

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**COMMERCIAL APPEAL NO.92 OF 2023 (NOB)
IN
COMM. ARBITRATION PETITION (L) NO.12018 OF 2023**

Vardhaman Builders : Appellant/Petitioner.

Vs.

Narendra Balasaheb Ghatge & ors. : Respondents.

**WITH
INTERIM APPLICATION NO.3363 OF 2023
IN
COMMERCIAL APPEAL NO.92 OF 2023**

Vardhaman Builders : Applicant
(Orig.Appellant/Petitioner)

In the matter between

Vardhaman Builders : Appellant/Petitioner.

Vs.

Narendra Balasaheb Ghatge & ors. : Respondents.

Mr. Kevic Setalvad, Senior Advocate a/w Mr. Jehan Lalkaka, Ms.Rashna Khan, and Mr. Simon Mascarenhas i/by Mulla & Mulla and Craigie Blunt and Caroe for the Appellant/Applicant.

Mr. Suneel Mogre a/w Mr. Chinmaya Acharya i/by Mr. Kevin Pereira for Respondent Nos.1 and 2.

Mr. Mayur Khandeparkar a/w Mr.Rohan Savant, Mr.Viraj Jadhav, Ms. Disha Jain, Adv. Jasvinder Choudhary and Mr. Gaurav Lele i/by Mr. Ashwin Sawlani for Respondent No.3.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.
DATE : 19th DECEMBER, 2023**

P.C. :

1 The captioned Commercial Appeal is not on board. With the consent of the learned counsel for the parties, the Appeal is taken on board and heard finally.

2 The Appeal impugns an order dated 11th July 2023 by which the Commercial Arbitration Petition filed by the Appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (“the Arbitration Act”) came to be dismissed.

3 Before adverting to the rival contentions, it is useful to set out the following facts which will give a context to the challenge before us, viz.

- i. The Appellant had initiated arbitration proceedings against Respondent Nos. 1 and 2 (the Respondent

Owners) and had sought specific performance qua a Plot of land admeasuring about 1580.28 sq.mt. CTS 323, Borivali ("the said property") of which Respondent No. 1 and 2 were the owners. By an Award dated 22nd November 2011 the Arbitral Tribunal was pleased to reject the Appellant's prayer for specific performance as also the prayer for damages.

- ii. The Arbitral Award was subsequently set aside by an order dated 8th February 2017 passed in Arbitration Petition No. 286 of 2012 filed by the Appellant under Section 34 of the Arbitration Act. The Respondent Owners filed Arbitration Appeal No. 257 of 2017 ("Arbitration Appeal") under Section 37 of the Arbitration Act impugning the order dated 8th February 2017. The Arbitration Appeal also came to be dismissed by an order dated 24th November 2017.
- iii. It was thus that the Appellant on 28th February 2018 filed an Application under Section 11 of the Arbitration

Act for appointment of a new Arbitrator in view of the dismissal of the Appeal (Commercial Arbitration Application 78 of 2018).

- iv. Thereafter by an order dated 6th April 2018, the Hon'ble Supreme Court remanded the Appeal, (being Arbitration Appeal No. 257 of 2017) back to this Hon'ble Court for consideration on merits and also expedited the hearing of the said Appeal. The Appellant thereafter on 12th April 2018 withdrew Arbitration Application No.78 of 2018.

- v. On 25th June 2018 a Development Agreement came to be executed between Respondent Owners on the one hand and Respondent No.3 (Respondent Developer) on the other in respect of the said property. It is the Appellant's contention that the Appellant became aware of this Development Agreement for the first time only in April 2023 on noticing that the said

property had been boarded up with large metal construction sheets and the structures standing thereon being demolished.

