

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

+ FAO(OS) 243/2009 & CM No. 8399/2009

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Reserved on: 10th July, 2009

Pronounced on: 13th July, 2009

VIJAY KUMAR AGARWAL & ORS

..... Appellants

Through: Mr. Jayant Bhushan,
Senior Advocate with
Mr. Shabyashachi
Petra, Advocate.

versus

SANDEEP MATHUR & ORS.

..... Respondents

Through: Mr. Sanjeev Puri,
Senior Advocate with
Mr. Gyaltsen
Barfungpa, Advocate.

Mr. Rakesh Pathak,
Advocate for
Respondent No. 3.

Mr. Sandeep Bhuraria,
Advocate for
Respondent No. 4.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether the Reporters of the local newspapers be allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

J U D G M E N T

NEERAJ KISHAN KAUL, J.

1. This appeal has been filed against the order of the learned Single Judge dated 25th May, 2009.

Briefly the facts of the case are as follows:-

2. The respondents were the shareholders in the appellant No. 5 having 30% shares in the company. The other shareholders of the company were the appellants No. 1 to 4. The respondents started their own company while they were working as Directors of the appellant company which resulted into disputes between the appellants and the respondents and ultimately a Memorandum of Understanding (for short 'MOU') was signed between the parties whereby the respondents agreed to sell their shares to the appellants. The payment of the value of equity shares was to be done in a phased manner. A detailed list of recoverable dues was attached with the MOU. There were certain projects of the appellant company under which the likely dates of completion of these projects were mentioned in the MOU and it was provided that the respondents shall continue to assist appellant No.5 in the business and completion of these projects and ensure smooth

takeover and smooth implementation of the MOU.

3. The respondents being Directors of the company had given collateral security to Canara Bank, bankers of the appellant No.5 company, for securing CC Limit. It was agreed between the parties that after signing the MOU, the appellant shall not exceed the sanctioned CC Limit till release of the collateral securities given by the respondent of their personal properties and the bank would be advised not to take recourse to the collateral securities before taking recourse to other securities provided by the company to the bank and the respondent will be indemnified by the appellants against the use of collateral securities/ personal guarantees by the bank. The appellant was to initiate proceedings of getting collateral securities released from the bank within 45 days of signing of the MOU. In case of delay in releasing of the security beyond 90 days of the MOU, it would be the responsibility of the appellants to give equivalent FDRs to the bank and get the collateral

securities of the respondents released immediately.

4. After signing of the MOU, disputes arose between the parties in respect of its implementation and on other aspects and the parties exchanged correspondence through e-mails. The appellants invoked the arbitration clause vide letter dated 3rd October 2008. We are informed that an Arbitrator has been appointed by the Court to adjudicate the disputes between the parties. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short the 'Act') was filed by the respondents in which the impugned order was passed. The respondents *inter alia* in the said petition prayed that the appellants be directed to release the collateral security of the respondents lying with the bank by substituting it with a fixed deposit as per the terms of the MOU. Various other prayers were also made in the said petition.

5. The appellants and the respondents have both

made allegations and counter-allegations accusing each other of having violated the terms of the MOU and of having not acted in accordance with the MOU. It was also submitted by the appellants before the learned Single Judge that they had requested the bank to release the collateral security and accept alternate securities given by the appellants, however, the bank verbally expressed its inability to release the collateral security provided by the respondents since the respondents continued to be the Directors on the Board of the appellant company. It was submitted on behalf of the appellants that under these circumstances, the collateral security of the respondents was not released by the bank. The learned Single Judge has rightly held that it was apparent from the MOU and from the correspondence between the parties that the appellants had not fulfilled their obligation of getting collateral securities of the respondents released in a time bound manner as provided in the MOU. The plea of the appellants

that the bank had refused to accept other collateral securities was rightly found by the learned Single Judge to be not convincing. We are in agreement with the reasoning of the learned Single Judge that the bank is only concerned with the collateral security irrespective of whether the property belonged to the appellants or to the respondents. The bank could have no reason to reject the alternate collateral securities. In any case, the appellants were to furnish the FDRs to the bank in the event of delay in release of the collateral securities beyond 90 days.

