money decree, normally an order of temporary injunction is not passed because there is no possibility of the Plaintiff suffering any injury. He submitted that the Division Bench has held that where a Plaintiff cannot make out a case for attachment before judgment, he cannot be successful in getting an order of temporary injunction, which has practically the same effect as an order for attachment before judgment. He therefore submitted that the injunction granted by the learned single Judge was wholly unwarranted in the facts of the present case and the impugned order was liable to be interfered with by us in our appellate jurisdiction.

19. To counter the aforesaid contentions, Mr. Dhond, learned senior counsel appearing on behalf of the Plaintiff, relied upon several clauses of the Letter of Undertaking dated 20th August, 2009 to contend that as far as the Defendant was concerned, its obligation to purchase the Plaintiff's shareholding in MCX-SX was complete. He submitted that under the said Letter of Undertaking, the Defendant had unconditionally committed to purchase the said shares from the Plaintiff and it was this very commitment of which specific performance was sought for in the suit. He submitted that the shares of MCX-SX are not listed on the stock exchange, and therefore, the Plaintiff even cannot sell its shareholding to the public. Mr. Dhond also relied upon the very same decision of this Court in the case of MCX Stock Exchange Limited v. Securities and Exchange Board of India and Others (Writ Petition No. 213 of 2011 decided on 14th March, 2012), to contend that the Defendant (through its group) has categorically affirmed the Letter of Undertaking and the stand now taken that it is not a concluded contract, is clearly an afterthought.

20. On the second contention, Mr. Dhond submitted that the Letter of Undertaking dated 20th August, 2009 itself contemplates that the Plaintiff's shareholding in MCX-SX would either be bought by the Defendant or be caused to be bought by the Defendant. He submitted that the Letter of Undertaking itself contemplates that either the Defendant or its nominees would buy the Plaintiff's

shareholding in MCX-SX. In this view of the matter, Mr. Dhond submitted that there was no legal impediment in granting specific performance of the Letter of Undertaking as it would not breach either the MIMPS Regulations or the SECC Regulations.

21. As far as the last contention of Mr. Naphade is concerned, Mr. Dhond invited our attention not only to the pleadings in the plaint and affidavit in support of the Notice of Motion but several other affidavits that were filed by the Plaintiff to justify the relief granted by the learned single Judge. Mr. Dhond further submitted that the learned single Judge, after considering the entire facts of the case, had exercised his discretion in granting the injunction in favour of the Plaintiff. The Appellate Court should not interfere with the exercise of such discretion and substitute its own view, except where the discretion has been shown to be exercised arbitrarily, capriciously or perversely, or where the Court had ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions, was the submission of Mr. Dhond. For all the aforesaid reasons, Mr. Dhond submitted that the order passed by the learned single Judge could not be faulted and required no interference by us in Appeal.

22. With the help of learned counsel, we have perused the papers and proceedings in the Appeal as well as the impugned order. The first contention raised by Mr. Naphade was that the Letter of Undertaking dated 20th August, 2009 (Exhibit-B to the Plaint), is not a concluded contract and therefore, no prayer for specific performance can be granted in relation thereto. According to Mr. Naphade, therefore, no interim relief could have been granted in aid of the final relief of specific performance. To understand this controversy, we have perused the Letter of Undertaking in some detail. The said Letter of Undertaking starts off by referring to the SPA dated 20th August, 2009 signed between the Plaintiff, MCX Ltd. and MCX-SX, under which the Plaintiff had agreed to invest in the share capital of MCX-SX. The Letter of Undertaking further specifically records that the Plaintiff had agreed to invest in the equity of MCX-SX on the assurance and undertaking of the Defendant that it would purchase the Plaintiff's shareholding in MCX-SX on the terms and conditions set out in the Letter of Undertaking. The relevant portion of said Letter of Undertaking reads as under:--

"We understand that you have agreed to invest on our assurance and undertaking on the following terms and conditions:

1. La-Fin Financial Services Pvt. Ltd. (LA-Fin) or its appointed nominees have an obligation to offer to purchase at any time during the Agreed Period (as defined hereinafter) in its sole discretion considers appropriate, all the shares purchased by you under the SPAs in MCX-SX by giving a written notice at any time after completion of one (1) year from the date of investment but no later than three (3) years from the date of investment ("Agreed Period"), post which your rights herein stated shall lapse. You will have to confirm your acceptance/non acceptance for the offer within a maximum period of 30 days. The price at which

such shares will be offered to be purchased by us will be at a price which will be higher of the following ("Buy Back price").

(i) Price which provides an internal rate of return ("IRR") of 15% on the investment or:

(ii) Price at which the most recent transaction of MCX-SX equity shares is carried out by MCX-SX or MCX or FTIL Group.