- vi. It was thus that the Appellant on 17th April 2023, filed Interim Application No.1686 of 2023 in the Arbitration Appeal *inter alia* seeking injunctive relief against the Respondent Owners from dealing with and/or dispossessing the said property. It is the Appellant's case that it was only on filing of the Affidavit in Reply by Respondent Owners that they, for the first time, became aware of the Development Agreement entered into between the Respondent Owners and the Respondent Developer.
- vii. On 24th April 2023 a Division Bench of this Court granted the Appellant leave to withdraw the Interim Application and file a Petition under Section 9 of the Arbitration Act before the Learned Single Judge. It

was thus that the captioned Commercial Arbitration Petition came to be filed by the Appellant on 27th April 2023. The Appellant thereafter on 20th June 2023 invoked arbitration against the Respondent Owners and Respondent Developer. The Respondent Owners and the Respondent Developer refused to participate in the fresh arbitral proceedings *inter alia* on the ground that the Arbitration Appeal was pending and contended that pending determination thereof, the Appellant was not entitled to invoke the arbitration again.

- viii. The Appellant thereafter on 5th July 2023 filed the second Application (Commercial Arbitration Application 165 of 2023) under Section 11 of the Arbitration Act for Constitution of an Arbitral Tribunal. The captioned Commercial Arbitration Petition was heard on 11th July 2023 when the Impugned Order dismissing the Interim relief was passed.

Submissions of Mr. Setalvad, on behalf of the Appellant

4 At the outset, Mr. Setalvad, Learned Senior Counsel, appearing on behalf of the Appellant submitted that by the Impugned Order, not only had the Learned Single Judge dismissed the Interim Application on factually and legally untenable grounds, but had also effectively prevented the Appellant from proceeding with the Section 11 Petition against the Respondent Developer. He thus submitted that the Appellant was rendered remediless.

5 Mr. Setalvad then in dealing with his first contention i.e. that the Interim Application was dismissed on factually and legally untenable grounds submitted that the Learned Single Judge had gravely erred in placing reliance upon the judgement of in the case of ***Dirk India Pvt. Ltd. vs. Maharashtra State Electricity Generation Company***¹ to deny relief to the Appellant on the basis that the Appellant was the unsuccessful party in Arbitration. He pointed out that the Impugned Order

1 2013 7 Bom CR 493

suffered from inherent contradictions as the Learned Single Judge had on the one hand denied relief to the Appellant on the ground that the Appellant was the unsuccessful party in Arbitration and thus in terms of the law laid down in ***Dirk India Pvt. Ltd.*** (supra) denied relief to the Appellant, while on the other hand, the Learned Single Judge had specifically recorded that the parties were at the pre arbitral stage. Basis this he submitted that the Impugned Order was required to be set aside and the matter to be remanded back for consideration of the Interim Application afresh on merits.

6 Mr. Setalvad then invited our attention to paragraph 22 of the Impugned Order and pointed out that the Learned Single Judge had factually erred by recording therein that the Appellant had not invoked arbitration. He pointed out that it was specifically brought to the knowledge of the Learned Single Judge that the Appellant had invoked arbitration to which the Respondents had even replied. He pointed out that it was in fact, not even the case of either the Respondent Owners or the

Respondent Developer that the Appellant had not invoked arbitration. He submitted that the Learned Single Judge had thus proceeded on a completely erroneous basis/assumption that the Appellant had not invoked arbitration, and that the parties were at the post award stage, basis which relief was denied to the Appellant.

7 He then, highlighted the conduct of the Respondents and pointed out that the Respondents had on the one hand resisted arbitration on the ground that the Arbitration Appeal was pending, while on the other hand they were rapidly proceeding with development on the said property which would effectively defeat the Appellant's claim. He pointed out that the effect of denial of interim relief was that the Respondent Developer would build upon the said property and thereby effectively defeat the rights of the Appellant under the Memorandum of Understandings entered into with the Respondent Owners.

8 Mr. Setalvad then submitted that it was only in April 2023 i.e., when the Appellant first became aware of the

Development Agreement entered into between the Respondent Owners and the Respondent Developer that occasion to apply for interim measures of protection first arose. He pointed out that the Development Agreement had been entered into by the Respondent Owners with the Respondent Developer without at any time informing this Court of the same. Basis such conduct, he submitted that it was imperative that the Appellant be granted interim reliefs as prayed, failing which the Respondents would succeed in making capital of their *mala fide* conduct.

