

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J.SREENIVAS RAO
COMMERCIAL COURT APPEAL NO.25 OF 2019
&
CIVIL MISCELLANEOUS APPEAL NO.1303 OF 2017**

Date: 10.02.2023

COMCA No.25 of 2019:

Between:

M/s Sunil Constructions,
501 Pent House, Sri Venkataramana Apartments,
Thakur Mansion lane, Somajiguda,
Hyderabad, Rep. by its Managing Partner
Sri B.Sunil Chandra Reddy.

.... Appellant

And

Dega Madhavi, W/o D.Srinivasa Reddy,
Aged about 56 Years, Occ:Homemaker,
R/o Plot No.207, Road No.1, Jubilee Hills,
Hyderabad and others.

.... Respondents

This Court made the following :

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J.SREENIVAS RAO**

**COMMERCIAL COURT APPEAL NO.25 OF 2019
&
CIVIL MISCELLANEOUS APPEAL NO.1303 OF 2017**

COMMON JUDGMENT: *(Per Hon'ble Sri Justice P.Naveen Rao)*

1. Facts as culled out from the pleadings are as under:

1.1. On 19.10.2002 Development Agreement-cum-General Power of Attorney (DAGPA) was entered into by the respondents 1 to 6 in favour of appellant for development of land admeasuring 3.5-3.6 acres (2 acres from respondents 1 to 4's total land of Acs.3.00 and 1.5-1.6 acres from respondents 5 and 6's total land of Acs.2.00) situated in Sy.N.136 of Gachibowli village, Serilingampally Mandal, Ranga Reddy district to be developed into a residential layout with independent houses. On 29.10.2002 appellant paid an amount of ₹ 12,50,000/- to respondents 1 to 4 and ₹ 9,00,000/- to respondents 5 and 6 as refundable deposit. The amount with respect to respondents 5 and 6 was paid in favour of Patel Engineering Limited as respondents 5 and 6 were Directors of the said company. The DAGPA required owners of the land to ensure mutation of their names in revenue records. On 24.07.2004, Mutation Certificate was obtained in favour of the original pattedar, Syed Suleman, vide proceedings bearing No.B/1986/1997.

1.2. Later, respondents 1 to 6 expressed desire to develop a Star hotel on the land instead of residential layout. Further, they requested the appellant to restrict the area to be developed from 3.5-3.6 acres to 9009 square yards and to construct a high-rise building as opposed to residential apartments. The appellant agreed to restrict the development area to 9009 square yards.

1.3. On 06.02.2007, Authorization Letter was issued by the Airport Authorities of India for the construction of a high-rise building. On 10.09.2007, the Fire and Emergency Services Department granted permission for the construction of a high-rise building.

1.4. On 30.10.2007, DAGPA was entered into by respondents 1 to 6 in favour of the appellant for development of land admeasuring 9009 square yards (5349 square yard from respondents 1 to 4 and 3659 square yards from respondents 5 and 6) situated at Sy.No.136 of Gachibowli village, Serilingampally Mandal, Ranga Reddy district to be developed into a high-rise office/software block (commercial building). The DAGPA terms specify that it should be registered within three months or after mutation of names of the present landowners in the revenue records as pattedars is completed, whichever is later. It was mutually agreed to share the constructed area, undivided share of land and parking area in the ratio of 60 to claimant and 40 to respondents 1 to 6. It was agreed that construction will be completed within 36 months after obtaining building permission. It was also agreed that if

the GHMC/HUDA insist on uniform setback of 13 Mtrs all around the building, the total extent of land for development would be 9174 square yards.

1.5. On 24.05.2010, respondents 1 to 6 obtained NOC from the Office of the District Collector, Ranga Reddy District. On 18.10.2010, appellant obtained the Land Use Information Certificate issued by the Commissioner, GHMC. On 02.11.2010, respondents 1 to 6 furnished the Revenue Sketch Plan of land admeasuring Acs.5.00 in Sy.No.136/2.

1.6. Land Use Certificate issued by the HMDA reflected that the land admeasuring Acs.5.00 was falling in commercial are (Commercial-cum-Offices) and was partly affected under 60 Mtrs road at one side and partly affected under 36 Mtrs wide road on the other side. The appellant claims to have taken various steps to secure construction permission. In the process, appellant came to know that road width was increased to 150 Mtrs from earlier 60 Mtrs and this has affected larger area of respondents 5 and 6. This required revision of proposals.