(2) It being clarified that in the event MCX-SX plans an IPO within one year from the date of investment we hereby covenant that we shall not proceed with the IPO in case the IPO Price is less than the Buy Back Price. Further, in the event MCX-SX plans an IPO within the Agreed Period we undertake that the IPO price will not be less than the Buy Back Price and you would be provided the right to completely exit in such an IPO by way of an offer for sale or else we shall provide the buy back offer as per point 1 above at the Buy Back Price before the listing of the shares.

(3) In the event you notify acceptance of our aforesaid offer by a written communication, the purchase of the shares then held by you (out of the shares purchased by you under the SPAs in MCX-SX) as on the date of your communication shall be consummated within seven days, unless mutually extended. If you decline to or fail to accept our offer within the said period of 30 days as mentioned in point 1 above or the exit offer or the buy back offer as mentioned in point 2 above, then in such case you shall not be entitled to IRR as mentioned in point No. 1 and LA-Fin and/or its nominees will have no liability whatsoever including without limitation of purchasing shares from you in future.

(4)

(5)

(6) We agree that pursuant to purchase of the MCX-SX shares from you as per point 1, we undertake for and on our behalf and on behalf of FTIL, MCX and our group companies, not to sell/issue any equity shares of MCX-SX for a period of three months commencing from the date of purchase as per point 1 above, for a price exceeding the Buy Back Price.

(7) This letter has been given by us for valuable and bonafide consideration and we undertake not to contest this letter for lack of consideration."

(emphasis supplied)

23. On a reading of the Letter of Undertaking as a whole, at least prima facie, we are unable to agree with the submissions of Mr. Naphade that the same amounted only to an "offer", and was therefore, not a concluded contract between the Plaintiff and the Defendant. Firstly, clause (1) of the said Letter of Undertaking categorically contemplates that the Defendant or its nominees have an obligation to purchase the Plaintiff's shareholding in MCX-SX by giving a written notice at any time after completion of one year from the date of

investment but no later than three years thereof, after which the Plaintiff's right to call upon the Defendant to purchase its shareholding would lapse. The price at which the shareholding would be purchased is also mentioned in the said clause and stipulates that the Buy Back Price would be (i) a price which provides an Internal Rate of Return ("IRR") of 15% on the investment or; (ii) a price at which the most recent transaction of MCX-SX equity shares is carried out by MCX-SX or MCX Ltd. or FTIL group, whichever is higher. Clause 2 of the Letter of Undertaking also contemplates that MCX-SX plans to come out with an IPO and the Defendant assures the Plaintiff that the IPO price would not be less than the Buy Back Price, and that the Plaintiff would be provided the right to completely exit by way of an offer for sale, or else the Defendant shall provide the Buy Back Offer as set out in Clause 1, at the Buy Back Price, before the listing of the shares. Clause 3 further contemplates that once the Plaintiff, by written communication calls upon the Defendant to purchase its shareholding, the same will be consummated within seven days unless mutually extended. Clause 7 further provides that this letter has been given by the Defendant for valuable and bonafide consideration and the Defendant undertakes not to contest this letter for lack of consideration.

24. We are unable to accede to the submissions of Mr. Naphade that the Letter of Undertaking only amounted to an "offer", which according to Mr. Naphade was withdrawn, before it was accepted by the Plaintiff. By virtue of the said Letter of Undertaking, the Plaintiff was persuaded to invest in the equity share capital of MCX-SX on the basis that its shareholding in MCX-SX would be purchased in the future by the Defendant on the terms and conditions set out in the Letter of Undertaking. To our mind, this commitment/obligation of the Defendant was complete and it was not merely an "offer" to purchase the Plaintiff's shareholding at a future date. We say this also because the Letter of Undertaking itself records that the same has been given for valuable consideration. If the Letter of Undertaking was merely an "offer", as contended by Mr. Naphade, there would be no question of the same being given for any consideration, because an offer does not have to be coupled with consideration. This would therefore indicate that the Letter of Undertaking was something more than merely an "offer" as contended by the Mr. Naphade. Therefore, at least prima facie at the interim stage of the suit, we are unable to agree with the submissions of Mr. Naphade that the Letter of Undertaking, being merely an "offer", was not unenforceable.

