

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

**CIVIL MISCELLANEOUS APPEAL Nos.959, 960 AND 1023 OF
2015**

-

COMMON JUDGMENT : (Per Hon'ble Sri Justice A. Shankar Narayana)

All these Civil Miscellaneous Appeals are directed against one and the same order dated 26.11.2015, passed in O.P. No.2739 of 2013 on the file of XXIV Additional Chief Judge, City Civil Courts at Hyderabad, preferred by the 1st and 2nd respondents, 3rd respondent and respondents 4 to 20 in the original petition respectively. Respondents 1 to 8 in all these civil miscellaneous appeals, filed the said O.P. under Section 9 of Arbitration and Conciliation Act, 1996, seeking multiple reliefs; (1) to grant injunction restraining respondents 1, 2 and 3 from either alienating or encumbering the schedule property i.e. 16660 square yards situated in Sy.No.391 (old), No.219, 220 (new), (T.S.No.4P & 6P), Ward No.8, Block No.2, Shaikpet village and Mandal, Road No.5 (old) and Road No.7 (new), Banjara Hills, Hyderabad, in favour of any third parties in pursuance of the alleged registered Development Agreement-cum-GPA (DAGPA) bearing document No.3589/2010, dated 29.07.2010; (2) to grant injunction restraining the respondent No.3 from

proceeding with the construction work in any manner in the said land; and (3) to direct the respondents 1, 2 and 4 not to indulge in any act in pursuance of the alleged DAGPA.

2. For the sake of convenience, the parties are referred to as arrayed in the O.P. before the Court below.

3. Petitioners claim their source of title through their mother, Smt. Soghra Begum, whereas, respondents 4 to 20 claim their title as purchasers from one Madanlal Gupta. In fact, as can be gathered from the pleadings, originally there was a dispute between Smt.Soghra Begum and Madanlal Gupta concerning an extent of Ac.9-20 gts., and the said Smt.Soghra Begum filed O.S.No.364/1990 on the file of V-Senior Civil Judge, City Civil Court, Hyderabad against Madanlal Gupta. That suit was dismissed and she preferred appeal in A.S.No.15/2005 on the file of III-Additional Chief Judge, City Civil Court, Hyderabad and during the pendency of proceedings, said Smt.Soghra Begum died and the petitioners as legal representatives, came on record and the appeal ended in compromise pursuant to the award passed by the Lok Adalat on 26.02.2005 as the matter was referred to Lok Adalat by the said Court on a joint compromise memo filed by both sides. The award was passed to the effect that an extent of Acs.4-20 guntas was given to the petitioners confirming

the title and possession and for the balance extent of Acs.5-00 guntas, the title and possession of Madanlal Gupta was confirmed. Subsequently, respondents 4 to 20 have filed O.S. No.484/2006 on the file of

III Additional Chief Judge, City Civil Court, Hyderabad against the petitioners seeking injunction simplicitor and also sought for temporary injunction, but they were unsuccessful. They carried the matter to this Court by filing C.M.A.No.1073/2006 and this Court by order dated 22.12.2006, directed both the parties to confine to the land in their possession respectively. Subsequently, the relief was amended seeking declaration of title. The said suit was disposed of by the judgment dated 07.09.2007, whereby, the possession in an extent of Acs.4-20 guntas in terms of the award passed by the Lok Adalat was confirmed in favour of the petitioners directing the respondents 4 to 20 not to disturb the possession of the petitioners and the rest of the extent of Acs.5-00 guntas, was adjudicated in favour of Madanlal Gupta, the vendor of the respondents 4 to 20. Thus, according to the petitioners, their title and possession over Acs.4-20 guntas was time and again confirmed by the Courts in the aforesaid litigations.

4. While things stood thus, 1st respondent approached them for negotiations and due to family necessities, they have offered to sell their extent of Acs.4-

20 guntas for a consideration of Rs.24 Crores and agreement of sale was also executed on 20.03.2006 between the petitioners and 1st and 2nd respondents, reciting therein that an advance amount of Rs.1,32,00,405/- was paid and the balance consideration of Rs.22,99,67,597/- was payable within a period of 12 months from the date of agreement subject to petitioners obtaining clearances.

The petitioners claim that the 2nd respondent induced them to execute GPA at Chennai to avoid heavy stamp duty which is prevailing in the State of Andhra Pradesh, stating that in case the GPA is registered at Chennai, the stamp duty would be about Rs.2,000/- and thus got the GPA, dated 27.03.2006, registered at Chennai as document No.A1172/2006. According to them, 2nd respondent was appointed as caretaker of the property.

