

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 19th April, 2021**

+ **FAO(OS) (COMM) 67/2021**

AVON HEALTHCARE PRIVATE LIMITED Appellant

Through: Mr. Prashant Mehta, Advocate.

Versus

TRADE INTERNATIONAL & ORS.

..... Respondents

Through: Ms. Tanya Swarup, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE NAJMI WAZIRI

JUDGMENT

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

C.M. No. 14837/2021(for exemption)

1. Allowed, subject to just exceptions and as per extant rules.
2. The application is disposed of.

FAO(OS) (COMM) 67/2021 & C.M. No. 14838/2021(for ad-interim ex-parte stay)

3. This appeal, under Section 37 of the Arbitration and Conciliation Act, 1996, impugns the order dated 15th February, 2021 of dismissal of OMP(I)(COMM) No.143/2020 under Section 9 of the Arbitration Act preferred by the appellant.

4. It is the case of and the argument of the counsel for the appellant, (i) that the appellant had made monetary claims against the respondent no.1 Trade International, Sole Proprietorship of P.K. Handa and respondent no.2 Snowcross Healthcare Pvt. Ltd; (ii) that the said claims were subject matter of arbitral proceedings; (iii) that during the pendency of arbitral proceedings, on an application under Section 17 of the Act, the respondent P.K. Handa was restrained from alienating, selling, encumbering or transferring his residential property, being second floor of house No. C-8, East of Kailash, New Delhi; (iv) that the said monetary claims were allowed and an Arbitral Award for recovery of monies was passed in favour of the appellant and against the respondent no.1 Trade International, Sole Proprietorship of P.K. Handa; (v) that since the order under Section 17 of the Act had come to an end with the making of the Arbitral Award, the appellant filed the petition under Section 9 of the Act, from which this appeal arises, to restrain the said P.K. Handa from selling, alienating or encumbering the property aforesaid, namely second floor of House No.C-8, East of Kailash, New Delhi, which was the only known asset of the respondent P.K. Handa, who otherwise claims to be an indigent person; (vi) in the said Section 9 proceedings, it was informed that P.K. Handa, after making of Arbitral Award, had gifted the said property to his son Rajan Handa, respondent no.3 herein; (vii) that the appellant then applied for amendment of the Section 9 petition and to also implead respondent no. 3 Rajan Handa and which application was allowed and though initially respondent no. 3 Rajan Handa was also restrained from dealing with the property, but vide the impugned order, the petition under Section 9 has been dismissed because in petition under Section 34 of the Act preferred by the

respondent P.K. Handa with respect to the Arbitral Award, execution had been stayed subject to deposit of 75% of the Award amount and which had been deposited; and, (viii) that since the appellant is not fully secured with respect to the Arbitral Award in its favour, the appellant is aggrieved from the order of dismissal of Section 9 petition and is, for recovery of the balance Award amount due, entitled to restrain respondent no.3 Rajan Handa from dealing with the property.

5. The counsel for the appellant has argued, that unless said protection is granted, the appellant, even on succeeding in Section 34 proceedings, will not be able to recover the entire awarded amount and would be entitled to only recover 75% thereof, which has been deposited in the Court.

6. We are unable to find any fault in the reasoning of the Single Judge, of the appellant being not entitled to take two proceedings for securing the award amount. Once the Court seized of the Section 34 proceedings with respect to the Arbitral Award has deemed it fit to grant stay of execution of the Arbitral Award subject to deposit only of 75% and not 100% of the Award Amount, if at the same time another Court, in Section 9 proceedings, comes to the conclusion that the entire Award Amount and not only 75% thereof, is required to be secured, the same would result in conflicting orders on the same matter and would not behave well for the principle of comity of different Benches of the same Court.

7. We have even otherwise enquired from the counsel for the appellant, the basis of the claim of the appellant against the respondent no.3 Rajan Handa, who is admittedly neither the judgment debtor nor was the party to the Arbitration Agreement.

8. The counsel for the appellant has rightly stated that the claim is premised on the transfer by the respondent P.K. Handa, of the immovable property to his son respondent No.3 Rajan Handa, being a fraudulent transfer within the meaning of Section 53 of the Transfer of Property Act, 1882.

9. Though Section 53 of the Transfer of Property Act provides for institution of a suit by a creditor, to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferer, but as discussed in *Rajeev Kumar Batra Vs. Kewal Krishan Kumar* 2020 SCC OnLine Del 408, the enquiry thereunder can be undertaken even in execution proceedings.

10. However, the fact remains that by virtue of the interim order in the Section 34 proceedings, the execution proceedings have been stayed.

11. We have enquired from the counsel for the appellant, whether under Section 9 of the Arbitration Act, interim measures against a non party to the Arbitration Agreement and if the Section 9 petition is filed post making of the Award, interim measures against a non party to the arbitration proceedings and/or Arbitration Award, can be granted.

