

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

ARBITRATION APPEAL NO.: 6 OF 2015

Tapadiya Construction Ltd.,
A Public Limited Company,
Having its office at
Tapadia Terraces, Adalat Road,
Aurangabad,
Through its Director,
Jugalkishor Chhaganlal Tapadia

... **APPELLANT**

VERSUS

- 1) Sanjay Suganchand Kasliwal,
Age: 45 years, Occ: Business,
R/o: 215/216, Apna Bazar,
Jalna Road, Aurangabad.
- 2) Jugalkishor Chhaganlal Tapadia,

Age: 60 years, Occu: Business,
R/o. Gapadia Terraces, Adalat Road,
Aurangabad.

... **RESPONDENTS**

Advocate for Appellant : Mr. Bajaj Anil S.
Advocate for Respondent No.1: Mr. P. M. Shah, Senior
Counsel with Mr. S. V. Advant.
Advocate for Respondent No.2: Mr. R. F. Totala with Mr. S.
A. Nirbar.

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CORAM:-
DATED:-

T. V. NALAWADE, J.
3rd DECEMBER, 2015.

JUDGMENT:

1. Appeal is admitted.

2. Notice after admission, made returnable forthwith. By consent, heard both the sides for final disposal.

3. The Appeal is filed under section 37 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as the Act] against the judgment and order of Miscellaneous Application numbered as M.A.R.J.I. No.198 of 2014 which was pending in the Court of Principal District Judge, Parbhani. The said proceeding was filed by present Respondent No.1 Sanjay Kasliwal under section 9 of the Act against present Appellant, which is a public limited company and Respondent No.2 Jugalkishor Tapadia. The learned Principal District Judge has granted relief of injunction against the Appellant and Respondent No.2 to prevent them from alienating in any way, immovable property of Appellant company situated in Hingoli, District Hingoli, till the dispute between Respondent Nos.1 and 2 is adjudicated by Arbitral Tribunal. One decree is already obtained by Buldhana Urban Cooperative Housing Society against Respondent Nos.1 and 2 and their Partnership for recovery of the amount in respect of which the present proceeding is

filed and the said decree is put to execution in Regular Darkhast No.339 of 2013. The learned Principal District Judge has given option to Respondent No.2 to give bank guarantee of the decretal amount in the said proceeding for getting the present injunction relief vacated.

4. Respondent Nos.1 and 2 have entered into a partnership agreement and the partnership came into existence on 7th March, 2007. The name of the partnership firm is M/s Kasliwal Empires and its place of business is Aurangabad. The object of the partnership is to make construction and develop housing project at Satara area of Aurangabad. The Respondent Nos.1 and 2 have agreed to distribute profit and loss equally between them. The other terms and conditions of contract of partnership, which are relevant for the present matter, can be found in clause Nos.7, 8, 10, 11, 12, 14 and 17. They are as under:

“7) It is agreed that drawings will be allowed to all the parties out of surplus funds of the firm. For this purpose the meaning of “Surplus” is not profit but funds lying with the firm after meeting expenses both capital and

revenue of the firm but before drawings of the partners. Such drawings will be allowed without hampering the day-to-day business of partnership firm.

8) The accounts of the partnership firm shall be taken annually on 31st March of every year and at the end of every year the Profit and Loss Account and Balance Sheet shall be prepared and verified by all the partners and thereafter a copy of which shall be supplied to each partner.

9.

10. The bank account in the name of the firm shall be opened with any nationalized, commercial or co-operative bank as may be agreed by the partners and all moneys, cheques and other securities belonging to the firm except those required for current expenses shall be paid into or deposited with a bank or bankers of the firm and bank account shall be operated by anyone of the partners.

11. It is specifically decided that the partnership shall be a specific partnership for the object of completion of the housing project at Satara, Aurangabad and that no partner shall be allowed to retire before the completion of project mentioned above unless the project

is completed or the claim of other partners is mutually settled.

12. The firm shall not dissolve upon the death, retirement or insolvency of any partner. Upon dissolution it shall be wound up and the assets and liabilities dealt with in accordance with the provisions of the Indian Partnership Act.

13.

14. That it is specifically decided that all the documents whether registered or unregistered for purchase/ sale/ lease etc. of any immovable property flats, row houses or any other tenements shall be signed and executed by any one of the partners.

15.

16.

17. If any dispute or difference arises between the parties hereto touching the business of the firm or interpretation of any provision hereof or otherwise, relating to the firm and its business the same shall be referred to arbitration and the arbitration shall be governed by relevant Arbitration Act."

5. In the application filed under section 9 of the Act by Respondent No.1 Sanjay he contended that the construction work of the project is going on, on Gat No.74 situated at Satara. Sale deed in respect of this property is got executed for the firm by Respondent No.1. The area covered by the project is 23422.51 Sq.mtrs. The project is of construction of 248 units comprising of 54 row houses, 2 independent bungalows, 24 twin bungalows and 168 flats. The land was purchased for the consideration of more than 3 crore rupees.

6. At Para No.4 of the application, filed under section 9 of the Act, Respondent No.1 Sanjay contended that the firm has not obtained any loan or financial assistance from any bank or financial institution. Thus, it is the case of Respondent No.1 Sanjay that only the loan in question, taken from Buldhana Cooperative Credit Society, is taken by them but it is not specific case that this loan was taken by the firm.