1.7. On 15.05.2015, appellant came to know that respondent no.5 alienated 4840 square yards of land to Sreshta Constructions i.e., a group company of respondent no.9 (Sreshta Properties) along with the western boundary of the scheduled property which was given for development to the appellant.

1.8. Appellant filed Arbitration O.P.No.1077 of 2015 seeking an injunction against respondents 5 and 6 from alienating the claim schedule property pending disposal of arbitration proceedings. Respondents 1 to 4 filed counter stating that entire land was entrusted to the appellant and respondents 1 to 4 have no objection for the development of their lands. In the counter filed by respondents 5 and 6, they have asserted that DAGPA was a tentative document and as the appellant has failed to comply with the obligations under the said agreement, the agreement was rendered null and void.

1.9. On 29.12.2005, Hon'ble XIII Additional District Judge, R.R.district, L.B.Nagar granted injunction directing respondents 5 and 6 to maintain *status quo* with respect to the claim on schedule property.

1.10. On 13.06.2016, respondents 5 and 6 sent a notice terminating the DAGPA. On 23.06.2016, appellant responded by stating that unilateral cancellation of the DAGPA was not permissible and that the matter was pending before the Court. As there was no response, on 03.10.2016 appellant addressed a notice to respondents 5 and 6 nominating an Arbitrator. On 09.11.2016, respondents 5 and 6 replied contending that DAGPA is a tentative document and the question of nominating an Arbitrator does not arise. Appellant addressed a rejoinder notice and filed Arbitration Application No.5 of 2017 under

section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act, 1996).

1.11. On 21.09.2017, the XIII Additional District and Sessions Judge, R.R. district, L.B.Nagar, dismissed Arb.O.P.No.1077 of 2015 holding that the DAGPA is not registered and that therefore no claim can be made under the said document. It also held that DAGPA is a tentative document and it cannot be looked into.

1.12. After the dismissal of Arb.O.P.no.1077 of 2015, respondent no.5 executed a sale deed dated 06.10.2017 in favour of respondent no.7 i.e., Sreshta Properties, with respect to an extent of 4840 square yards.

1.13. Aggrieved by the dismissal of Arb.O.P.No.1077 of 2015, the appellant filed CMA No.1303 of 2017 before this Court. This Court vide orders dated 15.12.2017 restrained the respondents 6 and 7 from alienating the schedule property.

1.14. On 07.02.2018, appellant and respondents 1 to 4 entered into a DAGPA to develop the portion of their schedule property. It is asserted that development work commenced and substantial construction has been completed.

1.15. During second week of October, 2018 appellant noted digging and execution work being undertaken on the land belonging to respondents 5 and 6.

1.16. Appellant filed Arb.O.P.No.10 of 2018 on the file of XIII Additional district Judge-cum-Commercial Court, Ranga Reddy District, L.B.Nagar under Section 9 of the Act, 1996 seeking interim relief restraining respondents 5 to 7 from undertaking any construction or from changing the nature of the schedule property. Respondents 5 and 6 filed counter affidavit urging that DAGPA is a tentative document and stood terminated. Respondent no.7, represented by its Managing Partner, Mr.Srikanth Reddy, filed counter contending that they are *bona fide* purchasers and did not have notice on DAGPA or pending proceedings. On 13.11.2018, the Court passed order of *status quo*. Arb.O.P.No.10 of 2018 was dismissed vide orders dated 01.04.2019. Aggrieved thereby, appellant filed COMCA No. 25 of 2019. This Court passed order of *status quo* on 10.07.2019.

1.17. CMA No.1303 of 2017 was filed after 5th respondent alienated land to an extent of 4840 sq yards along with western boundary of the petition schedule land to 9th respondent. COMCA No.25 of 2019 is filed against order in Arb.O.P.No.10 of 2018 which was filed based on subsequent developments after filing of Arb.O.P.No.1077 of 2015. As the core issue and parties to both cases are same, those two matters are heard and a common judgment is made.