12. The counsel for the appellant seeks adjournment to study the law.

13. However the need therefor is not felt. The question, whether interim measures under Section 9 can be granted against non parties to the Arbitration Agreement, has vexed this Court for long. As far back as in *CREF Finance Ltd. Vs. Puri Construction Ltd.* 2000 SCC OnLine DEL 514, the Managing Director of a party to the Arbitration Agreement and who

was representing the said party in the arbitration proceedings and who was held to be not a stranger to the terms of the contract containing Arbitration Clause, though not a party in his personal capacity to the Arbitration Agreement, was held to be amenable under Section 9. In ***Arun Kapur Vs. Vikram Kapur*** AIR 2002 Delhi 420, it was held that Section 9 is distinct from Section 17 in as much as under Section 17 an order only against a party to the arbitration proceeding can be granted whereas under Section 9 interim measure of protection can be sought against a person who need not be a party to the Arbitration Agreement or to the arbitration proceeding. However again, the conduct of the parties to the Arbitration Agreement as well as of non parties against whom interim measures were sought, was relied upon to justify grant of interim measures against non parties. The same view was followed in judgment dated 31st January, 2005 in OMP 361/2004 titled ***Goyal MG Gases Pvt. Ltd. Vs. Air Liquide Deutschland GmbH***. However in ***Kanta Vashisht Vs. Ashwani Khurana*** MANU/DE/0380/2008 and in ***Mikuni Corporation Vs. UCAL Fuel Systems Ltd.*** MANU/DE/0130/2008, it was held that Section 9 is applicable only inter se parties to the Arbitration Agreement and cannot be invoked by a party to seek an injunction against someone who was not a party to the Arbitration Agreement. The family companies of Ashwani Khurana were held to be not amenable to Section 9, merely because Ashwani Khurana was a party to the Arbitration Agreement. ***CREF Finance Ltd.*** (supra) was distinguished and reliance was placed on ***National Highways Authority of India Vs. China Coal Construction Group Corporation*** AIR 2006 Delhi 134. One of us (Rajiv Sahai Endlaw, J), in ***Ajay Makhija Vs. Dollarmine Exports Pvt. Ltd.*** MANU/DE/1906/2009, ***Sri Krishan Vs. Anand*** 2009 SCC

OnLine DEL 2472 and in *Value Advisory Services Vs. ZTE Corporation* 2009 SCC OnLine DEL 1961 had occasion to deal the said issue and held that maintainability/applicability of Section 9 part heard parties depends upon the facts of each case and upon the feasibility of the order sought/required and no general principle could be laid down; it will have to be determined by the Court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute, an order affecting a third party can be made or not. It was further held that whenever attachment qua properties/monies in hands of third parties is sought, if such third party denies liability and sets up title in itself and such denial raises disputed questions of fact which cannot be adjudicated without trial, Section 9 against such third parties may not be invoked. We find, that thereafter this Court in *Dorling Kindersley (India) Pvt. Ltd. Vs. Sanguine Technical Publishers* MANU/DE/1853/2013, *Gatx India Pvt. Ltd. Vs. Arshiya Rail Infrastructure Ltd.* MANU/DE/1914/2014, *VLS Finance Ltd. Vs. BMS IT Institute Pvt. Ltd.* 2015 SCC OnLine DEL 9292 and in *Blue Coast Infrastructure Development Pvt. Ltd Vs. Blue Coast Hotels Ltd.* MANU/DE/1259/2020, has granted interim measures under Section 9, against third parties to the Arbitration Agreement.

14. Our research having not yielded any judgment of the Division Bench or of the Supreme Court, on the said legal aspect and the said question having not been raised by the Single Judge or by the counsel for the appellant, though sitting in Division Bench, we would refrain from finally adjudicating the said legal question. However as far as the facts of the present case are concerned, the question, whether transfer by the respondent

P.K. Handa to the respondent Rajan Handa of the immovable property is fraudulent or not and whether the appellant is entitled to avoid the said transfer and to recover the award amount from sale of the said immovable property, entails disputed questions of fact which as per the language of Section 53 of the Transfer of Property Act are to be adjudicated in a suit and owing to amendment of the CPC, are to be adjudicated in execution and are not to be finally decided in Section 9 proceeding or in Arbitration. Once it is so, the Court, in exercise of powers under Section 9, would not grant an interim measure when it has no jurisdiction to decide the matter finally. The question, whether the transfer of the property has to be avoided or not, is in the domain of the execution Court and the appellant would be well advised to take the same thereto and interim measure restraining respondent Rajan Handa from dealing with the immovable property title wherein has vested in him and which he, under the law is entitled to deal with, cannot be granted in exercise of power under Section 9 since respondent Rajan Handa is neither a party to the Arbitration Agreement or a party to the Arbitration proceedings.

15. The Single Judge, while dismissing the Section 9 petition, has granted liberty to the appellant to take his legal remedy and extended stay by eight weeks.

16. The counsel for the appellant states that there is no other legal remedy available to the appellant.

17. We are unable to agree. The counsel for the appellant needs to study further.

18. However, as far as the reasoning in the impugned order is concerned, being unable to find any fault therewith, this appeal is dismissed.

RAJIV SAHAI ENDLAW, J.

NAJMI WAZIRI, J.

APRIL 19, 2021

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