The petitioners claim that the 1st and 2nd respondents are not affluent enough to pay the huge consideration of Rs.24 Crores at any time and they were never ready and willing to purchase the property and the deal was only speculative in nature, created by the 1st and 2nd respondents, and, therefore, the agreement of sale is un-enforceable. When the petitioners required the 1st and 2nd respondents to withdraw the agreement of sale and

for cancellation of registered GPA, 2nd respondent, with a dishonest intention, managed to create complications by unnecessarily canvassing the case of respondents 4 to 20 as if they are the rival claimants having claim over an extent of Acs.4-20 guntas belonging to them. Since the petitioners were not interested in selling the property any more,

2nd respondent introduced the 3rd respondent as the developer for developing the property, stating that they will be given 50% of the built-up area besides purchasing peace with the respondents 4 to 20 by way of giving them some fixed built-up area. The respondents 1 to 3, taking advantage of the trust reposed by the petitioners, inducted respondents 4 to 20 as claimants and thus, they all entered into compromise agreement on 24.06.2009. In the said compromise agreement, it was decided that about 43,000 square feet shall be allotted to the respondents 4 to 20 in the proposed development of that land by way of arrangement to avoid any litigation, and the sharing ratio of petitioners was settled at 49%, requiring the 3rd respondent to comply the same. The petitioners state that though, compromise agreement was got executed on 24.06.2009, subsequently, respondent No.1 entered into a fresh MOU with them on 07.11.2009 and in the said MOU, respondent No.1 again recited that a sum of Rs.18,50,00,000/- is payable to them apart from providing super

built-up area of 10,000 sq. feet in a de novo MOU dated 20.04.2008. The petitioners attributed fraud to respondent Nos.1 to 3 in obtaining the development agreement and denied receipt of consideration except an amount of Rs.1,25,00,000/-. The petitioners also claim that they are still in possession of the schedule property and the possession was delivered to respondent No.3, who is only a developer having no right or title or interest as the same was not created in him.

5. The petitioners also contend that they cancelled the document bearing No.3589 of 2010 on the ground of fraud and issued legal notice dated 08.07.2013 to the respondents intimating the termination and cancellation of registered DAGPA on the ground of fraud and invoked arbitration clause in view of the dispute and even furnished the name of a retired Judge of this Court which was received by the respondents except respondent Nos.9, 14, 15 and 16. The petitioners admit preliminary reply given by respondent Nos.1 and 2 dated 25.07.2013 seeking to furnish copy of the MOU dated 07.11.2009 for sending a detailed reply and the same was furnished and respondent No.3 sent a detailed reply dated 19.07.2013, which contents were denied by the petitioners. It is according to the petitioners, respondent Nos.4 to 20 failed to reply to the said notice. According to the petitioners, the contents of reply notice dated 10.09.2013 issued by

respondent Nos.1 and 2 are all false and incorrect. They also state that they have got issued a rejoinder notice dated 15.10.2013 to respondent Nos.1 to 3, which was acknowledged by them. The petitioners referred to certain other facts which are unnecessary to deal with. The other relevant facts referred to by the petitioners relate to the denial by them as to the receipt of Rs.10,50,01,205/- under a receipt dated 08.12.2010 towards full and final settlement as alleged by respondent Nos.1 and 2. According to the petitioners, the said receipt is a fabricated document. Even they denied the declaration dated 08.12.2010 said to have made by them as alleged by respondent Nos.1 and 2 stating that the same is also a fabricated document. Lastly, they state that the schedule property, since situated in Banjara Hills, a prime locality, the respondents attempting to grab the same by playing fraud without any legal entitlement, as such, if their rights are not safeguarded, they would suffer irreparable loss and injury and that there is *prima facie* case in their favour and balance of convenience also lies in their favour, and, therefore, they are entitled to reliefs sought for.

