

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****Commercial Arbitration Petition No.51 OF 2016**

1.Mohinder Singh Dua

2.Jasbir Dua.

...Petitioners

Versus

1.Kamla Landmarc Construction Pvt. Ltd

2.Columbia Co-op.Hsg.Soc.Ltd.

3. Sunil S. Jain.

...Respondents

Mr.S.C.Naidu with Mr.Aniketh Poojari i/b. C.R.Naidu & Co., for the
Petitioners.

Mr.Bipin Joshi with Mr.Prayag Joshi, for Respondent No.1.

Mr.Mayur Khandeparkar i/b. Mehul A. Shah, for Respondent No.3 in
CARBP 51/16.

CORAM : G. S. KULKARNI, J.

DATE : 8 DECEMBER 2017

JUDGMENT :

1. This is a petition under Section 9 of the Arbitration and Conciliation Act,1996 (for short 'the Act'). The petitioners who are investors in a project namely the 11th floor of the building belonging to respondent no.2-Columbia Co-operative Housing Society Ltd. (for short

“Columbia CHS”) being undertaken by respondent no.1- Kamla Landmarc Construction Pvt. Ltd (for short “Kamla”). The petitioners pray for diverse reliefs, however, what is pressed by the petitioners in this petition are prayer clauses (b) and (e) which read thus:-

“(b) A mandatory order of injunction restraining the Respondent No.3 from selling, transferring, dealing with or entering into an Agreement for sale/conveyance/MOU or alienating or creating third party rights or create any license in respect of flat bearing No.64 admeasuring 1660 sq.ft., being constructed on part 11th floor of the Respondent No.2 Society building being Columbia Co-operative Housing Society, St.Dominic Road, Bandra, Mumbai-400050 until the final disposal of the arbitral proceedings.

(e) In alternate to prayer clause (b) Respondent No.3 be directed to deposit the balance amount of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lakhs only) being the amount due and payable under agreement of sale dated 16th October,2015 at Exhibit J hereto with this Hon'ble Court to the Account of the Petition within a period of 7 days from date of order of such further time as this Hon'ble Court may deem fit and proper.”

FACTS AND PLEADINGS

2. In nutshell the facts are : The Columbia CHS owned a building comprising of ground plus six floors situated at Plot No.B, C-486, St.Domnic Road, Bandra (West), Mumbai-400050, on land admeasuring 2355 sq.meters.

3. A development agreement dated 7 October 2002 was entered between Columbia CHS and Kamla, for execution of additional

construction by utilization of transferable development rights (TDR), development plan rights and utilization of FSI to construct extension to the existing ground and sixth floors and construction of new floors being seventh to tenth floors, and converting the ground floor as stilt parking of the said building. Thereafter by a deed of confirmation dated 12 May 2003 between Columbia CHS and Kamla, the development agreement was ratified and confirmed and the development agreement dated 7 October 2002 was registered with the sub-registrar, Mumbai Suburban District on 12 May 2003. Kamla accordingly carried out vertical extension of the said building and obtained a full occupation certificate dated 10 August 2007. Kamla also exercised its absolute rights to enter into an agreement for sale of units/flats constructed under the said agreement.

4. As there was further scope for development by constructing *“part 11th floor of the said building”*, Columbia CHS in its special general body meeting considered Kamla's proposal to construct, part 11th floor of the building. A resolution to that effect was passed by Columbia CHS accepting the offer of Kamla, contained in its letters dated 27 May 2013 and 23 August 2013. Columbia CHS by its letter dated 27 September 2013 communicated its approval to Kamla.

5. As Kamla was desirous of commercially exploiting and developing part 11th floor and other incidental works, with an ultimate

scheme of selling the newly constructed flats on the 11th floor with two car parking spaces in the said building to the prospective buyers and the proposed cost of construction of the said part 11th floor and other repair and renewal of the said building estimated to about Rs.8 crores, Kamla approached the petitioners to invest an amount of Rs.4 crores (to be invested by petitioner nos.1 and 2 in the proportion of 20:30.) The petitioners agreeing to do so, entered into a memorandum of agreement dated 10 March 2014 with Kamla. Admittedly, this memorandum of agreement (for short 'MOA') is not a registered document as also there is an issue about the same being adequately stamped. Some of the clauses of this MOA are required to be noted and Clauses 17, 18, 19, 20, 30(a),(b), (c), 31, 32(b), 33(c),(d),(e) read thus:-

“19. Representations and Warranties of the Developer:

20. Marketable title of said flat proposed to be constructed:-
The Developer is the absolute owner of the said flat to be constructed on the part 11th floor of the said building and no other person has any right, title or interest on and over thereof. The said proposed flat is also free from all claims, demands, encumbrances, mortgages, charges, liens, attachments, lis pendens, uses, easements, trusts, prohibitions, court proceedings either in execution or pending, revenue recovery proceedings, wealth tax, Income tax dues, Income tax attachment, Financial Institution charges, claims and liabilities whatsoever or howsoever, made or suffered by the said proposed flat or any person or persons having or lawfully, rightfully or equitably claiming any estate or interest therein through under or in trust for the Developer or the Developer's Predecessors-in-title. The Developer undertakes that it shall indemnify the Investor against any loss or damages that may take place due to the defective title to said proposed flat or any part/portion thereof and/or for any encumbrances thereto.

