THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M. GANGA RAO

<u>COM.C.A.Nos.4, 5 AND 6 of 2017</u>

<u>COMMON JUDGMENT</u>: (per Hon'ble the Acting Chief Justice Sri Ramesh Ranganathan)

These appeals, under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter called the "2015 Act") r/w. Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter called the "1996 Act"), are filed against the order passed by the Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, in C.O.P.No.183, 184 and 185 of 2017 dated 16.08.2017. It would suffice for the disposal of all these three appeals if the facts in C.O.P. No.183 of 2017 are noted.

In the petition filed by her, in C.O.P.No.183 of 2017, the petitioner stated that the first respondent, along with Sri Manthini Pardosh Raag, had approached her in 2005 requesting that she enter into a partnership with them for real estate development, construction and managing resorts, and to procure large extents of land in the outskirts of Hyderabad for the purpose of development, demarcation and sale of plots; a partnership deed was executed between the petitioner and the first respondent on 28.07.2005 in the name and style of "M/s.S.S. Associates" of which Sri Manthini Pardosh Raag was also a partner; the first respondent had induced the petitioner to appoint him as the Managing Partner of the firm; the first respondent suggested that both of them enter into an exclusive partnership and, consequently, a partnership deed was executed on 18.08.2006 in the name of "M/s.Sri Nag Estates"; the first respondent used the amounts invested by the petitioner to purchase Ac.11-12.5 guntas in Nandigama Village, Kothur Mandal, Mahaboobnagar District, and an extent of Ac.6.16 guntas in Chinnamangalaram Village, Moinabad Mandal, Ranga Reddy District; the first respondent had induced the petitioner to enter into another partnership deed on 23.07.2007 in the name and style of “Sri Nag Corporation”, and requested that he be appointed as the Managing Partner of the firm; thereafter, the first respondent represented that real estate in and around the City of Visakhapatnam was developing, he had identified 50 acres of land abutting the National Highway leading to Vijayawada and Chennai, and she should buy the same and develop it into a huge layout by demarcating the land into plots and building residential apartments; yet another partnership deed was executed on 08.02.2010 between the petitioner and the first respondent in the name and style of “M/s.S.R. Properties”; the petitioner raised funds selling several of her personal assets, and pledging some of her other assets for the purpose of these developmental activities; to procure land, in and around Visakhapatnam, the petitioner had handed over cash/cheques worth Rs.6.7 Crores to the first respondent, from time to time, to be invested in the second respondent-firm to enable the firm to purchase/procure lands at Visakhapatnam; the first respondent withdrew money from other firms, in the name of the petitioner, without her consent; he informed her that he had identified 50 acres of land in Rajapulava Village, Bhogapuram Mandal, Vizianagaram District, abutting the National Highway, for a sum of Rs.12 Crores, and he would obtain a sale deed in the name of the second respondent i.e. “S.R.

Properties"; the second respondent, represented by the first respondent, entered into an agreement of sale dated 12.04.2010 with Mr.Dandu Kasiviswanadha Raju and his family to procure 40 acres of land in Rajapulava Village, Bhogapuram Mandal, Vizianagaram District i.e. Ac.10.00 cents in Survey Nos.35 and 36 from Mr.Dandu Kasiviswanadha Raju and his family, and the remaining Ac.30.00 cents of land which was to be procured by Sri Dandu Kasiviswanadha Raju and his family to be handed over to the second respondent; the total sale consideration, according to the said agreement of sale, was Rs.12.00 Crores; the first respondent, representing the second respondent, was the signatory to the said agreement of sale dated 12.04.2010; the petitioner was one of the witnesses to the said agreement; at the time of entering into the sale agreement, the petitioner had handed over cash of Rs.1.00 Crore to the first respondent for the purpose of paying advance to Sri Dandu Kasiviswanadha Raju and his family; in addition thereto, six cheques, totalling to Rs.60.00 Lakhs, were handed over to Sri Dandu Kasiviswanadha Raju and his family; this sum of Rs.60.00 Lakhs represented the amounts invested by the petitioner in the second respondent firm; despite several requests to provide details of the accounts and investments, the first respondent failed to do so; the petitioner visited the office of the first respondent on 15.04.2017 and, while going through the partnership deeds, she was shocked to chance upon the partnership deed dated 08.02.2010 executed between the first respondent and his wife Ms.Chintalapudi Suneetha; this partnership deed was executed on the same day, when the first respondent had entered into a partnership deed with the petitioner; the contents were also similar; the place of the business of the third respondent was also the same, as that of the second respondent; the petitioner then came to know that, after establishing the third respondent, the first respondent had purchased lands, located adjacent to the lands proposed to be purchased by the second respondent-firm which were and are also part of the same survey numbers mentioned in the agreement of sale, in the name of the third respondent; the first respondent had purchased Ac.12.33 cents of land in Rajupulava village, Bhogapuram Mandal, Vizianagaram District in the year 2010 vide five sale deeds; he had also purchased Ac.0.45 cents vide sale deed dated 24.03.2015 in Survey No.38/15 in Kurakalva Village, Renigunta Mandal, Near Tirupati; the properties/lands of the second respondent are described under A-Schedule; the first respondent had paid Rs.78,36,200/-, and had purchased Ac.12.33 cents; the petitioner had invested Rs.6.7 Crores for procuring land; lands were purchased by the first respondent in the name of the third respondent adjacent to the lands purchased by the second respondent-firm either in the same survey number, or in adjacent survey numbers; while the petitioner was led to believe that these lands were being purchased in the name of the second respondent, they were actually registered in the name of the third respondent; the first respondent had registered an extent of Ac.23.67 cents in the name of the third respondent, utilizing the funds invested by the petitioner in the second respondent firm, which were diverted to the third respondent by the first respondent in order to procure the lands in the name of the third respondent; the properties purchased, in the name of the third respondent, were those listed in B-Schedule; the petitioner called upon the first respondent to render accounts pertaining to the second respondent and the third respondent firms; and she was also taking steps to initiate arbitration proceedings against respondents 1 to 4.

