
(1989) 09 DEL CK 0004

In the Delhi High Court

Case No : Interim Application No's. 4433 , 4434 , 5490 and 5802 of 1989 and
Suit No. 1593A of 1989

Om Builders (P) Ltd.

APPELLANT

Vs

Edward Keventer (Successors) Pvt. and Others

RESPONDENT

Date of Decision : 04-09-1989

Acts Referred:

Citation : (1990) 40 DLT 39

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : R.K. Anand, Vinay Bhasin, Rajeev Sawhney, Sanjeev Anand, C.M. Oberoi and Ashok Mathur, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) plaintiff has filed the suit seeking a decree of permanent injunction restraining the defendants from selling or otherwise transferring Plot No. 48, measuring 25 acres of land situated at Keventer's Lane, Sardar Patel Marg, Chanakyapuri, New Delhi, to any other person without first offering the same to the plaintiff.

(2) plaintiff has filed LA. 4433/89 under Order 39 Rules 1 and 2, CPC seeking temporary injunction restraining the defendants from selling or otherwise transferring the suit property to any person without offering the same to the plaintiff for a price of Rs. 24 crores as per the agreed terms. LA. 4434/89 under Order 2 Rule 2. Code of Civil Procedure, has been filed by the plaintiff seeking leave to file another suit to enforce the right of specific performance. I.A. 4433 and 4434/89 were filed Along with the suit.

(3) After the written statement was filed, I.A. 5490/89 under Order 11 Rule 14 of the Code was filed by the plaintiff praying that defendants I and 2 be directed to give copies of documents mentioned in the said application to the plaintiff and produce the originals before the court. Another application I.A. 5803/89 under

Order 10 Rules 1,2 and 4 of the Code has been filed by the plaintiff praying that statement of an unauthorised representative of defendant No I and defendants 2.3 and 4 be recorded for elucidating the matters in controversy. This order will dispose of aforesaid four applications.

(4) Briefly, the facts, as pleaded in the plaint are these : plaintiff is a well-known builder. Defendant No. 1 is a company. Defendants 2 Sh.G.N. Dalmia and defendant No. 3 Shri Veru Dhasmana are directors of defendant No. 1. Defendant No. 4 Shri B.K. Kapoor appears to be a property broker. Defendants approached plaintiff and the informed it that defendant No I was desirous of disposing of the suit property. The plaintiff showed interest and, Therefore, Sh. Om Prakash Navani, director of the plaintiff met defendants No. 1 and 2 at Delhi on or about second week of June 1986. Talks were initiated by defendants Nos. 1 and 2 through defendant No. 3. plaintiff offered Rs. 24.50 crores which was accepted by defendant No. 1 and 2. It was agreed that a formal agreement would be entered into between the parties shortly. After the said meeting the plaintiff wrote to defendant No. 2 on 18.6.1986 asking for particulars and documents with regard to suit property to enable the preparation of the formal agreement to be drafted. It is averred that "As far as the plaintiff was concerned, the price being settled, the rest was a mere formality." A further meeting was held at Bombay in the month of July 1986 to discuss formal terms and conditions where defendant No. 2 stated that drawing up of the agreement would take some time and he was willing to make a further commitment on behalf of defendant No, 1 that the plaintiff shall be given the first option to purchase the suit property belonging to defendant No. 3 and that defendant No. 1 would never sell the property without giving the first opportunity to the plaintiff. plaintiff relied upon the assurances of the defendants, taking them at face value. plaintiff requested defendant No. 3 to ask defendant No. 2 to send a letter to the plaintiff confirming the said commitment made by defendants 1 and 2. plaintiff also sent a letter dated 29th July 1986 to defendant No. 2 requesting him to confirm the agreement and the commitment made by the defendants with regard to giving the first option to the plaintiff to purchase the suit property. Between months of June and September 1986 several meetings took place between Sh. Om Prakash Navani of the plaintiff and Sh. Veru Dashmana in the presence of M/s. Kapoor and Shamim Kazi a friend of Mr. O.P. Navani and Mr. Kapoor. plaintiff appointed architect to work out the details regarding the suit property. Defendant No. 2 once again stated that by reason of some internal reasons they would have to take some time for the formal agreement for sale and assured the plaintiff that he would stand by all commitments and promised to commit the option given to the plaintiff in writing. Defendant No. 2 on behalf of defendant No. 1 wrote to the plaintiff confirming and recording that defendant No. 1 had given first option to the plaintiff for purchasing the suit property. The confirmation letter is undated, however, the same was received by the plaintiff during the month of September 1986 and is written in response to plaintiff's letter dated 1st September 1986. Vide telex dated 18th September 1986 plaintiff was informed that Sh. Dalmia has