6. The learned Single Judge thus in para-6 of the impugned order has held as follows:-

“6. The petitioners, therefore, have a good prima facie case in respect of directions for collateral securities. However, no directions can be given in respect of other prayers made by the petitioners. The matter is already before the arbitrator and the petitioners can make appropriate application before the Arbitrator. Regarding collateral security, respondents are directed to take steps for substitution of the

security given by the petitioners with the respondent No.7 bank within 15 days from today and the collateral security be got released from the bank within 15 days from today, either by furnishing alternative collateral security or by giving a Fixed Deposit. It is also directed that till collateral securities of the petitioner are not released and the Arbitrator does not give final award, the respondents are directed not to sale the land and buildings of the respondent No.5 Company.”

7. It is contended by the learned senior counsel Shri Jayant Bhushan appearing on behalf of the appellants that though the learned Single Judge had categorically held that respondents had a good *prima facie* case in respect of the directions for collateral securities, however, no directions could be given in respect of other prayers made by the respondents and yet the learned Single Judge in the impugned order had apart from directing the appellants to furnish the alternate collateral security also directed the appellants not to sell the land and buildings of

the appellant No. 5 company till the collateral securities of the respondents were released and the Arbitrator gave a final award. The learned Senior counsel for the appellants submitted that the learned Single Judge could have directed the appellant No. 5 company not to sell the land and buildings till the collateral securities were released, however, the learned Single Judge clearly fell into error by directing that appellant No. 5 could not sell its land and building till the Arbitrator gave its final award. It was also the contention of the learned Senior counsel for the appellants that the stay against the sale of land and buildings went contrary to the earlier part of the impugned order wherein the learned Single Judge had held that the respondents had a good *prima facie* case in respect of the directions for collateral securities, however, no directions could be given in respect of other prayers made by the respondents.

8. Per contra it was argued on behalf of the respondents that large sums were owed by the

appellants to the respondents under the MOU and that the appellants were in clear breach of the terms and conditions of the MOU. As per the learned Senior counsel Shri Sanjeev Puri appearing for the respondents, the learned Single Judge had granted the stay against sale of land and buildings of appellant No. 5 company in order to protect the claims of the respondents as in case these were sold by the appellants, the respondents would have no means to recover the outstandings in case they were to succeed in the arbitration.

9. We are not inclined to interfere with the findings of the learned Single Judge and are in complete agreement with the same. Accordingly, the appellants are directed to furnish either an alternative collateral security or give a fixed deposit within 15 days from today to the respondent No. 3 bank and get the collateral security of the respondents released from the respondent No. 3 bank within 15 days from today. However, there is some

merit in the submissions made by the learned Senior counsel appearing for the appellants that the earlier finding of the learned Single Judge in para-6 of the impugned order that no directions could be given in respect of the other prayers made by the respondents could not be reconciled with the later direction in the same paragraph given by the learned Single Judge directing the appellant No. 5 not to sell its land and buildings till the Arbitrator gave his final award. The learned Senior counsel appearing for the appellants fairly stated that he had no objection if this stay against sale of land and buildings was to continue till the collateral security or fixed deposit was furnished by the appellants to the respondent No. 3 bank and the property of the respondents was released from the bank. However, as per him, the stay against sale of land and buildings of appellant No. 5 company, till the Arbitrator gave his final award, would be unjust and inequitable as also contrary to the learned Single Judge's own observation made in the impugned order

that no directions could be given in respect of other prayers made by the respondents.

10. After considering all aspects of the matter, we are of the view that the order of the learned Single Judge warrants no interference except for the modification to the limited extent that the stay against sale of land and buildings of the appellant No. 5 company will continue till the appellants furnish the collateral security/fixed deposit to the respondent No. 3 bank and get the collateral security of the respondents released from the bank. Thereafter the stay on sale of land and buildings of the appellant No. 5 company will only continue till the respondent moves an appropriate application in accordance with law before the appropriate Forum seeking such a prayer and it will be open to the Arbitrator or the Court, whichever is seized of the matter to vary, affirm or modify the stay against sale of land and buildings of the appellant No. 5 company. It is also made clear that the appropriate application will be

moved for grant of stay against sale of land and buildings of appellant No. 5 company by the respondents within 15 days from today. In case such an application is moved by the respondents the same will be decided and disposed of expeditiously and preferably within a period of six weeks from the date of filing of the application. It is further clarified that in any case the stay against sale of land and buildings of the appellant No. 5 company will continue till the appellants furnish alternate collateral security/fixed deposit to the respondent No. 3 bank and get the collateral security of the respondents released from the bank.

11. The appeal stands disposed of in the above mentioned terms. The pending application also stands disposed of.

NEERAJ KISHAN KAUL, J.

MUKUL MUDGAL, J.

JULY 13, 2009/sb