7. It is the case of Respondent No.1 Sanjay that he has made investment of several crores of rupees in that

project but Respondent No.2 Jugalkishor has made investment of negligible amount. It is the contention of Respondent No.1 Sanjay that as on 31st March, 2013, as per finalized balance sheet of this firm, the amount receivable by Sanjay in his capital account is Rs.18.15 crore as against the amount received by Respondent No.2 Jugalkishor in the same account of 3.61 crore. Thus, it is the contention of Respondent No.1 Sanjay that his investment is more by around Rs.14.5 crore.

8. It is the contention of Respondent No.1 Sanjay that he and Respondent No.2 Jugalkishor had jointly obtained loan of Rs.9 Crore from Buldhana Cooperative Credit Society by giving security of the aforesaid project of the firm. It is contended that the amount taken as the loan was to be utilized by them for aforesaid project. It is the contention of Respondent No.1 Sanjay that Respondent No.2 Jugalkishor made him some representation and due to trust reposed on Jugalkishor the amount of Rs.8 Crore was transferred through R.T.G.S. method in the account of present Appellant Company on 12th August, 2010.

9. It is the contention of Respondent No.1 Sanjay that

Jugalkishor is Managing Director of present Appellant company and this company is under total control of Jugalkishor. It is contention of Respondent No.1 Sanjay that by using the amount of Rs.7 Crore from aforesaid amount of Rs.8 Crore, the Appellant company has purchased the immovable property in Hingoli. It is contended that the remaining amount of Rs.1 Crore was withdrawn by Jugalkishor for himself from the account of the said company. The immovable property from Hingoli is shown to be purchased for the consideration of Rs.9.51 Crore under sale deed dated 30th December, 2013.

10. It is the case of Respondent No.1 Sanjay that the aforesaid amount of Rs.7 Crore was directly paid to the vendor, Nidhi Mercantile Limited and at that time Appellant company was not having other amount in its account. It is contended that these circumstances are sufficient to infer that fraud was played by Jugalkishor on him.

11. It is the case of Respondent No.1 Sanjay that Jugalkishor committed default in making repayment of

aforesaid loan and due to that the Cooperative Credit Society took action and decree is also obtained by the society in respect of the loan of Rs.9 Crore. It is contended that Regular Darkhast No.339 of 2013 is filed by the said society for recovery of Rs.10.78 Crore. It is contended that in view of aforesaid circumstances, the property purchased at Hingoli by Appellant Company needs to be treated as the property jointly owned by Sanjay and Jugalkishor and so action needs to be taken in respect of that property also.

12. Sanjay has informed about the other proceedings pending between the parties and has contended that with malafide intention and to block the property of Kasliwal Empire firm, application No.414 of 2013 is filed in District Court, Aurangabad by Jugalkishor. Sanjay has contended that he has filed Arbitration Application No.12 of 2012 under section 11 of the Act in High Court for appointment of Arbitrator. It is his case that in view of the aforesaid circumstances, interim measures need to be taken in respect of the property purchased by Appellant company at Hingoli.

13. The Appellant company filed say in proceeding filed under section 9 of the Act by Sanjay. Admittedly, it is a public limited company, though it is not disputed that the wife and other close relatives of Jugalkishor have most of the share capital of this company and Jugalkishor was Managing Director. Present appeal is also filed by Jugalkishor on behalf of the company. Following contentions were made for this company in section 9 proceedings.

- (i) That, Sanjay had filed proceeding under section 9 of the Act firstly in Aurangabad District Court which was bearing No.103 of 2014 and similar relief in respect of the same property was claimed. It is the contention that in the said proceeding Sanjay had applied for permission to make present Appellant company party respondent but this application was rejected and this decision had become final. It is the contention of Appellant company that the District Court, Aurangabad had refused to give relief against Appellant company in proceeding

No.103 of 2014 but this circumstance was not disclosed in District Court, Parbhani by Sanjay.

- (ii) That, Proceeding No.103 of 2014 filed by Sanjay in District Court, Aurangabad was dismissed though on the ground of territorial jurisdiction and that decision became final. This circumstance needs to be considered against Sanjay.
- (iii) Appellant company has no concern whatsoever with the Partnership business done under the name and style as "*Kasliwal Empire*" and Appellant Company had no transaction at all with the said partnership. Appellant Company was also not party to Arbitration agreement signed by Jugalkishor and Sanjay. So, the proceeding cannot be filed against appellant company under section 9 of the Act.
- (iv) The money which was received by Jugalkishor from the joint loan account of Jugalkishor and Sanjay, was his personal amount and he had credited that amount in the account of appellant

company. The company had treated that amount as loan from Jugalkishor and the account in respect of the said amount of Jugalkishor was settled by the company and so the property purchased in the name of Appellant company is the property of Appellant company and it is not the property of Jugalkishor. Similarly, this property cannot be treated as joint property of Jugalkishor and Sanjay.

- (v) The property of Appellant Company cannot be treated as subject matter for adjudication of dispute, if any such dispute is referred to Arbitral Tribunal.
- (vi) That, only because Jugalkishor is the Director and he was Managing Director for some time of Appellant Company, inference is not possible that the company is under his full control and the property of the company belongs to him alone. Some other legal defence were also taken.

14. Both the sides produced so many documents

before the Principal District Judge, Parbhani. The Principal District Judge, Parbhani has held for the purpose of section 9 application, as follows:

- (i) The loan obtained from Buldhana Cooperative Credit Society was personal loan of Sanjay and Jugalkishor and it was not the loan taken by partnership firm.
- (ii) For the loan of Rs.9 Crore, Jugalkishor and Sanjay had mortgaged the property of Kasliwal Empire, the firm to Buldhana Cooperative Credit Society.
- (iii) The disputed property from Hingoli does not belong to Kasliwal Empire or Sanjay Kasliwal but the property belongs to present Appellant Company.
- (iv) Though the present Appellant Company is third party to the aforesaid agreement, order under section 9 of the Act can be made against the Appellant Company as the money which was taken by Jugalkishor from aforesaid loan amount was also used for purchasing the disputed

property.