returned from foreign tour and the plaintiff was requested to confirm its offer (already accepted earlier) in writing in order to enable them to move further in the matter for their own internal purposes. plaintiff wrote a letter dated 19th September 1986 to defendant No. 1 and 2 reiterating the offer of Rs. 24.50 crores for the suit property subject to the usual terms relating to the marketable title, vacant possession and the property being available for the development of residential complex. It is pleaded that "the said letter in no way derogates from the valid, concluded and binding contract made between the parties as aforesaid." Reference to "the said letter" is to plaintiff's letter dated 19th September 1986 and reference to "valid concluded and binding contract made between the parties as aforesaid" is reference to the contract alleged to have been entered into in second week of June 1986 when the offer of the plaintiff for Rs. 24.50 crores was accepted by defendants 1 and 2. plaintiff was informed by defendants 1 and 2 that execution of the agreement of sale would be further delayed because of certain family disputes in the family of Sh. G.N. Dalmia. This was informed by defendant No. 2 on behalf of defendant No. 1 vide an undated letter which was received by the plaintiff during the month of October in the year 1986. plaintiff was requested to wait which he did in good faith and that the plaintiff was and at all material times continued to be ready and willing to pay the price being the principal term to be performed by the plaintiff. plaintiff periodically made enquiries with the defendant as to whether the dispute had been settled.

(5) On 28th April 1988 a meeting was held at 27, Akbar Road, New Delhi, at 11.30AM and again at 4.30 Pm between Sh. Om Prakash Navani and Sh. G.N. Dalmia when defendant No. 3 and some other persons were also present. In the said meeting it was agreed that the parties would enter into a formal agreement to sell and that necessary applications would be filed before the Income Tax authorities as required by the Income Tax Act. It was agreed that draft of the formal agreement would be sent by defendant No. 1 to the plaintiff shortly. However, till date defendant No. 1 has not cared to do so A letter dated 11th May 1989 was also sent to defendant No. 1 by plaintiff reminding them to do the needful but they have not cared to do so. plaintiff has reliably come to know that defendant No. 1 and 2 are trying to negotiate the sale of the suit property and to sell the same to some other person whose details are not known to the plaintiff. The sale by defendants, will be in breach of the obligations expressly created in favor of the plaintiff by defendants No. 1 and 2. There is an oral agreement to sell and a positive commitment made by the defendants that the said property shall not be sold to any person other than the plaintiff without giving the plaintiff the first option to purchase the same. A firm offer was made by the plaintiff at the request of defendants 1 and 2. The plaintiff has a legal right to enforce the said agreement and also the negative covenant made by defendants 1 and 2 in the plaintiff's favor with regard to the said option.

(6) Defendants have filed separate written statements but in substance defense of defendants 1 to 3 is same. The case as pleaded in the written statements of

defendants 1 to 3 briefly thus : There was no agreement for sale of property for Rs. 24.50 crores. There was no agreement giving first option to the plaintiff. Defendants say that on plaintiff's own showing, no agreement of sale ever came into existence or was concluded written or signed between any of the parties at any time and the matter remained only at the exploratory stage, under negotiations and discussions and inchoate. Defendant No. 2 never met the plaintiff or any of its representative in Sep. 1986. The alleged agreement sought to be set up by the plaintiff apart from being self contradictory and self demolishing is highly improbable and incredible and manifestly incorrect. The plea that plaintiff made any offer of Rs. 24.50 crores and the same was accepted by defendants has been denied. They say that various pleas of the plaintiff manifestly indicate absence of any concluded or executed agreement and rather it shows clear admission as to its absence. Defendants have also denied that it was agreed that first option to purchase the property will be given to the plaintiff. Defendants deny that any such negative covenant is contained in the letters and correspondence exchanged between plaintiff and defendant No. 3. It is also pleaded that the commitment alleged to have been made by defendant No. 1 to give to the plaintiff the first option to purchase the property is not legally binding as it is without consideration, vague and incomplete as such a permanent or temporary injunction cannot be issued enforcing the same. It is further pleaded that without prejudice to the contention that defendant No. 1 had not entered into any legally enforceable or binding commitment to give to the plaintiff the first option to purchase its property, as per plaintiff's own showing, the plaintiff was given the opportunity of exercising the option to make an offer for purchase of the property which offer plaintiff claims to have made in its letter dated 19th September 1986. It is pleaded that the offer dated 19th September 1986 was not clear and unambiguous as three conditions were stipulated therein. They say that the value of the property was atleast three if not four times more than the price alleged to have been offered by the plaintiff even in the year 1986. With regard to the meeting of 28th April 1989 it is pleaded that a proposal was discussed with respect to the development by the plaintiff company up to a maximum of 50% of the property as sub-co-developer to M/s. Dalmia Promoters and Developers Pvt. Ltd. with whom defendant No. 1 had earlier entered into a contract for the development of the entire property. The other 50% was not available as defendant No. 1 and Dalmia Promoters and Developers Pvt. Ltd. had entered a contract with M/s. Balarpur Industries Ltd. in March 1989 for the development of 25% of the area and for the other 25% negotiations were then at final stage between defendant No. 1, M/s. Dalmia Promoters and Developers Pvt. Ltd. and M/s. Ashoka Builders and the Promoters and M/s. Arenja Enterprises Pvt. Ltd. That contract was said to have been finalised, concluded and signed on 22nd June 1989. No terms could be agreed to between the parties and the meeting of 28th April 1989 concluded without any commitment having been made on either side.