1.18. To complete the narration, on 27.06.2019, this Court passed orders in Arbitration Application No.5 of 2017, based on the consent Memos filed by both the parties, appointing retired Judge Justice Sri

T.N.C.Rangarajan as the sole Arbitrator to decide the dispute between the parties. On 20.08.2019, appellant filed claim statement before the Arbitrator. Respondent no.9 (M/s.Sreshta Properties) and respondent no.6 (Sonal Patel) filed counters. Evidence was closed. Written arguments were filed by the appellant and respondents 5, 6 and 9. At that stage, by his decision dated 10.04.2021, Arbitrator terminated Arbitral proceedings holding that he was unable to pass an award. While doing so, he expressed his opinion on the dispute between the parties.

1.19. Aggrieved thereby, COP No.4 of 2021 is filed under Section 14(2) read with Section 15 of the Act, 1996 on the file of Special Judge for Trial and Disposal of Commercial Disputes, Ranga Reddy for appointment of substitute Arbitrator.

1.20. COP No.10 of 2021 is filed under Section 34 of the Act, 1996 on the file of Special Judge for Trial and Disposal of Commercial Disputes, Ranga Reddy for setting aside the award dated 10.04.2021.

1.21. On 09.06.2022 orders were passed by the Court below in COP Nos.4 of 2021 and 10 of 2021. In respect of COP No.4 of 2021, the Hon'ble Court held that it is the High Court which has the power to appoint a substitute Arbitrator. In respect of COP No.10 of 2021, the Hon'ble Court held that the termination order dated 10.04.2021 passed by the Arbitrator is not an 'award' and therefore setting aside of the same under Section 34 of the Act, 1996 is not warranted.

1.22. While so, appellant filed Arbitration Application No.109 of 2022 under Section 11 of the Act, 1996 seeking appointment of a substitute Arbitrator to decide the disputes between the parties. By order dated 22.12.2022, with the consent of all the parties, this Court appointed substituted Arbitrator.

1.23. While Arb.O.P.No.1077 of 2015 was filed seeking interlocutory orders under Section 9 of the Act, 1996 soon after 5th respondent sold 4840 sq yards of land to 9th respondent, praying to restrain respondents 5 and 6 from alienating the petition schedule property, i.e., 3659 square yards in sy.No.136 of Gachibowli village, O.P.No.10 of 2018 was filed contending that in second week of October, 2018 when appellant visited the site he noticed excavation work by 9th respondent on land entrusted to appellant and that the respondent no.6 executed registered sale deed on 6.10.2017 in favour of 9th respondent alienating 4840 sq yards of land of which appellant schedule land forms part seeking interim protection against respondents 5, 6 and 9 taking up construction, developing and changing the nature of the petition schedule property i.e., 3659 square yards in Sy.No.136 of Gachibowli village. It is thus seen that both O.Ps flow out of DAGPA dated 30.10.2007 and against Orders of trial Court in interlocutory applications filed under Section 9 of the Arbitration and Conciliation Act, 1996. The parties are same, issues raised are common and property in issue is same. Therefore, both were heard and considered together and common order is made.

1.24. We have heard learned counsel Sri M.V.Prtap Kumar for the appellants, learned senior counsel Sri Prakash Reddy appearing for Sri Rusheek Reddy K.V. for respondents 5 and 6, learned senior counsel Sri Damaalapati Srinivas, appearing for Sri C.S.Venkatsh, for the respondent no.9. In addition learned counsel also submitted written submissions.

2. **Submissions of learned counsel for appellant:**

(1) Learned counsel contended that the trial Court grossly erred in holding that the development agreement is compulsorily registerable to look into arbitration clause.

(2) He would submit that appellant never treated the land of respondents 5 and 6 as separate, but they themselves have treated as separate land, divisible agreement, issued separate notice of termination. The finding of trial Court on this aspect is also erroneous.

(3) He would submit that appellant has been ready and willing to carryout terms of DAGPA. In the written submissions, learned counsel chronicled various steps taken by him before executing DAGPA, from 2007 to 2012 and 2012 to 2015. He would submit that there has been constant correspondence in connection with development of the project. Respondents 5 and 6 failed to respond to two letters dated 27.06.2014 and 24.04.2015, which have highlighted all the steps taken by the appellant. It is the respondents 5 and 6 who failed to comply with their objections.

(4) He would submit that arbitration agreement is a separate agreement and it would still stand even if main agreement is terminated.

(5) He would submit that as a developer possession is inconsequential.

(6) Respondents 5 and 6 are guilty of breach of contract and therefore appellant is entitled to enforce specific performance of DAGPA.