... ..

30. The Scheme of the Investment & the Return:

a) The Investor shall invest the sum stated herein with the

said project of the Developer.

b) In consideration of the said Investment (defined herein) the Developer shall on completion of the said premises, the price received after selling the said proposed flat, cost of construction that is estimated to Rs.8,00,00,000/- (Rupees Eight Crore only) shall be deducted, or if in the event of increase or decrease of cost of construction, the actual cost of construction shall be deducted and balance shall be divided between the Developer and the Investor in the ratio of 50:50.

c) On completion of the construction or during the phase of construction of the said proposed flat on the part 11th floor if any purchaser approaches either to the Developer or the Investor both shall by mutual consent sell the proposed flat on agreed rate.

... ..

31. Investment:

a) Total Investment: A consolidated sum of Rs.4,00,00,000/- (Rupees Four Crores only) (Investors Portion) is to be invested by the Investor as agreed by and between the parties hereto. Save and except for purchase of TDR, which shall be paid if required by the Investor and the Developer in equal proportions and further the Developer and investor shall not be liable to invest any further amount with the Developer and/or any person or persons claiming through or under it in any manner whatsoever, however, if any further amount is required beyond as mentioned, then the same may be contributed by the Investor and the Developer in equal proportions.

b) Payment of Investment: The Investor shall make payment of the Investment specifically in the manner as mentioned herein. However, in any circumstances the Investor shall not be bound to pay any extra amount beyond the terms of the Payment Schedule except for cost of TDR.

32. Consideration in this Agreement:

a)

b) The Investor: In the event the flat remains unsold for 24 months from the date of commencement of the physical work of construction the Developer shall pay interest at the rate of 18% per annum which shall be paid on monthly basis from 25th month on the investors portion till the said proposed flat is sold.

33. Developer's Obligations:

a)

b)

c) No Agreement: The Developer shall not enter into any further agreement with any party in respect of the Subject Property from DOC, save and except for sale of the proposed flat.

d) Notice to Investor: Upon completion of the construction of

the proposed flat in all respects with O/C, and set of all documents in that behalf. Subject flat the Developer shall issue a notice to the Investor along.

e) Indemnification: The Developer undertakes to indemnify and agrees to keep the Investor saved, harmless and indemnified about all its activities under Said Project and/or within the purview of this Agreement, including but not limited to the correctness of the title of Said Land including the Said Land, subject Property, construction of the New flat in accordance with Said Plan, qualities of the materials, specification, disputes arising out of the deviation in construction from Said Plan and/or for the violation of any applicable laws or rules and/or any agreement entered into by the Developer with any third party or parties in respect of the Said Project and/or the Subject Property.
... ..”

6. Further in regard to the development of part 11th floor, another agreement titled as a supplementary agreement dated 11 April 2014 came to be entered between Columbia CHS and Kamla.

7. In pursuance of the said MOA dated 10 April 2014, the petitioners contributed the entire sum of Rs.4 crores. It is the petitioners' case that in terms of the supplementary agreement dated 11 April 2014, Kamla obtained commencement certificate and mobilizing men and equipment Kamla first undertook repair work of the said building which was completed by February,2015. The entire work of repairing was undertaken from the monies contributed by the petitioner. Kamla thereafter raised columns and laid shuttering for the slabs. However, no further construction work was being carried out by Kamla. The entire project had come to a standstill as Kamla claimed to be in financial difficulties and expressed inability to bring its share of construction. The

petitioners followed up with Mr.Jitendra Jain of Kamla who evaded and avoided to meet the petitioners. Looking at the dilatory tactics of Kamla in completing the project, the petitioners realised that respondent no.1 was not interested in completing the project as per the MOA. Kamla had not complied with the obligation under the MOA as also had not forwarded certified copies of the sanctioned plans of the proposed flats on the part of the 11th floor despite repeated follow up. As the petitioners were facing financial difficulties, Kamla offered to refund the entire amount brought by the petitioners in installment with interest at the rate of 21% from the date of investment till the date of repayment of installments between 1 April 2015 to 31 July 2015. Kamla assured that the amount would be mutually agreed and paid after all installments as envisaged in the Deed of Cancellation were paid over to the petitioners and the undated Deed of Cancellation was forwarded to the petitioner. The petitioner had sought refund of the amounts. The petitioners had performed all its obligations under the MOA. As nothing was forthcoming from Kamla, the petitioners addressed a notice through its Advocate dated 17 July 2015 to Kamla calling upon Kamla to pay the petitioners a sum of Rs.4 crores with interest thereon at the rate of 21% per annum from 7 May 2014 as also furnish the petitioners a true copy of sanctioned plan for construction of flat on the part 11th floor of the building; commence balance construction of the flat on the part 11th floor and complete the same within three months and in the alternative forthwith refund to the petitioners a sum of Rs.4 crores with

