HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON'BLE SMT JUSTICE T.RAJANI

COM.C.A.No. 13 OF 2018

JUDGMENT : (per the Hon'ble Sri Justice C.Praveen Kumar)

1) Assailing the order dated 14.06.2018 passed by the Judge, Commercial Court, Commercial Appellate Court, Commercial Division and Commercial Appellate Division at Hyderabad, wherein an application filed under Section 9 of the Arbitration and Conciliation Act, to restrain the respondents 1 and 4 from alienating the petition "B" schedule property to third parties and to restrain the respondent No.1 from operating the petition "C" schedule property of second respondent, was rejected, the present appeal came to be filed under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to "the Act").

2) The averments in the petition would show that the petitioner is a film producer and the respondent No.1 is a Journalist. In the year 2005, the respondent No.1 along with Manthani Pradosh Raag approached the petitioner for the purpose of entering into a partnership business, to do real-estate development and construction including technical construction work, construction and development of building apart from managing resorts etc. The petitioner was

induced to invest for procuring large tracts of land in the outskirts of the city of Hyderabad, development of land and selling the same after demarking them into plots. The petitioner and the respondent No.1 entered into a deed of partnership in the name and style of M/s.S.S.Associates along with Manthini Pradosh Raag. It is stated that as the petitioner was busy with the other commitments, the respondent No.1 induced the petitioner to appoint him as a Managing Partner of the firm and accordingly the first respondent, who was appointed as a Managing Partner, was looking after the affairs of the partnership firm. During the course of time, the first respondent is said to have represented to the petitioner to invest more amounts in the real-estate as they were intending to purchase some more land in the area without the involvement of Mr.Manthini Pradosh Raag and in order to avoid tax problems, the petitioner and the respondent No.1 shall enter into an exclusive partnership deed and establish a partnership firm. Accordingly, they entered into a partnership deed on 18.08.2006 and established a partnership firm in the name of M/s. Sri Nag Estates. The petitioner claims to have invested huge amounts forming major part of the capital, which was used by the respondent No.1 for purchasing various parcels of land admeasuring Ac.11-12.5 guntas in Nandigama village, Kothur Mandal, Mahaboobnagar District and also in Chinnamangalaram village, Moinabad Mandal, Ranga Reddy District. Another partnership deed came to be entered in between the petitioner and respondent No.1 on 23.07.2005 leading to establishment of a firm in the name and style of M/s. Sri Nag Corporation. In all the partnership firms, the respondent No.1 was given the powers to do the business and he was admittedly managing the affairs of the firms. While things stood thus, in the year 2010, the respondent No.1 is said to have represented to the petitioner stating that it would be appropriate to purchase properties around Visakhapatnam city and any constructions made in and around Visakhapatnam city would fetch huge profits. He claims to have informed the petitioner that he has identified 50 acres of land abutting the National Highway leading to Vijayawada and Chennai. Then the respondent No.2-partnership firm viz., M/s.S.R.Properties came to be established on 08.02.2010. The respondent No.1 insisted the petitioner to invest money for purchasing the properties. It is said that believing the representation, she sold several personal assets, for the purpose of infusing capital into the respondent No.2-firm. According to the partnership deed dated 08.02.2010, all the capital required for the business shall be contributed equally by both the partners. According to the needs of the business of the firm, the profit and loss shall be shared in the ratio of 60% to the respondent No.1 and 40% to the petitioner. The respondent No.1 was asked to look after the affairs of the said partnership firm and he was also obligated to maintain books of account in the ordinary course of business and other documents of partnership. The Registered Office of all the partnership firms was at Srinagar colony, Hyderabad. It was averred that the respondent No.1 always represented that all the amounts received from the petitioner being accounted to in the books of partnership firm and that the respondent No.1 will share the profits in proportionate to the investment made in. In view of the trust and good faith, the petitioner transferred the amounts to the account of partnership firm, as and when available. While things stood thus, the respondent No.1 informed the petitioner, about he identifying Ac.50.00 of land in Rajapulava village, Bhogapuram Mandal, Vizianagaram Dsitrict abutting the national highway, for a sum of Rs.12.00 Crores and that he would obtain a sale deed in the name of the respondent No.2 i.e., M/s.S.R.Properties. Believing the same, the petitioner permitted the respondent No.1 to acquire land in the name of R-2-firm for Rs.12.00 crores. An agreement of sale was also entered into on 12.04.2010 with one Mr.D.Kasiviswanadha Raju and his family for the purpose of procuring land admeasuring Ac.40.00 guntas in the said village i.e., Ac.10.00 guntas in Sy.No.35 and 36 from D.Kasiviswanadha Raju and the remaining Ac.30.00 guntas of land to be procured by the said Viswanadha Raju to be handedover to respondent No.2-firm. The respondent No.1, who is the Managing Partner of respondent No.2-firm was also a signatory to the agreement of sale dated 12.04.2010. The petitioner was one of the witnesses to the said agreement. It is said that an amount of Rs.One crore was handed over to the respondent No.1 for the purpose of paying advance to