6. Respondent Nos.1 and 2 filed common counter controverting the allegations levelled by the petitioners. According to them, clause 12.7 contained in DAGPA No.3589 of 2010, the petitioners are not parties to the said clause and it was entered into by the respondents and,

therefore, the said arbitration clause is an ancillary DAGPA and only those parties to the said clause can invoke the arbitration clause and if the petitioners have any grievance, they have to seek redressal by initiating proper proceedings under common law Courts. They state that DAGPA No.3589 of 2010 clearly recites that they have paid entire sale consideration under the agreement of sale and, therefore, the instant petition is not maintainable as it does not arise from out of the said development agreement. They state that the reliefs are mainly directed against them and respondent No.3, but not against respondent Nos.4 to 20, though, they are made parties and the relief of injunction restraining respondent No.3 from proceeding with construction work would affect the right of respondent Nos.4 to 20 also as they are entitled to 43000 sq. feet of built-up area together with proportionate

undivided share in the subject land and, therefore, the said relief cannot be granted. They referred to the earlier litigations and the award passed by the Lok Adalat and the sale agreement dated 20.03.2006 entered into by the respondent No.1 and petitioners and payment of Rs.1,00,32,405/- to the petitioners towards part sale consideration.

7(a). They state that the petitioners on their own volition having executed a GPA dated 27.03.2006

concerning the schedule land registered at Chennai, now cannot turn around and allege that they did so, on the alleged inducement on their (respondents') part. They refer to various agreements entered into amongst the parties, more particularly, the tripartite compromise agreement dated 24.06.2009 reducing the terms of settlement into writing the petitioners are signatories to the said compromise agreement, which recognized categorically and acknowledged the ownership of respondent Nos.4 to 20 over 43,000/- square feet of super built-up area together with proportionate undivided share in the land out of 49% share falling towards their entitlement. They refer to the development DAGPA dated 29.07.2010 stating that the petitioners levelled incorrect allegations contrary to the real facts. Their main stand is, that by the date of development agreement, the petitioners already received the entire consideration from them in proportion to their actual entitlement, which they transfer and convey to them (respondent Nos.1 and 2) under the development agreement and the petitioners have categorically admitted that they received entire sale consideration. According to them, the cancellation of GPA bearing No.1172 of 2006 is inconsequential, since the petitioners along with respondent Nos.4 to 20 appointed respondent No.1 as their general power of attorney in respect of their entitlement in 49% share of the proposed development and, therefore, according to them, the stand

of the petitioners that in the cancellation deed bearing No.60/IV/2013 cancelling GPA 1172 of 2006, the cancellation was effected even with regard to registered DAGPA is beyond comprehension and logic.

They reiterated that petitioner No.1 has given a declaration on 08.12.2010 titled as 'receipt' stating that he received a sum of Rs.10,50,01,205/- in respect of the said subject land and the development being made thereof in terms of the registered DAGPA and the said receipt is also filed and, therefore, the petitioners, now, cannot contend that they still own the schedule property.

(b) Respondent Nos.1 and 2 have narrated certain litigations filed by the alleged purchasers under the agreement of sales executed by the petitioners, which are O.S. No.240 of 2013 pending on the file of III Additional Chief Judge, City Civil Courts, Hyderabad, filed by one Syed Sibtenabi Abedi Shourab and 11 others for specific performance of an alleged agreement of sale dated 07.06.2005 for an extent of 3000 sq. yards, wherein the petitioners herein have filed their written statements suppressing the agreement of sale; second, O.S. No.416 of 2012 pending on the file of IV Senior Civil Judge, City Civil Courts, Hyderabad, filed by Mr. Mohammed Ahmed Khan against the petitioners and respondent Nos.1 to 3 and some other respondents seeking declaration that the award passed by the Lok Adalat in A.S. No.15 of 2005

dated 26.02.2005 is null and void, which, according to the respondents, was got filed by the petitioners; third, O.S. No.43 of 2011 pending on the file of III Additional Chief Judge, City Civil Courts, Hyderabad, filed by S.Krishna Murthy and others against some of the petitioners for specific performance of an alleged agreement of sale dated 03.12.2005 in respect of an extent of Acs.2-00 allegedly forming part of the subject land, again suppressing the execution of DAGPA by the petitioners; fourth, O.S. Nos.99, 100 and 101 of 2012 filed by Bilkis Begum, Zubair Alam and Nazeemuddin for the relief of specific performance of alleged agreements of sale said to have executed by the petitioners in their favour, again suppressing the DAGPA and, in fact, the petitioners have filed consent written statements. Respondent Nos.1 and 2, thus, projected these litigations to condemn the allegation of fraud attributed to the petitioners by them and also to show the conduct of the petitioners, which disentitles them from seeking the relief of injunction by way of interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'Act 1996'). Therefore, sought to dismiss the petition.