The petitioner further stated that, if the first respondent was permitted to continue to deal with any lands registered in the name of the second and third respondents, he would sell the entire lands to third parties and/or create third party interest in respect of the said lands, so as to defeat the legitimate and valid interests of the petitioner; it was necessary that the first respondent be injuncted from operating and/or withdrawing any amount whatsoever from the petition schedule bank accounts; and he be injuncted from dealing with the petition schedule-B and C properties in any manner.

In the order under appeal, the Commercial Court, after perusing the record and the documents, observed that the property sought to be attached was beyond its jurisdiction; hence, it was not a fit case to grant an ex-parte injunction; as far as the claim of "A" schedule property was concerned, the documents filed by the petitioner showed that respondents 1 to 4 had promoted the third respondent-firm; hence, it was not a fit case to grant any ad-interim ex-parte injunction in respect of "B" schedule property. The first respondent was, however, restrained from operating the "C" schedule bank accounts of the second respondent till 01.09.2017 on payment of process.

When the matter came up before us, we had, in our order dated 24.08.2017, noted that a statement of encumbrance of property dated 21.08.2017 was placed before us which showed that, after the order under appeal was passed on 16.08.2017, the first respondent had alienated an extent of 6500 square yards of land under different sale deeds, all of them dated 18.08.2017; the Court below had refused to exercise jurisdiction in respect of “A” and “B” schedule properties on the ground that the “A” and “B” schedule properties were located beyond its territorial limits, and “B” schedule properties related to a firm in which the appellant-petitioner was not a party; in so far as “A” schedule properties were concerned, the arbitration clause provided for the venue of arbitration to be at Hyderabad, and the first respondent was also residing within the territorial limits of the Commercial Court, Hyderabad; the Commercial Court had, prima-facie, erred in holding that it could not exercise jurisdiction over the properties at Visakhapatnam, which constituted the “A” schedule properties; in so far as “B” schedule properties were concerned, while these properties were no doubt purchased by the firm in which the appellant-petitioner was not a partner, the agreement of sale, based on which all these properties were purchased, was dated 12.04.2010 whereby the entire extent, in excess of Acs.40.00 of land in Visakhaptnam, was to be sold in favour of M/s.S.R. Properties, a partnership firm in which the appellant-petitioner was a partner; and it was, therefore, necessary to restrain the first respondent from alienating or creating third party rights in respect of both “A” and “B” schedule properties for a period of four weeks. The said interim order was extend thereafter and continues to remain in force till date.

I. WOULD AN APPEAL LIE TO THE COMMERICAL APPELLATE DIVISION AGAINST THE ORDER PASSED BY THE COMMERCIAL COURT IN C.O.P.No.183 OF 2017 & BATCH DATED 16.08.2017?