25. Equally, we find the reliance placed by Mr. Naphade on paragraphs 77 and 104(vii) of a decision of this Court in Writ Petition No. 213 of 2011, decided on 14th March, 2012 (supra) (to further his argument that there was no concluded contract), is wholly misplaced. The Division Bench was deciding a writ petition in which a decision of SEBI rejecting the application filed by MCX-SX for permission to undertake the business as a Stock Exchange, was challenged. This order of SEBI was passed under section 4 of the Securities Contracts (Regulation) Act, 1956 read with sections 11 and 19 of the Securities Exchange Board of India Act,

1992. At paragraph 77, the Division Bench has sought to make a distinction between the option to purchase or repurchase and an agreement for sale and purchase of shares. The Division Bench has opined that the option to purchase or repurchase is, by its very nature, dependent on the discretion of the person who is granted the option, whereas in an agreement for sale and purchase of shares, there is an arrangement imposing obligations and benefits on the promisor and the promisee. The performance of an option cannot be compelled by the person who has granted the option, and a concluded contract for purchase or repurchase of shares arises only upon the exercise of that option. The Division Bench does not go on to hold that the Letter of Undertaking (which was also being considered by the Division Bench in Writ Petition No. 213 of 2011) is merely an "offer", as sought to be contended by Mr. Naphade. The Division Bench has correctly held that performance of an option cannot be compelled by the person who has granted the option. However, it is wholly another to say that the person who has been granted the option, cannot compel its performance. To hold otherwise, would defeat the very purpose for which the option was granted in the first place. It is correct that the Letter of Undertaking, as it stands, is not a concluded contract for sale and purchase of shares, until the option is exercised by the Plaintiff. In the present case, the Plaintiff has exercised its option vide its letter dated 3rd August, 2012. After the option was exercised by the Plaintiff, the Defendant, after committing to the Plaintiff that it will purchase the Plaintiff's shareholding in MCX-SX, has sought to resile from this commitment. It is this commitment of which specific performance is sought. In this view of the matter, we find that the reliance placed by Mr. Naphade on paragraphs 77 and 104(vii) is of no assistance to the Defendant.

26. Even otherwise on a reading of the judgment and order dated 14th March, 2012 passed in Writ Petition No. 213 of 2011, we are of the view that far from holding that the Letter of Undertaking is not a concluded contract, in paragraph 25, whilst narrating the facts, the Division Bench has stated as under:--

"25. On 11 August 2010, IL&FS addressed a letter to SEBI in order to explain the background of the investment made in the Petitioner. The letter stated that a Share Purchase Agreement had been executed in August 2009 for the purchase of 44.2 million shares of the Petitioner from MCX. Another Share Purchase Agreement was executed by a private equity fund managed by an IL&FS Group Company with respect to 27.8 million shares. Under an exit arrangement it was agreed that La-Fin Financial Services which held a 26% equity stake in FTIL was obligated to offer to purchase the shares held by the IL&FS Group on the completion of one year and within a period of three years at a stipulated rate. The letter stated that on 10 August 2010, IL&FS Financial Services Ltd. had, in a meeting of its Board, resolved to explore an exit from the investment made in the shares of the Petitioner, including by expediting the right to sell the investment in accordance with exit terms to the promoters of the Petitioner."

(emphasis supplied)

27. In fact, the Petitioner therein (MCX-SX) had submitted before the Court that the Buy Back Arrangements entered into are lawful [see paragraph 31B(i) of the judgment]. Even Respondent No. 3 therein (FTIL) submitted that the Buy Back Arrangements did not constitute a concluded contract for the purchase and sale of the shares, but only furnishes an option to the Plaintiff which was in the nature of a privilege or concession entirely dependent on the volition of the Plaintiff. It was specifically urged that this option involves a unilateral exercise of volition by the Plaintiff herein, as distinct from a contract of sale and purchase of shares, which involved reciprocal obligations. [see paragraph 32A(i)].

28. Further, paragraph 65 of the judgment, in fact records that the terms of the Buy Back Agreement stipulate that the Defendant or its nominees would be under an obligation to purchase back the shares at any time after completion of one year from the date of investment and no later than three years. On 14th December, 2009 MCX-SX addressed a letter to the Plaintiff seeking approval of the scheme of reduction and confirmed that this would not be construed as a dilution of the terms of the SPA and the Letter of Undertaking issued by the Defendant. At paragraph 74, the Division Bench has held that the option granted to the Plaintiff under the Letter of Undertaking was a privilege, the exercise of which depends upon their unilateral volition. It held that in the case of the Plaintiff, the Defendant had assumed an obligation to offer to purchase either through itself or its nominee the shares which were sold to the Plaintiff. The Division Bench held that in a Buy Back Agreement of the nature involved in the present case, the promisor who makes an offer to buy back shares cannot compel the exercise of the option by the promisee to sell the shares at a future point in time. If the promisee declines to exercise the option, the promisor cannot compel performance. It is in this context that the Division Bench at paragraph 75 held that a concluded contract for the sale and purchase of shares comes into existence only when the promisee upon whom an option is conferred, exercises the option to sell the shares. Hence, an option to purchase or repurchase is regarded as being in the nature of a privilege. On reading the aforesaid judgment and the relevant paragraphs pointed out above, we are clearly of the view that the Division Bench did not seek to hold anything of the sort as is sought to be contended by Mr. Naphade. The Division Bench does not hold that the Letter of Undertaking is merely an "offer" and therefore not a concluded contract. In fact, reading the judgment it is clear that even the Division Bench was of the view that the option given by the Defendant to the Plaintiff to sell its shareholding to the Defendant on the terms and conditions set out therein, was binding on the Defendant. Further, even the Petitioner as well as Respondent Nos. 3 and 4 therein, proceeded on that very basis when they submitted to the Court that the Buy Back Arrangement as contemplated under the Letter of Undertaking dated 20th August, 2009 was lawful. We, therefore, have no hesitation in rejecting the first contention of Mr. Naphade. At least prima facie, we are of the opinion that the Letter of Undertaking dated 20th August, 2009 is specifically enforceable.