interest at the rate of 21% per annum from the date the amount was brought by the petitioners; mutually agree and fix the amount of compensation payable by the respondent to the petitioners for breach of MOA. Thereafter, the MOA dated 10 March 2014 stood cancelled by an undated cancellation deed under which Kamla interalia agreed under clause 8 to refer the disputes between the petitioners and Kamla for arbitration. The petitioners invoked Clause 8 of the Deed of Cancellation being the arbitration agreement and nominated a retired Judge of this Court as a Sole Arbitrator. However, as the request was not accepted, the petitioners approached this Court in Arbitration Application No.72 of 2016 under Section 11 of the Act. Pending adjudication of the dispute that have arisen between the parties, the petitioners also approached this Court against Kamla by filing a petition under Section 9 of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No.1731 of 2015. This Court by an order dated 26 October 2015 granted ad-interim relief restraining Kamla from creating third party rights, selling, alienating, transferring or parting with possession in respect of the second flat to be constructed on the part 11th floor of the building, until further orders. During the hearing of the said petition, it was disclosed by Kamla that in the flat already constructed on the part 11th floor admeasuring 1660 sq.ft., third party rights were created by Kamla however, with the other flat, referred as the second flat, on part 11th floor, the same was not dealt in pursuance of the order dated 26 October 2015 passed by this Court in the

said petition. The Advocate for Kamla by its letter dated 9 November 2015 forwarded a copy of the agreement for sale dated 16 October 2015 which was executed between Kamla and respondent no.3- Sunil S. Jain, for sale of flat on the part 11th floor admeasuring 1660 sq.ft. The said agreement was duly registered with the Sub-registrar of Assurances on payment of stamp duty of Rs.37,20,500/-. The sale consideration as received by Kamla under the said sale of flat to respondent no.3 was Rs.7 crores 42 lakhs.

8. In the above circumstances, the case of the petitioners is that Kamla has played fraud on the petitioners by entering into the said agreement with respondent no.3, inasmuch as the agreement with respondent no.3 was entered by Kamla after the petitioners had raised a dispute and had invoked the arbitration clause, seeking reference of the dispute for arbitration, as also it was entered into after the petitioners had approached this Court by filing petition under Section 9 against Kamla (supra) which was filed on 26 August 2015. It is also the case of the petitioners that Kamla was dishonest in its business dealings in respect of several other projects in Mumbai in regard to which FIR has been lodged against Mr.Jitendra Jain and Mr.Sushil Mantri, Directors of respondent no.1.

9. It is in these circumstances, the petitioners have approached this Court in seeking the above reliefs against respondent no.3.

10. In regard to prayer clause (a) by which the petitioners seek appointment of Court Receiver in respect of flat sold to respondent no.3 by Kamla, learned Counsel for the petitioners on instructions has made a statement that he would not press this relief at this stage and would seek this relief before the Arbitral Tribunal. Further, respondent no.1 has also agreed for referring the disputes that have arisen between petitioners, Kamla and parties (Arbitration Application No.72 of 2016) for arbitration and in that regard this Court by an order dated 21 August 2017 has appointed Ms.Manjari Shah, Advocate as a sole arbitrator to adjudicate the dispute between the parties.

11. On the above backdrop, the relief which is being sought by the petitioners in this petition is confined only against respondent no.3, who is a third party and with whom it is not in dispute that the petitioners have no privity of contract, under any agreement.

12. Respondent no.3 has contested this petition by filing reply affidavit of Mr.Hanuman Sipani, his constituted attorney. Respondent no.3 contends that the petition is not maintainable against him as he is not a party to alleged arbitration agreement between the petitioners and Kamla. It is contended that the Court, thus would not have jurisdiction, to entertain this petition against respondent no.3, who is a third party and a

bonafide purchaser. The petitioners can have no cause of action against respondent no.3, as the alleged dispute is between the petitioners and Kamla and respondent no.3 is unnecessarily dragged into this litigation. It is next contended that the MOA dated 10 March 2014 between the petitioners and Kamla is neither stamped nor registered and thus the same is inadmissible in evidence as also is liable to be impounded. Paragraph 5 of the reply affidavit of respondent No.3 narrates the facts pertaining to the transaction which has been entered between Kamla and respondent no.3 and the details of the amounts which respondent no.3 had paid to the sister concern of Kamla and which were being appropriated and acknowledged for the transaction of the flat in question. It is stated that apart from this an amount of Rs.3 crores 50 lakhs was paid by respondent no.3 between 15 October 2015 to 31 October 2015 by cheques drawn on Axis Bank. It is stated that a total consideration of Rs.7 crores 42 lakhs was paid by respondent no.3 to Kamla towards purchase consideration of the said flat admeasuring 1660 sq.ft. It is stated that additionally, respondent no.3 had agreed to pay service tax of Rs.31,16,400/- and Rs.7,43,820/- towards value added tax (VAT) which was paid by Respondent No.3 by the cheques drawn on Standard Chartered Bank Ltd. dated 16 October 2015. It is the case of respondent no.3 that under the agreement dated 16 October 2015, Kamla represented to respondent no.3 that Kamla's title to the said property was clear and it had all the legal rights to construct part 11th floor. Kamla also at no point of time disclosed that the petitioners had any claim