Mr.D.Kasiviswanadha Raju and his family apart from six cheques valuing Rs.60.00 lakhs. The said cheques were issued by respondent No.2-firm represented by respondent No.1. It is further averred that a sum of Rs.6.7 crores was handedover by the petitioner, by way of cash/cheques to the respondent No.1 from time to time, to be invested through respondent No.2-firm. Two accounts also came to be opened, one in Srinagar branch and another in Seethammadhara branch of Andhra Bank. It is stated that though the petitioner was requesting the respondent No.1 to provide her the details of transaction, books of accounts and amount spent, the respondent No.1 keep on assuring that he will provide the same at the earliest but kept the petitioner in dark with regard to the details of procurement of land, execution of sale deeds in favour of respondent No.2-firm and also the development works undertaken by the respondent No.1. It is further stated that the brochure released, clearly recites that the development of the property was in an extent of Acs.50.00 gts, which is undertaken by respondent No.2-firm. Since the first respondent was not providing the details as sought for by the petitioner and vexed with his attitude, she addressed letters dated 15.11.2016 and 02.12.2016 to the respondent No.2 represented by respondent No.1 calling upon him to show the books of accounts etc. Inspite of receipt of the letters, there was no response from the first respondent. The petitioner sent email to Mr.Sasi Kumar, the Chartered Accountant directing him not to file any returns with regard to any of the four firms without her approval. Suspecting foul play, the petitioner visited the administrative office at Srinagar on 15.04.2017, for obtaining the copies and collecting the information, as she intends to finalize her returns. Though books of accounts were not furnished, but while she was going through the partnership deeds, she was shocked to notice the partnership deed dated 08.02.2010 between the first respondent and his wife Mrs.Suneetha Chintalapudi. The said partnership deed was executed on the same day, on which, the petitioner and first respondent entered into a partnership deed in the name of M/s. S.R. Promoters. The husband (respondent No.1) and his wife entered into a partnership deed in the name of M/s. S.R. promoters represented by R-1. On a perusal of few sale deeds furnished by the staff on 15.04.2017, the petitioner came to know that after establishing M/s. S.R.Promoters, the first respondent purchased lands located adjacent to the lands proposed to be purchased by respondent No.2-firm and are also part of the same survey numbers mentioned in the agreement of sale. The enquiries made by the petitioner with the officials of the respondent No.7 i.e., office of Sub-Registrar, Bhogapuram Mandal, Vizianagaram District, revealed that the respondent No.1 bought lands admeasuring Ac.12.33 guntas in Rajapulova village, Vizianagaram District in the year 2010 under five sale deeds apart from lands in Kurakalva village, Renigunta Mandal, Tirupathi District etc. For the sake of convenience, the properties which are in the name of respondent No.2 i.e., M/s.S.R. Properties were shown as "A" schedule properties. It is said that the total amount invested by the respondent No.1 for purchasing Ac.12.33 guntas was only Rs.78,36,200/- and it is alleged that the amounts invested by the petitioner came to be used for procuring lands in the name of M/s.S.R.Promoters. It is further alleged that about Ac.23.67 guntas came to be purchased in the name of M/s.S.R.Promoters, which are shown as "B" schedule properties. It is further said that the blank cheques given by the petitioner were being used by the respondent No.1 for purchasing properties in the name of respondent No.3-M/s. S.R.Promoters.