Sri S. Niranjan Reddy, Learned Senior Counsel appearing on behalf of the appellant, would submit that, in view of Section 37(1)(b) of the 1996 Act, an appeal would lie to this Court against the order passed by the Commercial Court granting or refusing to grant any measure under Section 9; the Court shall have the same power for making orders, under Section 9(1)(ii), as it has for the purpose of, and in relation to, any proceedings before it; as has been held by the Division Bench of this Court, in **Bilasraika Sponge Iron Pvt. Ltd. v. Devi Trading Co**[1], Section 9 of the 1996 Act incorporates a power in the Court to grant ad-interim measures, pending grant of measures after hearing the concerned parties; an appeal can be preferred, against the ex-parte ad-interim order passed by the Court below, under Section 13 of the 2015 Act; the judgment of the Division Bench, in **Bilasraika Sponge Iron Pvt. Ltd**[1], was approved by a Full Bench of this Court in **East India Udyog Ltd v. Maytas Infra Ltd**[2]; as an appeal, under Section 37(1)(b) of the 1996 Act, lies against grant of an ex-parte interim order in an application made under Section 9 of the 1996 Act, an appeal would also lie against an order passed by the Court below refusing to grant an ex-parte ad-interim order; while the Commercial Court had, no doubt, posted the matter for considering grant of interim relief after two weeks, it had specifically held that the case before it was not a fit case for granting an ad-interim ex-parte injunction; and, consequently, an

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[1] 2011 (5) ALD 327
[2] AIR 2015 A.P. 118 = 2015 (5) ALD 446

appeal under Section 37(1)(b) of the 1996 Act would lie to this Court against the order, passed by the Commercial Court, refusing to grant an ex-parte ad-interim order of injunction.

On the other hand Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the first respondent, would place reliance on the judgment of the Supreme Court, in **Smt. Ganga Bai v. Vijay Kumar**[3], to submit that no appeal would lie merely against a finding recorded by the Court below; the Commercial Court had expressed its disinclination to grant an ex-parte ad-interim order for the reasons mentioned therein; unlike grant of an ex-parte ad-interim order, the law does not provide for an appeal against refusal by the Commercial Court to pass an ex-parte ad-interim order; accepting the submission, urged on behalf of the appellant, would mean that, in every case where the Commercial Court issues notice on an application for grant of interim injunction, an appeal would lie under Section 37 of the 1996 Act; such a construction of Section 37(1)(b) of the 1996 Act would result in this Court being flooded with innumerable appeals, as a party would only have to file an application before the Commercial Court, and then straight away invoke the appellate jurisdiction of this Court under Section 37(1)(b) of the 1996 Act; Section 37(1) stipulates that an appeal would lie from the orders mentioned in Clauses (a) to (c), and from no other; an appeal under Section 37(1)(b), against refusal to grant the measures under Section 9, would arise only where the application for injunction, pending disposal of the petition under Section 9 of the

[3] AIR 1974 SC 1126

1996 Act, is dismissed or allowed, and not where notice is ordered on the application for grant of stay during the pendency of the Section 9 application; and the present appeals are, therefore, not maintainable.

Section 13 of the 2015 Act relates to appeals from decrees of the Commercial Courts and, under sub-section (1) thereof, any person, aggrieved by the decision of the Commercial Court, may appeal to the Commercial Appellate Division of the High Court within a period of sixty days from the date of judgment, or order, as the case may be. Under the proviso thereto, an appeal shall lie from such orders passed by a Commercial Court that are specifically enumerated under Order XLIII CPC as amended by the 2015 Act and Section 37 of the 1996 Act. Section 13(2) stipulates that, notwithstanding anything contained in any other law for the time being in force, no appeal shall lie from any order or decree of a Commercial Court otherwise than in accordance with the provisions of the 2015 Act.

An appeal, under Section 13(1) of the 2015 Act, would lie to the Commercial Appellate Division of the High Court against those orders, passed by a Commercial Court which are specifically enumerated in Section 37 of the 1996 Act. Chapter IX of the 1996 Act relates to appeals, and Section 37 thereunder to appealable orders. Section 37(1)(b) stipulates that an appeal shall lie from the following orders (and from no other) to the Court, authorised by law to hear appeals from original decrees of the Court passing the order, viz., (b) granting or refusing to grant any measure under Section 9. While the words "***and from no other***", in Section 37(1) of the 1996 Act, no doubt restricts appeals only from original decrees of the Court passing the orders specified in clauses (a) to (c) thereunder, an appeal would lie even against an ad-interim order, pending passing of final orders, under Section 9 of the 1996 Act.