over the said property. It is submitted that the deed of cancellation itself indicates that there was no subsisting agreement between petitioner and Kamla. It is stated that prior to entering into the agreement for sale dated 16 October 2015, respondent no.3 had obtained a title report of an advocate, as also a search report which were clear on the title of the said property. Further respondent no.3 had no means to have any knowledge of any court proceedings and accordingly proceeded with the transaction on a clear representation of Kamla on there being no embargo on Kamla's title qua the flat in question. Thus, respondent no.3 was a bonafide purchaser without any notice of the petitioner's claim against Kamla. It is denied that any fraud is played by respondent no.3 in entering into the said agreement dated 16 October 2015.

13. Petitioners by their rejoinder affidavit dated 1 February 2017 have contested respondent no.3's case. It is submitted that respondent no.3 has acted in collusion with Kamla to assist respondent no.3 in defrauding Kamla's creditors such as the petitioners. It is contended that as Petitioners' amount of Rs.4 crores was not paid by Kamla, the petitioners were required to approach this Court by filing an arbitration petition under Section 9 (Arbitration Petition No.1731 of 2015) against Kamla. It is contended that on 26 August 2015, Kamla despite being aware of all these proceedings, entered into an agreement with respondent no.3 for sale of the said flat. The rejoinder affidavit sets out chronology of events to contend that the

transaction of sale of the said flat to respondent No.3 is not a bonafide transaction and was entered to defraud the petitioner. It is the petitioner's case that in fact the six cheques amounting to Rs.3 crores 30 lakhs issued by respondent no.3 came to be encashed by Kamla only after this Court passed an order dated 26 October 2015 in Arbitration Petition No.1731 of 2015. The above contentions of the petitioners in affidavit in sur rejoinder are contested by respondent no.3 by filing an affidavit in sur rejoinder dated 6 June 2017.

Submissions on behalf of the parties.

14. It is on the above rival pleadings that I have heard the learned Counsel for the parties. Learned Counsel for the petitioners in supporting the reliefs contends that MOA executed between the petitioners and Kamla is in regard to an area admeasuring 253 sq.mtrs (equivalent to 2724 sq.ft) proposed to be constructed by Kamla on part 11th floor of the suit building. It is submitted that flat no.64 is an integral part of the aforesaid area proposed to be constructed on part 11th floor, and hence is the subject matter of agreement dated 10 March 2014. It is submitted that though the MOA has been cancelled by a deed of cancellation executed between the petitioners and Kamla, the said deed of cancellation in clause 8 contained an arbitration agreement between the petitioners and Kamla in respect of the subject matter of deed of cancellation read with the MOA, and the dispute between the petitioners and Kamla are already referred to arbitration by an order dated 21 August 2017 passed by this Court in

Arbitration Application No.72 of 2016. It is submitted that the immovable property which is the subject matter before the learned arbitrator includes flat no.64 and which is required to be preserved till the disposal of the arbitration proceedings. It is submitted that respondent no.3 claims his title in flat no.64 through Kamla and the title of respondent no.3 arises subsequent to the contract between the petitioner and Kamla, and hence this part of the premises becomes subject matter of the arbitration agreement between the petitioners and Kamla and consequently the subject matter of the arbitral proceedings. It is therefore essential that respondent no.3 be restrained from alienating or creating third party rights. The petitioners have supported these contentions relying on the decisions in:-

(i) *Girish Mulchand Mehta & Anr. vs. Mahesh S.Mehta & Anr.*¹ ; (ii) *M/S. Calvin Properties And vs Green Fields Co.*² ; and (iii) *Housing Development and Infrastructure Ltd. Vs. Mumbai International Airport Pvt.Ltd. & Ors.*³ It is then submitted that there is a breach of contract by Kamla as Kamla arbitrarily and unilaterally, contrary to the MOA carved out a portion of the said 11th floor flat admeasuring 1660 sq.ft. carpet area and dealt with it by entering into an agreement with respondent no.3. This ought to have been done only after a consent of the petitioners was taken as per MOA. It is submitted that there is statutory fraud inasmuch as respondent no.1 under Section 55(1)(a) of the Transfer of Property Act,