- (v) Right of Sanjay may be frustrated and the Arbitration proceeding, if any, started in future may become infructuous if the property in dispute from Hingoli is not preserved and this property is affecting the subject matter of Arbitration agreement.
- (vi) Jugalkishor is a Director of present Appellant Company and is also Partner of Kasliwal Empire firm and so order can be made against Appellant Company and also Jugalkishor.

15. The aforesaid portions of prima facie findings given by the Principal District Judge show that even after giving the findings on first four points in favour of present Appellant Company the learned Principal District Judge gave the order of injunction against the Appellant Company. Further, when Buldhana Cooperative Credit Society had no concern with the dispute going on between Jugalkishor and Sanjay, indirectly relief is given against the recovery which can be made by the said society in aforesaid execution proceeding. The alternate

order shows that by giving bank guarantee of the decretal amount, the Appellant Company can get the injunction vacated. Nothing is said about the right of the said credit society with regard to the bank guarantee. Thus, the learned Principal District Judge has not considered the consequences of at least alternate order.

16. The operative part of order made by learned Principal District Judge, Parbhani, as interim measure under section 9 of the Act is as under:

“01) Respondent Nos.1 and 2 are hereby restrained from transferring, alienating and creating third party interest over the property purchased at Hingoli in the name of respondent No.2 under registered sale deed No. 4912/2013 dt. 30/12/2013 as more specifically mentioned in Schedule A of Exh. F pending the resolution of dispute by Arbitrator.

02) If respondent No.1 furnishes bank guarantee of the decretal amount in R. D. No.339 / 2013 arising out of award No. ARB/BUCCS/ 93/ 107/ 2012 The Buldana Urban Co-op. Credit Society Vs. Jugalkishor Chhaganlal Tapadiya and others the restraintment order against respondent Nos.1 and 2 in clause (1) of

order will stand vacated automatically.

03) No order as to costs."

17. It is already observed that the second part of aforesaid operative order indirectly affects the rights of one Credit Cooperative Society to recover its dues from the firm and the two partners of Kasliwal Empire on the basis of decree given to this society. Even when the society was not party to the aforesaid proceeding, indirectly, the Principal District Judge has asked the society to accept the bank guarantee. The nature and terms and conditions of the bank guarantee are not spelt out by the learned Principal District Judge in this order and so such order could not have been made against the said society. It needs to be observed that this part of the order is not binding on the said society.

18. The learned senior counsel appearing for Respondent, Sanjay submitted that the relief which was claimed and which is granted by the District Court falls under section 9 (ii), (b), (d) and (e) of the Act and this order is of the nature of temporary injunction. There cannot be any dispute over this proposition.

19. In the case reported as **(2007) 7 Supreme Court Cases 125 [Adhunik Steels Ltd. V/s Orissa Manganese and Minerals (P) Ltd.]** the Apex Court has laid down that in view of the nature of relief of injunction mentioned in section 9 of the Act, the provisions of Specific Relief Act, and also the provision of Order 39 of Civil Procedure Code need to be considered and used while deciding the application made under section 9 of the Act. There cannot be any dispute over this proposition. In section 9 of the Act itself, at the end, it is made clear that for making the order under this provision the Court shall have the same powers as it has in any proceeding which comes before it. This implies that the conditions laid down in the provisions of Specific Relief Act and also Order 39 Rule 1 and 2 of Civil Procedure Code need to be satisfied for getting the relief. The burden is always on the applicant to satisfy the conditions laid down, like prima facie case, balance of convenience, and that irreparable loss will be caused to him if the relief is not granted in his favour. All the three conditions need to be fulfilled. Further, the relief being discretionary relief, the conditions spelt out even in

Section 41 of Specific Relief Act need to be kept in mind and only in a fit case the Court is expected to use the discretionary power.

20. In the case reported as **2000 (4) Bom.C.R. 273, Bombay High Court [Newage Fincorp (India) Ltd. V/s Asia Corpn. Securities Ltd.]** the guidelines are given for dealing with the matters like present one by this Court and they are as under:

- (i) *That in the event of withholding the relief of interim measures he will suffer an irreparable injury;*
- (ii) *that in the event of his success in the arbitration proceedings he will not have the proper remedy, in being awarded adequate damages;*
- (iii) *that in taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience is in his favour or in other words;*
- (iv) *that his inconvenience in the event of withholding the relief of interim measures will in all events exceed that of the respondents in case he is not granted relief; and lastly;*

- (v) *the petitioner must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired."*

21. Many technical and legal points are raised by the learned counsel for the Appellant company and also by the learned counsel representing Jugalkishor and on those grounds the learned counsel submitted that the District Court could not have granted the relief. This Court is not addressing in detail so called technical points. In view of the observations made by Honourable Apex Court in the case of of "*Adhunik Steels Ltd.*" (*cited supra*) this Court is considering the provision of section 9 of the Act, the material available in the present case and for deciding the matter for the purpose of section 9 of the Act.

22. It is already observed that it was necessary for Sanjay to make out prima facie case. He was expected to show that some serious issue is there which needs to be tried in Arbitration. Admittedly, the property is standing in the name of present Appellant Company and

it is situated at Hingoli. If Sanjay fails to make out a case that such serious issue is involved, there is no question of granting the relief of interim injunction in respect of this property. When no prima facie case is made out, no serious issue is shown as available for arbitration, there is no question of considering the other two conditions like balance of convenience, the possibility of success of Sanjay in the matter which may be taken before the Arbitrator and the case that irreparable loss will be caused to Sanjay or Kasliwal Empire.