3) A counter came to be filed denying the averments made in the petition. According to the first respondent, in a partnership dispute, particularly, when the petitioner alleges that she has dissolved the partnership firm, the prayer of the injunction against alienation, cannot constitute an interim measure, for the reason that the managing partner of a partnership firm cannot be injuncted by another partner. In view of Sections 47 and 48 of the Partnership Act, 1932, a blanket injunction against alienation is impermissible in law. According to first respondent, M/s. S.R.Promoters is a partnership firm of which the petitioner is admittedly not a partner and as such the question of granting injunction against M/s.S.R. Promoters which has purchased the property from its own sources is

impermissible. It is further stated in the counter that except an amount of Rs.70 Lakhs, which was shown in the Income Tax returns of the partnership firm, the petitioner has not contributed any amount towards the said firm. Giving details as to the amount invested and the properties purchased, it is urged that the petitioner has no right or claim in the properties purchased by M/s. S.R.Promoters. According to him, majority of the amount was collected from the prospective purchasers and then the properties came to be purchased by giving advance to the vendors. The allegation that the respondent No.1 refused to access to the books of accounts of the partnership was denied. According to him, the petitioner was informed about the business transactions entered into by M/s. S.R.Properties and as to the documents which are available with the Chartered Accountant. According to him, so long as M/s. S.R.Promoters is not dissolved, it can conduct its business without obstruction and the petitioner has no legal authority to stall the business activity. Finally, it is pleaded that a blanket stay granted while giving notice to the respondent is illegal, improper and incorrect. In other words, it is pleaded that the court has no jurisdiction to order stay in respect of the properties purchased by M/s. S.R.Promoters.

4) Considering the documents filed by both the parties, to which no objection was raised by either side, the C.O.P.No.183 of 2017

came to be dismissed on the ground that the petitioner has miserably failed to prima facie prove that respondent No.1 has siphoned all the monies of the petitioner and invested in M/s. S.R. Promoters. Challenging the same, the present appeal came to be filed.

5) With the consent of both the learned Senior Counsel, the main appeal itself is heard.

6) Sri S.Niranjan Reddy, learned Senior Counsel appearing for the appellant mainly submits that the judgment of the trial court is erroneous as it proceeded on incorrect appreciation of facts. He further submits that the finding of the trial court that the petitioner has knowledge of the constitution of third respondent firm i.e., M/s. S.R.Promoters and that there has been delay of 7 years to initiate action in this regard, is without any basis. According to him, the amendment dated 23.10.2015, made to Section 8 of the Arbitration and Conciliation Act, 1996 (for short "the Act 1996") expands the scope of the reference of parties to the arbitration, to include persons claiming "through or under" such a party to the arbitration agreement. He relied upon the judgments of the Supreme Court in ***Ameet Lalchand Shah and others v. Rishabh Enterprises***[1] and ***Chloro Controls v. Seven Trent Water Purification Inc Ltd***[2] to show that alter-ego of a party to the

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[1] (2018) SCC online SC 487

[2] (2013) 1 SCC 641

arbitration agreement can be subject to arbitration even if he is a non-signatory. In other words, he would submit that in view of the judgments referred to above, the petition schedule "B" properties standing in the name of M/s. S.R.Promoters, are in effect, the properties held by its partners, including the respondent No.1; and respondent No.1 and his alter-ego M/s. S.R.Promoters are bound by the arbitration clause contained in the partnership deed of M/s. S.R.Properties dated 08.02.2010. He also placed reliance on the judgment of the Apex Court in ***Sukanya Holdings Pvt. Ltd. V. Jayesh H.Pandya,*** for rejecting the plea of arbitrability of the claims against M/s. S.R.Promoters. In any event, he would contend that since the arbitrator is not yet appointed to settle the dispute, the duty of the court under Section 9 of the Act 1996 is to preserve the substratum of the arbitration dispute. According to him, if the *status quo* of the property in the arbitration dispute is not maintained, irreparable loss would be caused to the party opposing it. Further, pleads that nothing would be left to be adjudicated by the arbitrator if the respondent No.1 is allowed to sell away all the properties. Since a *prima facie* case is made out, showing irreparable loss, he would submit that it is a fit case for granting stay of alienation till an arbitrator is appointed.