1 2010 (2) Mh.L.J. 657

2 Order dt.19.11.2013 in Arbitration Petition No.638 of 2013

3 Order dt.28.11.2013 in Appeal (lodg) no.365 of 2013

was required to disclose to the buyer any material defect in the seller's title. Omission to make such disclosure was fraudulent. Kamla was under a statutory obligation to disclose the MOA as well as deed of cancellation before executing an agreement for sale with respondent no.3. In the arbitral proceedings, the petitioners are entitled to plead and seek declaration that the agreement executed by Kamla with respondent no.3 is in breach of statutory provisions and essential contractual provisions and being void qua the petitioners. It is then contended that the agreement between Kamla and respondent no.3 is a collusive agreement and it is clear from the antecedents and relationship between Kamla and respondent no.3 that prior to the agreement dated 16 October 2017, a major part of the consideration price was received on 9 May 2013, as set out by the petitioners at page 147 of the paper book. It is next submitted that the deed of cancellation executed between the petitioners and Kamla in clause 3 records that Kamla shall refund the entire amount of Rs.4 crores with interest at the rate of 21% per annum with compensation and thus, on this very clause, the petitioners are entitled for award of compensation. As it is the case of respondent no.3 that the petitioners would be at the best entitled to the difference between the actual market value and the total consideration as mentioned in the agreement for sale between Kamla and respondent no.3, and in order to determine the said difference in price, it is essential that the flat has to be made available in the adjudication pending before the arbitral tribunal. Hence, preservation of the flat till the

completion of arbitral proceedings is necessary. There was no requirement to get the said document registered as also to pay the stamp duty as asserted by respondent no.3. This contention is supported by relying on the decisions in *Hindustan Lever Ltd. Vs. Municipal Corporation of Greater Bombay & Ors.*⁴ and *Hindustan Steel Ltd. Vs. M/s.Dilip Construction Co.*⁵, on the interpretation of taxing provisions. Further relying on the decision of the Division Bench of this Court in “*Mulheim Pipecoatings GmbH Vs. Welspun Fintrade Limited & Anr*”⁶, it is contended that the arbitration agreement is an independent agreement capable of specific enforcement and that even if the principal contract between the parties has been terminated, the arbitration agreement would still survive termination and the petitioners are entitled to a protective reliefs in the arbitration which would be undertaken between the petitioner and Kamla. It is submitted that the balance of convenience is completely in favour of the petitioner, as respondent no.3 although has executed the agreement for sale and paid the entire sale consideration, is not in possession of the said flat as also the flat is not fully ready for occupation. It is submitted that there is a dispute as to the extent of construction on the balance 11th floor and the stage upto which it has been constructed and which is also a subject matter of the suit filed by respondent no.3 against Kamla and Columbia CHS. In such a situation the resistance on the part of respondent no.3 to the petitioners' prayers not to deal or dispose of the flat pending the

4 (1995)3 SCC 716

5 AIR 1969 SC 1238

6 Decision Dt.16.8.2013 in Appeal(Lodg) No.206 of 2013

arbitration proceedings is incomprehensible, when this Court has already appointed a sole Arbitrator to arbitrate the dispute between the petitioners and Kamla.

15. On the other hand, learned Counsel for respondent no.3 in contesting this petition would submit that respondent no.3 is a third party and thus has no privity of contract with the petitioners so as to get entangled in the dispute. It is submitted that under the MOA dated 10 March 2014 and the deed of cancellation, there is no right or interest of any nature created in favour of the petitioners qua the flat as sold to respondent No.3. Learned counsel for respondent no.3 supports this submission referring to the reply affidavit as filed on behalf of respondent no.3. It is submitted that respondent no.3 is a bonafide purchaser of flat no.64 with two parking spaces, for valuable consideration of Rs.7 crores 43 lakhs under a duly registered agreement for sale dated 16 October 2015, without any notice of the alleged claim or the agreement between the petitioners and Kamla. It is submitted that MOA dated 10 March 2014 between the petitioners and Kamla is purely a financial/loan transaction and hence under the said agreement the petitioners cannot assert any legal right or interest of any nature on flat no.64 as sold to respondent no.3. It is submitted that clause 16 of the MOA clearly indicates that the petitioners are mere investors and no right, title or interest in the said flat or the said property has been created in favour of the petitioners. Referring to clauses

14, 20, 30(b) & (c), 33(c) & (e) and 35(a) of the MOA as entered between the petitioners and Kamla, it is contended that it clearly indicates that it was always in contemplation that the said flat could be sold and there was no embargo or a negative covenant between the parties, restricting sale of the said flat by Kamla. It is then submitted that the transaction between the petitioners and respondent no.1 also does not inspire any confidence as although clause 16 of the MOA admits and acknowledges receipt of Rs.2 crores 50 lakhs as on the date of execution of MOA dated 10 March 2014, but the said payment was made on 11 March 2014 that is on a day after the execution of the MOA. It is then submitted that the cancellation deed is undated. There are no witnesses to the said document. Further there is no reference to any board resolution being passed authorising Mr.Jitendra Jain to execute deed of cancellation on behalf of respondent no.1. It is submitted that admittedly there is no arbitration clause in the MOA and no payment has been made under the deed of cancellation. In such event having regard to clause 6, the agreement clearly contemplates that it would be as if the cancellation deed had not been executed or acted upon and in this eventuality, there would be no arbitration agreement between the parties as clause 8 of the Cancellation deed only contemplates resolution and reference to arbitration of disputes and differences under the deed of cancellation and not the MOA dated 10 March 2014. It is submitted that thus flat no.64 as purchased by respondent no.3 cannot be the subject matter of the arbitration. It is then submitted that the MOA dated 10