9 Mr. Setalvad pointed out that the Learned Single Judge had erred in holding that the Appellant was merely seeking a restraint order against a third party (Respondent Developer) under Section 9 of the Arbitration Act. He submitted that it was well settled that under Section 9 interim measures of protection could infact be granted against a third party i.e., non-signatory to an arbitration agreement. In support of his contention, he placed reliance upon the judgments of this Hon'ble Court in the case of ***Girish Mulchand Mehta Vs.***

Mahesh Mehta² and Housing Development and Infrastructure Limited Vs. Mumbai International Airport Pvt. Ltd.³

10 He then to buttress his contention that in the present case the Appellant was entitled to interim measures of protection against the Respondent Developer invited our attention to clauses 1(d), 1(e), 3A, 6 and 18 of the Development Agreement and pointed out therefrom that the rights of the Respondent Developer were entirely dependent upon the outcome of the Arbitration Appeal. It was thus he submitted that the finding of the Learned Single Judge that the Appellant was merely seeking a restraint order against a third party who had entered into an Agreement with the Respondent Owners was plainly incorrect.

11 Mr. Setalvad then submitted that Court as contemplated in Section 43(4) of the Arbitration Act must necessarily mean the Court which finally decides the lis between

² 2010 2 Mh LJ 657

³ 2013 SCC Online Bom 1513

the Parties and not the Court passing orders under Section 34 of the Arbitration Act. He submitted that if “the Court” under Section 43(4) was not the Court which finally decides the matter the same would lead to absurd consequences. He submitted that this issue was now no longer *res integra*. In support of his contention, he placed reliance upon a judgement of this Court in the case of ***Siddhivinayak Realities Vs. V Hotels Limited***⁴ and a judgement of the Punjab and Haryana High Court in the case of ***State of Uttar Pradesh Vs. Firm M/s Pearl Hosiery Mills Ludhiana***⁵ .

12 Mr. Setalvad then without prejudice to his aforesaid contention, submitted that even on first principles, an Appeal is merely a continuation of the original proceedings. He thus submitted that it would be absurd to suggest that the exclusion period under Section 43(4) would come to an end on the date the competent Court passes an order under Section 34 of the Arbitration Act and not the date on which any appeal/challenge

4 MANU/MH/1163/2021

5 ILR 1975 (2) PH 77

from such order is finally disposed of. In support of his contention he placed reliance upon the following judgments ***Laxmi Narayan Guin Vs. Niranjan Modak⁶, Rafiquennessa Vs. Lal Bahadur Chetri⁷, Amarjit Kaur Vs. Pritam Singh⁸*** and ***Dayawati Vs. Inderjit⁹***. Basis this, he submitted that there was no delay on the part of the Appellant and present arbitration proceedings were in no manner delayed, much less beyond limitation since the Appellant became aware of the Development Agreement only in April 2023 and the Arbitration Appeal was still pending.

13 Mr. Setalvad then submitted that in light of the observations made in the Impugned Order the Appellant could not move the Section 11 Application since the observations made by the Learned Single Judge in the Impugned Order that the Respondent Developer cannot be brought within the purview of the arbitration proceedings would come in the way of the Appellant proceeding to arbitration. Placing reliance upon the

6 1985 1 SCC 270

7 1964 6 SCR 876

8 1974 2 SCC 363

9 1966 3 SCR 275

judgement of the Hon'ble Supreme Court in the case of **Arcelor Mittal Nippon Steel India Ltd Vs. Essar Bulk Terminal Ltd.**¹⁰ he pointed out that once the Arbitral Tribunal is constituted, the Court cannot grant interim relief under Section 9, and it is only for the Arbitrator to consider such interim relief in an Application filed under Section 17 of the Arbitration Act. He thus submitted that the Impugned Order had effectively rendered the Appellant remediless since the Learned Single Judge had on the one hand denied relief to the Appellant under Section 9 of the Arbitration Act and on the other, held that the Respondent Developer could not be brought within the purview of arbitration. Thus, he submitted that the very arbitration invoked by the Appellant had been defeated by the Impugned Order as the same would equally bind the Arbitral Tribunal in any application taken out under Section 17.