7) On the other hand, Sri Vedula Venkata Ramana, learned Senior Counsel for the respondents would contend that in the absence of

any evidence being adduced before the Court below, this Court cannot go into the pleas raised. He further submits that the fact that the petitioner has filed the partnership deeds between both the parties itself indicates that she was aware about the existence of the partnership firm and also the sale deeds of petition "A" and "B" schedule properties. According to him, when the petitioner was aware about the existence of the partnership firm and the sale deeds entered into, there is no justification for her to keep quiet for nearly 7 years. It is further urged that when the appellant has filed the photo copies of the documents, including the partnership deeds of the four partnership firms, where she is a partner, it is unbelievable that she would have been kept out of the disclosure of business details of the partnership firms. With regard to the plea of the petitioner that in similar matters injunctions have been granted by the Court, he would contend that the same may be relatable only to "A" schedule properties and not "B" schedule properties. He further submits that the appellant approached the lower court in haste ie., even before the notice of dissolution of firm dated 09.08.2017 was served on the respondent. It is further argued that since there is no proof of service of notice of dissolution, there would be no dissolution at all. According to him, if a suit for dissolution of partnership firm is filed, the date of dissolution would be the date of plaint. Since there is an arbitration clause, the claim statement before the arbitrator is the crucial date for effecting/construing dissolution. Till such date, which has not yet come, there cannot be a dissolution of partnership firm and the Managing Director cannot be restrained from dealing with the partnership firm assets. In support of the plea regarding dissolution of partnership firm, he placed reliance in **Addanki Narayanappa and another v. Bhaskara Krishtappa and 13 others**[3] and **Saligram Ruplal Khanna and another v. Kanwar Rajnath**[4]**.** He mainly submits that injunction sought against petition "B" schedule property is outside the purview of Section 9 of the Act 1996 as the said firm is a third party to the Arbitration and Conciliation Act.

8) Learned counsel for the respondents further submits that in the absence of any oral or documentary evidence before the trial court, the documents which are now sought to be relied upon, which though form part of lower court record, cannot be made the basis to upset the findings given. It is further argued that in a partnership firm, a retiring partner or a partner dissolving the firm is entitled only to monetary value of share and when the final relief that can be granted is only the monetary value of share, the question of granting of injunction is not sustainable in law. At any rate, it is urged that the property in lis would safeguard the interest of the petitioner if she is successful before the arbitrary tribunal. The Learned counsel

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[3] AIR 1966 SC 1300

[4] AIR 1974 SC 1094

took us through various sale deeds and other documents to show that the petition "B" schedule properties were never purchased from the income or money of the second respondent partnership firm i.e., M/s.S.R.Properties. Since most of the transactions are after 10.04.2011, it is urged that there is no basis for the appellant to urge that the properties were purchased from the money given by the appellant. It is further pleaded that since the allegation of siphoning of money of the second respondent-firm for acquisition of "B" schedule properties, is required to be proved by adducing evidence, a statement on oath cannot be made the basis to grant injunction against the respondents.

9) To the argument of the learned counsel for the appellant that the relationship between the parties is a nature of mutual trust and as it is a fiduciary relationship and any act of distress enables the petitioner/appellant to seek relief of injunction, it is urged that there is a lot of difference between law of partnership and law of trust and in a partnership business, the principle of trust cannot be invoked. In other words, it is urged that once the parties entered into partnership business, they should keep a vigil over the other. Thus, argued that the appellant failed to make out any *prima facie* case and the balance of convenience is in favour of the respondent.