8(a) Respondent No.3 filed his separate counter stating that the petitioners are guilty of "suppressio veri and suggestio falsi" and have not come to this Court with clean hands. They have extracted clause 12.7 of

development agreement-cum-irrevocable general power of attorney dated 29.07.2010, a registered document bearing No.3589 of 2010, which clause concerns with arbitration agreement entered into mainly basing on one of the term contained therein that any of the parties shall not attempt to stop the construction work during pendency of the arbitration proceedings. They state that the law is well settled that the arbitration clause in any agreement is an independent agreement from the remaining part of the agreement and except parties to such arbitration agreement, no other party can invoke the arbitration agreement or initiate proceedings in any manner and also cannot seek any relief by way of interim measures in terms of Section 9 of the Act 1996. They state that though, there are about five parties in the said agreement, namely, Owners-I, Owners-II, Confirming Party-I, Confirming Party-II and Developer, only three of them are parties to the arbitration agreement, since under the said agreement, the other parties reserved no right to seek arbitration of the issue and the petitioners being Owners No.1 are exclusively excluded from the purview of the arbitration agreement and as such the present petition itself is not maintainable and when they reveal serious allegations of fraud, the fraud cannot be referred to an arbitrator as the same is within the exclusive jurisdiction and competence of the Civil Court and, therefore, the petitioners are not entitled to any arbitration proceedings

including the petition under Section 9 of the Act 1996. Respondents No.3 has submitted various events in paragraph No.3 of his counter, which are already narrated in the above. According to him, the compromise agreement dated 24.06.2009 was transformed into registered DAGPA in his favour and he was put in possession of schedule property thereunder.

(b) He states that he spent Rs.25 crores for development of the subject property mentioning the works executed and states that in view of clauses 12.2 and 12.3, right to indemnity under clause 12.12 and entitled for compensation on account of any dispute between them. He states that he has entered into agreement with several third parties and the petitioners have acquiesced to the construction and in creation of third parties and, therefore, they are not entitled to seek any injunction. It is according to him, the inter se disputes between the petitioners and other respondents cannot in any way affect much less diminish his rights under the development agreement. He referred to the reply dated 19.07.2013 got issued to the notice dated 08.07.2013 by the petitioners stating that the allegations of the petitioners are absolutely imaginary and without there being any basis, allegation of fraud is levelled. Respondent No.3 also states that the petitioners themselves have reconciled with the right and title and the claim of respondent Nos.4 to 20 and did not plead any

grievance against them and since the petitioners have no right and title under the development agreement cannot plead any prima facie case much less balance of convenience in their favour to entitle them for the grant of injunction.

(c) Respondent No.3 specifically denied the allegation of fraud levelled against him and raised certain grounds to show that the alleged fraud is wholly untrue and even the alleged conspiracy set up by the petitioners between respondent Nos.1 and 2 and himself (respondent No.3) and the inducement alleged by them in entering into compromise agreement dated 24.06.2009. They state that the petitioners are not illiterates and they have been guided by the advocate right from the beginning and taking up the issue after a lapse of five years and thereby attempting to stall the project requires examination in viewing the conduct of the petitioners. Respondent No.3 has also referred to certain grounds in paragraph No.11 in investing the amounts, thus:

- "a) Incurred huge amounts in levelling and protecting the site for the last 3 years.
- b) Incurred a sum of Rs.75.00 Lakhs towards construction of NALA passing through the subject land.
- c) Paid more than Rs.10.00 Crores to the Petitioners representing through their GPA Holder towards refundable Security Deposit and Petitioners being signatories to the said Development Agreement, acknowledged the receipt of the same.
- d) Paid a sum of Rs.1.76 Crores towards Building Permit Fee to the GHMC for obtaining Building

Sanctions.

- e) Incurred huge amounts towards Securing Permission for (a) Change of land Use, (b) No-objection from the collector and (c) Securing Go for diversion of NALA
- f) Incurred more than Rs.5.00 Crores towards making payment to Contractors, Architects, Engineers and other Material Suppliers as Advance.
- g) Has been incurring Rs.1.00 Crore per month towards the Construction Cost for the Development of the project."

9. Respondent No.3 also states mere cancellation of registered GPA bearing No.1172 of 2006 given in favour of Mr. R.Kishore Kumar Reddy would not affect his rights under the registered DAGPA. Lastly, he contends that the petitioners being parties and signatories in both the compromise agreement dated 24.06.2009 and registered DAGPA dated 29.07.2010, besides ratifying all the acts and the things done by the GPA Holder at every stage, now cannot question his rights.

