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THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 15.02.2024	Delivered on 11.03.2024
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CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

OSA(CAD).Nos.82 to 89 of 2023

and

**C.M.P.Nos.16555, 16473, 16474, 16472, 16468, 15999, 16000,
16003, 16554, 16479, 16008, 16004, 16007 & 16471 of 2023**

OSA(CAD).No.82 of 2023

M/s. Binny Limited,
Represented by its Executive Chairman,
Mr.M.Nandagopal,
Registered Office at No.1,
Cooks Road, Perambur,
Chennai - 600012.

...Appellant

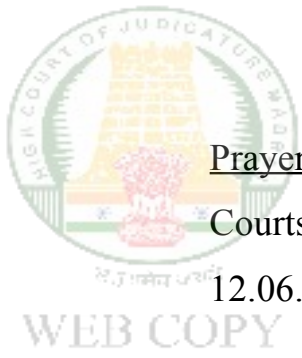
Vs.

1.M/s.SPR Construction Private Limited,
Represented by its Director / Authorized Signatory,
Mr.Hitesh P.Kawad,
Registered Office at: No.57,
Narayan Mudal Street,
Sowcarpet, Chennai - 600 079.

2.The Sub-Registrar, Purasawalkam,
6/13, Portious Road,
Ayanavaram, Chennai - 600023.

...Respondents

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Prayer: Original Side Appeal filed under Section 13(1) of the Commercial Courts Act, 2015, against the judgment passed in O.A.No.128 of 2023 dated 12.06.2023.

For Appellant : Mr.AR.L.Sundaresan, Senior Counsel
and Mr.P.V.Balasubramaniam
for Ms.Narmadha Sampath (in all OSAs)
For Respondents : Mr.Mustafa Doctor, Senior Counsel and
Mr.P.S.Raman, Senior Counsel for
Mr.M.N.Ramakrishnan for
M/s.ARK Law Associates for R1
(in all OSAs)

COMMON JUDGMENT

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

All these appeals have been filed under Section 37 of the Arbitration and Conciliation Act, challenging the order passed by the learned single Judge in exercise of jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 (herein after referred to as Act).

2.The proceedings stemmed out of a Joint Development Agreement entered into between the appellant and the 1st respondent for development of the land measuring about 63 acres situate in North Chennai. An



irrevocable Power of Attorney was also executed by the appellant / land owner on 29.06.2015 to enable the developer to carry out necessary works for developments. There was an amendment to the joint development agreement on 22.02.2018 and pursuant to the same, a new Power of Attorney, which was also irrevocable, was executed on 22.02.2018. The parties had agreed to share the proceeds of the sale at 60:40, i.e., while the developer would take 60% of the sale proceeds, 40% of the sale proceeds would go to the owner / appellant herein. The period of the project was agreed at 9 years due to the very size of the project and the combursome procedure that is to be undergone in obtaining planning permission from the Development Control Authorities namely, the Chennai Metropolitan Development Authority and the Chennai Corporation. An approval by the Government is also mandatory because of the nature of the development involved.

3.While things were going smoothly for almost five years, certain fissures appeared in the relationship between the parties to the Joint Development Agreement, which led to cancellation of the Power of Attorney by the land owner / appellant herein on 13.02.2023. This led to



the respondent moving the Court under Section 9 of the Act on 22.02.2023

with prayers for injunction. Three applications were filed in O.A.Nos.127

to 129 of 2003 seeking the following prayers:-

"O.A.No.127 of 2023:-

Original Application praying that this Hon'ble Court be pleased to grant an order of INTERIM INJUNCTION restraining the Respondent No.1, their men, agents, servants or any other person/s claiming under them from and in any manner interfering with or obstructing the implementation of the Project by the Applicant strictly in accordance with the terms of the JDA, pending adjudication of the dispute between the Parties before the Arbitral Tribunal.

