

(2007) 05 DEL CK 0086

In the Delhi High Court

Case No : IA No. 7129 of 2003 in CS (OS) No. 1388 of 2003

Pearson Education Inc.

APPELLANT

Vs

Prentice Hall of India Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 24-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Copyright Act, 1957 — Section 17, 18, 19, 19A, 2

Specific Relief Act, 1963 — Section 14, 14(1), 15, 16

Citation : (2007) 35 PTC 450

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : A.M. Singhvi and Rajiv Nayar, Gopal Jain, Sanjit Banyer, A. Deb and Shilpi Jha, for the Appellant; Sudhir Chandra Pravin Anand, Neel Mason and Sagar Chandra, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—In the plaint, the plaintiff has, inter alia, contended that the agreement between the plaintiff and the defendant No. 1 dated 07.09.1983 was no agreement at all and that no such agreement existed. It was further contended by the plaintiff that, in any event, the said agreement dated 07.09.1983 has been terminated by a letter dated 14.07.2003. The reasons for termination are that the defendant allegedly did not account for 35 titles; there was alleged concealment of true and complete figures relating to publishing, printing, reprinting and sales of titles; there was an alleged breach of fiduciary duty and breach of trust on the part of the defendants; there was alleged avoidance of payment of royalty by the defendant No. 1 to the plaintiff; there was alleged misappropriation of money by the defendant; and there was alleged suppression / misrepresentation and fraud on the part of the defendants. The plaintiff, inter alia, sought a mandatory injunction, commanding the rendition of true and faithful accounts. Alternatively, a direction was sought for initiation of an inquiry into the list of titles / books in which the plaintiff was the owner of the

copyright. A permanent and perpetual injunction was also sought for restraining the defendants from printing, reprinting or publishing any of the books or titles of which the plaintiff or its associates or subsidiaries were the owners of the copyright. A similar injunction was sought for marketing and sale of any of the books in which the plaintiff or its associates or subsidiaries held copyrights. A permanent injunction was also sought restraining the defendant No. 1 (Prentice Hall India) from using the name "Prentice-Hall" or "P-H" as part of its name. Other associative reliefs were also sought.

2. In the present application (IA No. 7219/2003), the plaintiff seeks the following reliefs:

(a) An ex parte ad interim temporary injunction, in favor of the plaintiff / Applicant and against the Defendant/Respondent No. 1 Company restraining the Defendant / Respondent No. 1 company from in any manner printing / reprinting or publishing and / or marketing and selling any of the books or titles of which the plaintiff / applicant or its associates or subsidiaries are the owner of the copyright and/or have a right in respect thereof;

(b) Pending the hearing and final determination of the said suit, an enquiry be directed and Defendant / Respondent No. 1 be ordered to furnish, the list of all titles and number of copies of the books published or sold by the Defendant/ Respondent No. 1 in respect of the titles of which the plaintiff is the owner of the copyright and / or has a right in respect thereof;

(c) A Local Commissioner be appointed to take charge of all the books of accounts, ledgers, print orders, inwards receipts / goods inwards documents, inventory stock (stock inward and outward) documents, purchase orders, invoices and all other relevant papers and vouchers of the Defendant / Respondent No. 1 Company and to initial each page of each document and make copies of the said documents including such of the said documents as are found in electronic form, and to seize all such publications belonging to the plaintiff / applicant, which are being printed, published and sold by Defendant / Respondent No. 1 without accounting for the same to the plaintiff / Applicant and to inspect the relevant records of the distributors / dealers and / or customers and / or wholesalers and stockists of the Defendant / Respondent No. 1 including those mentioned in the list set out in paragraph 50 hereinabove;

(d) Direct Defendant / Respondent Nos 3 and 4 to furnish true and fair accounts in respect of opening stock and purchase and sale of all titles printed, published and sold by the Defendant / Respondent No. 1 in the years 2000-01 and 2001-02 and until the date of termination being 14th July, 2003;

(e) Ex-parte ad interim temporary injunctions, in favor of the plaintiff / Applicant and against the Defendant / Respondent No. 1 company restraining the Defendant / Respondent No. 1 from using the name "Prentice-Hall" or "P-H" as part of its name in any manner whatsoever and restraining the Defendant / Respondent No. 1 whether by itself or by its servants or agents or assigns or

otherwise howsoever from using the mark "Prentice-Hall" or the words "Prentice" or "Hall" or any colourable imitation thereof in any stationery, literature, booklet, leaflet, any other form of visual representation or otherwise in connection with the business of the Defendant / Respondent No. 1 in any manner whatsoever;

(f) Ad-interim reliefs in terms of prayers (a) to (e) above;

(g) For cost.

3. The key issues which arise in this application are-whether the purported agreement dated 07.09.1983 was in existence ? If such an agreement is found to be in existence, whether the same had been validly terminated by the letter dated 14.07.2003 ? The related issue is whether the termination, if bad in law, entitled the defendants only to damages or to continue with the arrangement under the agreement ?

4. Dr A.M. Singhvi, the learned senior counsel, who appeared on behalf of the plaintiff, submitted that on 06.06.1963, Prentice-Hall Inc. (now known as Pearson Education Inc.-the plaintiff herein) had entered into a collaboration agreement with the defendant No. 1 (Prentice-Hall of India Pvt. Ltd.) wherein the plaintiff had agreed to grant to the defendant No. 1 exclusive rights to print, reprint, publish and sell in India and to export from India, books, the particulars of which were set out in the schedule attached to the collaboration agreement.

5. In 1973, the collaboration agreement was renewed for a further period of 10 years and the Government approval was also sought. According to Dr Singhvi, the plaintiff, in view of the impending introduction of compulsory licencing provisions into the Indian Copyright Law, reviewed its existing policy of granting distribution rights to the defendant No. 1 and, accordingly, both the plaintiff and the defendant No. 1 opted not to further renew the collaboration agreement. On 17.01.1983, a letter was written by Mr Leo Albert, Vice-President of the plaintiff to defendant No. 2 (Mr Asoke K. Ghosh). In the said letter, it was, inter alia, indicated by the said Mr Leo Albert that the collaboration would expire in June, 1983. The letter indicates that the defendant No. 2 had been advised by the plaintiff's legal counsel that it may not be necessary to apply for a renewal collaboration. It was indicated that some of the major reasons why the Government of India required a collaboration agreement in the past no longer existed. Furthermore, in the light of the impending compulsory licencing, which was about to be introduced by the Government of India, the plaintiff felt that it would be hard-pressed to prove that a collaboration renewal is to the advantage of the Government.