Section 9 of the 1996 Act relates to interim measures by the Court and, under sub-section (1)(ii)(a) thereof, a party may, before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court for an interim measure of protection in respect of preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement. The Arbitral proceedings, contemplated by Section 9, commences on the date on which a request for a particular dispute is received by the respondent for its reference to arbitration, as provided for in Section 21 of the Act. (**East India Udyog Ltd**[2]). Section 9 consecrates jurisdiction on a Court (inter alia the Principal Civil Court of original jurisdiction in a District) as may appear to it to be just and convenient (Section 9(e) of the 1996 Act). On such application the Court is endowed the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. Since the jurisdiction to order interim measures is conferred on the Court, in respect of any grievance of a party before or during arbitral proceedings, the Court has the power, authority and jurisdiction to order ad- interim measures as well, pending ordering of measures after hearing affected parties (arrayed as respondents to an application under Sec.9) (**Bilasraika Sponge Iron Pvt. Ltd.**[1]; **East India Udyog Ltd.**[2]), and without the necessity of reliance on the provisions of Order XXXVIII Rule 5 CPC. (**Bilasraika Sponge Iron Pvt. Ltd.**[1]; **East India Udyog Ltd.**[2]).

When an application is made under Section 9 of the Act to a Court, such application gives rise to a proceeding, which is original in nature. Such a proceeding is not dependent upon the pendency of any other proceedings such as any Suit or appeal. As an application under Section 9 can be filed even before commencement of arbitral proceedings, such an application would stand on the same footing as proceedings within the meaning of Section 141 of the Civil Procedure Code. (**East India Udyog Ltd.**[2]). While the party invoking Section 9 may not have actually commenced arbitral proceedings, he must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. What is a reasonable time would depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof, but the distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. (**East India Udyog Ltd.**[2]). While exercising jurisdiction under this provision, the Court can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencement of arbitral proceedings. If the arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under this provision and the arbitral proceedings would stand snapped, and the relief allowed to the party shall cease to be an order made before i.e., in contemplation of arbitral proceedings. (**East India Udyog Ltd.**[2]).

No special procedure is prescribed by the 1996 Act for dealing with an application for interim measure/order under Section 9 thereof. When power is conferred under a special statue on a Civil court without laying down any special condition for exercise of that power, the general rules that govern the Court, while considering the grant of interim measure/order at the threshold, are attracted. Thus, when an application under Section 9 is made, and during the pendency of such application, an ex parte ad interim order becomes imperative, in the facts and circumstances of the case, it is open to the Court to pass an ad interim ex parte order based on well recognized principles contemplated by the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Code governing the grant of interim injunctions and/or other orders of interim protection or the appointment of a Receiver. (**East India Udyog Ltd.**[2]).

The power to grant an ex parte interim order is derived by a Court under the principle that every Court has the power to pass an order, which it must pass so as to ensure that the application, made before it, does not become infructuous merely because of the fact that no specific provision has been made dispensing, in an emergent situation, the necessity to pass an ex parte order. In other words, the Court cannot be stated to be completely helpless in the matter of an ad -interim order/measure. Otherwise the entire purpose of the application under Section 9 of the Act would stand defeated, if ultimately the party approaching the Court under Section 9 succeeds in the Arbitration proceedings. It is difficult to conceive that the Legislature, so intended while providing the remedy to a party to approach the Court under Section 9 of the Act. When any power is expressly granted by a statute, there is impliedly included in the grant, even without special mention, every power and every control, the denial of which would render the grant itself ineffective. (**East India Udyog Ltd.**[2]).

The relief sought for by the appellants in COP No.83 of 2017, is to partly set aside the order in COP No.183 of 2017 dated 16.08.2017 passed by the XXIV Additional Chief Judge-cum-Commercial Court, City Civil Court, Hyderabad; to restrain the first respondent from alienating or creating third party rights over A schedule property; and to restrain respondents 1 and 4 from alienating and creating third party rights over B schedule properties. The Section 9 petition, filed by the appellant, before the Commercial Court, was to restrain the first respondent from dealing, alienating and creating third party rights, including leasing of the petition A and B schedule properties, and to restrain the first respondent from operating the petition schedule C bank Accounts of the second respondent. In its order in COP No.183 of 2017 dated 16.08.2017, the Commercial Court restrained the first respondent from operating the C schedule bank Account of the second respondent. It, however, held that (A) and (B) schedule properties were beyond its territorial jurisdiction; "A" schedule property, belonged to the third respondent which was promoted by respondents 1 and 4; and, hence, it was not a fit case to grant *ex parte* injunction.