(7) Briefly, the case pleaded by defendant No. 3 is this. Some time in 1986

defendant No. 3 was approached by plaintiff through defendant No. 4 to discuss proposals for the possible sale of defendant No. 1's property or alternatively the sale of shareholdings by the existing shareholders of defendant No. 1. Defendant No. 3 told Mr. O. P. Navani that he had no authority on behalf of defendant No. 1 to make any commitment with respect to the property but Navani chose to discuss matters with him in the hope that some arrangement may be finalised between plaintiff and defendant No. 1. He had made it clear to Mr. Navani that defendant No. 1 would be bound only if a written contract was signed between plaintiff and defendant No. 1 and that in absence of such written agreement there would be no binding obligation or commitment on defendant No. 1. During discussions it was clear that plaintiff at that time did not possess the necessary finances and resources for purchasing the property and plaintiff was hoping to raise some fresh loans from banks. Plaintiff suggested that an opportunity be given to it to purchase the property before defendant No. 1 decided to accept any offer. It was stated by the plaintiff that the said assurances were needed to enable it to approach their bankers with the proposal to enable them to work out the modalities for raising finances required to enable the plaintiff to make an offer and commitment for purchase of the property. By letter dated 2.8.1986 defendant No. 3 informed the plaintiff that defendant No. 1 was conducting negotiations with various parties with regard to the property. The plaintiff was called upon to make/submit a firm offer if it was interested. By letter dated 1st September 1986 the plaintiff requested defendant No. 3 to obtain a letter from defendant No. 1 in terms of the performance furnished to enable the plaintiff's bank to process plaintiff's request for loan. The said letter was required by the plaintiff for sanctioning of loan and was not/did not amount to any alleged agreement/undertaking as alleged or at all. Defendant No. 3 has denied that the plaintiff was granted the first option to purchase the property. The letter was sent by defendant No. 3 in his personal capacity and with a view to accommodate the plaintiff in his efforts to obtain a bank loan. That on 18th September 1986 he sent a telex to Mr. Navani informing him of the return of defendant No. 2 and calling upon the plaintiff to send the proposal in writing through defendant No. 4. By letter dated 19th September 1986 addressed to defendant No. 3 plaintiff stated that it was willing to offer Rs. 24.50 crores for the property subject to marketable title, vacant possession and the property being available for development for residential complex. The proposed offer by the plaintiff was much less than the actual market value and the same was not acceptable. Defendant No. 3 informed the plaintiff that the matter regarding sale of the property had been dropped in view of the objections of the family members of defendant No. 2 and that on request of plaintiff he issued an undated letter confirming that defendant No. 1 had shelved the matter of the sale of the property. With effect from 23rd December 1988 defendant No. 3 has ceased to be a director of defendant No. 1 company.

(8) In short, the case of the plaintiff as emerging from its pleadings is that a valid and binding oral agreement to sell was entered into between the parties in

June 1986 whereby defendants had agreed to sell the suit property to the plaintiff for Rs. 24.50 crores. It case also is that defendants have created an obligation in favor of the plaintiff giving the first option to it to purchase the suit properly. The option is said to be contained in the letters and other documents exchanged between the plaintiff and defendant No. 1 and plaintiff seeks to enforce the said negative contract. On the other hand, case of defendants I to 3, in short, is that there was no concluded contract between the parties either for sale of the property to plaintiff for Rs. 24.50 crores or any contract giving first option to the plaintiff to purchase the property. Defendants I to 3 have also pleaded that no commitment for sale of property could be made unless an agreement was signed and approval of income tax authority was obtained in terms of provisions of Chapter Xx (c) Income Tax Act.

