

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 13.04.2009
Date of Order: 15th April, 2009

OMP No. 190/2009

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15.4.2009

M/s. Pacific Greens Infracon Pvt. Ltd. ... Petitioner

Through: Mr. Harish Malhotra, Sr. Adv. with
Ms. Tania Sharma, Adv.

Versus

M/s. Senior Builders Ltd. ... Respondent

Through: Mr. Sanjay Goswami & Mr. H.K. Balaji, Adv.

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the reporter or not? Yes.
3. Whether judgment should be reported in Digest? Yes.

JUDGMENT

By this application under Section 9 of the Arbitration & Conciliation Act, 1996 the petitioner has prayed to the Court that the Court should restrain respondent from selling, transferring, disposing of or alienating or creating any third party interest with respect of 50,000 sq. feet of area in a Mall named as Senior Destination Mall/Senior Mall. The Court should restrain respondent from interfering into the rights of the petitioner in selling/marketing or dealing with

50,000 sq. feet of area in the aforesaid Mall and the Court should stay the operation of letter dated 18.2.2009 issued by respondent terminating the Joint Venture Agreement. It is also submitted that the respondent in advertisements termed the mall as 'Senior Mall' while under the Joint Venture Agreement it was to be named as 'Senior Destination Mall'.

2 Brief facts relevant for the purpose of deciding this application are that the petitioner entered into a Joint Venture Agreement with the respondent on 28.2.2007 whereas the respondent had entered into a Collaboration Agreement dated 16.4.2003 with one Mr. Amar Singh for development and construction of a multi storey commercial building in Gurgaon on a plot of land measuring 6600 sq. yards. Under the Collaboration Agreement respondent was to receive 60% of the built up commercial area and Mr. Amar Singh was to have 40%. In respect of its rights over 60% area, the respondent entered into a Joint Venture Agreement with the petitioner and the petitioner was to get right of selling for around 50,000 sq. feet unsold space within the 60% share of the respondent and in turn the petitioner was to infuse funds to the tune of around Rs.15 crore. The petitioner had paid around Rs.1 crore on 29.1.2007 and Rs.50 lac on the date of execution of Joint Venture Agreement i.e. 28.2.2007. The petitioner had booked part of the space with Indiabulls and an amount of Rs.60 lac was paid by Indiabulls to respondent. It is thus stated that it had already invested Rs.2.1 crore into the

Joint Venture Agreement and the respondent has wrongfully terminated the Joint Venture Agreement by its letter dated 18.2.2009.

3. The respondent in this case had filed a caveat and appeared in the case and as agreed between the parties the arguments on the matter have been heard. Respondent chose not to file any reply. The issue of jurisdiction has been raised by the respondent apart from the other issues, since the property in question is situated outside the jurisdiction of the court.

4. Counsel for the petitioner submitted that this Court would have jurisdiction in view of arbitration clause entered into between the parties and the fact that the contract between the parties was signed at Delhi. Both the parties are having their offices and business in Delhi. The Arbitration clause between the parties reads as under:

23. That is case any disputes or differences arise between the parties to the present agreement the same shall be referred to the members of the Committee who shall in case of any tie between them appoint an umpire to decided the said disputes and differences by majority. The progress of work at site however shall not be stopped even in case of any disputes between the parties. The provisions of Indian Arbitration and Conciliation Act, 1996, to the extent applicable shall govern the working of the said Committee of question of any disputes which may arise. The Courts at New Delhi shall have the sole jurisdiction over the matter.

5. Under the Arbitration Act, the parties are at liberty to chose as to who will be the Arbitrator to adjudicate the disputes for them, what will be the

place of arbitration. There is no restriction on the parties in choosing these two factors i.e. Arbitrator and the place of arbitration and the parties can even chose what will be the law applicable. If one party is the Indian Party and the other is the foreign party, the parties can chose whether the Indian law will be applicable or the foreign law will be applicable. But the parties cannot by mutual consent confer jurisdiction on a Court which otherwise does not have jurisdiction. Merely because the parties have chosen the place of arbitration as Mumbai, Chennai, Delhi or Kolkata, it would not mean that the Courts at Mumbai, Chennai, Delhi or Kolkata will have jurisdiction in respect of application filed under Section 9. In order to decide an application under Section 9, the Court where application is made must have jurisdiction taking into account the subject matter of the application. Section 2(1)(e) read with Section 9 of the Arbitration Act makes it clear that in order to have jurisdiction to decide an application under Section 9, the Court entertaining the application should be the Court which has power to entertain the suit on the facts as mentioned in the application under Section 9, and the Court is competent to give relief in a suit. In the present case, the petitioner wants this Court to give relief to the petitioner in respect of 50,000 sq. feet of area situated in a Mall at Gurgaon. The relief sought by the petitioner that this Court should restrain respondent from selling, transferring or creating any third party interest in 50,000 sq. feet area of immovable property situated in Gurgaon and this Court should restrain respondent from interfering into the petitioner's right of selling this 50,000 sq. feet of area is in respect of immovable

property in Gurgaon. I consider that this Court would have no territorial jurisdiction since the subject matter of the suit is immovable property and this immovable property is situated outside the jurisdiction of this Court. The petitioner however relied on *Jatinder Nath v. M/s Chopra Land Developers Pvt. Ltd. & Anr.* JT 2007(4) SC 300 wherein Supreme Court had held as under:

We are of the view that at the relevant time the appellant resided at Faridabad. He resided at Faridabad when the contract was made. Under the contract, the parties agreed to refer all disputes to the Faridabad court. Apart for the residence, we are also concerned with the place of accrual of the cause of action. In the present case, a bare reading of the agreement indicates that it is an agreement of developer. The appellant remains the owner, the Developer remains the contractor. The Developer is the financier. The appellant is the owner of an asset. The contractor/ Developer agrees to exploit that asset on behalf of the owner. The Developer funds the scheme. The building plans remained in the name of the owner. The DDA inform the owner regarding revocation of the building plan. The owner files the writ petition challenging the revocation. The contractor is paid consideration in terms of a part of the property. In the circumstances, it cannot be said that this case is similar to a suit for land. One cannot look at para 16 alone in isolation. On the other hand, with open eyes, the parties had entered into the contract, they had agreed to refer all disputes to an arbitrator at Faridabad and they had agreed that the Faridabad court alone shall have jurisdiction. In a matter of this kind, it cannot be said that the claim is similar to a suit for land. A housing complex has to be constructed at the site. When dispute arises, it will not be confined only to immovable property. Such disputes also require accounts to be maintained. The disputes also involve rendition of accounts. In the circumstances, in our view, section 20 CPC alone is attracted. Therefore, in our view, the High Court was right in holding that the Faridabad court had jurisdiction to make the Award the rule of the Court.

6. I consider that this judgment is of no help to the petitioner. In this case, the issue involved before the Supreme Court was whether the Civil Court at Faridabad had jurisdiction to entertain a petition under Section 14 of Arbitration Act, 1940 or not. In the present case, the issue is whether this Court should issue an injunction order under Section 9 in respect of the property situated in Gurgaon. The Counsel for the petitioner submitted that the relief sought by the petitioner was such which could be made effective by personal obedience of the respondent and this Court will have jurisdiction in view of proviso to Section 16 of CPC. In *Harshad Chiman Lal Modi v. DLF Universal Ltd. & Anr.* (2005) 7 SCC 791 Supreme Court had observed that the Court within whose territorial jurisdiction the property is not situate has no power to deal with the and decide rights or interest in such property. A court has no jurisdiction over a dispute in which it cannot give an effective judgment. The proviso to Section 16 no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief *in rem* still it can entertain a suit where relief sought can be obtained through the person obedience of the defendant. The proviso is based on a well-known maxim "equity acts in personam". The principle on which the maxim is based is that the courts can grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam i.e. by arrest of the defendant or by attachment of his property. The proviso to Section 16 is an exception to the main part of the section which cannot be interpreted or construed to enlarge the scope of the principal provision. It

would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant. In the present case an injunction is sought for commercial space of 50,000 sq. feet in a Mall in Gurgaon against sale of this space and against interference of respondent in sale of this space by the petitioner. I consider that it is not a case which is covered under proviso to Section 16 of CPC, it is a case where the interference of the Court is sought in respect of property situated outside the jurisdiction of Court. I find no reason to entertain this application.

7. I, even otherwise, find that no ground is made out for grant of interim injunction as prayed by the petitioner. The petitioner had entered into an commercial agreement with the respondent, the contract has been terminated by the respondent after a long correspondence between the parties. Under the contract/Joint Venture Agreement, the petitioner was to infuse funds to the tune of Rs.15 crore and in lieu thereof petitioner was entitled to reimbursement of these funds provided by it for the project and a return on this investment of funds in the form of 19% of the sale proceeds of 50,000 sq. feet of the commercial space. If, because of termination of contract, the petitioner is aggrieved, the petitioner can always claim damages from the respondent. The petitioner has so far invested Rs.2.1 crore and by the notice the respondent has asked the petitioner to provide true and proper accounts of the dealings done by the

petitioner in respect of marketing and sale of area put at its disposal. The petitioner can always claim damages, if any loss is suffered by the petitioner. No injunction can be issued against the respondent because of termination of contract from selling commercial area or from entering into any contract in respect of commercial area.

The petition is hereby dismissed.

April 15, 2009
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SHIV NARAYAN DHINGRA, J.