6. In response to this letter, Mr Asoke K. Ghosh (defendant No. 2) sent a letter to the said Mr Leo Albert on 11.03.1983 which essentially accords with the sentiments expressed by Mr Albert in his letter dated 17.01.1983. With regard to collaboration renewal, Mr Asoke K. Ghosh's letter was to the effect:

2. Collaboration Renewal: Mr. Dadachanji is of the view that there is no need for

submitting an application for renewal of collaboration. Foreign Company and non-resident individuals have the permission of the Reserve Bank of India to hold shares in Prentice-Hall of India and this permission is not time bound. Further, now there is no restriction by the Reserve Bank of India for allowing remittance of royalty on reprints of books of scientific, technical and educational nature.

7. Continuing the sequence of events, Dr Singhvi drew the attention of this Court to a letter dated 24.03.1983 which was written by Mr Leo Albert to Mr Asoke K. Ghosh (defendant No. 2) wherein the second point read as under:

(2) We will not apply for renewal of a collaboration.

8. Dr Singhvi submitted that this correspondence clearly indicates that the plaintiff and the defendant No. 1 as also the defendant No. 2 did not contemplate renewal of the collaboration agreement. This fact, Therefore, according to him, casts serious doubts on the existence of the agreement dated 07.09.1983 which is said to have been entered into between the plaintiff and the defendant No. 1. The terms of the purported agreement dated 07.09.1983 are relevant and germane to the discussion and, Therefore, are being reproduced hereinbelow:

AGREEMENT

This Agreement made this 7th day of September, 1983 between PRENTICE HALL INC. a corporation organized and existing under the laws of the State of Delaware, USA (hereinafter referred to as the "Foreign Company" which expression shall, unless, repugnant to the context, include its successors) of the One Part and PRENTICE HALL OF INDIA PRIVATE LIMITED, a Company with Limited Liability incorporated under the provisions of the Indian Companies Act, 1956 and having its registered office at M-97, Aggarwal Building, Connaught Circus, New Delhi -1. (hereinafter referred to as "the Publisher" which expression shall, unless repugnant to the context, include its successors) of the Other Part.

THE PARTIES HERETO AGREE AS FOLLOWS:

1. The Foreign Company hereby grants to the Publisher exclusive rights to print, reprint, publish, translate , adapt, import and sell in India and export to any other Asian or other countries standard textbooks and other books for schools, colleges, universities or other institutions or books for any other purpose, relating to subjects of science, Technology, Literature, Fine Arts, Economics, Law and any other subjects, subsidiaries or an associate company owns or any own the copyright of all such books are hereinafter referred to as "the Licensed Books")

(2) The Publisher shall for every Licensed Book reprinted by it in India pay to the Foreign Company, or to its subsidiary or associate company, as the case may be, royalty at the rate of ten percent (10%) of the Indian List price. The payments shall be in U.S. dollars.

(3) The Publisher shall pay to the Foreign Company royalty, in respect of the

Licensed Books sold in a calendar year ending on 31st December, calculated according to para 2 above, on or before the 31st December of the succeeding year. Every such payment shall be accompanied with an account of each Licensed Book during the relevant year.

(4) In order to facilitate remittance of royalty and record clearly the territories assigned to the Publisher, the Foreign Company will issue individual agreements for each Licensed Book in respect of which rights are granted to the Publisher.

(5) The Foreign Company hereby grants exclusive rights to the publisher to import and sell books which have been or may be published by the Foreign Company or any of its subsidiary or associate companies, in India and outside India. The Publisher may import such books itself through its nominee or other importers. All orders to be placed or forwarded by the publishers shall be in the prescribed sales order forms.

(6) The Foreign Company shall render all assistance and support to the publisher in exporting books produced by the publishers and guarantees the publisher to cause export of a minimum of ten percent (10%) or its annual production.

(7) The Foreign Company shall be entitled to terminate this agreement (a) if the Publisher commits breach of any term or condition of this agreement and fails to remedy the breach within thirty (30) days of receipt of written notice from the Foreign Company, or (b) If the Publisher goes into Liquidation (except for the purpose of amalgamation or reconstruction) or is declared insolvent. The termination shall be without prejudice to any claims which the Foreign Company may have against the Publisher.

(8) This Agreement shall be governed and interpreted in all respect by the laws of India.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed on the day and year first above return through their duly authorised representatives.

PRENTICE-HALL INC. PRENTICE HALL OF INDIA Through: Mr LEO N ALBERT
PRIVATE LIMITED Through: MR. ASOKE K GHOSH Sd/- Sd/- VICE PRESIDENT
MANAGING DIRECTOR

9. Dr Singhvi then referred to the letter dated 06.10.1983 written by Mr Asoke K. Ghosh, the defendant No. 2, to Mr Leo Albert of the plaintiff. In this letter, it is noted that in the absence of the collaboration agreement, the plaintiff and the defendant No. 1 ought to have obtained a certificate from the plaintiff stating that the defendant No. 1 had exclusive reprinting rights for reprinting the plaintiff's publications in India. It was felt that this certificate would be given to concerned authorities in order to prevent issuance of the compulsory license as well as to prevent any piracy. It was noted that Mr Dadachanji had drafted the certificate which was enclosed with the letter. The plaintiff had directed that the same be typed on the letter head of the defendant No. 1 and be signed and sent

to the plaintiff. That certificate was a draft. It took its final form as under:

PRENTICE-HALL INC. ENGLEWOOD CLIFFS, NEW JERSEY 07032 LEO N. ALBERT
TEL. 201592 2060 VICE PRESIDENT CABLE:PRENHALL. ENGLEWOODCLIFFS
October 1, 1983

TO WHOMSOEVER IT MAY CONCERN

Prentice-Hall of India Private Limited having their registered office at M-97, Connaught Circus, New Delhi-110 001, are having exclusive rights in India to reprint, publish and sell in India or to sell outside of India, books originally published by Prentice-Hall, Inc., Englewood Cliffs, New Jersey, U.S.A. and their subsidiaries. Any transgression of these exclusive rights in India by any other publishers booksellers and printers will be liable for legal prosecution and damages.

ON BEHALF OF PRENTICE-HALL INC.

Sd/-

Leo N. Albert, Vice President.

10. Dr Singhvi submitted that the defendants' case was founded upon the purported agreement of 07.09.1983. He submitted that there is no mention of this purported agreement of 07.09.1983 in any contemporaneous correspondence. The correspondence prior to 07.09.1983, referred to above, indicates that the plaintiff and the defendant No. 1 were not interested in continuing the collaboration agreement. The correspondence after 07.09.1983 also had no reference whatsoever to the purported agreement of 07.09.1983.