14 Mr. Setalvad then placed reliance upon the judgement of the Hon'ble Supreme Court in the case of **Cox and Kings Ltd**

10 2022 1 SCC 712

Vs. SAP India Pvt Ltd¹¹ and pointed out that the same specifically held that it was the Arbitral Tribunal that should decide whether a non-signatory party is indeed a party to the arbitration agreement and/or required to be joined as a party to the arbitration. In the present case he pointed out that the Respondent Developer was deemed to be a party to the Agreement given the plain terms of the said Development Agreement.

15 Mr. Setalvad, in the aforesaid backdrop of facts, submitted that the balance of convenience was entirely in favour of the Appellant. He submitted that commencement certificate had been granted to the Respondent Developer on 8th December 2023 and that the Respondent Developer was taking active steps to commence the re-development. He however pointed out that at present, no excavation work had commenced. He therefore submitted that if an injunction was not granted at this stage, the Respondent Developer would proceed to construct a building and thereafter create third party interest therein. He submitted that

11 2023 SCC Online SC 1634

if an injunction was not granted and the Appellant ultimately succeeded in the arbitration, the Appellant would have to take steps to remove the flat purchasers and demolish the building. He further submitted that the Respondent Owners and the Respondent Developer had entered into the Development Agreement with open eyes and made the same subject to the pending Arbitration Appeal. He thus submitted that neither of them could therefore claim any equity basis steps taken under the Development Agreement. Insofar as the tenants of the building, which was standing on the said property, he submitted that they would also not in any manner be prejudiced by any such order of injunction since under the Development Agreement, the tenants were to be provided with either alternate accommodation or paid monetary consideration in lieu of their tenancy rights. He pointed out that the Development Agreement did not contemplate re-housing the tenants in the newly proposed building.

16 Basis the above, he submitted that the Appellant had made out a strong *prima facie* case and balance of convenience

was entirely in favour of the Appellant. He thus submitted that it was just and equitable to allow the present Appeal and injunct the Respondents from carrying out any construction work on the property. In support of his contention, he placed reliance upon the judgement of this Hon'ble Court in the case of ***Raigad CHS Vs. Suman Eknath Gaik***¹².

Submissions of Mr. Khandeparkar, on behalf of Respondent-Developer.

17 *Per contra*, Mr. Khandeparkar, Learned Counsel appearing on behalf of the Respondent Developer submitted that the Appellant had clearly abandoned the arbitration. He pointed out that the Appellant unconditionally withdrew the first Application under Section 11 filed by it on 12th April 2018 without seeking liberty to file a fresh. He then pointed out that the second Application under Section 11 was filed on 5th July, 2023 which was almost six years from the date on which the Arbitral Award was set aside. He submitted that the Respondent Owners had issued the termination notice dated 24th July 2006

12 2021 SCC Online Bom 13958

and invoked arbitration by a notice dated 2nd September 2006 and the award was set aside on 8th February 2017. Mr. Khandeparkar submitted that the Arbitration Application under Section 11 (6) of the Arbitration Act ought to have been filed within three years from the date of the Award being set aside. In support of his contention that Article 137 of the Limitation Act, 1963 would also apply in the instant case, he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. & Anr. Vs. M/s Nortel Networks India Pvt Ltd.***¹³. He then pointed out that once the limitation period commences the same continues to run and exclusion of time, if any, would only be as per Sections 12 to 24 of the Limitation Act or Section 43(4) of the Arbitration Act. In the present case it was his contention that none of the grounds for exclusion of time under Section 12 to 24 of the Limitation Act were available to the Appellant.

18 Mr. Khandeparkar, then submitted that the Appellant could not be permitted to hitch their wagon to the Arbitration

13 (2021) 5 SCC 738

Appeal filed by the Respondent Owners since whatever the outcome thereof, the Appellant would not be granted the relief of specific performance in whatever the fate of those proceedings were. It was thus, he submitted that the exclusion of time as per Section 43(4) of the Arbitration Act could not be extended beyond the date on which the Arbitral Award was set aside under Section 34 unless there was a stay of such order. In this context, he pointed out that the words used in Section 43 (4) of the Arbitration Act were "*Where the court orders that an arbitral award be set aside*" and not "where the proceedings for setting aside the arbitral award concludes". Basis this, he submitted that the intention of the legislature was clear and unambiguous that the trigger point for limitation was date on which the award is set aside. He submitted that the exclusion of time cannot be kept in abeyance or suspension without an order of the Court. He pointed out that the exclusion of time could only be claimed when the Appeal filed under Section 37 of the Arbitration Act was filed by an unsuccessful petitioner and where the award was set aside in such Appeal for the first time. It was submitted that