(9) In support of its case, plaintiff has filed certain documents. Mostly these documents are photostat copies of letters. Except two, plaintiff has addressed all its letters to defendant No 3. Defendant No, 3 has addressed all letters to Mr. Om Prakash Navani. The said two letters of the plaintiff are :(1) letter dated 20th February 1989 addressed to "The Chairman/Managing Director, M/s. Edward Keventer (Successors) Pvt. Ltd" and; (ii) letter dated 11th May, 1989 addressed to "Shri Gun Dalmia, Managing Director". In plaint, reference has been made to some letters written by defendant No. 2 to plaintiff and some letters written by plaintiff of defendant No. 2. No letter of defendant No 2 has been filed. The letters which plaintiff has pleaded that it had written to defendant No. 2 have also not been filed except the aforesaid two letters. I will not draw an adverse inference against the plaintiff on account of non filing of these letters, but instead, at this stage, assume in plaintiff's favor, that plaintiff in fact intends to make reference, in relation to those letters, to defendant No. 3 and not defendant No. 2 and on account of some inadvertence reference has been made to defendant No. 2 in place of defendant No. 3, in the plaint in this regard.

(10) Bearing in mind the respective stands of the parties as emerging from their pleadings and set out above, now I proceed to consider the documents to determine whether plaintiff has been able to make out a prima facie case.

(11) plaintiff'S first document is a letter dated 18th June 1986 sent by the plaintiff to defendant No. 3 asking him to give to the plaintiff the following six documents:

1.Zerox copy of the lease. 2. City Survey Plan indicating the location and area of the land and the number of structures on that. 3. The user of land. 4. U.L.C. order if any. 5. Memorandum of M/s. Edward Kaventers Successors (P) Ltd. 6. Balance Sheet of the Company for the last three years, with list of shareholders and list of directors. After requesting defendant No. 3 to supply the aforesaid documents plaintiff states that it will get the formal sale agreement prepared on the basis of heads of agreement and send it to defendant No. 3 in due course. plaintiff has not pleaded whether the documents asked for in its letter dated 8th June 1986 were supplied to it or not or whether the said letter was replied or

not. The next document is a typed paper on the letterhead of M/s. Veharko International (Pvt.) Ltd., containing certain terms. This company appears to be connected with defendant No. 4. There is no reference of this document or the terms mentioned therein in the plaint. Defendants have denied this document. plaintiff has not pleaded that this document was sent to defendant No. 3 or any other defendant, it is also not stated in the letter dated 18th June 1986 that some terms are being enclosed therewith. In this document containing some terms the price of the land has not been mentioned. Price has been typed and deleted thereafter. One of the terms is that plaintiff will enter into an agreement with defendant No. 1 within 12 months or earlier. It is not stated in the said terms or in the letter dated 18th June 1986 that the parties had agreed that the land will be sold for Rs. 24.50 crores. According to plaintiff's own case the letter dated 18th June 1986 was sent after its offer of Rs 24.50 crores had been accepted by defendants 1 and 2.

(12) The next relevant document is a letter dated 29th July 1986 sent by plaintiff to defendant No. 3. In this letter the plaintiff mentions about the first option to purchase the property having been given to it and a request is made to defendant No. 3 to send a letter confirming the first option. The letter dated 29th July, 1986 was replied by defendant No. 3 by his letter dated 2nd August 1986. In letter dated 2nd August 1986, defendant No. 3 stated that as discussed in a meeting, negotiations are going on with certain parties and asked Mr. Navani to send a firm offer if he was interested in the said property. This letter also records that the defendant had not yet decided on any party for the sale any if Mr. Navani was seriously interested in pursuing the sale, he may meet defendant No. 3. The letter further states that Mr. Navani will be contacted prior to taking any final decision about the property. Learned counsel for plaintiff relies upon the following two concluding lines of the letter dated 2nd August 1984 :

"THIS is also to confirm that you will be contacted by us prior to taking any final decision about the properly."

(13) The submission of learned counsel is that this also amounts to giving the first option to the plaintiff to purchase the property. I do not agree The letters dated 29th July 1986 and 2nd August, 1986 only show that defendants were having negotiations with certain parties for sale of the property and plaintiff was also asked to give its firm offer. A combined reading of letter dated 29th July 1986 and its reply dated 2nd August 1986 does not show that prior thereto there was any agreement between the parties for sale of the property at Rs. 24.50 crores. On the contrary Mr. Navani was asked to send an offer. The aforequoted lines do not make out any concluded contract giving first option to purchase the property to the plaintiff. The letter dated 2nd August 1986 only shows an intending seller telling one of the intending purchasers that before taking a final decision that intending purchaser will also be contacted. By no stretch of imagination it can be said that the letter dated 2nd August 1988 has created a right of first option to purchase the property on the plaintiff. It may also be

noticed that no reference has been made in the plaint to the letter dated 2nd August 1986. plaintiff has also not pleaded that a reply was sent to this letter. It has also not been .pleaded that in reply to this letter a firm offer was sent by plaintiff to defendants or that the defendants were informed that the parties had already entered into a concluded contract for sale of the property at Rs. 24 50 crores.