11. Dr Singhvi submitted that the purported agreement of 07.09.1983 granted such extensive rights to the defendant No. 1 that it was legitimate to assume that the plaintiff could not have entered into such an agreement. He submitted that, in any event, Clause 7 of the purported agreement entitled the plaintiff to terminate the same if the defendant No. 1 committed breach of any terms or conditions and failed to remedy the breach within 30 days of receipt of a written notice from the plaintiff. He submitted that the breaches committed by the defendant No. 1 in the present case were of such a fundamental nature and related to the basics of faith and trust that there was no possibility of the defendant No. 1 remedying the same and, Therefore, the question of giving a notice in writing to the defendant No. 1 requiring it to remedy the breaches, did not at all arise.

12. Dr. Singhvi then referred to the letter from Mr Leo Albert to Mr Don Schaefer (both of the plaintiff company) with a copy to Mr Asoke K. Ghosh of the defendant No. 1 company. He submitted that this letter also had no mention of the purported agreement of 07.09.1983. He then submitted that on 12.04.1984, the mark "Prentice Hall" was registered in favor of the plaintiff in India under the Trade and Merchandise Marks Act, 1958 in Class 16 in respect of books, printed

matter etc. Thereafter, it was submitted that the plaintiff and the defendant No. 1 entered into individual title agreements from time to time. These agreements were in respect of individual titles / editions and the rights granted under those agreements were specific and limited to those agreements alone. In 1998-99, Prentice Hall Inc. was taken over by the Pearson Group and the name of the plaintiff was changed from "Prentice Hall Inc." to "Pearson Education Inc.". On behalf of the plaintiff, it is stated that after the change in the management of the plaintiff company, the purported agreement of 07.09.1983 was made available by the defendant No. 2 (Mr Asoke K. Ghosh) to the plaintiff. In January, 2000, the defendant No. 1 filed a suit (Original Suit No. 200/2000 [renumbered as CS(OS) 1339/2004] before this Court seeking a declaration that the defendant No. 1 was the exclusive licensee of the plaintiff for the territory of India. It was also claimed by the defendant No. 1 in the said suit that the agreement dated 07.09.1983 had been violated. An injunction had been sought by the defendant No. 1 against the plaintiff's act of restraining it from publishing, printing, importing titles into India. Essentially, this suit could be regarded as one for specific performance of the purported agreement dated 07.09.1983.

13. In February, 2000, the plaintiff filed Original Suit No. 716/2000 (later on renumbered as CS(OS) 1340/2004) essentially seeking a declaration that the agreement dated 07.09.1983 was a nullity. Interim applications in both the suits were disposed of by Sikri, J by a common order on 10.05.2002. By virtue of the said order dated 10.05.2002, both the plaintiff and the defendant No. 1 have been permitted to publish books subject to the terms of accounts and of depositing 10% of the sale proceeds. Appeals have been preferred from the said order dated 10.05.2002 which are pending. Those appeals are numbered as FAO(OS) Nos. 242/2002, 243/2002 and 252/2002. The following observations made in the order passed by Sikri, J on 10.05.2002 are relevant:

However, if the matter was to be decided on the basis of this agreement alone, it would not have posed any problem. But the fact remains that the agreement has been worked out for number of years and in the process the parties have acted in a particular manner. This course of conduct may be relevant for the purpose of ascertaining as to how the parties understood and acted on this agreement.

The important question which falls for consideration is as to whether Agreement dated 7.9.1983 is an Agreement which could be worked out and enforced without entering into individual agreements. Fact remains that individual agreements were entered into each time, which granting copyrights in respect of a particular book.

The aforesaid question posed can be answered by applying the following test:

Whether Agreement of 1983 is enforceable by itself i.e. the plaintiff could enforce this Agreement even if individual agreement were not entered into in respect of each separate book?

xxxx xxxx xxxx xxxx Therefore, although the extreme position adopted by

either party may not be correct and although Agreement dated 7.9.1983 may be an agreement by which the defendant No. 1 granted certain rights to the plaintiff, the fact remains that the parties acted with the understanding that without signing an individual agreement in respect of each book, it was not possible to work out 1983 Agreement. It is because in these individual agreements parties have agreed upon various other terms and conditions on which each book in which copyright is given by such specific agreement is to be printed, published and sold. The parties had adopted this course of action for number of years. Therefore, there may be some force in the argument of the defendants that parties contemplated separate agreements whereby detailed terms and conditions on which each book is to be published were to be agreed upon.

xxxx xxxx xxxx xxxx No doubt the court would look into the "comparative strength" of the case of each party in a matter like this. However, there is a dispute as to how the Agreement dated 7.9.1983 was to be worked out. Taking into consideration the conduct of the parties and particularly the fact that individual agreements were entered into, the defense of the defendants seems plausible and cannot be brushed aside lightly. The matter would be thrashed out in evidence. Thus one can approach the issue after taking into consideration the admitted position that has emerged.

Undisputed fact is that Defendant No. 1 is the owner of the publications in question in which the plaintiff is seeking to claim copyright without any individual agreements having been entered into. Therefore, it is the case of owner versus so called assignee of the copyright. Since title of the defendant No. 1 is not in dispute and on the other hand copyright of the plaintiff in such publications is in dispute, the grant of ad interim injunction in favor of the plaintiff at this stage would mean decreeing the suit itself. When this is seen in the context that in the past, parties have entered into specific agreements in respect of each book and it is only on the strength of such specific agreements that the plaintiff was able to publish and print the books, can the plaintiff be granted injunction of the nature prayed for ? Answer has to be in the negative. Grant of such an injunction would mean restraining the defendant NO.1 from getting its books printed, sold etc. through any other person except the plaintiff. In other words that would mean mandating the defendant No. 1 to enter into specific agreements in respect of each such book with the plaintiff thereby allowing the plaintiff alone to publish, print and sell such books. Unless the parties are at ad idem and are able to agree upon various terms and conditions on which specific agreements are entered into between the parties in the past, such a mandatory injunction cannot be issued by the Court at this interlocutory stage. Even the court cannot suggest the terms and conditions on which a specific agreement is to be entered. It is for the parties to agree upon such terms and conditions.