10. Respondent Nos.4 to 20 have filed their counter.

They specifically referred to the earlier litigations and entering into the compromise before the Lok Adalat. According to them,

sub-clause 6.1 of clause No.VI (Consequences of breach) of the said agreement entered in June 2009 prohibits the parties in creating legal obstruction or impediment to the project and also that no party shall be entitled to invoke clause 3(1) by creating fictitious litigation.

They state that only with a view to put an end to litigation and remove any claim or right over the property, they entered into development agreement requiring respondent No.3 to develop the property which is done for mutual benefit of all the parties. They attribute ill-motive to the petitioners in levelling the allegation of fraud in the instant petition and praying the Court seeking interim measure under Section 9 of the Act 1996. They also extracted Clause 12.7 of the agreement for arbitration and taken the same stand as respondent No.3 has taken, which was referred to in the above. Finally, they plead to dismiss the petition, as in case the injunctions as prayed for by the petitioners are granted, all the respondents would suffer irreparable loss, which would not be compensated in any other manner.

11. The Court below has extracted the averments mentioned in the petition affidavit, counters filed by the respondents and referred to the contentions raised by the learned counsel for the parties in the light of the authorities relied on by them and then in paragraph Nos.53 and 54, observing that the petitioners have already initiated arbitral proceedings by way of filing arbitration petition under Section 11(6) of the Act 1996 before this Court and recording a finding that the arbitration clause would apply to the owner and assignee and, somehow, holding that the petitioners have made out *prima facie* case and

balance of convenience also lies in their favour and that irreparable injury would occasion, in case the reliefs sought for by the petitioners are refused, granted injunctions. Aggrieved by the said order, respondent Nos.1 and 2 as one set, respondent No.3 as another set and respondent Nos.4 to 20 as the last set, preferred the instant Civil Miscellaneous Appeals challenging the order by raising various grounds.

12. Substantially the grounds raised in all the appeals are based on the averments mentioned in their respective counters before the Court below, which needs no narration once again.

13. Heard Sri L. Venkateshwar Rao, learned counsel for respondent Nos.1 and 2 (appellants in C.M.A. No.959 of 2015), Sri M.V. Durga Prasad, learned counsel appearing for Sri K.V. Siva Prasad, learned counsel for respondent No.3 (appellant in C.M.A. No.960 of 2015), Sri S.Chakrapani, learned counsel for respondent Nos.4 to 20 (appellants in C.M.A. No.1023 of 2015), and Sri D. Prakash Reddy, learned senior counsel appearing for Sri K.K. Waghray, learned counsel for the petitioners (respondent Nos.1 to 8).

14. Sri M.V. Durga Prasad, learned counsel for respondent No.3 (appellant in C.M.A. No.960 of 2015) has submitted main arguments in all these three (3) appeals

that clause 12.7 of the DAGPA dated 29-07-2010, is the arbitration clause and thus, it constitutes an independent agreement from the remaining part of the agreement and except parties to such arbitration agreement, no other party can invoke the arbitration agreement, and, therefore, cannot seek any relief by way of interim measures under Section 9 of the Act 1996. He would further submit that though, the development agreement would show that there are five parties, only three parties out of them are parties to it as other parties reserve no rights to seek arbitration of issues. It is according to him, since the Owners - I were excluded from the purview of the arbitration agreement, the original petition itself was not maintainable and, therefore, invoking arbitration clause amounts to abuse of process of law. His further submission is that since the petitioners have levelled allegations of fraud, it falls within the jurisdiction of the Civil Court, and, therefore, petition itself was not maintainable.

15. Learned counsel would contend that respondent No.3 was put in possession of the schedule property and also invested the amounts as security deposits under the said agreement and that the developer has even entered into agreement with several third parties and the petitioners are, therefore, not entitled to seek injunction for alienation of construction of the project. Since the petitioners have no right or share under the

development agreement, they cannot plead any *prima facie* case and balance of convenience does not lie in their favour. It is, therefore, his submission that the Court below without recording any finding on the arbitration agreement, went wrong in granting injunction, as prayed for, and, therefore, the impugned order is liable to be set aside.

16. For the proposition that the person, who is not a party to the arbitration agreement is not entitled to seek relief under Section 9 of the Act, learned counsel has placed reliance on the decisions of the Hon'ble Supreme Court in **Firm Ashok Traders and another v. Gurumukh Das Saluja and others**^[1], **Sundaram Finance Limited v. NEPC India Limited** [Appeal (Civil) 141-143 of 1999, dated 13.01.1999], **State of Goa v. Praveen Enterprises**^[2], **Indowind Energy Limited v. Wescare (India) Limited and another**^[3] and **S.N. Prasad, Hitek Industries (Bihar) Limited v. Monnet Finance Limited and others**^[4].