10) Before proceeding further, it is to be noted that an application seeking appointment of an Arbitrator to decide the dispute between

the parties, is pending before this Hon'ble Court and any order passed now would only be till the appointment of the Arbitrator.

11) Now, the issue is: "Whether the facts and circumstances of the case warrants passing of an injunction order against the 1st and 4th respondents in dealing with 'A' and 'B' schedule properties, who have promoted the 3rd respondent-firm herein ?"

12) It is to be noted that the partnership firm is not a registered partnership, but a partnership at will. The dispute in the present partnership firm relates to real-estate business and civil construction works. The main ground, on which the trial court rejected the request of the appellant, appears to be the conduct of the appellant in keeping quiet for 7 years without enquiring about the business of the partnership firm inspite of investing huge amounts in the said firm. As observed earlier, the claim of the appellant is that she was not aware about M/s. S.R. Promoters being floated by the 1st and 4th respondents and that she came to know about the same when she obtained certain documents of the second respondent-partnership firm. According to her incorporation of third respondent-firm was on the same day, on which the second respondent partnership firm was also incorporated. In other words, the plea of the appellant is that she came to know about M/s. S.R.Promoters only on 15.04.2017. Ofcourse, no evidence muchless legal evidence has been placed on record to show that the appellant

came to know about the existence of M/s. S.R. Promoters and purchase of properties in the name of M/s. S.R. Promoters by the 1st and 4th respondents, but only on the ground of conduct of the appellant in keeping quiet for about 7 years, and thereby an adverse inference has to be drawn against the appellant. In para 31 of the impugned order, the trial court held that after a period of 7 years, from the date of establishing M/s. S.R. Promoters, for the first time the appellant made an allegation against respondent No.1 alleging misappropriation of funds by M/s.S.R. Promoters. The case of the appellant is that she has applied for certified copies of the sale deeds of petition "A" and "B" schedule properties, and only then she came to know about the same, was not specifically denied by the respondent No.1 in his counter. The endorsement made in the said document shows that the appellant procured the certified copies of the documents on 29.07.2017.

13) The order further states that even after the institution of M/s. S.R. Promoters, the properties were purchased in the name of M/s. S.R. Properties. Therefore, the appellant has knowledge that respondents No.1 and 4 constituted a partnership firm in the name of M/s. S.R. Promoters, but still she did not take any steps. Merely because, the properties were purchased in the name of both the partnership firms after their registration, does not by itself mean that the appellant had knowledge of purchases made by the first

respondent. The Court was wrong in surmising that as the properties came to be purchased after the establishment of both the partnership firms, the appellant had knowledge about the purchase. It is the specific case of the appellant that out of trust and acquaintance, she believed the representations made by the respondent No.1. Further, as the respondent was not responding properly to the queries raised, she entertained a doubt, went to the office, obtained documents and by chance came across the partnership firm floated by the first respondent along with his wife and the properties purchased in the name of the said firm. It is no doubt true that for a period of seven years the appellant did not enquire into the business run by the first respondent in the name of the second respondent-partnership firm. Her conduct though at first blush appeared to be abnormal, but on perusal of the record and taking into consideration, the number of partnership firms and businesses done by both the parties together in real-estate, construction, cine field, production etc., it can *prima facie* be held that out of trust and belief she might not have doubted the representations made till it warranted. In the absence of any material showing her involvement in the business of the firm, *prima facie* the averment that she has no knowledge till she procured the documents, cannot be rejected or disbelieved.

14) The main contention raised by the learned counsel for the respondents is that "Whether the disputes relating to immovable properties, which do not form part of partnership firm, between the appellant and first respondent, be examined in the proceedings under Section 9 of the 1996 Act?"

15) The argument of the learned counsel for the appellant is that the properties in "B" schedule properties were purchased by the third respondent, of which the 1st and 4th respondents are partners, from the funds given by the appellant to the 2nd respondent-partnership firm. As noted by us earlier, the appellant's specific case is that an agreement of sale was executed on 12.04.2010, for purchasing Ac.40.00, pursuant to which the appellant had paid more than Rs.6-00 Crores to the first respondent. While only a part of land was purchased in the name of second respondent, the remaining extent of land was purchased by the first respondent in the name of third respondent by diverting the money paid by the appellant for purchase of these properties. It is urged that if the veil is lifted, it would be evident that the "B" schedule properties belong to the second respondent-firm. In other words, it is pleaded that 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 pumped 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.