March 2014 is inadmissible in evidence as it is not adequately stamped which in the contention of respondent No.3 is required to be stamped in terms of Article 5(h)(A)(iv) of the Bombay Stamps Act, as it is the case of the petitioners, that MOA creates an obligation having a monetary value as averred in paragraphs 4, 5, 24 and 28 of the arbitration petition. A reference is made to clause (6) of the Deed of Cancellation which according to respondent no.3 clearly provides that till the full and complete payment of the entire amount, “all obligations of the developer as provided in the MOA dated 10 March 2014 shall continue to remain in force”. It is submitted that this clause clearly indicates that MOA attracts stamp duty under Article 5(h)(A)(iv) of the Bombay Stamps Act, 1958. However, the MOA appears to have been franked with a stamp duty of Rs.100/- only, and hence, is liable to be impounded and cannot be acted upon pending payment of appropriate stamp duty. This submission has been made by referring to the decision of the learned Single Judge of this Court in **“Shri.Jayraj Devidas & Ors. Vs. Shri.Nilesh Shantilal Tank”** (Arbitration Appeal No.45 of 2013)⁷, wherein it is held that the court would not accept as admissible in evidence a document which is inadequately stamped and hence, no interim relief can be granted. It is next submitted that no case has been made out under Section 9 and Order XXXVIII and XXXIX of the Code of Civil Procedure. Referring to the decision of the Supreme Court in the case **“Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P)**

⁷ 2014(6) BCR 594

Ltd.”⁸ and the decision of this Court in “*Nimbus Communications Ltd. Vs. Board of Control for Cricket in India*”⁹ it is contended that the exercise of power under Section 9 of the Arbitration and Conciliation Act,1996 is controlled by provisions of Code of Civil Procedure and the same is dependent upon the principles which govern the grant of interim injunctions under the Specific Relief Act,1963. It is submitted that in the present case the petitioners have failed to make out any prima facie case as warranted by the provisions Section 9 of the Act. It is submitted that there is already a concluded transaction between Kamla and respondent no.3 being an agreement for sale dated 16 October 2015 and the decision in the case *Girish Mulchand Mehta & Anr. vs. Mahesh S.Mehta & Anr.* (supra) and the decision in the case *M/S. Calvin Properties And vs Green Fields Co.*(supra) are not applicable to the facts of the present case, in view of the concluded transaction between Kamla and respondent no.3. Thus, the requirements for grant of a relief under Order XXXVIII and Order XXXIX of the CPC are not fulfilled for grant of any relief falling under these provisions. It is submitted that the provisions are not applicable as the said flat has already been transferred to respondent no.3 and respondent no.3 is a third party to the arbitral proceedings. It is next submitted that the flat is not the subject matter of the arbitral proceedings as no interest in relation to said flat has been created in favour of the petitioners and, therefore, the said flat will not form the subject matter of arbitral

8 (2007)7 SCC 125

9 2013(1) Mh.L.J.39

proceedings. It is submitted that the agreement of sale dated 16 October 2015 between Kamla and respondent no.3 cannot be the subject matter of the arbitral proceedings. No relief which is not in aid of a final relief can be granted under Section 9 by the Court. This submission is supported by referring to a decision of this Court in the case “*Hemant D.Shah Vs. Chittaranjan D.Shah*”¹⁰. It is then submitted that there is no interest subsisting in favour of respondent no.1 qua the said flat. The said flat would not be available to the petitioners in execution in the event of an award being passed in favour of the petitioners and against Kamla. Respondent no.3 can never be the judgment debtor in the arbitral proceedings and thus, no injunction can be granted against respondent no.3. It is next submitted that the arbitration agreement contained in clause 8 of the Deed of Cancellation is limited to terms, conditions and obligations only contemplated under the Deed of cancellation and do not extend to the disputes, if any, between respondent no.1 and a third party.

Discussion and Conclusion

16. I have heard the learned Counsel for the parties. With their assistance, I have also perused the documents as placed on record. Some of the admitted facts need to be noted. Kamla had entered into a supplementary agreement dated 11 April 2014 with Columbia CHS for development of the balance area on the 11th floor against the available FSI

¹⁰ Order dt.5.9.2006 in Appeal No.658 of 2006

which had remained incomplete, and this supplementary agreement was in continuation to the development agreement dated 7 October 2002 as entered between Columbia CHS and Kamla. The supplementary agreement pertained to the development of 'part 11th floor', of the said building 'Columbia' under which Kamla was conferred rights to sell new flats to be constructed under the said supplementary agreement. It is the MOA dated 10 March 2013 entered between the petitioners and Kamla under which the petitioners are asserting their rights qua the premises in question. The said MOA is not a registered document. Significantly respondent No.3 against whom injunctory reliefs are prayed, is not a party to the said agreement, and thus, it can be said that the respondent no.3 is a third party in regard to any dispute which may arise between the petitioners and Kamla. The MOA dated 10 March 2014 stood cancelled by an undated Cancellation Deed under which the petitioner and Kamla agreed under clause 8 to refer the dispute arising between the parties to be referred for arbitration.