the exclusion of time contemplated under Section 43 (4) comes into operation immediately when the award is set aside and the same cannot be kept in abeyance absent a specific stay. He then submitted that it was well settled that the law of limitation is a harsh law, but equally had to be applied with all its rigour when the statute so prescribes. He submitted that the Court has no power to extend the period of limitation on equitable grounds even though the statutory provision may sometimes cause hardship or inconvenience to a particular party. He submitted that the Court had no choice but to enforce it giving full effect to the same. In support of his contention, he placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***F.Liansanga & Anr vs Union of India & Ors.***¹⁴

19 Mr. Khandeparkar then submitted that the doctrine of merger does not apply to Section 34 or Section 37 of the Arbitration Act. He submitted that the proceedings under Section 34, after an Arbitral Award is passed, are not proceedings which

14 SLP (Civil) Nos. 32875-32876 of 2018

are in continuation of the Arbitral Proceedings. He submitted that unlike the Appeal, in a Petition under Section 34, the Court can either set aside an Arbitral Award or part thereof or then dismissed the Arbitration Petition. It cannot pass a decree or allow a claim which has been rejected by the Arbitral Tribunal. In support of his contention, he placed reliance upon a judgement of the Hon'ble Supreme Court in the case of **MMTC Limited Vs. Vedanta Ltd.**¹⁵. He thus submitted that considering the limited scope of Section 34 Petition filed by the Respondent Owners, the Appellant cannot be permitted to take advantage of the pendency of such Appeal to assert that the filing/pendency of the same has suspended the Appellant's right indefinitely. He submitted that the concept of merger would also not apply in the present case because execution proceedings under Arbitration Act are always in the context of an Award. He submitted that the order passed by a Court under Section 34 or Section 37 is never executed. He submitted that it is the Award passed by the Arbitral Tribunal which is executed under Sections 35 and 36 of the Arbitration Act. He, therefore, submitted that the otherwise

15 (2019) 4 SCC 163

applicable rule of merger in the context of Suits and Appeals would not be applicable to arbitral proceedings.

20 Mr. Khandeparkar then submitted that the Appellant had taken no effective steps to actually commence the Arbitral Proceedings and thus had no present right to seek any injunctive reliefs *qua* the said property. He pointed out that despite the fact that the Respondent Owners had issued a notice of termination dated 24th July 2006, the Appellant had at no point thereafter taken any steps to stay the effect of such termination or to restrain Respondent Owners from acting thereon. He submitted that therefore there was absolutely no fetter on the Respondent Owners in any manner dealing with the subject property for the last approximately 18 years. He pointed out that the Respondent Owners were constrained to execute the Development Agreement with the Respondent Developer on account of the fact that the building had outlived its life and had to be demolished pursuant to the notice dated 21st October 2022 issued under Section 354 of the Mumbai Municipal Corporation

Act, 1888. He pointed out that the Appellant, save and except for deposit/payment of an amount of Rs.22,00,000/-, had taken no steps whatsoever. He pointed out that the said amount of Rs. 22,00,000/- along with interest had been deposited with the Prothonotary and Senior Master. He then submitted that it was well settled that a mere Memorandum of Understanding creates no interest in the property and further that there was no registered document, basis which the Appellant could claim any rights in the said property. He pointed out that the Appellant, if at all, would always be entitled to claim compensation in terms of money, but the Appellant was merely attempting to profiteer from what was a purely commercial transaction in respect of which the Appellant had failed to perform/discharge its obligations.