29. Having dealt with the first contention, we shall deal with the argument of Mr. Naphade that assuming that the Letter of Undertaking is considered as a concluded contract, even then, no specific performance can be ordered as the same would result in violation of the MIMPS Regulations and the SECC Regulations. In other words, it is the argument of Mr. Naphade that such a contract would be void under the provisions of section 23 of the Contract Act, 1872.

30. To consider the aforesaid submission, it would be necessary to set out the relevant provisions. The MIMPS Regulations were enacted in exercise of the powers conferred by section 31 read with section 4B(8) of the Securities Contracts (Regulation) Act 1956. Chapter III of the said Regulations provides for shareholding restrictions. Mr. Naphade, in support of the aforesaid contention, placed heavy reliance on Regulation 8(1) of the MIMPS Regulations which reads as under :--

"8(1) No person resident in India shall at any time, directly or indirectly, either individually or together with persons acting in concert, hold more than five per cent of the equity share capital in a recognised stock exchange.

Provided that a stock exchange, a depository, a clearing corporation, a banking company, an insurance company and a public financial institution defined under section 4A of the Companies Act 1956 may hold, either directly or indirectly, either individually or together with persons acting in concert, upto fifteen per cent of the paid up equity share capital of the recognised stock exchange;

Provided further that person holding equity shares in a recognised stock exchange in excess of the limits specified in this regulation at the commencement of these regulations shall reduce his holding to ensure compliance with this regulation within the time specified in sub-section (8) of section 4B of the Act or the time extended under the proviso thereto.

Explanation : For the purposes of this sub-regulation:--

(I) "banking company" shall have the meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act 1949 (10 of 1949);

(II) "insurance company" shall have the meaning assigned to it in sub-section (8) of section 2 of the Insurance Act 1938 (4 of 1938);

(III) "person resident in India" shall have the meaning assigned to it in clause (v) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);

(IV) "person acting in concert" shall have the meaning derived from clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 1997."

31. As noted earlier, the MIMPS Regulations were replaced in the year 2012 by the SECC Regulations. Similar provisions are found in the SECC Regulations. Regulations 17(1) and 17(2) read as under:--

"17(1) At least fifty one per cent of the paid up equity share capital of a recognised stock exchange shall be held by public;

(2) No person resident in India shall at any time, directly or indirectly, either individually or together with persons acting in concert, acquire or hold more than five per cent of the paid up equity share capital in a recognised stock exchange;

Provided that -

(i) a stock exchange;

(ii) a depository;

(iii) a banking company;

(iv) an insurance company; and

(v) a public financial institution

may acquire or hold, either directly or indirectly, either individually or together with persons acting in concert, upto fifteen per cent of the paid up equity share capital of a recognised stock exchange."

32. As noted, Regulation 8(1) as well as Regulation 17(2) inter alia stipulate that no person resident in India shall at any time, directly or indirectly, either individually, or together with persons acting in concert, acquire or hold more than five per cent of the paid up equity share capital in a recognised stock exchange. This cap of 5% is increased to 15% in cases where the equity share capital of a recognised stock exchange is either held by a depository; a banking company; an insurance company; a public financial institution; or any other stock exchange.

33. Having noted the provisions of the Regulations, we shall now turn our attention to the Letter of Undertaking which is the subject matter of the present Appeal. The Letter of Undertaking firstly records that it is on the assurance and undertaking of the Defendant that the Plaintiff had agreed to purchase the equity share capital of MCX-SX, and on the terms and conditions set out therein. Clause 1 of the Letter of Undertaking specifically stipulates that the Defendant or its appointed nominees have an obligation to purchase the Plaintiff's shareholding by giving a written notice at any time after completion of one year from the date of investment but no later than three years. From a reading of the Letter of Undertaking, it is clear that if for any reason, the Defendant is unable to purchase the Plaintiff's shareholding as set out therein, it can always appoint nominees who would purchase the same. Merely because the Defendant may not be in a position to purchase the Plaintiff's shareholding directly, as it would allegedly violate the MIMPS Regulations or the SECC Regulations, would not be a ground, at least at this stage, to deny the Plaintiff interim relief.