The power to pass an order granting ad -interim measures, before hearing the respondent in an application under Section 9 of the 1996 Act, is comprehended within the scope of the powers granted under Section 9. It would not be necessary for the appellant to await the passing of an order under Order XXXVIII Rule 6 CPC, and to pursue remedies there against. The appeal is, therefore, maintainable as an appeal against an order passed under Section 9 of the 1996 Act. (**Bilasraika Sponge Iron Pvt. Ltd.**[1]; **East India Udyog Ltd.**[2]). The appeal, provided under Section 37 of the 1996 Act, comprises within its locus an appeal against an order granting ad-interim measures, pending passing of final orders under Section 9 of the 1996 Act. (**Bilasraika Sponge Iron Pvt. Ltd.**[1]). The order granting or refusing to grant any measure under Section 9 of the 1996 Act is appealable under Section 37 thereof to the Court authorized by law to hear the appeals from original decree of the Court passing the order. (**East India Udyog Ltd.**[2]). An appeal lies against grant of, or refusal to grant, an interim measure of protection by way of an ex-parte order under Section 9 of the Arbitration and Conciliation Act, 1996. In **ICICI Bank Ltd. v. IVRCL Ltd.**[4], a Division bench of this Court observed:-

> "…………Since the jurisdiction to order interim measures is conferred on the Court, under Section 9 of the Act, in respect of any grievance of a party before or during arbitral proceedings, it is axiomatic that the Court has the power, authority and jurisdiction to order ad-interim measures as well, and pending ordering of measures after hearing affected parties (arrayed as respondents to an application under Section 9). Section 9 of the Act incorporates a power in the Court to grant ad-interim measures, pending grant of measures after hearing the concerned parties, and without the necessity of reliance on the provisions of Order XXXVIII Rule 5 CPC. **An order under Section 9 of the Act, granting ad-interim measures, can be appealed against under Section 37 of the Act. The appeal provided under Section 37 of the Act comprises within its locus an appeal against an order granting ad-interim measures, pending passing of final orders, under Section 9 of the Act. (Bilasraika Sponge Iron Pvt. Ltd., Hyderabad1). Grant or refusal of an interim measure of**

[4] 2015 (6) ALD 486

protection, by way of an ex-parte ad- interim order under Section 9 of the Act, is an appealable order under Section 37 thereof. (Mrs. Perin Hoshang Davierwalla v. Mr. Kobad Dorabji Devierwalla (Bombay High Court) ; M/s. East India Ydyog Ltd.2; Sati Oil Udyog Ltd. v. Avanti Projects and Infrastructure Ltd. ; and Aventis Pasteur S.A v. Cadila Pharmaceuticals Ltd.). It is evident, therefore, that an appeal lies under Section 37 of the Act against an ex-parte order of ad- interim injunction passed under Section 9 of the Act................ " (emphasis supplied).

Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the respondents, would, however, contend that the present appeal is not against an order of the Commercial Court either granting or refusing to grant interim injunction, but only against hearing of the application being deferred, and against some findings recorded in the order. While it is debatable whether an appeal would lie against mere deferment of hearing of the application for grant of interim injunction, and we find considerable force in the submission of Sri Vedula Venkataramana, Learned Senior Counsel, that an artificial expansion of the scope of Section 37 may well result in applications being filed before the Commercial Court and, before they are considered, appeals being preferred thereagainst, the fact remains that, in the present case, the Commercial Court has not merely deferred hearing of the petition filed in COP No.183 of 2017, but has also recorded reasons for not granting an *ex parte* order of injunction. It is wholly unnecessary for us, therefore, to examine, in the present case, whether an appeal would lie against hearing of an interlocutory application being deferred by the Commercial Court.

Smt. Ganga Bai[3], on which reliance is placed by Sri Vedula Venkataramana, Learned Senior Counsel, arose out of a Suit filed to enforce mortgage of a joint family property executed by the father. A preliminary decree for sale was passed only against the half-share of the father in the mortgaged property, and the Suit was dismissed against the sons on the ground that the mortgage, not being for legal necessity, was not binding on the sons' interest under the Hindu Law. The sons filed an appeal not against any part of the preliminary decree, but only against the finding of the trial Court that the partition between the father and the sons, effected subsequent to the mortgage in the Suit, was a sham and a colourable transaction. It is in this context that the Supreme Court observed:

"…Under section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising original jurisdiction, to the court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. **Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an appeal is expressly allowed by rules". 'Order 43, Rule 1 of the Code, which by reason of clause (i) of section 104(1) forms a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof, Finally, section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a court in exercise of its original or appellate jurisdiction.**

These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under, rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial Court.