O.A.No.128 of 2023:-

Original Application praying that this Hon'ble Court be pleased to grant an order of INTERIM INJUNCTION restraining the Respondent No.2 herein from proceeding with the registration of the Deed of Cancellation of the Power of Attorney presented to him for registration by the Respondent on 13.02.2023 seeking to cancel the General Power of Attorney dated 22.02.2018 executed by the Respondent in favour of the Petitioner which is registered as Document No.982 of 2018 before the Sub-Registrar of Purasawalkam, pending adjudication of the disputes between the Parties before the Arbitral Tribunal.



O.A.No.129 of 2023:-

Original Application praying that this Hon'ble Court be pleased to grant an order of INTERIM INJUNCTION restraining the Respondent No.1, their men, agents, servants or any other person/s claiming under them from in any manner writing any letters, e-mails or notices to any statutory authorities, banks, financial institutions, customers or any other person/s or entity regarding the Project or the implementation thereof or the disputes pending adjudication between the Parties which is likely to hinder or obstruct the progress of the Project or cause prejudice to the Applicant."

4.An interim order was granted by the Court, which resulted in the respondent / owner coming up with applications for vacation of the injunction in Arb.Appln.Nos.113 to 115 of 2023. There were also other applications seeking an order for conduct of forensic Audit, for sale of the undivided share in the land, for fixation of the 40% share of the appellant and for several other interim reliefs. Since an Arbitral Tribunal was constituted, pending the proceedings before the learned single Judge, those applications were referred to the Arbitral Tribunal for a decision under Section 17 of the Act. The learned Single Judge by a common order dated 12.06.2023, refused to vacate the injunction granted in O.A.Nos.127 to 129



of 2023 and allowed the said applications, continuing the order of injunction till disposal of the arbitral proceedings by the Panel of Arbitrators. As a consequence, applications for vacation of an injunction filed by the appellant herein in Arbitration ApplnNos.113 to 115 of 2023 were dismissed. Arbitration Appln.Nos.279 of 2023 filed by the appellant, seeking permission of the Court to write to the Financial Institutions and Statutory Authorities was closed by the learned single Judge by order dated 08.06.2023 and the same is the subject matter of the appeal in O.S.A.No.86 of 2023.

5.While O.S.A.Nos.82, 83, 84, 85, 87 and 89 are appeals, challenging the orders passed in O.A.Nos.127, 128 & 129 of 2023 for injunction and Arbitration Appln.Nos.113, 114 & 115 of 2023 seeking vacation of injunction, O.S.A.No.88 of 2023 is against the order passed by the learned single Judge in Arbitration Appln.No.227 of 2023 filed by the respondent herein seeking appointment of an Auditor to audit the accounts.

6.While the respondent sought for injunctions as aforesaid mainly contending that the project of such magnitude cannot be allowed to be



derailed at the whims and fancies of one of the parties to the contract. It was also pointed out that the respondent has made an interest free refundable security deposit of Rs.250 crores, which is lying with the owner / appellant.

The Joint Development Agreement confers absolute rights on the developer to develop the large extent of land situate within the limits of the Greater Chennai Corporation and the project once completed would be one of its kind within Corporation limits. It was also pointed out by the applicant that the Power of Attorney should co-exist with the Joint Development Agreement and the cancellation of the power would result in the whole project coming to a grinding halt.

7.The grievances of the owner / appellant herein can be redressed without jeopardizing the entire project, since the most of the claim of the owner is monetary and ever paise received by the respondent as a developer is accounted for and is put in escrow account from where 40% is credited to the account of the owner and 60% goes to the account of the builder. It is also claimed that the Chief Financier of the project M/s. Catalyst Trusteeship Limited is maintaining a very close vigil over the transactions and as such the apprehensions expressed by the owner have no basis. It is



also pointed out that the Joint Development Agreement enables the developer to avail credit facilities, not exceeding Rs.1000 crores from lenders and Financial Institutions of which, a portion has been already availed of by the developer and stoppage of the project would completely cripple the developer. Each and every apprehension that has been raised by the owner can be addressed very conveniently before the Panel of Arbitrators, which consists of three former Chief Justices of India and therefore, the continuing of the project during the pendency of the arbitration alone would be beneficial to both the parties.