(7) Respondents 5 and 6 illegally sold a portion of land given for development in favour of M/s.Shrestra Properties. Later, they have alienated entire extent of land keeping this Court in the dark.

(8) As the 9th respondent purchased land *pendente lite* he is bound by the result of litigation. Against 9th respondent, appellant can claim relief of specific performance.

3. **Submissions of learned senior counsel Sri D.Prakash Reddy:**

(1) According to learned senior counsel, the party who has committed breach or unilaterally novated the agreement cannot claim specific performance of a contract. He would submit that the appellant entered into separate Development Agreement dated 07.02.2018 with respondents 1 to 4 exclusively and excluding the land of 6th respondent, applied for building permission on 06.07.2015 in respect of land belonging to respondents 1 to 4, which was much prior to filing Arb.O.P.No.1077 of 2015 and prior to termination of DGPA. By his conduct, the appellant frustrated the DAGPA dated 30.10.2007.

(2) The DAGPA is in the nature of license. The appellant has not applied for building permission and, therefore, the issue of developing the property does not arise. There is no transfer of land to the appellant. Therefore, no injunction can be granted to a licensee. Further, under Section 60 of Easement Act, a license can be revoked by the grantor unless license is coupled with transfer of property and such transfer is in force and the licensee has done some work of permanent character. None of these conditions are attracted here. Learned senior counsel relied on the decision in **M/s.Landman Ventures LLP Vs. M/s.Jubilee Hills Co-op. House Building Society Limited** (CMA No.216 of 2022).

(3) He would submit that no physical possession was delivered to appellant. This is also clear from prayer sought before Arbitral Tribunal seeking to deliver possession.

(4) While respondents 5 and 6 fulfilled all the obligations flowing out of DAGPA, not a single obligation was fulfilled by the appellant and thus committed breach of contract. In paragraph-5 of the written submissions, he lists out the violations by the appellant.

(5) He would justify the termination. According to learned senior counsel from the letter dated 23.06.2010 it is clear that the appellant clearly admits of inability to fulfill its obligations and respondents 5 and 6 cannot endlessly wait for appellant to honour the commitments. Further, cancellation/termination of contract on 09.06.2016/13.06.2016 is not challenged and has become final.

Coupled with this the fact that appellant entered into another DAGPA with respondents 1 to 4 only, obtained building permission covering their land and making construction would show the intention of the appellant and imply that old DAGPA stood dissolved.

(6) Appellant was never ready and willing to perform his obligations flowing out of DAGPA. Therefore, he is not entitled relief of specific performance and his claim is hit by Section 16(1) of the Specific Relief Act. The claim is also hit by delay and laches and hopelessly barred by limitation under Article 56 of Limitation Act.

(7) He would submit that Arb.O.P.No.1077 of 2015 was initially dismissed for non-prosecution. On an application filed to restore the O.P., it was restored only against respondents 1 to 6 and not against defendant no.9. whereas, respondent no.6 sold the subject land to respondent no.9, much before filing of CMA No.1303 of 2017.

(8) As consistently held by Hon'ble Supreme Court that when granting damages is an adequate relief, no injunction should be granted.

(9) He would submit that entire claim is vitiated on account of interpolation in the document. Original word '*Earlier*' was struck-off by writing word '*later*' by changing the meaning. This was done behind the back of the respondents 5 and 6.

(10) Learned senior counsel relied on following decisions:

- (i) **Sushil Kumar Agarwal vs. Meenakshi Sadhu and others**¹;
- (ii) **Kishorsinh Ratanasinh Jadeja Vs. Maruti Corporation and others**²;

¹ (2019) 2 SCC 241

- (iii) **Best Sellers Retail (India) Private Limited vs. Aditya Birla Nuvo Limited and others³;**
- (iv) **Dalpat Kumar and another vs. Prahlad Singh and others⁴;**
- (v) **Build India Constructions System vs. Union of India⁵;**
- (vi) **Polymat India (P) Ltd. And another vs. National Insurance Co.Ltd. and others⁶; and**
- (vii) **Judgment of this Court in M/s. Landman Ventures LLP vs. M/s.Jubilee Hills Cooperative House Building (CMA No.216 of 2002 dt. 15.09.2022).**

4. Submissions of learned senior counsel Sri D.Srinivas for 9th respondent:

(1) According to learned senior counsel, 9th respondent is a *bona fide* purchaser and, therefore, his transaction cannot be dragged into *inter se* dispute between appellant and respondents 5 and 6. He has drawn the attention to paragraph-20 of petition averments filed by appellant in Arb.O.P.No.1077 of 2015. The appellant deposed that 5th respondent sold 4840 square yards to 9th respondent which is adjacent to petition schedule land on western boundary that included 200 square yards of land on which DAGPA was executed.