The High Court mixed up two distinct issues : one, whether it was competent to defendants 2 and 3, if they were aggrieved by the preliminary decree of file an appeal against that decree; and two, whether the appeal such as was filed by them was maintainable. **If it be correct that defendants 2 and 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal. But they did not file an appeal against the preliminary decree and therefore the question whether they were aggrieved by that decree and could file an appeal therefrom was irrelevant.** While deciding whether the appeal filed by defendants 2 and 3 was maintainable ' , the High Court digressed into the question of the competence of defendants 2 and 3 to file an appeal against the preliminary decree and taking the view that it was open to them to challenge that decree even though the suit was wholly dismissed against them, the High Court held that the appeal, which in fact was directed against a finding given by the trial court, was maintainable. It the High Court had appreciated that the-two questions were distinct and separate, it would not have fallen into the error of deciding the latter question by considering the former…." (emphasis supplied)

Unlike in **Ganga Bhai**[3] where the appeal preferred was against a mere finding, and not against the preliminary decree passed by the Court below, in the present case the appeal is preferred against the order passed by the Commercial Court assigning reasons why it was not inclined to grant an *ex parte* order of injunction. As noted hereinabove, an appeal would lie under Section 37 against the order of the Commercial Court either granting or refusing to grant an order of interim injunction pending disposal of the application under Section 9 of the 1996 Act. What the Commercial Court has done, in the present case, is to refuse to grant of an *ex parte* order of ad-interim injunction for the reasons stated in the order. We may, therefore, not be justified in refusing to entertain this appeal, or to hold that the appeal, as filed in the present case, is not maintainable.

II. CAN THE COMMERCIAL COURT AT HYDERABAD EXERCISE JURISDICTION UNDER SECTION 9 OF THE 1996 ACT, EVEN THOUGH THE SUBJECT PROPERTIES ARE LOCATED IN VIZIANAGARAM AND VISAKHAPATNAM:

Sri S. Niranjan Reddy, Learned Senior Counsel, would draw our attention to the partnership deed of the second respondent dated 08.02.2010, (which in Clause 18 provides that the venue of arbitration is at Hyderabad), to submit that the Commercial Court at Hyderabad would have territorial jurisdiction over the subject properties, located outside its territorial limits, in view of the parties having agreed for arbitration to take place at Hyderabad; the Supreme Court, in **Indus Mobile Distribution Pvt Ltd v. Datawind Innovations Pvt Ltd**[5], held that the Courts, where the

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[5] 2017 SCC Online SC 442

cause of action arises and where the arbitration takes place, would both have jurisdiction; and an appeal, against an interim order passed by the arbitral tribunal sitting at the place of arbitration, would lie to the Court which has supervisory jurisdiction over the arbitration proceedings.

A partnership deed was executed between the petitioner and the first respondent, constituting a partnership in the name and style of “M/s. S.R. Properties”. Clause 18 of the partnership deed is the arbitration clause which stipulates that, if any dispute or difference or question of interpretation arises between the parties under the contract/ partnership deed as to their rights and liabilities, the matter under the contract would be decided through arbitration by two arbitrators to be appointed by the parties; and in case of the arbitrators disagreement, an umpire is to be appointed whose decision is to be final, conclusive and binding upon the parties. The said clause stipulates that the venue of the arbitration would be at Hyderabad.

As Clause 18 of the partnership deed, which is the arbitration clause in the said agreement, stipulates that the venue of arbitration would be at Hyderabad, the Court, which would have jurisdiction to entertain an application under Section 9 of the 1996 Act, would be the Court as defined in Section 2(1)(e)(i) of the 1996 Act. Section 2(1)(e) stipulates that in the case of an arbitration, other than the international commercial arbitration, the principal Civil Court of original jurisdiction in a district shall be the Court having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of the Suit.

The term "subject-matter", in Section 2(1)(e) of the 1996 Act, is confined to Part I of the said Act. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. (**Indus Mobile Distribution Pvt. Ltd.**[5]). The legislature has, intentionally, given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located, and the courts where the arbitration takes place. This was necessary as, on many occasions, the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process, and an appeal under Section 37 against an interim order passed by such a Court would lie to the High Court having supervisory jurisdiction over such Courts. This would be irrespective of whether the obligations to be performed under the contract is at a place other than where the arbitration is to take place. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located. (**Indus Mobile Distribution Pvt Ltd.**[5]).