17. For the proposition that when serious allegations of fraud and malpractices are alleged, the parties can only avail the remedy of approaching the Civil Court to decide such issues, but not the arbitrator, learned counsel placed reliance on the decisions of the Hon'ble

Supreme Court in **N. Radhakrishnan v. Maestro Engineers and others**^[5], **Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and another**^[6] and also the decision of the Delhi High Court in **Kapil Chopra (Partner SKN) and others v. Satish Chopra (Partner SKN) and others** [Arb.P. No.455 of 2012 and O.M.P. No.748 of 2012, dated 06-05-2013].

18. For the proposition that a party to an agreement, who creates third party interest in respect of the subject matter of the arbitration cannot seek protection under Section 9 of the Act 1996, learned counsel placed reliance on the decisions of the Hon'ble Supreme Court in **Orissa Manganese & Minerals Limited v. Synergy Ispat Private Limited**^[7], **Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal**^[8], **Power Control Appliances v. Sumeet Machines Private Limited**^[9], **Khardah Company Limited v. Raymon and Co. (India) Private Limited**^[10], the decision of the Madras High Court in **K.S. Chidambaram v. Gomathi Ammal and others**^[11] and also the decisions of the Gauhati High Court in **Brahmaputra Realtors Pvt. Ltd. v. G G Transport (P) Limited and others**^[12], **Reboti Ray v. Sashi Kanta Budhia @ Agarwal**^[13].

19. For the proposition that disputes should be relatable to the contract to seek reference to the arbitration, learned counsel placed reliance on the decision of the Hon'ble Supreme Court in **Yogi Agarwal v. Inspiration Clothes & U and others**^[14]. He has also placed reliance on the decision of the Hon'ble Supreme Court in **India Household and Healthcare Limited v. LG Household and Healthcare Limited**^[15] for the proposition that if the dispute is not covered by the arbitration agreement, the parties are to be relegated to the Civil Court.

20. In the context of principles governing grant of injunction, learned counsel has placed reliance on the decisions of the Hon'ble Supreme Court in **M. Gurudas and others v. Rasaranjan and others**^[16] and **Anand Prasad Agarwalla v. Tarkeshwar Prasad and others**^[17].

21. For the proposition that the parties seeking equitable relief of interim injunction should approach the Court with clean hands, the learned counsel placed reliance on the decisions of the Hon'ble Supreme Court in **M/s. Gujarat Bottling Co. Ltd., and other v. Coca Cola Company and others**^[18] and **S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs.**

and others^[19].

22. Sri L. Venkateshwar Rao, learned counsel for respondent Nos.1 and 2 (appellants in C.M.A. No.959 of 2015), besides adopting the submissions made by the learned counsel for respondent No.3 (appellant in C.M.A. No.960 of 2015) would submit that the petitioners have not approached the Court with clean hands in seeking the relief of injunction as they have colluded with various third parties, fabricated ante dated documents in their favour and got cases filed before the Civil Courts, in which, the petitioners filed written statements admitting specific performance of agreement and in other instances got the matter referred to Lok Adalath and got award passed at the appellate stage and thus, obtained collusive decrees concerning very same subject matter. He would also submit that the Court below has not considered jurisdiction to entertain the original petition. Thus, he submits that it is not open for the petitioners to level the allegation of fraud, having they themselves played fraud, and, therefore, sought to set aside the impugned order.

23. Learned counsel also placed reliance on the decision in **S.B.P. AND CO v. Patel Engineering Limited**^[20] in support of his submission that the Court below has to necessarily decide whether it has jurisdiction to, when the opposite party 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.

24. Sri S. Chakrapani, learned counsel for respondent Nos.4 to 20 (appellants in C.M.A. No.1023 of 2015), would submit that the petitioners since not included in the arbitration agreement shown as Clause 12.7 of the DAGPA cannot invoke arbitration clause and cannot maintain a petition for interim measures under Section 9 of the Act 1996 and they cannot also stop construction, as the said clause also includes an absolute prohibition on the parties to attempt to stop the construction work during the pendency of the arbitration proceedings. He would also submit that the petitioners have got filed collusive suits and the very fact that they have filed consent written statements would prove that at the behest of the petitioners, the said litigations have been created only to defeat compromise decree passed in A.S. No.15 of 2005 and to extract more money and concessions from the developer. He, thus, would submit that the petitioners, who are respondent Nos.1 to 8 herein, were not entitled to equitable relief and the order granting injunctions passed by the Court below is liable to be set aside.

