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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL NO. 112 OF 2018
IN
COMMERCIAL ARBITRATION PETITION NO. 51 OF 2016
WITH
NOTICE OF MOTION NO. 276 OF 2018

Mohinder Singh Dua and anr. .. Appellants
(Org. Petitioners)

Vs.

Kamla Landmarc Construction Pvt. Ltd.
and ors. .. Respondents

Mr. S. C. Naidu a/w Mr. T. R. Yadav, Mr. Aniketh Poojari i/by C.R. Naidu & Co. for appellants.

Mr. Mayur Khandeparkar i/by Mehul A. Shah for respondent no.3.

CORAM: NARESH H. PATIL &
SMT. ANUJA PRABHUDESSAI, JJ.

APRIL 05, 2018.

P.C.

1. This appeal is directed against the Judgment and Order dated 8th December, 2017 passed by the learned Single Judge in Commercial Arbitration Petition No. 61 of 2017.

2. It is the appellants-petitioners' case that they are investors in a project, precisely the 11th floor of the building belonging to respondent no.2 – Columbia Co-operative Housing Society Ltd. (for short "Columbia Housing Society). The appellants pressed for the reliefs in terms of prayer clauses (b) and (e) of the petition, which read as under :-

> "(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.
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> (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."

The Columbia Housing Society owned a building comprising of ground plus six floors situated at Plot No.B, C-486, St. Domnic Road, Bandra (East), Mumbai – 400 050, on land admeasuring 2355 sq.meters.

3. Under a development agreement dated 7/10/2002 entered into between the Columbia Housing Society and respondent no.1 – Kamla, it was agreed to develope the property by constructing seventh to tenth floors. The development agreement was ratified and confirmed and a development agreement dated 7/10/2002 was registered with the sub-registrar, Mumbai Suburban District on 12/5/2003. The respondent no.1 carried out vertical extension of the said building and obtained a full occupation certificate on 10/8/2007.

4. In a Special General Body meeting, a proposal of respondent no.1 was considered by the Columbia Housing Society to construct part 11th floor of the subject building. Resolution was accordingly passed and communicated to the respondent no.1 – Kamla. The respondent no.1 approached the appellants to invest an amount of Rs.4 crores in the proportion of 20:30. The appellants agreed to do so and entered into a memorandum of agreement dated 10/3/2014 with respondent no.1 –

Kamla. Admittedly, this memorandum of agreement is not a registered document. The clauses of the said agreement have been incorporated by the learned Single Judge in para 5 of the impugned judgment. In respect of development of part 11th floor, another agreement, titled as "supplementary agreement" dated 11/4/2014 came to be entered into between Columbia Housing Society and the respondent no.1.

5. It is the appellants' case that they contributed Rs.4 crores, which was paid to the respondent no.1 – Kamla. The project could not be fully completed as respondent no.1 – Kamla was in a state of financial difficulties. As the appellants were not getting the returns out of their investment, they addressed a notice through their Advocate on 17/7/2015 to respondent no.1 – Kamla to pay the appellants a sum of Rs.4 crores with interest thereon at the rate of 21% per annum. The memorandum of agreement dated 10/3/2014 stood cancelled by an undated Cancellation Deed under which the respondent no.1 agreed to refer the dispute between appellants and respondent no.1 – Kamla for arbitration. A retired judge of the High Court was appointed as a sole Arbitrator.

6. The appellants filed an application under Section 11 of the

Arbitration and Conciliation Act, 1996 (for short " the Act") being Arbitration Application No. 72 of 2016. The dispute was referred to Arbitrator. Pending adjudication between the parties, the appellants filed a petition under Section 9 of the Act being Arbitration Petition No. 1731 of 2015. By an order dated 26/10/2015 the learned Single Judge granted ad-interim relief restraining respondent no.1 – Kamla from creating third party rights in respect of the second flat to be constructed on the part 11th floor of the subject building. An agreement for sale dated 16/10/2015 was executed between respondent no.1 and respondent no.3 – Sunil S. Jain in respect of flat on the 11th floor admeasuring 1660 sq.ft. The said agreement for sale was registered with the Sub Registrar of Assurances. The respondent no.3 paid Rs.7 Crores 42 lakhs to respondent no.1 – Kamla by way of consideration.

7. In the present petition filed under Section 9 of the Act on 26/8/2015, the appellants-petitioners contended that a fraud was played by the respondents wherein third party interest was created in the subject flat inspite of the order passed by this court in an Arbitration Application. The appellants, therefore, sought relief against the purchaser, respondent no.3 – Jain in respect of the subject flat.

8. The learned counsel appearing for the appellants submits that a fraud was played by the respondents as respondent no.1 – Kamla entered into sale transaction in respect of portion of 11th floor of the building by executing agreement in favour of respondent no.3 – Mr. Jain. In view of the order of injunction passed on 26/10/2015 by the learned Single Judge in the first Arbitration Petition (L) No. 1718 of 2015, filed by the appellants-petitioners, it was necessary to pass protective order and injunct the respondent no. 3 – Mr. Jain not to create third party interest in respect of the subject flat and in absence thereof the appellants would be prejudiced. The learned counsel further submitted that the learned Single Judge erroneously rejected the interim relief as prayed by the appellants. The learned counsel has referred to various clauses of agreement, MOU and the observations of the learned Single Judge.