(2) He would further submit that Arb.O.P.No.1077 of 2015 was dismissed for default for non-prosecution. While seeking restoration of the O.P., appellant did not seek restoration against 9th respondent. Therefore, it is no more open to appellant to drag the 9th respondent into litigation.

² (2009) 11 SCC 229

³ (2012) 6 SCC 792

⁴ (1992) 1 SCC 719

⁵ (2002) 5 SCC 433

⁶ (2005) 9 SCC 174

(3) He would submit that clause-1 of the DAGPA stipulated for registration within three months or after the mutation was completed whichever is 'earlier'. Illegally the word 'earlier' is replaced by 'later' by overwriting. This changed the whole complexion of the agreement. As per the original terms, after 3 months of execution, the DAGPA is not valid as it was not registered. Further, even though mutation was secured in April, 2010, the appellant was not keen to continue the project as is evident from its letter dated 25.06.2010. it clearly shows that appellant was not willing to perform his obligations for long years.

5. **Reply by learned counsel for appellant:**

(1) It is the respondents 5 and 6, who have treated DAGPA as separable for their property and resorted to termination and appellant always treated as one composite DAGPA. Development Agreement entered with respondents 1 to 4 is inconsequential and irrelevant insofar as DAGPA dated 30.10.2007 on land belonging to them.

(2) Appellant has never abandoned the project. Various steps taken by him from the year 2002 are testimony of his commitment to stand by the terms of agreement. On the contrary, respondents 5 and 6 breached the terms of agreement.

(3) In reply to the contention on delay and limitation, he would submit that the registration of DAGPA was not an issue and time was not the essence of contract. Arbitration clause was invoked on 03.10.2016, which was within three years of respondents 5 and 6 refusing to perform their obligation under DAGPA.

(4) Change of word '*earlier*' with that of '*later*' was within the knowledge of respondents 5 and 6 and was never raised and is an after thought. He would submit a solitary letter dated 25.06.2020 cannot categorize the appellant as disinclined to carryout his responsibilities. More so, having regard various steps taken by him later.

(5) He would submit that there was no delay in applying for building permission. Mutation proceedings were issued in June, 2010. Thereafter there was *inter se* correspondence. Appellant applied for excavation permits, permits from Fire Department and other permissions. Then, on 27.03.2012 applied for building permission.

6. Learned counsel for the appellant relied on following decisions:

- i) **Reva Electric Car Company Private Ltd. v. Green Mobil**⁷;
- ii) **SMS Tea Estates (P) ltd. v. Chandmari Tea Co. (P) Ltd.**⁸,
- iii) **Lala Durga Prasad and Ors. vs. Deep Chand and Ors.**⁹,
- (iv) **Adhuik Steels Ltd. v. Orissa Manganees and Minerals (P) Ltd.**¹⁰
- (v) **Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors.**¹¹

7. The issue for consideration is whether trial Court erred in not granting interlocutory reliefs sought by the appellant in Section 9 of the Act, 1996 application ?

⁷ (2012) 2 SCC 93

⁸ (2011) 14 SCC 66

⁹ AIR 1954 SC 75

¹⁰ 2007 (7) SCC 125

¹¹ (2019) 2 SCC 241

8. Shorn of details, the issue is in a narrow compass i.e., whether appellant is entitled to injunction pending commencement and conclusion of arbitral proceedings.

9. In Arb.O.P.No.1077 of 2015, the trial court held that arbitration agreement is compulsorily registerable document and as the DAGPA is not registered the arbitration clause in DAGPA cannot be looked into. It has further held that though Arb.O.P., was filed in the year 2015, arbitration proceedings have not commenced within 90 days from the date of filing of Arb.O.P., and petitioner has not shown interest to refer the dispute to arbitration and as such the petition is not maintainable. Further held that injunction cannot be granted when awarding of damages is an adequate relief.