23. The learned Principal District Judge, Parbhani has held that the immovable property situated at Hingoli belongs to present Appellant company and it is not property of Kasliwal Empire or of its two partners like Sanjay and Jugalkishor. However, the learned Principal District Judge has observed that the property at Hingoli affects subject matter of Arbitration. Let us see as to whether the property involved in proceeding under section 9 of the Act really affects the subject matter of Arbitration. Section 9 of the Act is as follows:

“9. Interim measures, etc., by Court. - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observations to be made, or experiment to be tried, which may be necessary or expedient for the

purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

24. The relevant portion of agreement of partnership and the pleadings of Sanjay from pleading under section 9 of the Act are already quoted. The partnership is only for one project and it cannot be dissolved by the partners unless and until the project is completed. The case of Sanjay shows that no loan is taken by this firm for the project. The learned Principal District Judge has also held on the basis of the record like sanction letter of aforesaid credit cooperative society that, it was personal loan of Sanjay and Jugalkishor and it was jointly taken by them and it was not the loan given to firm Kasliwal Empire.

25. The record shows that at the relevant time the amount of around Rs.15 Crore had come to the joint account of Jugalkishor and Sanjay. It needs to be kept in mind that this was not the amount of firm. As per the partnership agreement the firm is expected to keep its money in account of the firm. Out of the amount of Rs.15 Crore, the amount of Rs.8 Crore was transferred by Jugalkishor and Sanjay jointly to Appellant Company by using R.T.G.S. method. The account extract further shows that these two partners then withdrew the amount of more than Rs.3 crore each from this joint account. From the other clauses of partnership agreement, already quoted, it can be said that they had made arrangement for distributing the money collected even for partnership business even when if it was not actual profit. The amount which was taken as loan jointly by them, was given to Jugalkishor in the year 2010 and from the record it can be said that no dispute was raised about this amount by Sanjay till the year 2014. These circumstances are sufficient to prima facie show that the amount was given to Jugalkishor as per the settlement between Jugalkishor and Sanjay and

Jugalkishor gave this amount to the Appellant company for its use. The property from Hingoli was purchased for the consideration of more than Rs.9 Crore and the amount of 7 Crore rupees out of the amount of 8 Crore given to Jugalkishor was used in this transaction of Appellant company. There was no agreement of any kind between the Appellant company and Kasliwal Empire or between Appellant company and Sanjay in respect of this amount. Thus, the inference is not possible that Jugalkishor deceived Kasliwal Empire or Sanjay by using this amount for Appellant Company. There are many other circumstances in support of this probability.

26. In the present proceeding, this Court had asked the learned counsels of both the sides about the present assets of Kasliwal Empire. Learned counsel for Jugalkishor submitted that the value of the property of Kasliwal Empire, at present, is more than Rs.100 Crore. The learned Senior Counsel representing Sanjay submitted that the value is around Rs. 90 Crore. Sanjay has come with a case that no loan is taken by Kasliwal

Empire. The learned counsel for Jugalkishor submitted that by mortgaging the property of Kasliwal Empire not only the aforesaid amount of Rs.9 Crore was taken from the Credit Cooperative Society but more loan amount, of Rs.30 Crore was taken and that amount is passed to son of Sanjay. Record like a letter given by this institution in that regard is produced. On the basis of that record, the learned Principal District Judge has given finding that such other loan was also taken. Thus, by mortgaging the property of Kasliwal Empire not only Jugalkishor has taken the money but Sanjay and his son have taken the money which is more than the amount taken by Jugalkishor when Jugalkishor has equal share in the partnership business of Kasliwal Empire. Due to these circumstances, it is not possible for Sanjay to say that as the property of the project is mortgaged for the amount of Rs.8 Crore given to Jugalkishor, for securing that amount, the property of Appellant company from Hingoli needs to be considered in Arbitration proceeding. Considering the value of the project of Kasliwal Empire and aforesaid circumstances it cannot be said that there was the necessity of taking of such security.`

27. Even if the case of Sanjay that he has made investment of Rs.14.5 Crore more than the investment made by Jugalkishor is accepted as it is, considering the assets of Kasliwal Empire and the nature of agreement of partnership, it cannot be said that Jugalkishor has withdrawn more amount than his entitlement and so there is no prima facie case on this point.

28. The learned counsel for Jugalkishor made a statement with regard to security and gave list of the properties owned by Jugalkishor. It was submitted for Jugalkishor that, Jugalkishor is independently in a position to discharge the entire liability in respect of the aforesaid loan of Rs.9 Crore and for that he is ready to give even the security of that amount to the cooperative society. It is already observed that it is up to the society to proceed against the property of Kasliwal Empire, or the properties of both Jugalkishor and Sanjay and that point cannot be considered in the present proceeding. In the present case, it needs to be considered as to whether it will be difficult to execute the Award, if any, made by Arbitrator. Record produced by both the sides

show that prior to filing of the application in Parbhani Court by Sanjay, proceeding was already started by Jugalkishor under section 9 of the Act in District Court, Aurangabad in respect of the property of Kasliwal Empire. In that proceeding, the order of status-quo is made and Sanjay is prevented from disposing of the property of the Kasliwal Empire. When Sanjay also could have gone against the property of Kasliwal Empire or the property of Jugalkishor, if he had fear that the Award, if any, given by Arbitrator will not be executable, he preferred to go only against the property of Appellant Company of which Jugalkishor is a Director. Probably that company is under his control. There is clear probability that Sanjay wanted to block the property of this Company and stop the development activities of this company.