(14) The next set of documents required to be considered and on which strong reliance has been placed by the plaintiff are (i) letter dated 1st September 1986 sent by plaintiff to defendant No. 3, and; (ii) an undated letter from defendant No. 3 in reply to plaintiff's letter dated 1st September, 1986. According to the plaintiff the undated letter of defendant No. 3 confers on the plaintiff the right of first option to purchase the property. As the plaintiff has based its case mainly on the these two letters it would be appropriate to reproduce the said letters in order to appreciate the respective contentions of the parties. Letter dated 1st September 1986 reads as under ;

"SHRIOM Builders Private Limited September 01,1986 To; Mr. Veru Dhasmana, Director, M/s. Edward Keventer (Successors) Pvt. Ltd. 27, Akbar Road, New DELHI-1100011. Dear Mr. Dhasmana, Re : Sale of property at Chanakyapuri. This has reference to our meeting in Delhi on 11th August, 1986, to discuss and finalise the sale of above property. We are pleased to inform you that we have already appointed architect in Bombay, and in Delhi to work out the details of the above property. Reference to our discussions regarding mode of payment and the details of payment terms, I have subsequently approached the Bankers to see if they would be able to solve the problem. The Bankers have asked me a letter from you seeking certain clarifications. I am enclosing herewith the perform a of the letter which the Bank wants, enabling them to proceed further in the matter. I am confident, if proper representation is made to the bank finance for the said project would be available and you will appreciate that this would be of tremendous help to us. The Delhi Law Times 1990 I would request you to kindly send me the above letter if you feel appropriate for which I will be grateful. Thanking you, Yours faithfully, for Shri Om Builders PVT. Ltd sd/- (OM Prakash NAVANI) Director."

THE proforma enclosed with letter dated 1st September 1986 reads as under :-
"PROFORMA To: Mr. Om Prakash Navani, Director, M/s. Shri Om Builders Pvt. Ltd.. Om Chambers, Om Corner Bombay-400036 Dear Sir, Re : Sale of property at Chanakyapuri. I am in receipt of your letter dated 1st September, 1986. As desired by you we had already confirmed the first option of purchasing the Compan'y land. However, the sale could be completed only after the return of Mr. G.N. Dalmia. We will be too pleased to extended all necessary co-operation in your securing the loan from your Bankers. Thanking you, Yours faithfully, for Edward Keventer (SUCCESSORS). PVT. LTD. (VERU DHASMANA) Director The undated letter sent by defendant No. 3 to Mr. Navani reads as under:- "Edward Kaventer (Successors) Private Ltd. Regd. Office & Factory : Kaventer Lane Sardar

Patel Marg New Delhi-110021. Dated.....19

To: Mr. Om Prakash Navani, Director, M/s. Shri Om Builders Pvt. Ltd.. Om Chambers, Om Corner, BOMBAY-400036 Dear Sir, Re : Sale of property at Chanakyapuri belonging to M/s. Edward Keventer (Successors) Pvt. Ltd. I am in receipt of your letter dated 1st September, 1986. This is to confirm and record that we have given the first option of purchasing the company's land and its right, title and interest in the said land to your Company. The sale would be by way of Conveyance or purchase of Shares as may be mutually decided. We will be too pleased to extend all necessary co-operation in your securing loan from your Bankers for this project. Thanking you, Yours faithfully. for Edward Kaventers (SUCCESSORS) PVT. Ltd sd/- Veru DHASMANA) Director"

(15) The submission of Mr. R.K. Anand, learned counsel for the plaintiff with regard to first option having been given to the plaintiff is primarily based on the aforesaid undated letter of defendant No. 3. The said undated letter, however, is to be considered in the light of the plaintiff's letter dated 1st September 1986 and other circumstances of the case. A bare reading of letter dated 1st September 1986 shows that the plaintiff was finding some problem with regard to the payment for which he had cached the bankers. The bankers had asked for a letter from the seller and as such the proforma letter was sent to defendant No. 3 so that finances from bank could be arranged. Under those circumstances the undated letter sent by defendant No. 3. A reading of the said undated letter shows that stage even the manner of sale had not been decided as the said letter records that sale would be by way of conveyance or purchase of shares may be mutually decided. Neither the letter dated 1st September 1986 or the undated letter refers to the price which may have been agreed upon between the parties. According to plaintiff, the price of Rs. 24.50 crores had been agreed in June, 1986. There is yet another letter dated 15th September 1986 sent by defendant No. 3 to Mr. Navani. An endorsement on letter dated 15th September 1986 shows that it was received by Mr. Navani on 19th September 1986. There is no reference in the plaint to this letter of 15th September 1986. The letter dated 15th September 1986 reads as under :