34. To our mind, this is also how the parties understood it. This becomes clear when one refers to the submissions canvassed by FTIL as well as MCX Ltd.,

before the Division Bench in Writ Petition No. 213 of 2011. In relation to this Letter of Undertaking, FTIL (Respondent No. 3 therein) submitted as under:--

"(ii) SEBI did not have any reasonable basis to presume that the exercise of the buy back option would result in the promoters exceeding the limit on the shareholding of five percent, particularly having regard to the fact that the conduct of the promoters thus far has reduced their shareholding in compliance with the Regulations. Moreover, even if the promoters were to acquire shares on the exercise of the option under the buy back arrangement by PNB or IL&FS, the promoters could lawfully comply with the Regulations by increasing the authorised share capital of the Petitioner to such an extent that the acquisition of shares pursuant to the buy back arrangement would not result in the promoters exceeding the shareholding of five percent. Alternatively, the promoters could arrange for the acquisition of the shares by some other independent persons so that no one would cross the limit of five percent. In any event, the effect of the exercise of the buy back option would have to be considered only at that stage in the light of the situation as it would emerge. Allowing SEBI to take into consideration hypothetical future possibilities would result in an arbitrary exercise of powers contrary to Article 14;" [See paragraph 32C(ii) of the judgment].

(emphasis supplied)

Similarly, MCX Ltd. (Respondent No. 4) also submitted as under:--

"(vii) The possibility of the buy back arrangement increasing the shareholding of promoters to beyond five percent is not a relevant consideration. In spite of the exercise of the option under the buy back arrangement, the promoters' shareholding can still be within the limit of five percent by the promoters (a) disposing of their other existing shareholding so that the total shareholding does not exceed five percent; (b) increasing the share capital so that the increased holding of the promoters does not exceed five percent; and (c) performing the buy back arrangement by nominating a third party to buy back the shares;

(viii) The MIMPS Regulations do not upon their terms apply to the Petitioner, but they have been made applicable by notifications dated 18th September 2008 and 31st August 2009. Under the later notification, only the relevant Regulations are made applicable. This notification was issued to get over an impasse created by the earlier notification. If a limited Company already in existence applied for permission, such permission could not be granted because all promoters taken together would ordinarily hold more than five percent shares. In such an event, there would be no application made by an existing Company and all the provisions would be rendered useless. Hence, that regulation has no application to the facts of the present case and there can be no occasion to commit a breach thereof;" [See paragraphs 33(vii) and (viii) of the Judgment].

(emphasis supplied).

35. It is therefore clear that members of MCX Group (and of which the Defendant

is admittedly a member), have given various scenarios by which the Letter of Undertaking dated 20th August, 2009 can be complied with and/or performed without breaching the provisions of MIMPS Regulations or the SECC Regulations. In fact, it is the specific case of MCX Ltd. that these Regulations do not apply to MCX-SX. In this view of the matter, and in view of the specific stand taken by the MCX Group before the Division Bench in Writ Petition No. 213 of 2011, at least prima facie we are unable to agree with the submission of Mr. Naphade that specifically enforcing the Letter of Undertaking would have the effect of breaching the MIMPS Regulations and/or the SECC Regulations. This, according to us, cannot be a ground at the interim stage to deny the Plaintiff interim reliefs if they are so entitled, otherwise. This contention would also therefore have to be rejected.

36. The last contention raised by Mr. Naphade was that in any event of the matter, the relief granted by the learned single Judge was in the nature of attachment before judgment and no case whatsoever has been made out for granting such a drastic relief against the Defendant. We must note that the learned single Judge, after discussing the facts of the case, granted an interim injunction in terms of prayer clause (f) of the Notice of Motion. This interim injunction was granted subject to the attachment levied by the EOW and it was clarified that in the event the EOW raises the attachment or releases the assets therefrom, the injunction order would operate pending the hearing and final disposal of the suit, until the Defendant secures the suit claim by deposit of monies or furnishing of such security as may be approved by the Court. Prayer clause (f) of the Notice of Motion reads as under:--

"(f) the Defendant whether by itself or through its servants or agents or otherwise howsoever be restrained by an order and injunction of this Hon'ble Court from, in any manner, assigning, transferring, discounting, securitising or otherwise encumbering its assets or properties including the assets and properties disclosed in the Balance Sheet of the Defendant for the year ended 31st March 2012 (listed in the Schedule being Exhibit "2" to the Notice of Motion) until the sum of Rs. 166,54,31,820/- together with further interest from the date of the filing of the suit is either paid to the Plaintiff or deposited in this Hon'ble Court or secured by a Bank Guarantee to the satisfaction of the Prothonotary and Senior Master;"

37. Mr. Naphade, on reading the impugned order, sought to equate the injunction granted by the learned single Judge to a relief for attachment before judgment. He submitted that in any event of the matter, in a case like the present one, if no case for attachment before judgment was made out, no injunction could be granted. To support this submission, Mr. Naphade places heavy reliance on the judgment of this Court in the case of Swan Mills Ltd.¹ and more particularly paragraph 14 thereof.