29. The proceeding for appointment of Arbitrator was filed in the year 2012 by Sanjay. It can be said that till the year 2014 he never thought that the property of Appellant Company has any relation with the business of Kasliwal Empire. When the amount of Rs.8 Crore was

given in the year 2010, Sanjay took steps under section 9 of the Act in the year 2014. This circumstance also speaks lot about the intention, it creates possibility that the intention of Sanjay is to create pressure. Due to this circumstance also the injunction needs to be refused. Thus, no case is made out for balance of convenience in respect of the property at Hingoli and it is not probable that irreparable loss will be caused to Sanjay if appellant company makes use of this property or disposes of the property. The learned Principal District Judge has also mentioned that Sanjay has not come to the Court with clean hands. In spite of this observation, the learned Principal District Judge granted the relief. It appears that only due to circumstance that amount of Rs.8 Crore was given to Jugalkishor from the joint account of Jugalkishor and Sanjay and out of that amount the amount of Rs.7 Crore was used for Appellant Company for purchasing the property at Hingoli, the learned Principal District Judge thought that it is desirable that relief is given in respect of this property. In view of the facts and circumstances already mentioned, it is not possible to believe that there is eminent danger of infringement of

legal or equitable rights of Sanjay. It can also be said that Sanjay did not prosecute the matter filed for appointment of Arbitrator in this Court and for more than 3 years the said matter is pending. Thus, on merits, the learned Principal District Judge, Parbhani has committed error in granting relief of injunction in respect of the property of the present Appellant company.

30. The record of the accounts produced by the Appellant Company showing the dealings between the Appellant Company and Jugalkishor is sufficient to prima facie show that this property belongs to Appellant Company. The learned Principal District Judge ought to have considered probability that by making such order it was stopping development activity of the Appellant company when the appellant company has no concern with the business of Kasliwal Empire.

31. The learned counsel for the Appellant company argued that some legal points with regard to the provision of Section 9 of the Act also need to be considered and they create such hurdles that it is not possible to grant relief under section 9 of the Act in

favour of Sanjay. He submitted that those legal points are not properly addressed by the learned Principal District Judge. This Court is discussing those points herein after.

32. *The relief of injunction against a party (Appellant company) who is not party to the Arbitration agreement :-* On this point, the learned counsel for the Appellant Company took this Court through some provisions of the Act and he cited some reported cases. Other side also relied on the wording of provision of Section 9 and on some reported cases. Section 9 of the Act is already quoted. This provision is interpreted by Honourable Apex Court and relevant cases are cited hereinafter. The provision shows that condition for getting relief under section 9 of the Act is that the Applicant must be 'party' to Arbitration agreement. The section does not prohibit giving of relief against a person who is not a party to Arbitration agreement. Further, the last sentence of this section like *"the Court shall have the same powers for making orders as it has for the purpose of and in relation to any proceeding before it"*

shows that the Court can use the provisions of Civil Procedure Code against third party. On this point, the case reported as **(2007) 6 Supreme Court Cases 798 [Arvind Constructions Co. (P) Ltd. V/s Kalinga Mining Corporation and others]** can be referred.

33. The learned counsel for Sanjay placed reliance on the case reported as **2010 (2) Mh.L.J. 657 [Girish Mulchand Mehta and another V/s Mahesh S. Mehta and another]**, In this case, this Court has held that order under section 9 of the Act can be made against third party. The facts of this case were different. There was development agreement between a cooperative housing society and a developer. There was Arbitration clause in the said agreement. Few members of the society, who were in minority, were against this development agreement. A proceeding was filed under section 9 of the Act by the developer against society and its members as members were creating obstruction. Receiver was appointed and then the property was handed over to the developer under section 9 of the Act. In this case, the Court held that though the person

objecting was not party to the agreement, as he had become member of the cooperative society, he had lost independent identity and he had no rights independent of the society. It was observed that he had the rights available only under the statute and bylaws of the society. This Court referred the observations made by Kerala High Court and made following observations, on this point:

“12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under section 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration

Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. The appellants, however, place reliance on the decision of the Kerala High Court in the case of Shoney Sanil V/s M/s Coastal Foundations (P) Ltd. and ors. reported in AIR 2006 Kerala 206. In that case the question considered was whether the writ-petitioner, admittedly, a third party to an alleged Arbitral Agreement between the respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, injuncted or subjected to other Court proceedings under section 9 of the Act? The Kerala High Court held that orders under section 9 (ii) (c) can be passed only in relation to subject-matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third

party rights. It concluded that on a plain reading of section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure under section 9, the rights of third party holding possession on the basis of Court sale could be interfered with, injuncted or subjected to proceedings under section 9 of the Act. Instead, it held that section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject-matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject-matter of the Arbitration Agreement, section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders under section 9 against a third party if such person is claiming under the party to the Arbitration Agreement. Thus understood, section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming

under the party to the arbitration agreement and likely to be affected by the interim measures. The appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject-matter of the Arbitration Agreement on their own and not claiming under the respondent No.2 society who is party to the Arbitration Agreement in absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.”

34. The aforesaid case was decided by Division Bench of this Court. This case was subsequently referred in many cases by Delhi High Court like the cases reported as ***Manu/DE/1853/2013 [Citation: 2013(3)ARBLR52 (Delhi) - Dorling Kindersley (India) Pvt. Ltd. V/s Sanguine Technical Publishers & Ors.], MANU/DE/1914/2014 [Gatx India Pvt. Ltd. V/s Arshiya Rail Infrastructure Limited]*** etc.