10. In Arb.O.P.No.10 of 2018, the trial Court held that when the main agreement is frustrated even the arbitration also goes and even for the sake of arbitration clause, it cannot be looked into. It is further observed that as petitioner entered into a separate development agreement with respondents 1 to 4 after receiving Ex.R1-notice of cancellation of DAGPA dated 30.10.2007 with respondents 5 and 6, it is not justified to contend operation of DAGPA dated 30.10.2007. The contention of petitioner that respondents 8 & 9 though aware of DAGPA dated 30.10.2007 purchased the property and therefore even though they are not party to DAGPA in an application under Section 9 of the Act relief can be sought against them is rejected holding that it is

an unregistered agreement and invalid. Further, in spite of respondents complying the conditions of mutation and NOC, petitioner did not come forward to execute registered DAGPA. The tone and text of petitioner letter dated 25.06.2010 shows he was not ready to comply the terms of DAGPA.

11. The trial Court further held that petitioner failed to establish his possession. The trial Court further observed that when petitioner admits that 200 square yards of petition schedule property was included in the land sold by 5th respondent to 9th respondent much prior to filing of Arb.O.P.No.1077 of 2015, it is clear that petitioner is not in possession.

12. It is further held that if petitioner has incurred damages he can only claim damages from respondents 5 and 6. It is further held that arbitral proceedings did not commence within 90 days of filing of Arb.O.P.No.1077 of 2015 and therefore not entitled to any relief. That petitioner failed to establish that land sold by 5th respondent to 9th respondent is part of DAGPA.

13. The trial Court further observed that respondents 5 and 6 own Ac.1.00 each out of 9009 square yards which was the subject matter of DAGPA, 5349 square yards belong to respondents 1 to 4 and 3659 square yards belong to respondents 5 and 6. However, it is not stated as to what is the specified extent of land belonging to respondents 5

and 6 out of 3659 square yards and covered by DAGPA sold by them separately.

14. The trial Court therefore held that no *prima facie* case was made out and balance of convenience is not in favour of the petitioner and that petitioner is not entitled to any relief.

15. Parties have submitted lengthy pleadings and documents. Learned counsel made elaborate submissions and also filed lengthy written submissions. Trial Court also passed a very lengthy orders in Section 9 applications. The submissions made by learned counsel touchup on various aspects of terms of contract, alleged failure of compliance/breach of terms of agreement, scope of arbitration clause in an unregistered DAGPA so on which are to be urged and decided in arbitral proceedings. Submissions are also made to grant/not to grant interlocutory orders in Section 9 applications. The decisions cited at the bar also touch upon the above aspects. We are confining our consideration to interlocutory order under Section 9 of the Act, 1996.

16. Granting interlocutory protection/injunction pending commencement of arbitral proceedings is a discretionary relief that may be granted by the trial Court under Section 9 of the Act. To consider to grant injunction, the petitioner has to make out *prima facie* case, show balance of convenience and irreparable injury that would be caused if injunction is not granted. Even when these are satisfied by the petitioner/appellant, Court is also required to see whether granting

injunction would prejudice respondents. In both cases trial Court assigned detailed reasons why it was not inclined to grant interlocutory orders sought by appellant on both occasions.

17. At this stage, it is necessary to note briefly the decisions relied on by learned counsel.

17.1. In **Kishorsinh Ratanasinh Jadeja** (supra), landowners cancelled development agreement due to long inaction of 19 years and futile efforts of the developers in developing the land. Landowners sold and conveyed land in favour of third parties. Land developer filed suit for Specific performance of contract. Trial Court granted alternative relief of damages and return of earnest money. Not satisfied with the judgment, the developer filed appeal before the High Court. He also sought injunction against sale or further construction on land of landowners. High Court did not grant the stay and ordered that the property in question had to be dealt as per the order of the court. On a second occasion, by an order dated 2-04-2008, High Court granted stay on sale. In the meantime, landowners sold the land to as many as 280 purchasers and also conveyed the lands to them. On a third occasion, by the impugned order dated 07.05.2008, High Court granted stay on sale and also constructions, directing police action if required. Injunction was granted on the very next day of filing the injunction application without hearing the parties to the suit or

noticing the purchasers of the land in issue. Hon'ble Supreme Court held,

“36. It is well established, that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the court is required to consider three basic principles, namely,

- (i) prima facie case;
- (ii) balance of convenience and inconvenience; and
- (iii) irreparable loss and injury.