17. It is not in dispute that respondent no.3 has a registered agreement namely the agreement for sale dated 16 October 2015 in regard to flat no.64 which is entered between Kamla and respondent No.3, which Kamla was entitled to enter under its agreement with Columbia CHS.

18. It is on the above admitted factual matrix, the reliefs as sought

by the petitioners are required to be considered. The moot question which falls for consideration of the Court would be whether an injunction against flat no.64 sold to respondent no.3 by Kamla under the registered agreement dated 16 October 2015, can be granted at the behest of the petitioners.

19. The petitioners contend that they have a legitimate entitlement to seek this relief inasmuch as the flat is the subject matter of MOA dated 10 March 2014 entered between the petitioners and Kamla. In supporting this submission, reference is made to several clauses of MOA as noted above to contend that the petitioners have a legal right in regard to the construction undertaken by Kamla on the part 11th floor where flat no.64 is constructed. The basis for the reliefs as prayed by the petitioners is that Kamla could not honour its obligations towards the petitioners who have invested an amount of Rs.4 crores interalia to undertake the development of the Columbia building, as also the development of part 11th floor being the subject matter of supplementary agreement dated 11 April 2014. The petitioners have contended that Kamla has played fraud upon the petitioners firstly by not repaying the amount of Rs.4 crores alongwith interest at 21% per annum as agreed under the MOA and that there are several breaches which are committed by Kamla in selling the flat in question to respondent no.3 without consultation and behind the back of the petitioners. The clauses of MOA as noted above clearly indicate that

the flat in question as purchased by respondent no.3 cannot be said to be the subject matter of the MOA between Petitioners and Kamla.

20. Further, it is not in dispute between the petitioners and Kamla that the MOA dated 10 March 2014 stood cancelled between the parties in view of deed of cancellation. The relevant recitals in the deed of cancellation which are required to be noted are clauses 2, 3, 4, 5 and 6 and 8 which read thus:-

“2. It is agreed and confirmed by and between the parties hereto that in view of the circumstances recited above, the parties hereby cancel the said Agreement absolutely and/or the said Agreement dated 10.03.2014 stands cancelled absolutely and/or shall be deemed to be treated as cancelled on and from the date of cancellation.

3. It is further agreed and confirmed by the parties hereto that the Developer shall refund to the Investors the Entire amount of investment of Rs.4,00,00,000/- (Rupees Four Crore only) paid under the said Agreement, with interest @ rate of 21% p.a. with compensation from date of investment till the date of repayment of installments between 1st April 2015 to 31st July,2015.

4. Agreed and Declared that upon the Developer making full payment of the Entire amount of investment with compensation as provided above to the Investors the said Agreement shall stand revoked and cancelled. It is distinctly agreed and understood that date of cancellation of the said agreement dated 10th March 2014 shall be the date on which full and complete Entire amount of investment together with compensation amount is paid under this Agreement.

5. It is agreed and confirmed that the Investors shall not claim any additional amount by way of damages liquidated damages, interest and/or further

compensation or otherwise of or by whatsoever nature under the said agreement from the Developer except the amount as mentioned hereinabove, provided that the entire payment is made by Developer within the time stipulated herein above.

6. Agreed, declared and recorded till full and complete payment of the entire amount in terms of this Agreement is not paid in full all obligations of the Developer as provided for in agreement dated 10th March 2014 shall continue to remain in force and shall be valid and binding upon the Developer as if this agreement was not executed or acted upon.

... ..

8. Agreed and recorded that any dispute or differences between parties in respect of terms, conditions or obligations under this agreement shall be resolved by reference to Arbitration of a Sole Arbitrator to be nominated by the aggrieved party with 21 days notice to the other party. The venue of Arbitration shall be Mumbai, the language of the Arbitral Tribunal shall be English and the decision of the Sole Arbitrator shall be final and binding.”