35. In the second case, order under section 9 of the Act was made against Respondent No.2 company when

Respondent No.2 company was holding company of Respondent No.1 company and there was Arbitration Agreement between the Petitioner company and Respondent No.1 Company. Under the deed of guarantee, Respondent No.2 Company had guaranteed payment of full of the amount due and payable to petitioner by Respondent No.1 Company. In view of these circumstances order was made against third party. The observations made by Delhi High Court are at para 75 and they are as under:

“75. Respondent No.1 is a wholly owned subsidiary of respondent No.2. It is not uncommon that in cases where group companies substantially constitute one economic entity, the courts instead of going by the separate legal entities of the companies, have lifted the corporate veil, and looked at the common economic entity of the group to which they belong. In view of the facts of the case, and the conduct of the parties as reflected from the material on record, it does, prima facie, appear that the respondents conducted their affairs as constituents of the Arshiya Group. Also, in as much, as, respondent no.2 has undertaken to honour respondent no.1's

obligations towards the petitioner as its own primary obligations, and the petitioner has a right to claim from respondent no.2, the amounts allegedly due and payable by respondent no.1 under the lease, there is a commonality of interest between respondent No.1 and respondent No.2. Moreover, looking at the dismal financial condition of respondent No.1 as discussed hereinafter, a direction only to respondent No.1 to furnish the required security might not afford adequate protection to the petitioner. Therefore, I am of the opinion that the facts of the instant case are such that orders under section 9 ought to be passed against Respondent No.2."

36. The learned counsel for Appellant company placed reliance on a case of Delhi High Court like **MANU/DE/0380/2008 [Smt. Kanta Vashist and Ors. V/s Shri Ashwani Khurana]**. In this case, there was the agreement between Smt. Kanta and Ashwani. There was allegation against Ashwani that he had created 16 companies and relief was claimed to block the properties of all the 16 companies to secure the amount which was allegedly due to Smt. Kanta from Ashwani. Delhi High Court held that these 16 companies were separate legal

entities, though they were family companies of Ashwani and it was further held that it cannot be said that they were parties to the Arbitration agreement only because Ashwani, who was Director of the Companies, was signatory to Arbitration Agreement with Smt. Kanta. In another case, on which reliance was placed by learned counsel for the Appellant Company like **MANU/DE/ 1906/2009 [Ajay Makhija V/s Dollarmine Exports Pvt. Ltd. and Ors.]** Delhi High Court held, on facts, that there was no material for lifting of corporate veil.

37. Learned senior counsel for Sanjay placed reliance on two more cases reported as **(2000) 3 Supreme Court Cases 312 [Subhra Mukherjee And Another V/s Bharat Coking Coal Ltd. And Others]** and **MANU/DE/ 0098/2005 [Goyal MG Gases Pvt. Ltd., V/s Air Liquide Deutschland GmbH and Ors.]** of Delhi High Court. On the basis of observations made, learned counsel submitted that the learned Principal District Judge, Parbhani has rightly pierced the veil of incorporation of Appellant company to ascertain who is the real owner. In the first case of *Subhra Mukherjee*

(cited supra) the Apex Court has held that “Court would be justified in piercing the veil of incorporation to ascertain true nature of transaction, the identities of parties involved and to ascertain as to whether the transaction was genuine and bonafide.” In the second case of *Goyal (cited supra)* Delhi High Court has referred a case of Apex Court and on observations that “Though company is a legal personality entirely distinct from its members and the company is entitled of enjoying rights and being subjected to duties, in exceptional cases the Court is entitled to lift the veil of corporate entity and pay regard to the economic realities behind the legal facade.” There are further observations of the Apex Court that *when group of companies constitute one economic entity, the Court may instead of going by separate legal entities of the companies, look at the common economic entity of the group to which they belong.* There cannot be any dispute over the propositions which are made by the Apex Court.

38. From the law laid down in aforesaid cases, by Division Bench of this Court, the Apex Court and Delhi

High Court, the following deductions for the purpose of use of section 9 of the Act are possible:

- (i) *Order under section 9 of the Act can be made against a person who is not party to Arbitration Agreement provided that prima facie case is made out that subject matter or part of subject matter of Arbitration is with the third party and the third party has no independent right in respect of the said subject matter. If the property in the hands of third party affects subject matter of arbitration, then also order can be made.*

This follows that if the third party has prima facie case that it is holding the property on its own and not through party to Arbitration Agreement, such order cannot be made. Further, if the property of the third party has no concern with subject matter of the Arbitration then also such order cannot be made against third party.

- (ii) *If there is material, corporate veil needs to be lifted by the Court to ascertain as to who is the real owner of property. If the property belongs to party*

to agreement, order can be made by presuming that they are one economic entity.

In the present matter, in facts and circumstances of the case, this Court has no hesitation to hold that Sanjay has failed to make out the case that the property of Hingoli of Appellant Company is subject matter of Arbitration or it has any relation with the subject matter of Arbitration.

39) Point:- Kasliwal Empire firm being unregistered firm, whether the dispute can be referred to Arbitral Tribunal when there is intention to continue the partnership. This point refers to the point of tenability of proceeding under section 9 of the Act in such case.

This point has two parts. The first part is the effect of non-registration on the rights of the partner. The second part is about the further effect of non-registration of the firm on the proceeding under section 9 of the Act. This point also involves the point of the scope of consideration of relevant points for such proceeding.