None of the said principles have been considered by the High Court while passing the second and third interim orders dated 22-4-2008 [*Maruti Corpn. v. Jayaba Ratansinh Jadeja*, First Appeal (Civil) No. 853 of 2008, order dated 22-4-2008 (Guj)] and 7-5-2008 [*Maruti Corpn. v. Jayaba Ratansinh Jadeja*, Civil Application for Injunction No. 5618 of 2008, order dated 7-5-2008 (Guj)] , nor has the High Court taken into account the long silence on the part of Respondent 1 Corporation in filing a suit after 19 years.

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39. As far as the lands which the appellant and the other joint owners have been restrained from alienating by the second order dated 22-4-2008 [*Maruti Corpn. v. Jayaba Ratansinh Jadeja*, First Appeal (Civil) No. 853 of 2008, order dated 22-4-2008 (Guj)] are concerned, we are of the view that in the event the order of 22-4-2008 [*Maruti Corpn. v. Jayaba Ratansinh Jadeja*, First Appeal (Civil) No. 853 of 2008, order dated 22-4-2008 (Guj)] is set aside, Respondent 1 can be compensated in terms of money and no irreparable loss and injury will be caused to it on account thereof.

40. On the other hand, if the owners of the property remain restrained from developing the same, it is they who will suffer severe prejudice, as they will be deprived of the benefit of the user of their land during the said period. The balance of convenience and inconvenience is against the grant of such an injunction. The success of the suit for specific performance filed by Respondent 1 depends to a large extent on tenuous proof of genuineness of the agreement sought to be enforced after 19 years, despite the finding of the trial court that the suit was not barred by limitation.

41. The question of conduct of Respondent 1 also becomes relevant, inasmuch as, having slept over its rights for more than 19 years, it will be inequitable on its prayer to restrain the owners of the property from dealing with the same, having particular regard to the fact that a large portion of the land has already been conveyed to as many as 280 purchasers who are in the process of erecting constructions thereupon.”

17.2. In **Best Sellers Retail (India) Pvt.Ltd.**, (supra), a franchise agency agreement was entered into for exclusive sale of goods of respondent-

plaintiff company through premises leased to appellant-defendant partnership firm. A suit for specific performance of said agency agreement was filed by the respondent company, also claiming alternative relief of damages in case of non-grant of relief of specific performance along with which, temporary injunction restraining defendants from leasing/sub-leasing of the said property was filed. Courts below granted injunction on the ground that refusal would entail hardship and mental agony to plaintiff-respondent company.

Hon'ble Supreme Court held:

"29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

30. In *Dalpat Kumar v. Prahlad Singh* [(1992) 1 SCC 719] this Court held: (SCC p. 721, para 5)

"5. ... Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in 'irreparable injury' to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages."

34. The High Court has similarly held in the impugned judgment that if the premises is let out, Respondent 1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit.

35. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and Respondent 1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, Respondent 1 will not suffer irreparable injury."

17.3. In **Dalpat Kumar** (supra), first Appellant claimed to have entered into an agreement to purchase a residential house situated in Jaipur. Appellant filed suit for specific performance of contract for purchase of house. Court decreed the same ex parte, and executed sale deed. Respondent's wife filed a suit and sought temporary injunction from dispossession. Trial court rejected the application for ad interim injunction which was confirmed on appeal by the High Court. Thereafter, the suit was dismissed for non-prosecution. The respondent filed five objections which were dismissed. A third round of litigation was started by the respondent's sons claiming the house to be a joint family property and sought for declaration that the sale does not bind them and also sought for partition. They also filed for an ad interim injunction which was dismissed and confirmed by the High Court. A fourth round of litigation was started by the respondent filing the present suit contending that the first appellant being his counsel played fraud on him and also sought for an interim injunction from dispossession. Trial court dismissed the applications, but the High Court allowed the same and granted interim injunction in favour of the respondent restraining the appellants from taking possession of the residential portion. Supreme Court held High Court erred in granting interim injunction in favour of respondent. Hon'ble Supreme Court held:

"4. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the

purpose of staying and preventing ... or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by Section 86(i)(b) of the Amending Act 104 of 1976 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under Section 151 CPC to grant ad interim injunction against dispossession. Rule 1 primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