16) On the other hand, Sri Vedula Venkataramana, learned Senior Counsel appearing on behalf of the respondents would contend that Section 9 of the 1996 Act is only available to a party to the arbitration agreement. It is not in dispute that the 1st and the 4th respondents are lone partners of the 3rd respondent firm and while the partnership deed also contains the arbitration clause; the said arbitration clause has no application to the appellant as she is not a partner to the 3rd respondent firm. In other words, he would contend that the appropriate remedy for the appellant, in case she disputes the purchase of property by the 3rd respondent, would be by initiating appropriate civil proceedings before a civil court.

17) In **Chloro Controls India Pvt. Ltd v. Severn Trent Water Purification Inc. and others (two supra)** the Apex Court held as under:

> "102.Joinder of non signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement.

103.1. 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 good faith principle. They apply to private as well as public legal entities.

103.2. 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. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. [YCA XXIII (1998), 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

105. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

106. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to

substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

18) In **Ameet Lalchand Shah and others v. Rishabh Enterprises and another**[5] the Apex Court dealt with somewhat identical issue:-

The order of the Delhi High Court holding that the agreements between the parties are not inter connected with the principal agreement dated 05.03.2012 and that the parties cannot be referred to arbitration as per the decision in **Sukanya Holdings Private**

[5] 2018 SCC online SC 487

Limited v. Jayesh H.Pandya[6] came to be challenged before the Apex Court. After referring to the judgment of the Apex court in **Chloro Controls India (P) Limited v. Severn Trent Water Purification INC and others (two supra)** wherein, it has been held that a non-signatory party also could be bound by the arbitration agreement; to Section 8 of the Act and the consequent amendment to Section 8, set-aside the order of the High Court by allowing the appeal and all the four agreements and parties thereon were referred to arbitration.

The Apex Court held that the amendment to Section 8 of the Act has to be viewed in the background of the recommendations set-out in 246th Law Commission report, wherein the Law Commission while recommending amendment to Section 8 more particularly with regard to the word "such of the parties.............................. to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H. Pandya*, .

It would be appropriate to extract the comment of the Law Commission in this regard which is as under:-

"LC Comment: The words "such of the parties.... to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H. Pandya*, (2003) 5 *SCC* 531, - in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference

[6] (2003)5 *SCC* 531

is to be rejected only where such parties are necessary parties to the action - and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified thereof in circumstances where the original arbitration agreement or duly certified copy is retained only by the other party.

LC Comment: In many transactions involving Government bodies and smaller market players, the original/duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same" ***(Ref: 246th Law Commission Report, Government of India)***

In view of the recommendations, four amendments came to be introduced to Section 8(1) by 2015 amendment which are as under :

29. "Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments - (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "*prima facie*" basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same." ***(Ref: Justice R.S. Bachawat's Law of Arbitration and Conciliation**, Sixth Edition, Vol. I (Sections 1 to 34) at page 695 published by LexisNexis).*

19) A reading of the two judgments of the Apex Court referred to above would clearly show 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.

20) As observed by us earlier, in **Chloro Controls India Pvt. Ltd.**, the Apex Court held that an 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.

21) Applying the ratio laid down to the facts in issue, it is the specific contention of the appellant that M/s. S.R. Promoters-respondent No.3 is the alter-ego of respondent No.1. The petition schedule "B" properties, in the name of M/s. S.R.Promoters are, in effect, the properties held by its partners, including the respondent No.1, and respondent No.1 and his alter-ego M/s. S.R.Promoters are bound by the arbitration clause contained in the partnership deed dated 08.02.2010 with M/s. S.R.Properties. Hence, *prima facie,* order of the court below in rejecting the plea of arbitrability of the claims against M/s. S.R. Promoters basing on the judgment of **Sukanya Holdings** appears to be incorrect. Therefore, the trial court was not right in rejecting the claim at the threshold. Even otherwise, as seen from the above, Section 9 of the Act confers power to pass orders against the third parties to the arbitration agreement for the purpose of preserving the substratum of the arbitration dispute.