"EDWARDKEVENTER (SUCCESSORS) Private LTD. Dairy Specialists and Approved Military Contractors Regd. Office & Factory : Keventer Lane Sardar Patel Marg New Delhi-110021, Mr. Om Prakash Navani Dated : September 15, 1986 Director M/s. Shri Om Builders Pvt. Ltd. Om Chambers, Om Corner, Bombay-400036. Dear Sir, Ref: Sale of property at Chanakyapuri. Reference our earlier discussions about the above property, your offer for the sale of the above property could be considered only after the return of Mr. G.N. Dalmia. in case the deal is finalised, we will be pleased to extend our cooperation in your securing the loan from your Bankers. Thanking you, Yours faithfully, for Edward Keventer (Successors) Pvt. Ltd. sd/- (Veru Dhasmana) Jt. Managing Director."

(16) There is no Explanation by the plaintiff of this letter. It has not been explained whether letter dated 15th September 1986 was received earlier or the

undated letter was received earlier. From the sequence of events, prima facie, it appears that in reply to letter dated 1st September 1986 defendant No. 3 had first written the letter dated 15th September 1986 which was not to the requirement of the plaintiff or its bankers, and on such a representation being made defendant No. 3 gave to the plaintiff the undated letter. The plaintiff has also filed a copy of a telex dated 18th September 1986 sent by defendant No. 3 to Navani and copy of letter dated 19th September 1986 sent in reply thereto by plaintiff to defendant No. 3. In regard to telex and letter dated 19th September 1986 the plaintiff has pleaded in Para 8 of the plaint that "Vide telex dated 18th September 1986 the plaintiff was informed that Sh. Dalmia has returned from foreign tour. They requested the plaintiff to confirm the plaintiff's offer (already accepted earlier) in writing in order to enable them to move further in the matter for their own internal purposes. Therefore, the plaintiff wrote a letter dated 19th September 1986 to defendant No. 1 and 2 reiterating the offer of Rs. 24.50 crores for the said property subject to the usual terms relating to marketable title, vacant possession and the property being available for the development of residential complex." The telex, however, does not require the plaintiff to confirm its offer. Telex reads that :

"MR. Dalmia has returned from Usa last night. Please send you offer of the property in writing through Mr. Kapoor, who is in Bombay and leaving for Delhi on Friday evening."

(17) Even in the reply dated 19th September 1986 plaintiff does not state about any earlier offer and does not reiterate the offer of Rs. 24.50 crores as pleaded in Para 8 of the plaint. It is, inter-alia, stated in the letter dated 19th September 1986 that :

"WE are in a position to offer Rs. 24.50 crores for the above property subject to marketable title, vacant possession and the property being available for development of residential complex." After giving the aforesaid offer the plaintiff states in the said letter that : "you are good enough to give us the first option to purchase the property and accordingly we are in touch with our bankers for necessary finance for the project. We hope and trust that former agreements for sale of the property would be prepared and signed expeditiously."

The aforesaid telex and the letter dated 19th September 1986 further demolishes the plaintiff's case that any concluded agreement was entered into whereby the defendants agreed to sell the suit property to plaintiff for Rs. 24.50 crores. It is not the case of the plaintiff that offer contained in letter dated 19th September 1986 was accepted by the defendants. Thus question of defendants agreeing to give first option to purchase the property to plaintiff does not arise.

(18) Assuming the defendants had agreed to give to the plaintiff the first option to purchase the property, the said first option was given by defendants to the plaintiff by sending the aforesaid telex, dated 18th September 1986. In reply to the telex as noted above, the plaintiff had given its offer but with three

stipulations/conditions. Even if the stipulation with regard to marketable title is ignored as it is one of the obligations of the seller to pass a marketable title to the buyer, the other two stipulations namely, the vacant possession and property being available for development of residential complex were in the nature of conditions and it thus shows that when first option was given to the plaintiff it gave a conditional offer in terms of its letter dated 19th September 1986. It is not even the case of the plaintiff that the offer or the conditions contained in the letter dated 19th September 1986 were accepted by the defendants.