Thus the deed of cancellation also does not make any reference to the flat in question qua which rights are created in favour of respondent no.3. The contention on behalf of the petitioners relying on the above clause 6(c) of the Deed of Cancellation that the obligations of Kamla under the MOA dated 10 March 2014 are agreed to remain valid and in force till the entire amount in terms of the MOA dated 10 March 2014 is not paid to the petitioners, also cannot be accepted. To consider this submission if the agreement dated 10 March 2014 is examined and more particularly clause 16, 17 and 30 it would indicate that the MOA is merely an agreement to finance the project and no right whatsoever has been created in favour of

the petitioners in regard to construction which was required to be undertaken utilising the finance as provided by the petitioner under the said MOA dated 10 March 2014. Clause 30 sub-clause (c) in fact shows that it was agreed between the parties that on completion of the construction or during the phase of construction of the said proposed flat on the part 11th floor if any purchaser approaches either the developer (Kamla) or the investor (petitioners) both shall by mutual consent sell the proposed flat on “agreed rate”. A plain reading of this clause shows that what the petitioners and Kamla have agreed is only to decide on the “agreed rate” of sale and nothing more. The petitioners thus cannot contend that any corporeal rights were created in favour of the petitioners under this clause. Sub-clause (3) of clause 33 in that regard would also not assist the petitioners as it does not bar the sale of the proposed flat. If this is the clear position, then one would be at a loss to understand as to how and on what basis the petitioners can claim an injunction against respondent no.3 who has no privity of contract with the petitioners. There are no other rights which the petitioners are asserting except under the MOA dated 10 March 2014 and the undated deed of cancellation.

21. In regard to the contention as urged on behalf of respondent No.3 that the document is not adequately stamped, the respondents would be correct in placing reliance on the decision of this Court in *Shri.Jayraj Devidas & Ors. Vs. Shri.Nilesh Shantilal Tank (supra)*. If the parties

intended that under the MOA or the Deed of Cancellation any rights in respect of immovable property were to be created in the petitioners, then the documents would not only require registration, but also it was necessary in law, that such documents are adequately stamped. In the absence of these basic legal requirements, applying the settled principles of law the petitioners are surely not entitled for any interim reliefs in this Section 9 application. This even assuming that rights in the flat in question, were to be vested with the petitioners.

22. Further it certainly cannot be overlooked that respondent no.3 is a third party to the finance transaction which is entered between the petitioners and Kamla under the MOA. Prima facie it appears that respondent no.3 has taken care and caution before entering into an agreement dated 16 October 2015 in purchasing flat no.64 and parting with valuable consideration of Rs.7 crores 42 lakhs. It is significant that even otherwise, qua the rights asserted by the petitioners, the efforts of respondent no.3 to take proper search of the title in respect of this flat qua the MOA dated 10 March 2014 could not have succeeded as the petitioners and Kamla had not taken any steps to get registered the MOA dated 10 March 2014 or the undated deed of cancellation. However, the parties did not consider it necessary to register the said document and may be for the reason that the parties understood that it does not create any right, title and interest in the petitioners in regard to the construction to be

undertaken by Kamla in regard to part 11th floor of the said building Columbia. Thus, prima facie, respondent no.3 cannot be said to be under any impediment in entering into an agreement dated 16 October 2015 to purchase flat no.64 on the 11th floor of the said building Columbia.

23. Apart from what has been noted above, it may be pointed out that clearly the flat in question being the subject matter of agreement dated 16 October 2015 as sold to respondent no.3 is not the subject matter of the MOA dated 10 March 2014 and/or undated deed of cancellation.

24. In these circumstances, for the Court to consider the prayers as made by the petitioners for an injunction the principles of law as well settled in the decisions of the Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd.* (supra) and the decision of this Court in *Nimbus Communications Ltd. Vs. Board of Control for Cricket in India* (supra) would be required to be applied. In my opinion, considering the above facts and applying these principles of law, no case is made out by the petitioners for grant of any reliefs as prayed for.

25. The decision in *Girish Mulchand Mehta & Anr. vs. Mahesh S.Mehta & Anr.* (supra) and *M/S. Calvin Properties And vs Green Fields Co.* (supra), as relied on behalf of the petitioners in my opinion, would not be applicable in the facts of the present case as it is quite clear that

respondent no.3 having parted with the sale consideration and the agreement for sale of the flat in question being a registered agreement between Kamla and respondent no.3, there is admittedly a concluded contract between Kamla and respondent no.3. In any case as noted above, the flat in question is not the subject matter of arbitral proceedings as can be clearly seen from the MOA dated 10 March 2014 and the undated deed of cancellation.

26. I do not wish to labour this order by discussing other decisions as relied on behalf of the petitioners in regard to interpretation of statute/taxing provision, as also the decision on the arbitration agreement to be independent of the principal contract between the parties. The principles of law are well settled as the decisions lay down. However, in the context of the view that I have taken in the facts of the case, in my opinion, these decisions would not assist the petitioners.

27. In the circumstances the petitioners are not entitled for any reliefs qua respondent no.3 as prayed in prayer clauses (b) and (e) of the petition. The petition is accordingly dismissed. No order as to costs.

28. At this stage, the learned Counsel for the petitioners seeks continuation of the ad-interim reliefs as initially granted on 6 October 2016. Learned Counsel for respondent no.3 opposes this prayer as made on

behalf of the petitioners. However, in the interest of justice and as the ad-interim order is in operation since 6 October 2016, the same is continued for a further period of six weeks.

(G.S.Kulkarni, J.)