25. Sri D. Prakash Reddy, learned senior counsel for the petitioners (respondent Nos.1 to 8), would submit that under the agreement of sale, dated 20-03-2006,

entire sale consideration was not paid by respondent No.1, but by playing fraud in the development agreement, a clause was incorporated as if the entire sale consideration was paid and it constrained the petitioners to cancel the registered DAGPA through the registration process as a registered document is required to be cancelled through a registered deed, but by all the parties by reflecting the same in the records of the registration office.

26. It is also his submission that it cannot be said that Owners – I being petitioners are not being represented by Confirming Party – I so far as sharing of the entire development under the said agreement is concerned, and, therefore, it has to be construed that the petitioners are parties to the arbitration agreement and can invoke arbitration clause and appoint an arbitrator which they did so, and, therefore, it cannot be said that they are not parties to the arbitration agreement. He would further submit that nothing is placed on record by either of the respondents (appellants herein) to show that entire sale consideration under the agreement of sale was paid, and, therefore, the terms contained in the agreement 2006 would continue to operate and even the said agreement cannot be construed as an assignment deed to exclude the petitioners from the purview of the arbitration agreement, which has been incorporated in the

development agreement.

27. Learned senior counsel, of course, projected certain other probabilities, which, in our view, are not relevant, at this stage, in deciding the instant appeals.

28. At the outset, we would like to observe that we intend to examine the controversy herein in the light of the two significantly important aspects as to whether clause 12.7 occurring in development agreement constitutes an independent arbitration agreement and that the petitioners are exclusively excluded in invoking that clause as contended by the learned counsel for the various sets of respondents or whether the petitioners can be construed as parties to the said arbitration agreement by virtue of they being represented by Confirming Party – I as per development agreement and the other related issues, such as, whether the dispute said to have raised by the petitioners is relatable to the contract to seek reference to the arbitration or whether such dispute cannot lead to arbitration.

29. The first aspect that requires consideration is the effect of invocation of arbitration clause contained in the development agreement by the petitioners. We would like to extract the said clause, which is thus:

"12.7. All the Confirming Party-I and Owners-II on one Part and Developer on the other part, agree that in the event of any doubt

or dispute arising between the parties herein in relation to this Development Agreement, the matter shall be referred to a mutually agreed Arbitrator and the Award passed by such Arbitrator shall be final and binding on all the parties herein and the provisions of the Arbitration and Conciliation Act, 1996, as amended, shall be applicable. However, any of the parties shall not attempt to stop the construction work during the pendency of the Arbitration Proceedings."

30. A perusal of the affidavit filed by the petitioners would show that they have specifically mentioned in paragraph No.21 of the affidavit that they got issued legal notice on the respondents on 08.07.2013, intimating about the termination and cancellation of registered DAGPA bearing document No.3589 of 2010 on the ground of fraud and also invoked arbitration clause in view of the dispute and for such purposes, they have also furnished the name of a retired Judge of this Court as per arbitration clause. A perusal of the said notice shows in the concluding paragraph therein, the petitioners have stated that there is a serious dispute arisen between the parties in relation to the alleged instant DAGPA and clause 12.7 contemplates provisions for referring the dispute to arbitration and under the very same clause the parties have agreed for referring the matter for mutually agreed arbitrator and, therefore, they were ready and willing to proceed with the arbitration for adjudicating the dispute and for the purpose of invoking the arbitration clause, they have nominated the name of a retired Judge of this Court having obtained consent and willingness to

act as arbitrator by him and invited the respondents to come out with the name if they have any other choice and refer the same, which would be again subject to mutual consent of the parties or else, in case the parties fail to arrive at appointment of mutually agreed arbitrator, the petitioners will take suitable step for appointment of arbitrator through the Court of law. In paragraph No.53 of the order under challenge, the Court below made observation that the petitioners have already initiated the arbitral proceedings by filing arbitration application under Section 11(6) of the Act before this Court seeking appointment of an arbitrator.