8. Having been satisfied with the *prima facie* case made out, the learned single Judge exercising jurisdiction under Section 9 of the Act had granted an order of interim injunction on 22.02.2023. This prompted the appellant / owner to seek vacation of the injunction contending that there were several violations of the conditions contained in the Joint Development Agreement. According to the appellant / owner, the respondent / developer had acted in excess of the rights conferred by the Joint Development Agreement and the Power of Attorney. It had also acted against the interest of the owner by making several alienations at below par



prices and also leasing out a large chunk of land to a Trust controlled by the developer itself for running a school at a very nominal rent resulting in monetary loss to the owner. It was also the contention of the owner that construction is being put up in violation of the sanctioned plan or in some cases without the sanctioned plan being approved. It was also contended that the project is unduly delayed and the developer / respondent has committed major defaults in repayment of the loans borrowed by it, which resulted in notices being issued by the Financier, seeking recovery.

9.The learned single Judge, after hearing the parties and after perusing the documents placed before him had concluded that it will not be in the interest of the parties to derail the project midway. The grievances that are voiced by the owner can be amicably resolved in the arbitration proceedings, even while the project was allowed to continue. The learned Judge also found that the balance of convenience was in favour of the respondent / builder as the parties together have sold undivided share in the land to nearly 3000 persons and the construction of the apartments is underway. Apart from construction of the apartments, there are various other facilities, which have been agreed upon between the parties and they



were also in the process of being created.

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10. Adverting to the grievances of the appellant / owner, the learned single Judge found that all his grievances are matters which can be compensated in terms of money and therefore, to bring the project to a grinding halt by allowing the owner either to terminate the contract by canceling the Power of Attorney or by writing to the Financial Institutions and the Statutory Authorities, making complaints about the builder will not be in the interest of justice. Taking note of the fact that the Arbitral Tribunal has already been constituted, the learned single Judge made the injunctions granted on 22.02.2023 absolute and directed the parties to proceed with the arbitration. The applications filed by the owner seeking permission to write to the authorities in A.No.279 of 2023 was also closed recording the undertaking made by the learned Senior Counsel, who appeared for the respondent before the learned single Judge to the effect that the builder would properly reply to the Financier namely, M/s. Catalyst Trusteeship Limited with regard to the repayment of the loan without any further delay. As already pointed out, the said order is under challenge in O.S.A.No.86 of 2023. The learned single Judge also appointed M/s.R.Subramanian & Co.

10/25



LLP, a firm of Chartered Accountants to audit the accounts maintained by the respondent. The said order is under challenge in O.S.A.No.88 of 2023.

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11.We have heard Mr.AR.L.Sundaresan, learned Senior Counsel and Mr.P.V.Balasubramaniam, learned Senior Counsel for Ms.Narmadha Sampath for the appellant in all the appeals and Mr.P.S.Raman, learned Senior Advocate and Mr.Mustafa Doctor, learned Senior Counsel for Mr.N.Ramakrishnan for the 1st respondent.

12.Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the appellant would reiterate the submissions made before the learned single Judge. He would also point out that the learned single Judge has overlooked several acts of omission and commission on the part of the builder which justify the apprehension of the owner that its interest will not be served by allowing the project to continue. The learned Senior Counsel would draw our attention to the following facts to justify the apprehension:-

- i) Construction being done without obtaining applications.
- ii) Fixation of sale price at a very low rate for some sales.



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iii) Leasing out the land to a Trust created by the builder itself for the purpose of running a school at a very low rent.

iv) Violation of Clause - 12 regarding fixation of sale price.

v) Violation of terms regarding submission of plans, particularly, Clause 9.1 and 9.3 of the Joint Development Agreement, which require a joint approval of the plans.

vi) Non-submission of sales and calculation reports.

vii) Non-approval of the business plan

viii) Non-repayment of the loans availed by the developer, and

ix) Issuance of notices by the Financiers.

According to the learned Senior Counsel, the above constitute very serious violations of the agreement between the parties and therefore, if the respondent / developer, is allowed to continue with the project, the same will jeopardize the interest of the owner beyond redemption.