(19) There is no averment in the plaint as to what plaintiff was doing after its letter dated 19th September 1986 for nearly 21 years except a vague averment in the plaint that the plaintiff waited in good faith and had no reason to doubt the bonafides of the defendant and the plaintiff periodically made enquiries with the defendants as to whether the dispute had been settled. But for these general averments there is neither any pleading nor any letter for the period of about 2" years after letter dated 19th September 1986. The next letter thereafter is dated 20th February 1989 sent by plaintiff to the Chairman/Managing Director of plaintiff No. 1. There is no reference of any negative covenant or first option in the letter dated 20th February 1989. It refers to certain discussions in regard to development and sale of the property. For the present purpose the letter dated 20th February 1989 is not of much significance.

(20) The further case of the plaintiff as pleaded in Para 11 of the plaint is that:

"ON 28th April 1989 a meeting was held at 27, Akbar Road, New Delhi, at 11.30 Am and again at 4.30 Pm between Sh. Om Prakash Navani and Sh. G.N Dalmia when defendant No. 3 and some other persons were also present. It was agreed that the parties would enter into a formal agreement to sell and that necessary applications will be filed before the income tax authorities as required by the Income Tax Act, It was agreed that the draft of the formal agreement would be sent by defendant No. 1 to plaintiff shortly".

20The plaintiff has placed on record a document, which according to it. records the minutes of the meeting dated 28th April 1989. The said document is not signed by defendants 2 and 3 or by any representative of the defendant No. 1. Defendants 1 to 3 have denied the said document though they have not disputed the factum of meeting which had taken place on 28th April 1989. Even in the minutes as filed by the plaintiff it is stated that: "The prospects of collaboration for 50% of the land situate at Chanakyapuri, New Delhi, belonging to Edward Keventer's was discussed. Broadly, the terms were agreed upon between Mr. Dalmia and Mr. Om Prakash Navani and Mr. Dalmia promised to send the details shortly."

(21) The minutes aforesaid do not show that the parties had agreed to enter into any formal agreement to sell as pleaded in the plaint. Even if the minutes are accepted they only show about some discussion on the question of collaboration 50% of land and certain broad terms having been agreed upon for the said

collaboration .The plaintiff has not even pleaded as to what were those broad-terms which had been agreed upon between the parties in the meeting on 28th April 1989. The minutes filed by the plaintiff itself completely demolishes its case of a concluded contract of Rs. 24.50 crores and also its case that defendants gave first option to the plaintiff to purchase the property.

(22) Next, I will consider the question of legality of the first option like the one pleaded in the suit. The question for determination is, can the agreement of first option of this nature, i.e. without any agreement between the parties on the material terms like the price, the mode of payment, the time and the alike, be legally enforced. Learned counsel for the plaintiff contended that such an agreement of first option is legally enforceable. On the other hand, learned counsel for the defendants contended that in absence of agreement between the parties on the material terms such an agreement is not enforceable and would be void for uncertainty.

(23) Learned counsel for the plaintiff has placed strong reliance on the judgment of Chancery Division in *Smith v. Morgan* 1971 (2) All ER 1500 for the proposition that the absence of settled price does not vitiate the option. In the case relied upon the first option was in respect of the adjoining land and was contained as a covenant in a conveyance deed. The said covenant was construed by Brightman J. as an obligation imposed on the vendor alone to make an offer for sale and it was held that it created an obligation on the vendor to make an offer to the purchaser at the price at which vendor was in fact willing to sell. However, that is not the position in the present case. Here the plaintiff has pleaded that price agreed upon was Rs. 24.50 crores which it has prima facie failed to establish. Even in the application (I.A. 4433/89) plaintiff has sought an injunction against defendants restraining them from transferring the property to any person without offering the same to the plaintiff for a price of Rs. 24.50 crores as per the agreed terms. The observation made in *Ryan v. Thomas* by Warrington ,J. that :-

"THE words "first option" by themselves have no meaning; there is no mention of price, or time, or anything else."

have been referred by Brightman J. at page 1104 of the Report. It was held by Warrington J. that there was no contract. At the same page (1504) reference has also been made by the learned Judge to decision of Chancery Court of the County Palatine of Lancaster, *King's Motors (Oxford) Ltd. v. Lax* 1969 (3) All ER 665 where it was held by Burgess V.C that in the absence of an arbitration clause or some supplementary agreement fixing the rent to be paid, the option was void for uncertainty and could not be enforced against the defendants. Brightman J. however, held that the aforesaid two decisions were not applicable on the facts of the case before him. But that is not the position on the facts of the present case The aforesaid observations of Justice Warrington & Burgess V-C are fully applicable to the facts of the case. There cannot be a valid agreement of giving first option without agreement on material terms, such as, the price, time and mode of payment and alike. If it is held otherwise, it will lead to absurdity. If the

agreement of learned counsel for the plaintiff is accepted, it will mean that in case an owner writes a letter to another person slating that "As and when I will sell the property, I will give you the first option to purchase it " the owner will remain bound for an indefinite period and when the owner or his successor wants to sell the property, after say 50 years, the first option will have to be given to the other person. In my view such is not the position in law.