As Clause 18 of the partnership deed stipulates that the venue of arbitration shall be at Hyderabad, the principle Civil Court of original jurisdiction in Hyderabad District, where the arbitration is to take place, would prima-facie have jurisdiction to entertain an application under Section 9 of the 1996 Act. It would, however, be wholly inappropriate for us to, conclusively, hold that the XXIV Additional Chief Judge-cum-Commercial Court, Hyderabad has territorial jurisdiction, to entertain an application under Section 9 of the 1996 Act, with respect to immoveable properties situated at Vijayanagaram and Visakhapatnam, for the petition, filed under Section 9 of the 1996 Act, is still pending consideration before the Commercial Court. Suffice it to observe that in so far as B schedule properties are concerned, which are said to be belong to the second respondent firm of which the appellant is a partner and to which Clause 18 of the partnership deed would apply, the Commercial Court, prima-facie, has jurisdiction to entertain a petition under Section 9 of the 1996 Act. It is made clear that the Commercial Court shall decide the Section 9 petition, after the respondents file their counter/reply to the petition filed by the appellant, uninfluenced by the observations made in this order.

III. CAN DISPUTES, RELATING TO IMMOVEABLE PROPERTIES WHICH DO NOT FORM PART OF THE AGREEMENT CONTAINING THE ARBITRATION CLAUSE, BE EXAMINED IN PROCEEDINGS UNDER SECTION 9 OF THE 1996 ACT?

Sri S. Niranjan Reddy, Learned Senior Counsel, would submit that the properties in “B” schedule were purchased by the third respondent partnership firm, of which the first and the fourth respondents were partners; it is the appellant’s specific case that an agreement of sale was executed on 12.04.2010 for purchase of Acs.40.00; pursuant thereto the appellant had paid Rs.6.4 Crores to the first respondent; and, while an extent of Acs.17.00 was purchased in the name of the second respondent, the remaining extent of Acs.23.00 were purchased by the first respondent in the name of the third respondent, diverting monies paid by the appellant, for purchase of these properties, to the third respondent; if the veil were to be lifted, it is evident that the “B” schedule properties would, in fact, belong to the second respondent-firm; while “B” Schedule properties are situated along the highway, the properties in “A” schedule are located behind the properties in “B” schedule; the endeavour of respondents 1, 3 and 4 is to knock away the properties which belong to the second respondent, of which the appellant is a partner; and the properties of the partnership firm are, in effect, the properties of the partners.

Learned Senior Counsel would refer to various legal principles which, according to him, can be applied to bind a non-signatory to an arbitration agreement; this would include the legal doctrines of agent-principal relations, apparent authority, piercing the veil (also called the “alter ego”) etc. While fairly stating that the judgment in **Chloro Conatrols India Pvt Ltd v. Severn Trent Water Purification Inc.**[6] related to foreign awards, Learned Senior Counsel would submit that, since Parliament amended the 1996 Act to bring it in conformity with the order of the Supreme Court, the law declared in the aforesaid judgment would also apply to domestic arbitration; unlike a Civil Court which has the power to

[6] (2013) 1 SCC 641

grant restitution, no such power is conferred on the arbitral tribunal; if the arbitral tribunal were to later hold that the properties purchased by the third respondent, at Vizianagaram, was only from out of the funds of Rs.6.4 crores brought in by the appellant, alienation of the property, in the interregnum, would disable the appellant from seeking restitution as persons, who purchased the property, would not fall within the jurisdiction of the arbitral tribunal; duty, of a very high order, is placed on the partners to act in trust for all the partners of the partnership firm; the first respondent had betrayed the trust placed on him by the appellant; he had surreptitiously knocked away 23 acres of prime property, which was purchased with the funds of the appellant under the agreement of sale dated 12.04.2010, reserving them in favour of the third respondent; and the first respondent had also fraudulently executed a registered sale deed in favour of the third respondent.