The interest of the plaintiff can be adequately safeguarded by imposing certain conditions upon the defendant No. 1 relating to maintenance of accounts etc. The

balance of convenience is also, Therefore, in favor of the defendant No. 1. What would be the position if ultimately court comes to the conclusion that Agreement dated 7.9.1983 could not be enforced without specific agreements and the suit of the plaintiff is dismissed? Grant of injunction at this stage, if the suit of the plaintiff is ultimately dismissed, would cause an irreversible situation for the defendant No. 1. On the other hand if the plaintiff ultimately succeeds the plaintiff shall be adequately compensated and order to that effect can be passed. The defendant No. 1 being the owner of the publications in question and plaintiff's rights are under cloud, even on the touchstone of "comparative strength" of the case, it is the defendant No. 1 who would succeed insofar as question of interim injunction is concerned.

xxxx xxxx xxxx xxxx xxxx In view of the aforesaid discussion relating to Agreement dated 7.9.1983, it cannot be said that it is a case where no rights have accrued in favor of Indian company in respect of the publications already undertaken. The entire thrust in the application is that Agreement dated 7.9.1983 was only in the nature of a Memorandum of Understanding and in any case null and void being against the public policy etc. It is already observed hereinabove that prima facie these contentions of the foreign company are not valid. Therefore, it would not be appropriate to grant them any injunction of the aforesaid nature in favor of foreign company as well. The Indian company had printed/ published various books not only on the basis of Agreement dated 7.9.1983 but also when the foreign company had signed individual agreement in respect of these book. It may also be mentioned that the Indian company was incorporated in collaboration with the foreign company which is also having 30% stakes in this company. If the injunction of the nature sought for by the foreign company is granted at this stage, it would sound death knell to the Indian company. Therefore, even the balance of convenience is in favor of Indian company. Accordingly this application is also dismissed. However, the Indian company shall also be bound by the conditions imposed upon foreign company, namely, it would file statement of account in respect of sales made by it in this Court from time to time and deposit 10% of the sale amount in respect of these publications in this Court. This amount shall be kept in a fixed deposit by the Registry in the name of Registrar General of this Court.

14. Dr Singhvi then sought to establish the purported fraud that was played by the defendant No. 1 with regard to the 35 titles. He referred to the letter dated 29.03.2002 written by the defendant No. 1 to the plaintiff enclosing the royalty payment of US\$241,438.82 for the fiscal year ending 31.03.2001. It was contended by Dr Singhvi that the royalty payment did not include 35 titles in respect of which, also, the plaintiff was entitled to receive royalty. He submitted that for the next year also, i.e., 31.03.2002, the position was the same. Dr Singhvi referred to the letter dated 01.07.2003 received by the plaintiff from the defendant No. 3 (Allied Publishers Pvt Ltd) who were the distributors of books. The letter essentially enclosed details of the purchases of titles from the defendant No. 1. The list enclosed with the letter showed a number of titles

which were not included in the list annexed to the royalty letters of 2001 and 2002. As an example, Dr Singhvi referred to the title "Social Psychology" authored by Baron which was mentioned in the list supplied by the defendant No. 3 and did not find mention in the royalty list for the year 2001-2002 supplied by the defendant No. 1. Dr Singhvi then referred to para 6 of the affidavit of the defendant No. 2 filed on 16.07.2003 wherein, according to Dr Singhvi, the non-mention of these titles is admitted, though the excuse of the titles being out of print, etc. was taken. He also referred to the reply filed on behalf of the defendants 1 and 2 to this is (IA No. 7129/2003) wherein, in paragraphs 12 to 16, according to Dr Singhvi, the defendants have virtually admitted the fact that the books were sold but the royalty was not remitted for the aforesaid titles. It is also mentioned in para 16 that the defendant No. 1 was, now, remitting the royalty in respect of the titles and was also clearing up the shortfall in the advance royalty. It was also explained in paragraph 16 that for some titles, no royalty was payable and others were out of print.

15. It was submitted by Dr Singhvi that it was because of this breach of trust and / or dishonesty on the part of the defendant No. 1 that the plaintiff was compelled to issue the letter of termination dated 14.07.2003 terminating the agreement of 07.09.1983 without prejudice to the plaintiff's contention that the purported agreement dated 07.09.1983 was never intended to nor had been acted upon. In the termination letter dated 14.07.2003, the issue of the royalty not being paid in respect of a number of titles was specifically mentioned in para 4 thereof. In para 5, it was contended by the plaintiff that the defendant had deliberately suppressed and concealed the details of the said titles for co-lateral considerations with ulterior motives and for unjust gain which deprived the plaintiff of royalty payments to which they were entitled. According to the plaintiff, this constituted a breach of the terms and conditions of the purported agreement dated 07.09.1983. According to the plaintiff, the alleged acts of impropriety on the part of the defendant No. 1 smacked of dishonesty and deception and had shattered the basis of the relationship which was built upon mutual trust and good faith. According to the plaintiff, this constituted a fundamental breach which went to the root of the matter and was incapable of being remedied and accordingly, there was no necessity to issue a 30 days notice for remedying the breach.

16. Dr Singhvi referred to the provisions of Section 14 of the Specific Relief Act, 1963 to indicate that the agreement dated 07.09.1983 was, in any event, a contract which could not be specifically enforced being one which in its nature was determinable inasmuch as it contained a termination clause. He also referred to Sections 15 and 16 of the Specific Relief Act, 1963 to point out that the non-grant of an injunction and / or interim relief in favor of the plaintiff would amount to permitting specific performance of the purported contract dated 07.09.1983 when the defendant No. 1 was not so entitled in law.

17. Dr Singhvi then referred to the decision of a learned single Judge of this

Court in the case of Vidya Securities Ltd. Vs. Comfort Living Hotels Pvt. Ltd., to demonstrate that in cases of terminable contracts, no specific performance can be permitted and that where a terminable contract is wrongfully terminated, the remedy would not be of specific performance, but of adequately compensating the aggrieved party in terms of money. A reference to the Supreme Court decision in the case of Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, was also made by Dr Singhvi. In para 12 of the said decision, the Supreme Court observed that a distributorship agreement which had been terminated and which by its nature was terminable could not be specifically enforced and even if the finding was that the breach was committed by the party terminating the contract, the relief of restoration of the distributorship could not be granted in view of the provisions of Section 14(1) of the Specific Relief Act, 1963. Dr Singhvi referred to para 14 of the said decision to indicate that where the termination clause required a 30 days notice period and that had not been complied with, at best, the aggrieved party could be compensated for loss of earnings for the notice period. Para 14 of the said decision reads as under:

14. The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under Clause 27 of the agreement. No doubt, the notice of termination of distributorship dated March 11, 1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the appellant-Corporation; and such acts would permit exercise of the right of termination of distributorship under Clause 27. However, the arbitrator having held that Clause 27 was not available to the appellant-Corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revocable by either party in accordance with Clause 28 by giving 30 days" notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, Therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship. The award has, Therefore, to be modified accordingly. The compensation for 30 days notice period from march 11, 1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil Corporation Ltd.