22) In **Girish Mulchand Mehta and another v. Mahesh S.Mehta and another**[7] a Division Bench of the Bombay High Court while dealing with Section 9 of the Arbitration and Conciliation Act held that the jurisdiction under Section 9 can be invoked only by a party

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[7] (2010) 1 Bom CR 31

to the arbitration agreement. The Court further held that Section 9, however, does not limit the jurisdiction of the court to pass order of interim measures only against party to an arbitration agreement or arbitration proceedings; whereas the court is free to exercise same power for making appropriate order against the party to the petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not a party to the arbitration agreement or arbitration proceedings does not affect the jurisdiction of the Court under Section 9 of the Act, which is intended to pass interim measures of protection or preservation of the subject matter of the arbitration agreement.

23) Similarly, in **M/s.Value Advisory Services** v. **M/s. ZTE Corporation and others**[8] a learned Single Judge of the Delhi High Court in paragraph 18 of the order observed as under:-

> "18. However, considering the nature of proceeding under Section 9, I find that the court is not bound to, where the third party, with respect to property/money in whose hands attachment is issued, denies liability and such denial raises disputed questions of fact which cannot be adjudicated without trial. The court, in such cases in its discretion can on a prima facie view of the matter, either refuse to exercise powers under Section 9 or pass other appropriate order to protect the interest of all parties concerned."

24) Though the learned counsel for the respondents tried to contend that the judgments referred to above are not at all applicable to the facts in issue, but we feel that in the given factual

[8] (2009) SCC Online Del 1961

situation and in view of the finding that M/s. S.R. Promoters is the alter-ego of respondent No.1 and that the petition "B" schedule properties being in the name of M/s. S.R. Promoters, in affect, the properties held by its partners, including the respondent No.1, and respondent No.1 and his alter-ego M/s. S.R.Promoters, invocation of Section 9 of the Act to protect the properties and the lis, till an arbitrator is appointed, cannot be said to be illegal.

25) The next ground urged by the learned counsel for the respondents is that in the absence of any oral evidence and the documents being placed on record without getting them marked through an appropriate witness, does not amount to proving the pleadings and verification of the pleadings in the form of a petition does not satisfy the requirements of Code of Civil Procedure. It is urged that though provisions of the C.P.C., and the Evidence Act may not expressly apply. According to the learned counsel for the respondents, the Court would be handicapped to decide any case, where the parties fail to adduce oral and documentary evidence. In other words, it is urged that any assertion or denial would not lead anywhere. Hence, pleads that this ground alone is sufficient to reject the claim.

26) To this, learned counsel for the appellant would submit that since the veracity of the documents, which were relied upon are not disputed in the counter and since no prejudice is shown, he would

contend that the procedure adopted by the trial court warrants no interference. He pleads that the procedure which was followed was never questioned before the trial court and as such the respondents are precluded from doing so in the appeal. Relying upon Rule 60 of Civil Rules of Practice, he contends that proceedings under Section 9 being interlocutory in nature, marking of documents is not mandatory. He submits that if this court is not inclined to accept the argument of the respondent, the matter may be remitted back for adjudication on merits again after marking documents and till such time the injunction may be directed to be continued.

27) It is to be noted here that the respondents herein never raised any objection before the trial court with regard to the manner in which the application filed under Section 9 of the Act, was disposed of nor did they challenge the order on the ground that the procedure adopted was illegal, improper and incorrect. As the order came to be passed in their favour, they never thought of challenging the same. But, even when the proceedings were pending before the trial court, the procedure that was followed while deciding the application was never questioned. Therefore, we feel that the respondent is not justified in raising the said ground in the appeal, moreso, when the veracity of these documents were never disputed in the counter. The entire counter concentrated on answering the averments made in the petition filed in the C.O.P., and never an objection was raised with

regard to genunity or authenticity of the partnership deeds and the agreements of sale. In fact, the trial Court relied upon the said documents to reject the claim of the appellant. Viewed from any angle, we are of the opinion that the argument of the learned counsel that the entire proceedings should be set-aside on the said ground alone cannot be accepted.