13.Mr.P.V.Balasubramanian, learned Senior Counsel appearing for the appellant in some of the appeals would apart from reiterating the



submissions of Mr.AR.L.Sundaresan, contend that the owner of the land should be allowed to exercise its discretion in choosing its partner or in deciding as to whether it should continue the alliance with the developer or terminate the same. According to him, being the owner, it cannot be forced to continue the contract with the builder despite the fact that the same is prejudicial to its interest.

14.Contending contra, Mr.P.S.Raman and Mr.Mustafa Doctor, learned Senior counsel appearing for the respondent would submit that all the allegations made would ultimately result in a claim for money on the part of the owner. The same can be conveniently negotiated between the parties without bringing the project to a grinding halt. Both of them would stress on the question of balance of convenience which is an essential factor that is to be borne in mind by the Courts, while granting a refusing injunctions to buttress their submissions.

15.Mr.Mustafa Doctor, learned Senior Counsel would point out that the entire project, upon completion, will be one of its kind in the whole country which encompasses in it independent villas, multi storied



apartments of various sizes, an exclusive school now being conducted by the management of Shri Ram College of Commerce, New Delhi which offers education of very high standards to the occupants, several other sports facilities that had been created, construction of India Market a completely new concept which provides for spaces for vendors to sell their products. The learned counsel would submit that all these facilities are encapsulated in 63 acres of land, which would not only be a dream project but also result in a phenomenal development of the North Chennai, which was hitherto neglected.

16. On the contention of Mr. A.R.L. Sundaresan that some of the sale deeds have been executed for a much lesser consideration and the lease of the land to the school, the learned Senior Counsel appearing for the respondent would submit that all these have been done with the consent or the knowledge of the owners for certain special reasons. On the allegation that construction has been put up without sanctioned plan, the learned counsel would submit that the construction of Towers A, B, H & C have been approved, while approval for Tower D is awaited. While no construction has been made in the proposed Towers E, F, G the construction



in the sky tower has been stopped. The learned counsel would also invite us to various notices that have been issued by the Financier periodically and they would submit the very fact that the Financier has been issuing notices for almost three years but it has not chosen to proceed with auction would show that the dues have been paid periodically and the threatened auction will never happen.

17. On the contention of the learned Senior Counsel that business plans were not approved, the learned counsel would submit that the business plans have been approved and those approvals are also available in the paper books that have been filed. Though Mr. AR.L. Sundaresan would vehemently contend that the signature found in the business plan approval, which is sought to be relied upon are not that of the representatives of the owner, the said question cannot be gone into at this interlocutory stage. The learned Senior Counsel would also point out that a sum of Rs.250 crores is lying with the owners as interest free deposit and therefore, their interests are completely secured. If at all there is any claim on the part of the owners, it is necessarily a money claim, which can be settled by negotiations or by a decision of the Arbitrators. Pointing out the fact that the Arbitration Penal



that has been nominated consists three former Chief Justices of India, the learned Senior counsel would vehemently contend that all these matters can be left to their decision and it is also pointed out that they had also in the course of the arbitral proceedings observed that it is a matter for parties to sit together and resolve. We have considered the rival submissions.

18.We shall first dispose of the two appeals which relate to order appointing an Auditor and the order refusing permission to the appellant to write to the Financial Institutions and statutory bodies.

19.As far as O.S.A.No.88 of 2023 is concerned, it is against an order appointing M/s.R.Subramanian and Co. LLP as Auditors. It is the grievance of the learned Senior Counsel for the appellant that the Auditors have completed the audit without even notice to the owner. An application was filed by the appellant in CMP.No.28875 of 2023 in OSA.No.88 of 2023 seeking permission to participate in the audit proceedings to be conducted by the Audit firm appointed by the learned single Judge.



20.Be that as it may, the Auditors have filed a report in this Court.

Hence, we have dismissed the application with liberty to the appellant / petitioner to move the Arbitrators under Section 17 of the Arbitration and Conciliation Act, if they are aggrieved by the report of the Auditor. Pursuant to our orders, the copy of the audit report has been furnished to the appellant and hence, we do not see any reason to interfere with the order of the Court, appointing an Auditor. Therefore, the appeal in O.S.A.No.88 of 2023 is dismissed. In view of the dismissal of the appeal, C.M.P.Nos.16473 & 16479 of 2023 are closed.