21 Mr. Khandeparkar submitted that it was imperative for the Appellant, who was seeking interim protection under Section 9 of the Arbitration Act, to satisfy the Court that the arbitral proceedings were infact actually contemplated or manifestly

intended, and that the Appellant was positively going to commence the proceeding within a reasonable period of time. In support of his contention, he placed reliance upon a judgement of the Hon'ble Supreme Court in the case of ***Firm Ashok Traders & Anr. Vs. Gurumukh Das Saluja & Ors.***¹⁶. In the present case, he reiterated that the Appellant had effectively abandoned the proceedings having taken no steps whatsoever since 2017 except for filing the first Arbitration Application in the year 2018 and then subsequently withdrawing the same. He submitted that the Appellant's conduct in the present case did not even remotely reflect that the Appellant actually contemplated or manifestly intended that the Appellant was going to commence Arbitration Proceedings within a reasonable time.

22 Mr. Khandeparkar, in dealing with the judgement of the Hon'ble Supreme Court in the case of ***Cox and Kings Ltd.*** (supra) relied upon by the Appellant, pointed out that the Appellant's reliance thereon was entirely misplaced. He pointed

16 (2004) 3 SCC 155

out that since the Respondent Developer was not a party to the Memorandum of Understanding, the Respondent Developer could not be regarded as a party as contemplated in Section 2(1)(h) and Section 7 of the Arbitration Act. Equally he pointed out that the Appellant was not a party to the Development Agreement, which was admittedly executed only between the Respondent Owners on the one hand and the Respondent Developer on the other hand. It was thus, he submitted that the Appellant could not implead the Respondent Developer in the Section 9 Petition or seek to challenge a document executed by the Respondent Developer in arbitration proceedings to which the Respondent Developer had not consented to be a part of. He submitted that the cause of action, if any, that the Appellant might have against the Respondent Developer was entirely independent of the arbitral proceedings between the Appellant and the Respondent Owners. He, therefore, submitted that it was incumbent upon the Appellant to have adopted an appropriate independent remedy against the Respondent Developer as may be available to the Appellant in law. He submitted that any cause of action

that the Appellant might have against the Respondent Developer was thus independent and distinct from the cause of action that the Appellant had against Respondent Owners.

23 Mr. Khandeparkar then, in dealing with the judgement of this Hon'ble Court in the case of ***Siddhivinayak Realities Pvt. Ltd.*** (supra), submitted that the same was wholly inapplicable to the facts of the present case, since in that case the Plaintiff therein when withdrawing the Section 11 Petition filed was infact granted liberty to file a Suit whereas in the present case the Appellant had unconditionally withdrawn the first Section 11 Application. .

24 Mr. Khandeparkar then placed reliance upon an order passed by this Court in the case of ***Wadhwa Group Holdings Pvt. Ltd. Vs. Homi Pheroze Ghandy & Anr.***¹⁷ submitted that this Court had taken the view that notwithstanding the pendency of an Appeal under Section 37, a party can file and maintain an Application under Section 11 for constituting the Arbitral Tribunal

¹⁷ Order dated 7th March 2022 in Commercial Arbitration Application No.414 of 2019.

after securing an order of setting aside an Arbitral Award. He submitted that this was because there was no stay of the order setting aside the order of the Arbitral Tribunal and also considering the scheme of the Arbitration Act contemplates expeditiousness. He submitted that the ratio in the case of ***Siddhivinayak Realities Pvt. Ltd.*** (supra) would not be applicable.

Submission of Mr. Mogre, on behalf of Respondent-Owners.

25 Mr. Mogre while adopting the submissions made by Mr. Khandeparkar placed reliance on the judgment in the case of ***Dirk India Pvt. Ltd.*** (supra) to submit that the same had been properly construed by the Learned Single Judge. He pointed out that if the Appellant had been granted relief in Section 9 Petition, the same would result in interim specific performance of a contract in the teeth of Arbitral Award which held to the contrary. He pointed out that the interference of the Court at this stage to grant what in essence, according to him, was a mandatory order for interim specific performance would negate

a sanctity and efficacy of the Arbitral process. He submitted this because even if the Respondent Owners were to fail in the Arbitration Appeal, the Appellant would still not be entitled to specific performance in these proceedings. He, therefore, submitted that what a litigating party could not possibly obtain upon completion of the proceedings under Section 34, they could not secure in a Petition under Section 9 as an interim measures of protection. Basis this, he submitted that the question of Appellant now in the present fact scenario seeking interim measures of protection did not arise. He also then reiterated that despite the Respondent Owners having issued a letter of termination in the year 2006, no steps whatsoever were taken by the Appellant to in any manner restrain the Respondent Owners from dealing with the said property. He pointed out that there has thus never been any fetter upon the Respondent Owners from dealing with the said property. He, therefore, submitted that the Respondent Owners were well and sufficiently entitled to enter into the Development Agreement. He pointed out that the amount paid by the Appellant had been deposited in

this Court and would be returned to the Appellant along with accrued interest, therefore, no prejudice whatsoever would be caused to the Appellant. Basis this, he submitted that the present Appeal be dismissed.