18. The decision of a Division Bench of this Court in the case of Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company, was also referred to. In para 20 of the said decision, the said Division Bench observed that even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening the events specified therein, from the very nature of the agreement which is a private commercial transaction, the same could be terminated even without any reason by serving a reasonable notice. It was further observed that at the most, in case it is ultimately found that the termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedies of the

aggrieved party would be to seek compensation for wrongful termination.

19. Commencing his arguments, Mr Sudhir Chandra, the learned senior counsel, who appeared on behalf of the defendants 1 and 2, drew my attention straightway to Section 2 (j) of the Copyright Act, 1957 which defines "exclusive license" to mean a license which confers on the licensee or on the person authorised by him, to the exclusion of all other persons, (including the owner of the copyright) any right comprised in the copyright in a work, and "exclusive license" is required to be construed accordingly. He then referred to Section 54 of the Copyright Act, 1957 to indicate that the expression "owner of a copyright", for the purposes of chapter XII would include an exclusive licensee. Section 30 of the Copyright Act, 1957 was also referred to indicate that licenses are granted by owners of the copyright. Section 17 relates to the first owner of the copyright and Section 18 relates to the assignment of the copyright. Mr Sudhir Chandra also referred to Section 30 (A) to indicate that the provisions of Section 19 (A) would, with necessary adaptations and modifications, apply in relation to a license u/s 30 in the same way as they apply in relation to assignment of a copyright in a work.

20. With this background, Mr Sudhir Chandra invited my attention to the various clauses of the purported agreement dated 07.09.1983 which have already been set out above. With reference to Clause 1, he submitted that an exclusive license for current and future books was granted by the plaintiff to the defendant No. 1. In this context, he submitted that the defendant No. 2 worked assiduously hard to build a market for the various titles. With reference to Clause 4 of the purported agreement dated 07.09.1983, Mr Sudhir Chandra submitted that these individual agreements were only for the purposes of royalty remittances. The exclusive license did not flow from these individual agreements, but from Clause 1 of the purported agreement dated 07.09.1983 which was the parent license for all titles, present and future. He referred to Clause 7 of the purported agreement dated 07.09.1983 which related to termination. He contended that termination was possible only where there was a breach of a term and condition by the defendant No. 1 and where, after notice, within 30 days thereof, the breach was not remedied by the defendant No. 1. The other ground for termination being the liquidation or insolvency of the defendant No. 1 which is not in question. Mr Sudhir Chandra submitted that reading the said termination clause, it cannot be submitted that the contract was terminable by its very nature. According to him, the contract was not terminable and only an exception had been provided and that is where the breach was not remedied within 30 days notice period. Therefore, it was submitted by Mr Sudhir Chandra that apart from the fact that the termination letter dated 14.07.2003 was illegal, the contract itself was not terminable and, Therefore, could be specifically enforced.

21. Thereafter, Mr Sudhir Chandra referred to the background and traced the history of the relationship between the parties. He submitted that in 1963, a joint venture collaboration between the plaintiff and members of the Laroia family was

entered into. The result of this relationship was the defendant No. 1 company. In 1983, the defendant No. 2, Asoke K. Ghosh was invited to take up the majority shares in the defendant No. 1 company as the Laroia wanted to withdraw. Accordingly, 67.75% of the share-holding was with the defendant No. 2 and the plaintiff held 32.25% shares in the defendant No. 1. In 1984, Prentice Hall Inc. was taken over by Gulf Western. In 1998, Pearson Education took over the controlling interest and the company's name was also changed from Prentice Hall Inc. to Pearson Education Inc. Mr Sudhir Chandra submitted that the plaintiff started importing and printing titles through third parties in India and that is why the plaintiff filed OS 716/2000 [renumbered as CS(OS) 1340/2004] claiming that the 07.09.1983 agreement was a nullity. He submitted that in the interim order passed on 10.05.2002 by Sikri, J, the prima facie view held by him was that it was not a nullity and that an injunction granted against the Indian company would sound its death knell. He referred in detail to the said order dated 10.05.2002 passed by Sikri J to submit that a prima facie view had been taken in that order that the contract dated 07.09.1983 was not opposed to public policy nor was it in restraint of the trade. With reference to Clause 4 of the agreement dated 07.09.1983, he submitted that the individual agreements were necessary for complying with the Reserve Bank of India guidelines. He submitted that the view taken by Sikri, J that the purported agreement dated 07.09.1983 was not workable without the individual agreements was only a prima facie view and that in order to strike a balance between the parties, directions were issued permitting both the plaintiff and the defendant No. 1 to publish titles in India, subject to the condition that statements of accounts would be submitted to this Court and that 10% of the sale proceeds would be deposited in this Court. According to Mr Sudhir Chandra, this is a balance which had been struck between the competing interests of the parties and ought not to be disturbed.

22. To demonstrate as to how the controversy and dispute between the parties arose, Mr Sudhir Chandra invited my attention to the letter dated 12.06.1998 written by the defendant No. 2 to Mr Steve Dowling wherein it was mentioned that Prentice Hall of India's relationship with the American management had been very good for the first 33 years of its existence and there had never been any cause of complaint. It was noted that during the last two and half years, the relationship between the Prentice Hall of India and the present management of Simon and Schuster International had been strained due to the most unreasonable and hostile attitude of the latter. In response to this letter, Mr Steve Dowling, by a letter dated 25.08.1998, indicated to the defendant No. 2 that the new Pearson Education was keen to work with him and to expand its presence in India and that he was open to discussion about the past and about how they could be more successful in the future. Further correspondence was referred to by Mr Sudhir Chandra to indicate the souring of the relationship between the defendant No. 2 and the plaintiff represented by Mr Steve Dowling. A sample of this is indicated by the following passage in the letter dated 19.07.1999 written by the defendant No. 2 to Mr Steven Dowling of the plaintiff:

Pearson Education has purchased in the USA a company which also include Prentice-Hall Inc. Just as you have taken over the assets and liabilities of the purchased company, you have also taken over the responsibility to respect the commitments and agreements entered into by the purchased company. Apparently some of your executives think that they can throw these agreements to the wind as if we are living in a world where there is no law. They show no respect to agreements that exist between Prentice-Hall Inc. and Prentice-Hall of India from the day the Indian company was formed 36 years ago.