(24) Mr. Anand has also placed reliance on a decision of Court of Appeal in Mountford and another v. Scott (1975) 1 All Er 198 and the judgment of Chancery Division in Gardner v. Coutts & Co. (1967) All Er 1064. Both the aforesaid judgments, in my opinion, have no application to the facts of the present case. The case before the Court of Appeal was of specific performance. The price had been agreed and option was to be exercised within the stipulated period i.e. within a period of six months from the date of the agreement. In case before the Chancery Division also the price had been agreed and it was an action for damages for breach of an agreement in writing. In the present case, there is no agreement between the parties as to its material terms.

(25) There cannot be an agreement in vacuum. Where terms of an agreement are so vague and indefinite there cannot be any contract enforceable at law. The agreements the meaning of which is not certain or capable of being made certain are void (Section 29, Contract Act). A contract to enter into a contract is not enforceable. The law does not recognise a contract to negotiate. The reason is, as Lord Denning says, "because it is too uncertain to have any binding force". A contract to negotiate, like a contract to enter into a contract, is not a contract known to the law per Courtney & Fairbairn Ltd. v. Tolaini Brothers (Hotels) Ltd and another 1975) 1 W.L.R. 297, a case relied upon by Mr. Oberai, learned counsel for defendants. Lord Diplock while agreeing with the opinion of Lord Denning held that the observations of Lord Wright in Hillas Co. Ltd. v. Arcos Ltd. (1932) 147 L.T. 503 to the effect that "there is a contract to negotiate" should be regarded as bad law. The correspondence between the parties, in the present case, show that at best it was a contract to negotiate or a contract to enter into a contract. Both such contracts are not enforceable in law.

(26) From the aforesaid discussion, prima facie, the conclusions which emerge are these :-

A. There was no agreement for sale of property for Rs. 24.50 crores. B. There was no agreement giving first option to purchase the property to the plaintiff. C. Assuming there was an agreement of first option, defendants gave the first option to the plaintiff by sending telex dated 18th September 1986 and in reply thereto plaintiff gave a conditional offer which was never accepted by the defendants. D. The first option, without agreement on material terms like price, time and alike is not enforceable in law. E. The agreement of option relied upon by the plaintiff, at best, amounts to an agreement to negotiate or an agreement to enter into a contract, which are both not enforceable in law. Looking from any angle, the plaintiff has failed to establish a prima facie case and thus is not

entitled to the temporary injunction sought by it. In view of above conclusions it is not necessary to consider the objection raised by defendants that defendant No. 3 had no authority to enter into an agreement on behalf of defendant No. 1 or that suit has been instituted by Shri Om Builders Pvt. Ltd. though some of the letters have been addressed on behalf Om Builders Pvt. Ltd. and the two companies appear to be distinct and separate legal entities.

(27) By I.A. 5490/89 plaintiff has sought production of agreements entered into by defendants with third parties. Defendants have objected to the said application and have, inter-alia, contended that the said agreements with third parties have no relevance to the present proceedings and those agreements contain various confidential information regarding their property as also confidential trade secret and confidential terms and conditions based on which defendant No. 1 has entered into a contract with those parties. In view of my conclusion that the plaintiff has failed to, prima facie, show that there is any concluded agreement on the question of price or on the question of option, it is not necessary, particularly at this stage, to direct the defendants to file the agreement entered into with the third parties and the objections raised by the defendants to the application are well founded. Likewise, I do not consider it expedient or necessary to direct the recording of statements of an authorised representative of defendants 2 and 3 at this stage. In my view, there is no point which requires elucidation at this stage. Thus, I do not find any substance in plaintiff's application LA. 5802/89.

(28) With regard to plaintiff's application I.A. 4434/89 I grant the leave sought for by the plaintiff to file another suit to enforce its alleged right of specific performance with consequential/alternate relief. The plaintiff will, of course, have to establish a concluded and binding agreement in the said suit, if filed.

(29) For the reasons aforesaid. plaintiff's application for injunction (I.A. 4433/89), its application for production of documents (LA. 5490/89) and I.A. 5802/89 seeking examination of defendants, are dismissed. plaintiff's application (LA. 4434/89) is allowed and leave sought to institute a suit for specific performance is granted. The applications are disposed of in the above terms leaving the parties to bear their own costs. Applications disposed of as directed.