On the other hand Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the respondents, would submit that the measures which can be sought from a Court, under Section 9 of the 1996 Act, are only available to a party to the arbitration agreement; it is not in dispute that the first and the fourth respondents are alone the partners of the third respondent-firm; while the partnership deed, of the third respondent, also contains an arbitration agreement, the said arbitration clause has no application to the appellant as she is not even a partner in the third respondent-firm; any dispute, regarding the properties purchased by the third respondent, can only be agitated by way of a Civil Suit, and cannot be the subject matter of arbitration proceedings instituted by the appellant as she is not a partner in the third respondent-firm; it is only disputes, relating to the partnership deed of the second respondent, which can be referred to arbitration; and as the appellant cannot have disputes, relating to purchase of properties by the third respondent-firm, adjudicated by the arbitral tribunal, it would not be open to them to seek interim injunction in a Section 9 application with respect to the properties of the third respondent.

In **Chloro Controls India Pvt. Ltd.**[6] the Supreme Court observed that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him; a person may not be a signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and, thus, he may be claiming through or under one of those parties; for the purposes of both the New York Convention, and the UNCITRAL Model Law, it is sufficient that there should be a defined "legal relationship" between the parties, whether contractual or not; plainly there has to be some contractual relationship between the parties, since there must be some arbitration agreement to form the basis of the arbitral proceedings; given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract; arbitration can be possible between a signatory to an agreement and a third party; however, heavy onus lies on that party to show that, in fact and in law, it is claiming under or through a signatory party, as contemplated under Section 45 of the 1996 Act; various legal basis may be applied to bind a non-signatory to an arbitration agreement; the first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights; this theory relies on the discernible intentions of the parties and, to a large extent, on the good faith principle; they apply to private as well as public legal entities; the second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel; and they do not rely on the parties' intention but rather on the force of the applicable law.

In the case on hand, an agreement was entered into between Sri Dandu Kasiviswanadha Raju and others with the second respondent on 12.04.2010 agreeing to sell 40 acres of land; and the petitioner has affixed her signature as a witness to the said agreement of sale dated 12.04.2010. While the submission of Sri S. Niranjan Reddy, Learned Senior Counsel for the appellants, under this head, cannot be said to be without merit, it may not be appropriate for us to express any opinion on these issues, as the respondents have not yet been afforded an opportunity to file their counter in the pending Section 9 petition.

Suffice it, therefore, to make it clear that the question whether the principles, enunciated in **Chloro Conatrols India Pvt Ltd.**[6], would apply to the case on hand are all matters for the Commercial Court to consider in the substantive Section 9 petition which is still pending consideration before it.

IV. SHOULD THE INTERIM ORDER PASSED BY US ON 24.08.2017 BE VACATED ON THE MATTER BEING REMAND TO THE COURT BELOW?

Sri Vedula Venkataramana, Learned Senior Counsel, would submit that, since respondents 3 and 4 have entered into agreements of sale with several parties, the order passed by this Court, restraining them from alienating the subject properties, is causing them substantial prejudice; and instead of having all these matters adjudicated before the Commercial Court, the appellant has needlessly invoked the appellate jurisdiction of this Court under Section 37 of the 1996 Act, even though the present appeal is not maintainable.

Except for a vague submission across the bar, no evidence has been adduced, nor has any material been placed before us, by the respondents to show that they have entered into agreements of sale with third parties, and the interim order passed by us on 24.08.2017, directing the respondents not to alienate or create third party rights over the subject "A" and "B" schedule properties, has caused them substantial prejudice. Even otherwise, in terms of the interim order passed by this Court earlier, the first respondent would continue to retain possession of the subject "A" and "B" schedule properties. All that he is disabled is to alienate the subject immoveable properties or to create any third party rights thereupon. We see no reason, therefore, not to continue the interim order, passed on 24.08.2017, till the Section 9 petition is finally heard and disposed off.

V. CONCLUSION:

The interim order, passed on 24.08.2017, shall continue to operate till the Section 9 petition is finally heard and decided as we are satisfied, albeit prima-facie, that the Commercial Court has territorial jurisdiction, at least with respect to "B" schedule properties, since Clause 18 of the partnership deed, to which the appellant and the first respondent are parties, specifies the venue of Arbitration as Hyderabad. Since the Commercial Court has, prima-facie, erred in holding otherwise, the order under appeal necessitates interference.

In the light of the urgency expressed by Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the respondents, we requested the Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad to decide C.O.P.No.183, 184 and 185 of 2017 with utmost expedition, preferably within three months from the date of receipt of a copy of this order. All the three Appeals in Com.C. Appeal Nos.4 to 6 of 2017 are, accordingly, disposed of. The Miscellaneous Petitions, if any pending, shall also stand disposed of. No costs.

RAMESH RANGANATHAN, ACJ

M.GANGA RAO, J.

Date: 21.02.2018.
MRKR/CS