23. In an e-mail received by the defendant No. 2 from the said Mr Steven Dowling, there is reference to the agreements of 1963 and 1983 which, according to Mr Dowling, both, seemed to contemplate individual contracts for each title for each edition. In response, the defendant No. 2 indicated that the defendants had been working for Prentice Hall Inc. since 1963, but had never been harassed in the way the plaintiff had been doing so now. It was also indicated that for most of the titles, no individual agreements were necessary and that where they were necessary, it was only for the purposes of remittance of royalty. It was lastly mentioned in the letter dated 25.08.1999 that the agreements which existed between plaintiff Hall Inc. and the defendant No. 1 be honoured with immediate effect.

24. Mr Sudhir Chandra submitted that the discernible shift in stands took place when the said Mr Steven Dowling sent a letter dated 02.11.1999 to the defendant No. 2 and the defendant No. 2 responded to the same by its letter dated 06.12.1999. The following extracts from the letter dated 02.11.1999 would be indicative of such a change in stance:

I began by stating that the goal of Pearson Education is to be a more significant participant in the Indian market. This means an increase in revenue and profits greater than we are realizing from the limited joint venture that we currently have with PHI. While the dividend income has been steady and the licensing income from PHI reprints has been increasing, we feel that we can do better with our own company and in control of our own destiny in the market.

xxxx xxxx xxxx xxxx I agreed that Pearson Education would review your requests for reprint rights for Prentice Hall Higher Education titles on a title-by-title basis. This includes any titles reprinted in the past by PHI. I stated our view that grants of reprint rights are on a title-by-title and edition -by-edition basis. There are no continuing grants of rights to reprint any titles. Each reprint of a new edition requires a new reprint license. The requests for reprint licenses in respect of identified titles and identified editions should be sent to Rosalia Garcia in Singapore with a copy to me.

xxxx xxxx xxxx xxxx Our goal is to be a full participant in the Indian market. There is great opportunity. We can do that as Pearson Education India through a fuller ownership of PHI or by establishing a new company. If we pursue the latter route, we will consider and discuss how we can work with PHI in

licensing and distribution.

The response of the defendants is exemplified by the following extracts from the letter dated 06.12.1999:

Soon after my return from Frankfurt I got a nasty shock when I discovered fresh and flagrant violations of the rights vested in Prentice-Hall of India. By now you are fully aware of the exclusive rights vested in Prentice-Hall of India to reprint, publish, import, sell, export etc. all books in respect of which Prentice Hall Inc. or any of its subsidiary or associate companies owns or may own copyright. This right of Prentice-Hall of India is a right protected by the Indian Copyright Act. Hence the violation of the agreements in this manner is not a simple breach of contract but an offence punishable under the Copyright Act. All civilized nations have similar laws based on various copyright conventions. By reprinting and importing into India Prentice-Hall PTR titles which stand "assigned" to Prentice-Hall of India you have again brought yourself in direct collision with law. Such action on the part of Pearson Education is most unbecoming, to say the least.

xxxx xxxx xxxx xxxx Your view that "there are no continuing rights" and "each reprint of a new edition requires a new reprint license" is entirely your personal view. A plain reading of our contract would clearly convey that Prentice-Hall of India has a continuing right.

25. Mr Sudhir Chandra submitted that the reliefs sought in the present suit are virtually identical to the reliefs sought by the plaintiff in its first suit-OS 716/2000 [renumbered as CS(OS)1340/2004]. Mr Sudhir Chandra referred to various provisions of the purported agreement dated 07.09.1983 and then referred to the documents indicating the payments of royalty by the defendant No. 1 to the plaintiff for the years 31.03.2001 and 31.03.2002 and also indicated the form of the Reserve Bank of India which is utilised for remittance of royalty. He then referred to the earlier suit filed by the plaintiff as well as the suit filed by the defendant. In this context, he referred to the judgment and / or order of Sikri, J passed on 10.05.2002. He drew my attention to the order passed in is No. 992/2002 in Suit No. 200/2000 [renumbered as CS(OS) 1339/2004] whereby the application filed by the defendant No. 1 was disposed of by holding that the defendant No. 1 was not entitled to an injunction at that stage and that the plaintiff herein would be entitled to get its book published through any other person, but that the arrangement would be subject to the condition that the plaintiff herein shall file complete accounts / statements of sales relating to the publications in this Court from time to time. Furthermore, the plaintiff herein was required to also include those publications which had already been undertaken by the plaintiff and particulars where of were given by the defendant. The plaintiff was also required to deposit 10% of the sale amount in respect of these publications in this Court. He also referred to the order passed in is No. 3524/2000 in OS No. 716/2000 [renumbered as CS(OS) 1340/2004]. The said is and the suit were filed on behalf of the plaintiff herein. In that application, the plaintiff sought a restraint order against the defendant No. 1 prohibiting and

restraining it from printing, etc. any book over which the plaintiff had a copyright, including the books mentioned at Annexure-F to the plaint therein other than the books over which the defendant No. 1 had a separate independent, valid and enforceable agreement in operation. In this context, Sikri, J, while disposing of that application, observed that if the injunction of the nature sought by the plaintiff was granted at that stage, it would sound the death knell of the defendant No. 1. Accordingly, that application was also dismissed and the defendant No. 1 was bound to the same conditions which were imposed on the plaintiff, of filing statements of accounts in respect of the sales made by it and of depositing 10% of the sales in this Court.

26. Mr Sudhir Chandra pointed out that the present suit was filed in a very secretive manner. He submitted that the purported termination letter is dated 14.07.2003, whereas the present suit was also filed on the same day, i.e., 14.07.2003 and the termination letter was faxed on 15.07.2003. The first hearing in the suit took place on 15.07.2003. The reliefs that are claimed in the present suit were similar to the reliefs sought in Suit No. 716/2000 [renumbered as CS(OS) 1340/2004]. The appeals in respect of the order passed by Sikri, J were directed to be listed for hearing before the Division Bench on 21.07.2003. This direction was given on 22.04.2003 prior to the issuance of termination letter. The order of 22.04.2003 passed by the Division Bench in FAO(OS) 242/2002 clearly indicates that the parties had submitted that they were in the process of settlement and the matter had been adjourned at the counsels' requests. Thus, according to Mr Sudhir Chandra, on the one hand, the plaintiff took an adjournment on the ground that the possibility of a settlement was being explored, while on the other hand, it issued the termination letter and filed the suit on the same day. Apart from this, the termination letter was itself bad because the required 30 days notice was not given to enable the defendant No. 1 to remedy the breaches, if any. Consequently, according to Mr Sudhir Chandra, the plaintiff was not entitled to any equitable remedy on account of its conduct. This is apart from the fact that ex facie the plaintiff has no case as admittedly no notice was given. The purported reason for not giving the 30 days notice was, according to Mr Sudhir Chandra, clearly bogus.