28) Insofar as the objection raised by the learned counsel for the respondents that even before the notice of dissolution was served, the appellant acted in haste in approaching this Court, it is to be noted that the situation was such, which made the appellant to approach the court at the earliest point of time. Apprehending that the respondent No.1 may take steps to dispose of the properties of the partnership firm, thereby causing irreparable loss to the appellant and the second respondent/firm, the appellant moved the court. The same gains ground from the argument of the appellant that the respondent No.1 alienated about 20,000 sq. yards of land belonging to four partnership firms between the date of notice of dissolution on 09.08.2017 and 05.09.2017, when the first respondent came on record before the Hon'ble High Court in the earlier round of litigation. Therefore, invoking the jurisdiction of the Court before service of notice with regard to dissolution of partnership firm, cannot be found fault with, in the circumstances of the case.

29) Coming to the relationship between the parties, it is urged that since the partners being placed in utmost fiduciary relationship, they are obliged to account for the profits made by the partners from the property/business connection of the firm. The doctrine of good faith is paramount in cases of partnership. Lindley on the Law of Partnership, 14th Edition, places the doctrine of uberrima fides/utmost good-faith between partners several notches higher and states that if a partner, without the consent of the other partners, carries on any business of the same nature and competes with the firm, he must account for and pay over to the firm all profits made by him in that business. Lindley further states that if a partner, without the consent of his co-partners, carries on for his own benefit, either openly or secretly, any business in rivalry with the firm to which he belongs, he must account for and pay over to the firm all profits made by him in that business. The above passages from Lindley came to be referred to in various judgments of the Supreme Court and made the basis to decide the issues. However, the learned counsel for the respondents would submit that the fiduciary relationship or utmost good-faith, conduct do not apply to law of Partnership. According to him, the act has regulated the relationship between the partners as per Sections 9, 12, 16 and 18 of the Act. Hence, pleads that no additional sanctity can be given to partnership business or conduct or misconduct of the partners. He pleads that when once the parties entered into a partnership

business, each of them should keep a vigil over the other as a reasonable and prudent person and that there is no devotion or integrity of a partner in a partnership business. However, submits that the principles of lispendency would adequately safeguard the interest of the appellant, if she is able to succeed before the Tribunal.

30) But, as observed by us earlier, prima facie, petition schedule "B" properties were held in the name of the third respondent/firm and the agreement of sale dated 12.04.2010 was between the second respondent/firm and the vendors. The first respondent should account for the appellant for the properties held by the third respondent/firm, which are derived from the business transaction of the second respondent/partnership firm. This issue as to whether the third respondent/firm gained any pecuniary advantage or acquired any land through the finances of the second respondent/firm, in our view, would be subject matter before the Arbitrary Tribunal. If the third respondent/firm is not injuncted at this stage, possibility of alienating the said properties cannot be ruled out. If the third respondent is restrained from alienating the properties for some time, it will not cause any prejudice to either party. But, if allowed, it would cause irreparable loss to the appellant, if the Arbitrary Tribunal ultimately holds in favour of the appellant with regard to the properties, which are in possession of

the third respondent, as the same cannot be made the subject matter of the Arbitral Tribunal, since they would be in the hands of third parties. Viewed from all the angles and as the order now passed is only till the appointment of an Arbitrator, which proceedings are pending before the High Court, we feel that it is a fit case where the order under challenge requires interference.

31) Accordingly, the appeal is allowed restraining R-1 from alienating the petition schedule "A" properties; R-1 and R-4 from alienating the petition schedule "B" properties; and R-1 from operating the petition schedule "C" property of the second respondent-firm, till appointment of an Arbitrator.

C.PRAVEEN KUMAR, J

T.RAJANI, J

Date:07.09.2018

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