Reasons and Conclusion

26 As already noted by us above, the Appellant's challenge in the present Appeal is twofold. *Firstly*, the Appellant has contended that relief under Section 9 of the Arbitration Act was denied to the Appellant on both factually as also legally untenable basis and, *secondly*, that the Learned Single Judge had effectively rendered the second Application under Section 11 qua Respondent Developer as infructuous. It was basis this that both Mr. Setalvad appearing on behalf of the Appellant and Mr. Khandeparkar appearing on behalf of the Respondent Developer, advanced detailed arguments on the aspect of the maintainability of the second Application under Section 11. We must, however, note that what is before us is an Appeal from an Order passed in a Petition filed under Section 9 of the Arbitration Act and not either the section 11 Application or any challenge

thereto. It is for this reason that it is not necessary for us to enter into the realm of the controversy of the maintainability or otherwise of the Section 11 Application which is presently pending and shall no doubt be heard and decided on its own merits. For this reason, we make it clear that the second Application under Section 11 being Commercial Arbitration Application No. 165 of 2023 shall be heard and disposed of on its own merits uninfluenced by the observations made by the Learned Single Judge in the Impugned Order.

27 Insofar as the Appellant's challenge to the failure to grant interim measures of protection to the Appellant, what we find is that the Learned Judge has essentially denied relief to the Appellant by placing reliance upon the judgement of this Hon'ble Court in the case of **Dirk India** (supra) on the basis that the Appellant was the unsuccessful party in arbitration and was thus not entitled to seek any relief under Section 9 of the Arbitration Act. We find that this premise is palpably erroneous since infact that Arbitral Award was set aside, and the Appellant had sought

to have its claim adjudicated afresh. In these circumstances it cannot be said that the Appellant was the unsuccessful party in arbitration. We must also that the Learned Single Judge has infact in the Impugned Order noted that the Parties were at a pre arbitration stage which would mean that the judgement in the case of **Dirk India** (supra) would infact not apply. Another patent error in the Impugned Order is that the Learned Single Judge has erred in recording that the Appellant had not invoked arbitration and was merely seeking a restraint order against a third-party/Developer, who had entered into an agreement with the Respondent owners. Firstly, there is no dispute that the Appellant had infact filed Commercial Arbitration Application No. 165 of 2023 i.e. the Second Arbitration Application in which both the Respondent Owners and the Respondent Developer were parties and against all of whom the appointment of an Arbitrator was sought for and secondly, it is well settled that relief under Section 9 can be granted against a third party. The objection as to whether or not the Respondent Developer could be made a party to the Arbitration proceedings was an issue to be decided

by the Arbitral Tribunal as has been held by the Hon'ble Supreme Court in the case of ***Cox and Kings*** (supra).

28 Given the above, we find force in the contention of Mr. Setalvad learned senior counsel appearing on behalf of the Appellant that by the Impugned Order, the Appellant has effectively been rendered remediless. We must also note that there has been not adjudication on merits by the Learned Judge but the Appellant has been denied relief only on the aforesaid grounds which we have found untenable. In view thereof, we accordingly set aside the Impugned Order and remand the matter back to the Learned Single Judge for consideration of the same afresh. We make it clear that the observations made in this order are only for the purposes of considering and disposing of the present Appeal and shall not in any manner come in the way of the Learned Single Judge when deciding Commercial Arbitration Petition (L) No. 12018 of 2023. All the rights and contentions of the parties are kept open.

29 For the reasons stated herein above, the captioned Appeal is disposed of in aforesaid terms.

30 In view of the disposal of the Appeal, the captioned Interim Application does not survive and the same is accordingly disposed of.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)