27. Mr Sudhir Chandra then referred to the Supreme Court decision in the case of M/s. Gujarat Bottling Co. Ltd. and others Vs. Coca Cola Company and others, and in particular para 46 thereof. He also submitted that Sikri, J has considered the balance of convenience and has observed that granting an injunction in favor of the plaintiff would amount to sounding the death knell of the defendant No. 1. Mr Sudhir Chandra submitted that the entire attempt of the plaintiff behind the issuance of the termination letter and the filing of the suit was designed to present the court with a fait accompli. Both the parties were already before Court and litigating and there was no occasion for the plaintiff to have surreptitiously issued the termination letter. It was also contended by Mr Sudhir Chandra that in Suit No. 200/2000 [renumbered as CS(OS) 1339/2004], an order had been passed on 31.01.2000 in the following terms:

Pending the further orders the defendant No. 1 is restrained from invoking Clause 7 of the agreement dated 7.9.1983 (Annexure-1 at pages 1-2 of the documents file) to terminate the agreement with the plaintiff.

28. Mr Sudhir Chandra submitted that this order has not been vacated by the subsequent order dated 10.05.2002 which disposed of the application for interim relief and, according to him, the order of 10.05.2002 does not supplant the order of 31.01.2000, but the former order merges into the latter order. Thus, even on this ground, the termination letter could not have been issued. Mr Sudhir Chandra submitted that the plaintiff is only interested in multiplying proceedings and complicating the issue further. He submitted that now the plaintiff has filed a fourth suit being CS(OS) 1554/2005 wherein the plaintiff has, inter alia, sought a decree for cancellation of the agreement dated 07.09.1983 and delivery of the deed to the plaintiff after cancellation. He submitted that instead of seeking an amendment under Order 6 Rule 17 of the CPC, the plaintiff is filing fresh suits and adding to the multiplicity of proceedings. Order 6 Rule 17 could have been resorted to. For this, reliance was placed on the case of Suraj Prakash Bhasin Vs. Smt. Raj Rani Bhasin and Others, . And, this, according to Mr Sudhir Chandra, clearly amounts to an abuse of the process of court. For this, Mr Sudhir Chandra placed reliance upon the decision of the case of Rajappa Hanamantha Ranoji Vs. Sri Mahadev Channabasappa and Others, . He also placed reliance on the case of K.K. Modi Vs. K.N. Modi and Others, as an instance of abuse of process of court. One of the examples cited in the said decision was re-litigation. The Supreme Court observed that it is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. It also observed that the re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the court. Mr Sudhir Chandra also placed reliance on the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), and Austin Nicholas & Co. and Anr. v. Arvind Behl and Anr: 2006 (32) PTC 133 (paragraph 69).

29. In rejoinder, Dr Singhvi submitted that the prayers in OS 716/2000 [renumbered as CS(OS) 1340/2004] and CS(OS) No. 1388/2003 (the present suit) are different. The former suit related to a stage pre-termination and the present suit relates to a stage post-termination. He submitted that the termination letter dated 14.07.2003 constituted a fresh and subsequent cause of action and entitled the plaintiff to file a fresh suit. In such a situation, according to Dr Singhvi, there is no compulsion for amending the earlier suit and a fresh suit on a subsequent cause of action could be filed. For this proposition, he referred to the decision of the Supreme Court in the case of The Haryana Co-operative Sugar Mills Ltd., Rohtak Vs. Joint Hindu Family Firm Styled as Gupta Drum Supply Company, Sujanbai Haribhau Kakde and Others Vs. Motiram Gopal Saraf and Another, and Hindu Religious Endowments and Others Vs. B. Samitra and Others, . He also submitted that CS(OS) 1554/2005 was also in respect of a separate cause of action and in that suit the prayer was for cancellation of the

agreement dated 07.09.1983.

30. He further submitted that the order dated 31.01.2000 which was an interim order against termination passed in OS No. 200/2000 [renumbered as CS(OS) 1339/2004] does not survive any more inasmuch as after the passing of the final order on 10.05.2002, the same stood merged therewith. He referred to the Supreme Court decision in the case of National Bal Bhawan and Another v. Union of India and Ors. : (2003)9SCC671 for the purposes of demonstrating the doctrine of merger. With respect to the balance of convenience argument raised by the defendant to the effect that, if the reliefs prayed for by the plaintiff are granted at this interim stage, it would sound the "death knell" of the defendant company, Dr Singhvi submitted that this is a mere false alarm. He submitted that 60% of the revenues that are received by the defendant company are from non-Pearson titles and, Therefore, there is no question of raising the "death knell" argument. He submitted that, in any event, after May, 2002, there was no individual agreement subsisting.

31. With regard to the argument of exclusivity under the agreement dated 07.09.1983, Dr Singhvi submitted that this exclusivity has not even been sustained by the order dated 10.05.2002 because it permits both the plaintiff and the defendant to publish titles in India. He also submitted that the reference to Section 2 (j) of the Copyright Act, 1957 for the purposes of defining the expression "exclusive license" can only be used for explaining the said expression wherever it is used in the Act. It is so used in Sections 54, 55, 56 and 61. He submitted that the copyright does not vest in the licensee as it is not a case of assignment. Sections 18 and 19 of the said Act related to assignees but, that, is not where the expression "exclusive license" is used. He further submitted that the individual agreements that were entered into between the parties cannot be regarded as progeny of the purported parent agreement dated 07.09.1983. This is so because the individual agreements were at variance with the general agreement of 07.09.1983. He submitted that the relationship of the parties are governed in respect of the different titles of books on the basis of the individual agreements that had been entered into between them. They were stand-alone agreements which have expired and he submitted that, in any event, the owner can always terminate a license even if it is an exclusive license. He further submitted that the licenses were terminable.