9. The learned counsel appearing for the respondent no.3 submitted that in view of the provisions of Section 9 of the Act, the respondent no.3 is not party to the dispute referred for arbitration. Therefore, a petition under Section 9 is not maintainable. Even otherwise, respondent no.3 is a purchaser from respondent no.1 – Kamla. Under the

agreement exchanged between the parties, there was no restrictions on the rights of respondent no.1 – Kamla to enter into contract with third party like respondent no.3. At the most, according to the learned counsel, the appellants may exercise their rights and option against respondent no.1 – Kamla and not against respondent no. 3, who is a bonafide purchaser against consideration of a flat which was sold by respondent no.1.. The learned counsel submits that the learned Single Judge had in detail discussed history of the matter while referring to relevant clauses of the agreement and MOU and had rejected the petition, which does not call for interference by this court. The learned counsel, in support of his submissions, placed reliance on the following judgments :-

(a) Adhunik Steels Ltd. vs. Orissa Manganese and Minerals (P) Ltd. [(2007) 7 SCC 125]

(b) Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya [(2003) 5 SCC 531]

(c) Shri Jayraj Devidas & Ors. And vs. Shri Nilesh Shantilal Tank [in Arbitration Appeal No. 45 of 2013 decided on 22/8/2014]

(d) Hemant D. Shah vs. Chittaranjan D. Shah [in Appeal No.658 of 2006 decided on 5/9/2006]

(e) Nimbus Communications Ltd. vs. Board of Control for Cricket in India [2013 (1) Mh.L.J. 39]

10. We have perused the record placed before us and considered the submissions advanced. We have also gone through the judgments cited supra. We have perused the impugned Judgment and the relevant clauses of the agreement, memorandum of agreement entered into between the appellants and respondent no.1 on 10/3/2014. Clauses (b) and (c) of para 30 of the memorandum of agreement dated 10/3/2014 read as under :-

30. The Scheme of the Investment & the Return :

a)

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.”

11. In Arbitration Petition (L) No. 1718 of 2015 filed by the appellants, the learned Single in paras 6, 7 and 8 of his order dated 26/10/2015 observed as under :

> "6. A perusal of the record prima facie indicates that the petitioners have already complied with their part of the obligation under the second agreement and thus the respondent cannot create any third party rights, if any, in respect of any portion of the flats proposed to be constructed / constructed on the part 11th floor of the society building.
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> 7. The petitioners have thus made out a case for grant of ad-interim injunction in so far as the flats consisting of three bedrooms, hall, kitchen constructed on the part 11th floor of the society building is concerned. It is ordered accordingly.
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> 8. The respondent is also restrained from creating third party rights, selling, alienating, transferring or part with possession in respect of the proposed flats to be constructed on the part 11th floor of the society building until further orders. Affidavit-in-reply shall be filed within four weeks from today. Rejoinder, if any, shall be filed within two weeks from the date of service of the affidavit-in-reply."

12. We have also perused the agreement for sale dated 16/10/2015

entered into between respondent no.1 and respondent no.3. The learned Single Judge observed that the memorandum of agreement dated 10/3/2014 stood cancelled by an undated cancellation deed. It is not disputed that the respondent no.3 got the agreement executed on 16/10/2015 in respect of Flat No. 64. The agreement was executed by respondent no.1 in favour of respondent no.3. It was further observed that deed of cancellation does not make any reference to the flat in question. According to the learned Single Judge, MOU was merely an agreement to finance the project and no rights whatsoever have been created in favour of the appellants in regard to the construction which was required to be undertaken by respondent no.1. There was no privity of contract between respondent no.3 and the appellants.

13. It was submitted, during the course of hearing, by the learned counsel appearing for the respondent no.3 that the memorandum of agreement dated 10/3/2014 was not properly stamped and registered. The respondent no. 3 being third party to the financial transaction entered into between the appellants and respondent no.1 under the memorandum of agreement, no relief could be considered and granted in favour of the appellants in an Arbitration Petition under Section 9 of the Act. Whatever

relief the appellants-petitioners would claim could be against respondent no.1 and not against respondent no.3. We find substance in the submission advanced by the learned counsel for the respondent no.3. We are in agreement with the observations of the learned Single Judge on this point.

14. Prima facie we are of the view that respondent no.3 could not be held to be under any impediment in entering into an agreement dated 16/10/2015 to purchase Flat No. 64 on 11th floor of the subject building. The learned counsel appearing for the appellants submitted that the observations made in paras 19 and 25 to the effect that "the flat in question is not the subject matter of arbitral proceeding as can be clearly seen from the MOA dated 10/3/2014" would prejudice the appellants' case before the Arbitrator. The learned counsel seeks clarification to that effect.

15. We clarify that in case the Arbitrator is convinced to compute compensation in respect of the area of 11th floor of the flat which was sold by respondent no.1 in favour of respondent no.3, then in that case the Arbitrator may compute compensation notionally without the appellants being permitted to have any recourse to the flat No.64, which was sold by respondent no.1 to respondent no.3.

16. During the course of hearing, it is submitted that even respondent no.3 has filed a Suit, wherein the appellants have applied for joining them as party. We do not express any opinion on the pending proceedings between the parties.

17. The view adopted by the learned Single Judge is a reasonable, possible and sound one. No interference is, therefore, warranted. The appeal is dismissed accordingly.

18. Notice of Motion No. 276 of 2018 does not survive and is disposed of.

(SMT. ANUJA PRABHUDESSAI, J.) **(NARESH H. PATIL,J.)**