17.4. In **M/s. Landman Ventures LLP vs. M/s.Jubilee Hills Cooperative House Building** (CMA No.216 of 2002), the appellant is a real estate developer. Respondent is a cooperative society. Both entered into a DAGPA to develop property. After appellant was put in possession of property, process of obtaining permissions was initiated. However,

respondent gave a notice cancelling the agreement. Appellant filed application for injunction under Section 9 of the Arbitration Act to restrain the respondent from dispossessing the appellant from the possession of the property. The appellant pleaded that the agreement does not envisage that the owner of the property has the right to terminate the agreement and that the possession must not be disturbed. This Court held:

“12. To secure an injunction appellant has to satisfy three ingredients, prima facie case, balance of convenience and irreparable injury. Further, even fulfilling these conditions may not be sufficient unless the Court is satisfied that petitioner is *bona fide* prosecuting the litigation and it can extend equity jurisdiction to grant discretionary relief of injunction. As fairly submitted by the learned senior counsel for respondent though appellant has made out prima facie case, but that is not sufficient to secure injunction.”

18. Guided by the above principles, coming back to the cases on hand, by DAGPA (Ex.P4) both parties have come to an understanding to develop the separate land parcels belonging to respondents 1 to 4 and 5 & 6 respectively. It was an unregistered document. The DAGPA is compulsorily registerable document. Clause-1 of the DAGPA as it stood initially envisaged registration within three months or after mutation was completed, whichever is ‘*earlier*’. The word ‘*earlier*’ is struck-off and word ‘*later*’ is written in ink and four persons put their signatures at the place of correction. It does not contain the signatures of respondents 5 and 6. Respondents 5 and 6 contend that corrections were made behind their back while appellant contend that respondents 5 and 6 are aware of the corrections. The issue of correction and its impact on terms of agreement are not gone into as they have to be

considered in the arbitral proceedings. Fact remains the DAGPA is not registered. A document which is compulsorily registerable under Section 17 of the Indian Registration Act, but not registered is inadmissible in evidence. Whether arbitration clause in an unregistered document is enforceable by a party to an agreement is also not gone into. Again this has to be considered in arbitral proceedings. Suffice to note, as rightly held by the trial Judge, contents of Ex.P4 cannot be looked into for any purpose to uphold the contention of appellant.

19. It is not in dispute that respondents 5 and 6 each owned Ac.1.00. Out of 9009 square yards on which DAGPA was entered into, their extent of land shown was 3659 square yards. It is not shown before the trial Court as to what extent of land of respondents 5 and 6 respectively covered in the 3659 square yards and what extent of their shares in 3659 square yards are affected by sale deeds executed in favour of 9th respondent. In the absence of clarity on respective extents, appellant cannot plead balance of convenience and equities in his favour. Further, appellant entered into separate agreement with respondents 1 to 4 covering their extent of land only and obtained building permission and is constructing the building. On the contrary, the 9th respondent has also started development activity exclusively covering the land purchased by him from 5th respondent. Thus, it is no more possible to develop comprehensively covering the total land as originally envisaged in DAGPA dated 30.10.2007. Further, respondent

no.9 was not a party to DAGPA. His purchase from 5th respondent was not *pendente lite*. Further, DAGPA was rescinded by respondents 5 and 6. These aspects also have a bearing while considering application to grant interlocutory orders filed under Section 9 of the Act, 1996.

20. As noticed by the trial Court in both Arbitration O.Ps., the appellant is not in possession of land belonging to respondents 5 and 6, later sold to 9th respondent. In the facts of this case, if the appellant succeeds in the arbitration proceedings, he may be entitled to damages.

21. Thus, *prima facie* case is not made out, balance of convenience is not in favour of appellant and it cannot be said that appellant would suffer irreparable injury to grant injunction. The trial Court considered all aspects and declined to exercise equity jurisdiction. Trial Court committed no error in rejecting interlocutory applications. Both Orders are made on due consideration of issues raised by both parties. They do not call for interference. For all the aforesaid reasons, Appeals fail. They are accordingly dismissed. No order as to costs. All pending miscellaneous applications stand closed.

P.NAVEEN RAO, J

J.SREENIVAS RAO, J

Date: 10.02.2023
KKM

**HON'BLE SRI JUSTICE P.NAVEEN RAO
AND
HON'BLE SRI JUSTICE J.SREENIVAS RAO**

**COMMERCIAL COURT APPEAL NO.25 OF 2019
&
CIVIL MISCELLANEOUS APPEAL NO.1303 OF 2017**

Date: 10.02.2023

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