40. The aforesaid point has the base of provision of section 69 of Indian Partnership Act, 1932 which gives effect of non-registration. Relevant portion of section 69 is Section 69 (1) (2) and (3) and it reads, as under:

“69. Effect of non-registration. - (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect, -

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise

the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.”

(Underline added).

41. The basic case on the effect of non registration of partnership firm is ***AIR 1964 SC 1882 (Jagdish Chandra Gupta V/s Kajaria Traders India Limited)***.

This case was decided by 4 Honourable Judges of the Supreme Court. The facts of the reported case show that there was unregistered partnership agreement between Jagdish Chandra and Kajaria Traders and it was to supply Manganese ore to a party from New York. As Jagdish Chandra failed to carry out his part of the agreement, application under section 8 (2) of Indian Arbitration Act, 1940 was made after following the necessary procedure, for appointment of an Arbitrator. Jagdish Chandra took defence that there was bar of provision of section 69 (3) of Partnership Act, to such proceeding. While allowing his objection, the Apex Court

laid down as follows:

- (i) The expression “other proceeding” used in section 69 (3) of Partnership Act includes a proceeding filed under section 8 (2) of Arbitration Act, 1940, for appointment of Arbitrator.
- (ii) The wording of section 69 (3) of Partnership Act like “a right arising from contract” cover the proceeding filed under section 8 (2) of Arbitration Act, 1940.
- (iii) The ban given by section 69 (1) (2) applies against the partner if he seeks enforcement of rights given under partnership agreement and when he is not asking for dissolution or for adjudication of dispute after dissolution of the firm as mentioned in section 69 (3) (a) of Partnership Act

42. The learned Senior Counsel for Sanjay placed reliance on the case reported as **(2004) 3 SCC 155 (Firm Ashok Traders and another V/s Gurumukh Das Saluja and others)**. This case was decided by two Honourable Judges of Supreme Court. The facts of this reported case show that application was filed for

appointment of Receiver under section 9 of the Act by a partner of unregistered firm. The learned counsels of both sides agreed before Supreme Court to get the decision of the appeal pending in Supreme Court *de hors* the issue involved in the matter like *“the effect of the bar created by provisions of section 69 (1) (2) (3) of Partnership Act to make order under section 9 of the Act”*. The Apex Court decided the matter due to such agreement between the parties and made order under section 9 of the Act. While making order, the Apex Court said that it was giving prima facie opinion and the following view taken by the Apex Court was tentatively taken.

“The bar created by section 69 of the Partnership Act does not affect the maintainability of application under section 9 of the Act”.

43. The learned counsel for the Appellant Company submitted that law was not laid down by the Apex Court in *Firm Ashok Trader's* case (cited *supra*) in view of aforesaid specific observations made by the Apex Court and though the case of *Jagdish Chandra* (cited *supra*)

was referred, the law laid down in Jagdish Chandra's case is not disturbed or interpreted. There is force in this submission made by learned counsel for the Appellant company.

44. On this point, there are cases of this Court also. In the case reported as **AIR 1994 Bom. Page 16 (Chandulal Hathibhai Shah V/s Champaklal Ambalal Parikh)** Division Bench of this Court relied on the case of *Jagdish Chandra* (cited supra) and held that the rights under section 20 of Arbitration Act, 1940 cannot be enforced when partnership is unregistered to the extent mentioned in section 69 of the Partnership Act. In the case reported as **2008 (5) Bom.C.R. 855, Bombay High Court, (Oberoi Construction Pvt. Ltd. V/s Warali Shivshahi Housing Society Ltd.)** Division Bench of this Court has held that in an application filed under section 9 of the Act it is necessary for the Court to decide, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement? While laying down this law, this Court referred and relied on the view

expressed by Honourable 6 Judges of Apex Court (majority view) in the case reported as **2005 (8) SCC 618 [S.B.P. & Co. V/s Patel Engineering Ltd.]**

45. On the aforesaid point, learned senior counsel for Sanjay placed reliance on the case reported as **MANU/MH/1775/2010 (Ezra Victor Aboody V/s H. Dhanrajgir Estate Pvt. Ltd.)**. The facts of this case were altogether different. The partnership was terminated and reference was to be made for damages for repudiation of the partnership. Thus, this case is on different point.

46. The learned senior counsel for Sanjay placed reliance on another case reported as **(2013) 15 Supreme Court Cases 414 (Arasmeta Captive Power Company Private Limited V/s Lafarge India Private Limited)**, the case decided by two Honourable Judges of the Apex Court and submitted that the objection available under section 69 (3) of Partnership Act cannot be considered in proceeding filed under section 9 of the Act. This submission is not at all acceptable. In this case also, the Apex Court laid down

that application for appointment of Arbitrator can be made under section 11 of the Act only if there is valid Arbitration Agreement. However, it is observed that at the time of appointment of Arbitrator, the issue like Arbitrability of matter like “*excepted matter*” cannot be dealt with. There cannot be any dispute over this proposition.

47. The learned senior counsel for Sanjay alternatively submitted that all the disputes can be referred to Arbitrator and after the reference of the dispute, the Arbitrator himself can decide the objection available under section 69 (3) of Partnership Act. He placed reliance on one case reported as **(2012) 12 Supreme Court Cases 581 (State of Goa V/s Praveen Enterprises)**. The facts of this reported case were altogether different and the point involved was also different. The case was with regard to the entitlement to make claims in respect of the dispute and limits in relation to the claims made in the notice and it was also in respect of entitlement of other side to raise claims under counter claim.