38. We are unable to agree with this submission of Mr. Naphade. There is a clear distinction between the relief for attachment before judgment, which is governed

by the provisions of Order 38 Rule 5, and the grant of temporary injunctions under Order 39 of the Code of Civil Procedure, 1908. The argument of Mr. Naphade proceeds on the basis that the powers of the Court are circumscribed by the provisions of Order 38 Rule 5 and Order 39 of the CPC, 1908 and that on the facts and circumstances of the case, the reliefs asked for were not capable of being granted. His submission was that the injunction as prayed for, and granted, would have the same effect as an order passed under Order 38 Rule 5 of the CPC, 1908. This submission, according to us, proceeds on the wrong premise. Firstly, the grant of relief under Order 38 Rule 5 is on different considerations from the grant of relief of temporary injunctions. Secondly, it is now a well settled legal position, that at least with respect to Chartered High Courts, the power to grant temporary injunctions are not confined to the statutory provisions alone. The Chartered High Courts have an inherent power under the general equity jurisdiction to grant temporary injunctions independently of the provisions of the Code. In this regard, it would be useful to refer to a decision of the Supreme Court in the case of *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527 : (1962) 1 SCR 450 Supp In the said decision, the majority view held that the provisions of the CPC, 1908 are not exhaustive for the simple reason that the Legislature was incapable of contemplating all the possible circumstances which may arise in future litigations, and consequently providing a procedure for them. Whilst interpreting section 94, section 151 and Order 39 Rule 1 of the CPC, 1908 the Supreme Court, at paragraphs 18 and 19 opined as under:--

"18. There is difference of opinion between the High Courts on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code: *Vadapalli Varadacharyulu Vs. Khandavilli Narasimhacharyulu*, 92 Ind. Cas. 615 ; *N. Govindarajulu Nayudu Vs. Imperial Bank of India*, AIR 1932 Mad 180 : 136 Ind. Cas. 346 : (1932) 35 LW 168 *Karuppayya Nadar* through his authorised agent *Ratnasami Nadar Vs. Ponnuswami Nadar and Another*, AIR 1933 Mad 500 : (1933) ILR (Mad) 563 : (1933) 37 LW 110 : (1933) 64 MLJ 112 ; *Murugesu Mudali Vs. Angamuthu Mudali*, AIR 1938 Mad 190 : (1937) 46 LW 956 : (1937) 2 MLJ 888 and *Subramanian and Others Vs. Seetarama Aiyar*, (1949) ILR (Mad) 316 : (1948) 61 LW 541 : (1948) 2 MLJ 188 . The other view is that a Court can issue an interim injunction under circumstances which are not covered by Order 39 of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction: *Dhaneshwar Nath Tewari Vs. Ghanshyam Dhar Misra*, AIR 1940 All 185 : (1940) 10 AWR 74 ; *Firm Bichchha Ram Babu Ram Vs. Firm Baldeo Sahai Suraj Mal*, AIR 1940 All 241 : (1940) 10 AWR 178 ; *Bhagat Singh Bugga Vs. Dewan Jagbir Sawhney*, AIR 1941 Cal 670 and *Chinese Tannery Owners" Association and Others Vs. Makhan Lal and Others*, AIR 1952 Cal 560 . We are of opinion that the latter view is correct and that the Courts have inherent jurisdiction to issue temporary injunctions in circumstances which are not covered by the provisions of Order 39 CPC. There is no such expression in

Section 94 which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code. It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" is only this that when the rules prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising that jurisdiction and the Court exercises its inherent jurisdiction only when it considers it absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

19. There is nothing in Order 39 Rules 1 and 2 which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction."

(emphasis supplied)

Thereafter, referring to section 151 of the CPC, 1908, the Supreme Court observed as under:--

"23. The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

24. Further, when the Code itself recognises the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code."

(emphasis supplied)

39. In view of this authoritative pronouncement of the Supreme Court, we are unable to agree with the submission of Mr. Naphade that in a money suit, if no case for attachment before judgment is made out, no injunction can also be granted. This is too sweeping a proposition for us to accept.