31. When viewed the aforesaid facts, we are of the opinion that it is not necessary to probe into the contentions raised by the rival parties referred to in the above. Therefore, we are inclined to leave the question touching the jurisdiction of the arbitrator to entertain the dispute by the arbitrator himself open and also for the reason that we are not adjudicating upon, the question of appointment of arbitrator by the Court below on a request made to that effect by way of a petition under Section 8 of the Act. Thus, it is for the arbitrator to decide whether the arbitration agreement can be invoked by the petitioners and whether he has got jurisdiction to entertain the dispute alleged and other incidental questions, if any. In that view of the matter, the authorities relied on by the

learned counsel for respondent No.3 -Developer, in our view, needs no advertence.

32. Now the issue that remains for adjudication is whether the injunctions granted by the Court below can be upheld or withheld.

33. In the above context, we would like to once again refer to clause 12.7 of the DAGPA strongly relied on by both the parties. The concluding sentence thereof shows an express prohibition prohibiting any of the parties to attempt to stop the construction work during the pendency of the arbitration proceedings. When the petitioners are harping upon the said arbitration agreement and even invoked the said clause, certainly, they were disentitled to seek the injunctions by invoking Section 9 of the Act. When viewed in that context, certainly, we are of the view that the petitioners are unsuccessful in substantiating a strong *prima facie* case in their favour and the balance of convenience lying in their favour.

34. The second aspect that requires consideration is whether the petitioners have approached this Court with clean hands to seek the equitable relief of injunction. We would like to observe that when respondent Nos.1 and 2 in their counter specifically averred in paragraph No.34, listing out the litigations

specifically mentioning that the petitioners have colluded with various third parties, fabricated ante-dated agreements in favour of the said third parties and got various cases filed and then they filed consent written statements to defeat their valuable rights and rights of other respondents under the development agreement. The petitioners have not chosen to file rejoinder traversing the instances referred to in that paragraph.

We have already narrated the litigations with relevant details while narrating the averments of the counter filed by respondent Nos.1 and 2 in the above. Thus, certainly, the conduct of the petitioners is worthy of blame and, therefore, they are disentitled to seek the equitable relief of injunction. We would also like to observe that the petitioners have chosen to seek multiple injunctions of different nature through one and the same petition, which is contrary to the mandate of Rule 55 of the Andhra Pradesh Civil Rules of Practice.

35. So far as jurisdiction to entertain the dispute raised by the petitioners (respondent Nos.1 to 8) is concerned, we are of the view that it is for the arbitrator to decide the same.

36. In view of the foregoing discussion, we hold that the petitioners failed to make out a *prima facie* case and balance of convenience lying in their favour and the consequential irreparable injury that would occasion to

them, in case, injunction is refused, and, therefore, these three Civil Miscellaneous Appeals are allowed and the impugned order is set aside. However, to safeguard interest of the petitioners, we issue the following directions:

The appellant in C.M.A. No.960 of 2015, who is respondent No.3 – developer, shall not alienate 50% of the share in 49% of share allotted towards Confirming Party - I and the Owners - II till disposal of arbitration proceedings. We also direct that the arbitrator shall dispose of the arbitral proceedings uninfluenced by any of the observations made herein and also the observations made by the Court below in the order under challenge. There shall be no order as to costs.

37. As a sequel thereto, Miscellaneous Applications, if any, pending stand disposed of.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

10th February 2016

Ajr/PV/SIVA

[\[1\]](#) AIR 2004 SC 1433

[\[2\]](#) (2012) 12 SCC 581

[\[3\]](#) (2010) 5 SCC 306

[\[4\]](#) (2011) 1 SCC 320

[\[5\]](#) (2010) 1 SCC 72

- [\[6\]](#) AIR 1962 SC 406 (V 49 C 63) (Bombay)
- [\[7\]](#) 2014 Law Suit (SC) 746
- [\[8\]](#) AIR 1962 SC 527(1)
- [\[9\]](#) 1994 SCR (1) 708 = 1994 SCC (2) 448
- [\[10\]](#) AIR 1962 SC 1810
- [\[11\]](#) 1996 Law Suit (Mad) 847
- [\[12\]](#) 2013 Law Suit (Gau) 286
- [\[13\]](#) 2006 Law Suit (Gau) 49
- [\[14\]](#) (2009) 1 SCC 372
- [\[15\]](#) (2007) 5 SCC 510
- [\[16\]](#) (2006) 8 SCC 367
- [\[17\]](#) AIR 2001 SC 2367
- [\[18\]](#) AIR 1995 SC 2372
- [\[19\]](#) AIR 1994 SC 853
- [\[20\]](#) 2005 Law Suit (SC) 1461