48. On the power and duty of the Court dealing with application under section 9 of the Act there are observations of Apex Court in the case of *Patel Engineering (cited supra)* and the observations of the Honourable 6 Judges of the Apex Court at para No.18 are as under:

“18, It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2 (e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See Fair Air Engineers (P) Ltd. and another V. N. K. Modi (1996 (6) SCC 385). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject

matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has

necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, -- the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication [See R.M.A.R.A. Adaikappa Chettiar and Anr. V. R. Chandrasekhara Thevar (AIR 1948 P.C. 12)."

49. It is also laid down by the Apex Court in Patel Engineering case, cited supra, that in the application filed under section 11 of the Act the preliminary aspect like existence of valid arbitration agreement needs to be decided.

50. The aforesaid position of law shows that the larger bench of the Apex Court in *Jagdish Chandra's* case (cited supra) has laid down that the expression "other

proceeding” used in section 69 (3) of the Partnership Act includes even the application filed under section 8 (2) of Arbitration Act, 1940. In the case of *Patel Engineering, cited supra*, the Apex Court has laid down that before appointing Arbitrator under section 11 of the Act it is necessary to consider the preliminary aspect like existence of valid arbitration agreement. It is also laid down that the court deciding the proceeding under section 9 of the Act is also expected to consider the existence of such agreement. When it is laid down that reference of the dispute in a case, like the present one to Arbitration, is not possible as such reference is barred, this aspect needs to be considered in a proceeding filed under section 9 of the Act and on this aspect the applicant needs to make out prima facie case. The Applicant needs to be necessarily “party” to the agreement and so these aspects need to be considered.

51. Let us ascertain as to what is nature of the dispute which Sanjay wants to refer to arbitration. This exercise is necessary in view of the aforesaid position of law. The definition of “Arbitration Agreement” can be found in

section 2 (1) (b) and section 7 of the Act. The provision of section 7 of the Act shows that there can be arbitration agreement (a) to submit all or certain disputes to Arbitral Tribunal and (b) the dispute may have arisen already before the making of the agreement or may arise subsequent to the arbitration agreement. The definition shows that the existence of “dispute” is essential condition for appointment of Arbitrator. In view of the position of law, already discussed the case of the existence of dispute also needs to be made out to get order under section 9 of the Act. It also needs to be kept in mind that every dispute need not necessarily be treated as a dispute giving cause of action for Arbitration. Thus, the terms of reference are critical in arbitration process. The 'dispute' and the terms of reference need to be ascertained very cautiously when there is objection like the objection available under section 69 (3) of Partnership Act. When section 69 (3) of Partnership Act has created a clear bar of referring some disputes to Arbitration, it needs to be ascertained whether the dispute raised is also barred due to this provision, for reference. The provision of section 21 of

the Act can be referred in this regard.

52. The relevant clauses of partnership agreement are already quoted. They show that the parties cannot put to an end themselves to the contract unless the project is completed. The submissions made and copy of proceeding filed in this Court under section 11 of the Act (Application No.12 of 2012) show the nature of dispute which Sanjay has raised. There is a dispute that Jugalkishor is not giving accounts of partnership firm to Sanjay and the dispute has arisen between these two partners regarding accounts of business of firm. As per this record, Sanjay wants to settle this dispute amicably and he wants to continue with the project and complete it as provided under the agreement. Thus, Sanjay does not want the relief of dissolution of the partnership in the adjudication. Thus, the partnership is in existence and Sanjay has no intention to go for dissolution of partnership. In view of this nature of dispute raised by Sanjay, this Court has no hesitation to hold that the bar given by section 69 (3) of Partnership Act is applicable against Sanjay and due to that even interim relief under

section 9 of the Act cannot be given.

53. Some other points were raised by learned counsel for Appellant company and they are as under:

(I) That, the first application under section 9 of the Act was filed in District Court, Aurangabad by Jugalkishor in the year 2013 and so in view of the provisions of section 42 of the Act all the subsequent proceedings ought to have been considered by District Court, Aurangabad. The District Court, Parbhani had no jurisdiction over the subject matter of Arbitration and in view of bar of provision of section 42 of the Act, District Court, Parbhani had no jurisdiction to make such order.

(II) The term "Court" mentioned in section 9 and 34 of the Act is the District Court of the District where subject matter is situated or where the cause of action arose. At Hingoli, District Hingoli, there is District Court but Sanjay filed proceeding in District Court, Parbhani and for that reason also District Court, Parbhani had no jurisdiction over the matter.

(III) The first application under section 9 of the Act was

filed by Sanjay in District Court, Aurangabad only against Jugalkishor. The application filed by Sanjay to allow him to make Appellant Company party respondent to the proceeding was rejected by District Court, Aurangabad and that order has become final. In view of this circumstance, it was not open to Sanjay to implead Appellant company again in a proceeding filed under section 9 of the Act.

54. There is force in all the aforesaid contentions made for the Appellant company. This Court has considered the main legal challenges extensively and the decision on those points is sufficient for decision of the present matter. There is no need to discuss the aforesaid circumstances in detail and those circumstances are matter of record.

55. In view of the discussions made above this Court holds that the order under challenge cannot sustain in law. In the result, the appeal is allowed. The judgment and order of the Principal District Judge is hereby set aside. The application filed under section 9 of the Act by the present Respondent, original applicant, stands

rejected. Relief of temporary injunction stands vacated. The learned senior counsel for the Respondent Sanjay submitted that he wants to challenge the decision of this Court in Supreme Court. So, for four weeks the order made by the Principal District Judge to continue.

56. In view of final disposal of the Arbitration Appeal itself the pending civil applications, if any, also stands disposed of.

[T.V. NALAWADE, J.]

Dt.03/12/2015
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