40. We must mention here that the decision of the Supreme Court in Manohar Lal

Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 : (1962) 1 SCR 450 Supp , has been relied upon by another Division Bench of this Court in the case of Triangle Drilling Ltd. v. Jagson International Ltd. and Anr.² In the facts of this case (Triangle Drilling), a suit was filed by the Appellants against the 1st Respondent for recovery of hire charges in respect of two jack-up rigs. A Notice of Motion was filed seeking interim relief inter alia restraining Respondent No. 1 from receiving payment under a contract with Respondent No. 2 until the amount in the suit was paid to the Appellants and/or deposited in the Court and/or secured by a bank guarantee. This Notice of Motion was substantially decided on the ground that the power of the Court was circumscribed by the provisions of Order 38 Rule 5 and Order 39 of CPC and that on the facts and circumstances of the case, reliefs asked for were not capable of being granted. It was in these circumstances that the Appeal was filed before the Division Bench. The short question therefore before the Division Bench was whether the prohibitory reliefs sought by the Appellants were not covered by the relevant provisions of the CPC, 1908 and therefore incapable of being granted, even if there was no merit in the defence. In that context, the Division Bench held that it is well settled that at least with respect to Chartered High Courts, the High Court's power to grant a temporary injunction was not confined to the statutory provisions alone. Relying upon the Supreme Court decision in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 : (1962) 1 SCR 450 Supp , the Division Bench took the view that the learned single Judge had erred in law that he had no power or jurisdiction to grant the prohibitory reliefs claimed, even assuming that there was no substance in the defence raised by Respondent No. 1. The relevant portion of this judgment is reproduced hereunder:--

"The short question, therefore, is whether the main basis of the order of the learned Single Judge, namely, that the prohibitory reliefs sought by the Appellants are not covered by the relevant provisions of the Code of Civil Procedure and that, therefore, they were not capable of being granted, even if there was no merit in the plea in defence, is well founded in law. We may assume, without granting, that the prohibitory reliefs are not covered by the relevant provisions of the Code. However, the well settled legal position with respect to Chartered High Courts is that the powers of those High Courts to grant an injunction are not confined to the statutory provisions alone. The Calcutta High Court has held that the powers of that High Court to grant a temporary injunction were not confined to the terms of Order XXXIX Rules 1 and 2 of the Code and that the Chartered High Courts have inherent power under the general equity jurisdiction to grant an injunction independently of the provisions of the code and also that such power can be exercised by a Single Judge sitting on the Original Side of the High Court (See Naskarpara Jute Mills Co. Ltd. Vs. Nirmal Kumar Jain, AIR 1941 Cal 434 . Our Court has also taken the same view. (See Muchand v. Gill and Co. (1920)(44 Bombay 283).

In Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 : (1962) 1 SCR 450 Supp , the question which fell for consideration was whether

having regard to the language of clause (c) of section 94 of the Civil Procedure Code, interim injunction can be issued only if a provision for their issue is made in order XXXIX Rules 1 and 2. The submission on behalf of the appellant in that case was that clause (c) of section 94 provides that the Court may, if it is so prescribed, grant a temporary injunction in order to prevent the ends of justice from being defeated and that the word "prescribed", according to section 2 of the Code means "prescribed by Rules" and that Rules 1 and 2 of Order XXXIX lay down precisely the circumstances in which a temporary injunction may be issued. The majority decision rejected this submission and held that Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order XXXIX of the Code. The reasons set out in support of this view are as follows :

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise I future litigation and consequently for providing the procedure for them. The effect of the expression "if it is so prescribed" is only this that when the rules prescribed the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary order in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of section 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. No party has a right to insist on the Court's exercising the jurisdiction and the Court exercises its inherent jurisdiction only when it considers absolutely necessary for the ends of justice to do so. It is in the incidence of the exercise of the power of the Court to issue temporary injunction that the provisions of section 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power.

There is nothing in Order XXXIX rules 1 and 2, which provides specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction."

Referring to section 151 of the Code, it was observed :

"The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it.

Further, when the Code itself recognizes the existence of the inherent power of the Court, thee is no question of implying any powers outside the limits of the

code."

In the minority judgment of Shah J., the power of Chartered High Courts exercising ordinary original jurisdiction to exercise inherent jurisdiction to issue an injunction was expressly recognised. His Lordship observed :

"Power to issue an injunction is restricted by Section 94 and O. 39 and it is not open to the Civil Court which is not a Chartered High Court to exercise that power ignoring the restrictions imposed thereby in purported exercise of its inherent jurisdiction"

(Underlining supplied).

For the foregoing reasons, in our opinion the learned Single Judge, with respect, erred in law in taking the view that he had no power or jurisdiction to taking the view that he had no power or jurisdiction to grant the prohibitory reliefs claimed, even assuming that there was no substance in the defence raised by the First Respondent."