32. As mentioned at the beginning of this judgment, the key issues that have been raised are whether the agreement dated 07.09.1983 was in existence ? If yes, whether the same had been validly terminated by the letter of 14.07.2003 ? If the termination was bad in law, would the defendants only be entitled to damages ? The issue with regard to the existence and / or validity of the agreement dated 07.09.1983 was before this Court when the said order dated 10.05.2002 was passed by Sikri, J. Therefore, it would not be appropriate for this Court to venture into that arena. The only thing that has happened after the passing of the order dated 10.05.2002 is the issuance of the letter dated

14.07.2003 invoking Clause 7 of the purported agreement dated 07.09.1983. It has been contended by the plaintiff that the agreement dated 07.09.1983 was a terminable contract and, Therefore, no specific performance could be permitted of the same. And, if the defendants were aggrieved by the termination, they could claim damages only. However, it must be remembered that it is not the defendants who have filed the present suit, but it is the plaintiff who, after purportedly terminating the agreement dated 07.09.1983, is claiming an injunction on the basis of such termination. The defendants have not approached this Court seeking specific performance of the contract. The decision in Vidya Securities Ltd (supra) would, Therefore, not be applicable. As regards the decision in Indian Oil Corporation Ltd (supra), it must be noted that in that case, though the distributorship was terminated, the termination clause itself permitted termination of the contract by either party on giving 30 days notice. It was an admitted case of a terminable contract and terminable at the instance of either party. Para 14 of the said decision which has been extracted earlier in this judgment clearly indicates this. In the present case, it is disputed as to whether the contract dated 07.09.1983 was a terminable contract at all. It has been contended that this contract was not terminable and only two exceptions have been provided in Clause 7 of the agreement dated 07.09.1983. The exception of insolvency or liquidation of the defendant is not in issue and, Therefore, does not call for any consideration. The other exception is that the plaintiff was required to issue a written notice of 30 days requiring the defendants to remedy any breaches. In case the breaches were not remedied during the notice period, only then was it open to the plaintiff to terminate the same. It was contended by Mr Sudhir Chandra that this was the only exception which permits the contract to be terminated. Otherwise, the contract was not terminable by its own terms. To my mind, the issue as to whether the agreement dated 07.09.1983 was or was not a terminable contract is a debatable one which need not be determined at this stage. Consequently, the issue of whether the defendant is only entitled to damages or not is also not in issue at this stage because, firstly, the present suit is one of injunction at the instance of the plaintiff and is not a suit for specific performance at the instance of the defendant. Secondly, the question of any damages, if at all, would arise only at the final stage of the suit and cannot be determined at this interim stage. Therefore, the decision in Rajasthan Breweries Ltd (supra) would also not be applicable at this stage.

33. As pointed out in Gujarat Bottling Company Ltd (supra) the grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring exercise of discretion of the court. It has also been pointed out that while exercising discretion, the court is required to apply the following tests:

- i) Whether the plaintiff has a prima facie case;
- ii) Whether the balance of convenience is in favor of the plaintiff;
- iii) Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

It was pointed out that the decision whether or not to grant interlocutory injunction has to be taken at a time when the existence of a legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before the uncertainty could be resolved. The Supreme Court also pointed out that the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. It was, however, pointed out that the need for such protection has to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the balance of convenience lies. Considering the present case in this context, one finds that the plaintiff does not have a clear-cut prima facie case of a valid termination of the agreement dated 07.09.1983. Clearly, the purported termination does not comply strictly with the provisions of Clause 7 of the agreement inasmuch as no written notice of 30 days has been issued. The plaintiff claims that issuance of such a notice would be a redundancy in view of its understanding that the alleged breach was of such a nature that it could not be remedied. But this so-called redundancy has to be established on evidence in the trial. It cannot, at this stage, be accepted that the plaintiff was entitled to give a go-bye to the requirement of issuing the said written notice.

34. As regards the question of balance of convenience, the same has to be considered by weighing the needs of the plaintiff against the needs of the defendants. If the injunction that the plaintiff is seeking is granted at this stage, it would amount to virtually decreeing the suit and setting at naught the arrangement that has been determined by Sikri, J in his order dated 10.05.2002. It would, in my view, completely disturb the balance that has been achieved by that order and would permit the plaintiff to do something which was not allowed by this Court earlier.

35. There is another aspect of the matter and that is that on 31.01.2000, as indicated above, an order had been passed in Suit No. 200/2000 [renumbered as CS(OS) 1339/2004] to the effect that pending further orders, the plaintiff was restrained from invoking Clause 7 of the agreement dated 07.09.1983 to terminate the agreement with the defendant No. 1. According to Dr Singhvi, this order has merged with the order dated 10.05.2002 and, Therefore, no longer exists. However, according to Mr Sudhir Chandra, this order, though it has merged with the order dated 10.05.2002 has not been supplanted by it. Dr Singhvi had relied upon the decision of the Supreme Court in the case of National Bal Bhawan (supra) to indicate that once a writ petition is finally disposed of by the High Court, any interim order passed in the pending writ petition merges with the final order. Unfortunately, in this case, the suit has not yet been

disposed of and only interim orders have been passed. The question would still remain as to whether the interim order passed on 31.01.2000 has been supplanted by the interim order passed on 10.05.2002 in its entirety. As observed by the Supreme Court in *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, , the juristic justification of the doctrine of merger may be sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. It is in this context that the Supreme Court observed that the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. The Supreme Court further observed that in other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court. In the present case, it could be argued that the fields covered by the order dated 31.01.2000 and that by the order dated 10.05.2002 are different and, Therefore, the latter order did not supplant the former. That of course, is also a debatable issue.

36. Therefore, the crux of the issue in this application is the course of action to be adopted in view of the purported termination on 14.07.2003 of the agreement dated 07.09.1983. This by itself does not pose much difficulty. However, this issue cannot be considered in a vacuum and has to be considered in the background of the other suits filed by the parties and particularly the said order dated 10.05.2002 passed therein as an interim arrangement. I have referred to the arguments advanced by the counsel for the plaintiff and the defendants in great detail so as to demonstrate the internecine battle that is raging between the plaintiff and the defendants. All issues prior to the purported termination letter dated 14.07.2003 have already received the attention of this Court and have culminated in the order dated 10.05.2002 passed by Sikri, J. That order is also the subject matter of Letters Patent Appeals, as mentioned above. The circumstances in which the order was passed and the order itself indicates that the matter of dispute between the parties lies in a critical balance. Which way the balance tilts can only be determined after the conclusion of the trial in the suits. Therefore, I feel that at this stage, this balance ought not to be disturbed by passing any order of injunction in favor of the plaintiff. Because if such an order were to be passed, it would definitely impinge upon the earlier order passed on 10.05.2002 in the other suits. It is not as if the suits are unrelated. The entire litigation between the parties which has resulted, so far, in the filing of four suits has formed an intricate web which, to my mind, can only be resolved after evidence is led and the suits are concluded.

37. For the aforesaid reasons, I dismiss this application.