(emphasis supplied)

41. To be fair to Mr. Naphade, the decision of this Court in the case of Swan Mills Ltd."s case¹, and on which heavy reliance was placed, does seem to suggest that if the Appellant cannot make out a case for an order of attachment before judgment, he could not be successful in getting the order of temporary injunction which has practically the same effect of restraining the Respondent from transferring his property. However, on going through the said judgment we find that neither the decision of the Supreme Court in Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 : (1962) 1 SCR 450 Supp nor the decision of this Court in the case of Triangle Drilling Ltd.², were brought to the notice of the Division Bench that decided the Swan Mills Ltd."s case.¹ We are certain that had these decisions been pointed out to the learned Judges deciding the Swan Mills Ltd."s case¹, they would not have taken the view that they did. To that extent, we find that the judgment in Swan Mills Ltd."s case¹ does not lay down the correct law. In view thereof, the reliance placed by Mr. Naphade on the said decision is of no assistance to the Defendant. We must add here that we are not for a moment suggesting that in every case an injunction ought to be granted by resorting to section 151 of the CPC, 1908. The discretion to grant or refuse the grant of injunctions, has to be exercised on well settled principles and would depend on the facts and circumstances of each case.

42. Having said this, we have to now see whether the discretion exercised by the learned single Judge in granting the injunction against the Defendant was justified in the facts and circumstances of the present case. It is not in dispute that the Plaintiff is a subsidiary of IL & FS and monies owed to it are public monies. Furthermore, it cannot be seriously disputed that if the Plaintiff's claim for specific performance is ultimately granted, it would cast a monetary exposure of approximately Rs. 226.70 crores (as on date) on the Defendant. In these

circumstances, Mr. Dhond, learned senior counsel for the Plaintiff, invited our attention to paragraphs 41 and 42 of the plaint as well as the averments made in a further affidavit dated 28th August, 2013 wherein the Plaintiff has brought to light the developments in respect of one National Stock Exchange (NSEL) which was involved in a major scandal and was said to owe to market participants more than Rs. 5,000 crores. It was pointed out that the collapse of NSEL (of which admittedly FTIL and Mr. Jignesh Shah are promoters), had influenced large scale damage to the MCX Group. We must mention here that Mr. Jignesh Shah and Mrs. Rupal Shah hold 100% of the shareholding of the Defendant. Thereafter, our attention was drawn to an additional affidavit dated 5th May, 2014 filed by the Plaintiff which placed on record news reports that suggested that the Defendant is looking to sell its shareholding in FTIL and which constitutes the bulk of its assets. These news reports are referred to at page 194-B of the appeal paper-book.

43. Looking at all this material, and it being a part of the record before the learned single Judge, we do not think that the discretion exercised by him in granting the interim injunction against the Defendant, could be said to be either perverse, capricious, arbitrary or not based on well settled principles, so as to enable us to interfere with the exercise of such discretion. This is more so in the present case, because the learned Judge, after granting the injunction, has ordered that if the Defendant seeks to alter or renew any of its investments, it could do so after obtaining prior orders of the Court. It is now well settled that the Appellate Court will not interfere with the exercise of such discretion unless it is exercised perversely, capriciously, arbitrarily or against the well settled principles of law relating to the grant or refusal of temporary injunctions. If one must refer to any authority on this subject, the Supreme Court in the case of *Wander Ltd. and Another Vs. Antox India P. Ltd.*, (1990) 2 ARBLR 399 : (1990) 1 SCC 727 Supp : (1990) SCC 727 Supp has very eloquently reiterated the said proposition at paragraph 14, and which reads thus:--

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial

court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, AIR 1960 SC 1156 : (1960) 3 SCR 713

"... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* [1942 AC 130] "...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

The appellate judgment does not seem to defer to this principle."

(emphasis supplied)

44. We do not find that in the facts and circumstances of the present case, the learned single Judge has in any way exercised the discretion vested in him either perversely, capriciously, arbitrarily or against the well settled principles of law relating to the grant or refusal of temporary injunctions, for us to interfere in our appellate jurisdiction. Equally, we find the reliance placed by Mr. Naphade on the decision of the Supreme Court in the case of *Raman Tech. and Process Engg. Co. and Another Vs. Solanki Traders*, (2008) 106 CLT 1 : (2007) 3 SCALE 419 : (2008) 2 SCC 302 : (2007) 12 SCR 409 has no application to the present scenario. The Supreme Court held that a relief for attachment before judgment cannot be granted on the basis of bald and vague averments. In the present case, the learned single Judge has not granted any relief of attachment of before judgment, but instead granted an interim injunction. Even otherwise, we do not think that the averments made or the material produced by the Plaintiff, and referred to by us earlier, can be said be bald or vague as sought to be contended by Mr. Naphade. Therefore, this decision of the Supreme Court is wholly inapplicable.

45. For all the aforesaid reasons, the appeal fails and is hereby dismissed. However, in the facts and circumstances of the case, we leave the parties to bear their own costs.

1Appeal No. 546/2011 decided on 2-2-2012.

2Appeal No. 704 of 1992 decided on 15-10-1992.