21.Adverting to O.S.A.No.86 of 2023, challenge in which is to the order passed in A.No.279 of 2023 filed by the owner, seeking permission to write to the Financial Institutions and Statutory Authorities regarding the violations made by the developer, we are of the considered opinion that allowing such prayer would only lead to further complicating the already complicated relationship between the parties. Interest of third parties namely, purchasers of the undivided share in the land, students who are now studying in the school that has been established and various investors will be severely affected, if the project is brought to grinding halt.



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22.The Division Bench while passing interim orders on 20.07.2023 had permitted the appellant / owner to respond to the notices that it receives from the Statutory Authorities. We are of the considered opinion that liberty given would take care of the interest of the owner. We therefore, dispose of the appeal permitting the appellant to reply to any notice that it may receive from either the Statutory Authorities or the Financial Institutions. The appeal in O.S.A.No.86 of 2023 is disposed of with the above observations.

23.We shall now advert to the other appeals namely, O.S.A.Nos.82, 83, 84, 85, 87 & 89 of 2023 namely, appeals against orders granting injunction and refusing to vacate the injunction. Though these proceedings are under Section 9 of the Arbitration and Conciliation Act, the principles governing grant of injunction under Order 39, Rule 1 & 2 will necessarily apply to these proceedings also. Therefore, the Court while examining the application for injunction under Section 9 has to necessarily look into the *prima facie* case, balance of convenience and irreparable injury. In the background facts, the term irreparable injury should be taken to mean injury that cannot be compensated in terms of money. The appellant, who is the



owner of the land in question had raised several complaints, which have been narrated supra in support of its contention that the learned single Judge ought not to have granted the injunctions prayed for. A perusal of those contentions would show that most of them are issues relating to a monetary compensation or issues where the appellant apprehends that its 40% share will get reduced because of the action of the builder either in selling of the apartments at low price or leasing out the land for running a school at a very low rent.

24.As far as the claim that the business plan has not been approved or that there has been no agreement on the prices etc., are concerned, these are contentious issues which depend the validity or the otherwise of the documents which have been placed before us. Those issues, cannot be gone into very conveniently at the interlocutory stage. The Court while deciding an application under Section 9 has to look at the *prima facie* case. It cannot conduct rowing enquiry into the validity or otherwise of the documents. The Court has to go by a *prima facie* proof. Therefore, we do not think, we could conveniently address the issues relating to the validity or otherwise of the documents that are produced by the parties unless it is shown that such a



document could not have come into existence. We have to proceed on the assumption that the documents produced are true and valid. It is of course open to the parties, during the arbitration proceedings, to demonstrate that the documents that have relied upon are either forged or invalid. Therefore, on the question of price fixation and approval of business plans, we have to proceed on the assumption that the appellant / owner have agreed and unless they prove that such an agreements never happened, the same cannot be a ground for refusing injunction. Once execution of the Joint Development Agreement is admitted and once it is shown that power of attorney should be co-exist with that of the joint development agreement, the cancellation of the power of attorney which would result in the entire project coming to a grinding halt cannot be allowed by the Court.

25.As we have already pointed out, interests of several thousands of purchasers of undivided shares in the land and interest of almost more than 2000 students, who are now studying in the school that has been established in the project area will be under immediate threat, if the project is brought to a halt by allowing the owner to cancel the Power of Attorney and interfere with the implementation of the project and to write the various



authorities with a view to jeopardize the project.

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26. On the other hand, if we look at the consequence, the builder at best will have to compensate the owner for the loss that would be caused to the owner because of the actions of the builder. It is necessarily a money claim. Though both the learned Senior Counsel appearing for the appellant would contend that the appellant being the owner of the land has every right to protect its interest, we fail to see any justification, since nobody can take away the land from the owner. The land will remain as land as it is and any development there on will only be beneficial to the owner of the land. If the Arbitrators are to come to a conclusion that the builder is not entitled to develop the land any further, he has to walk out and he cannot remove the construction that has been put up by him. Therefore, essentially the question of irreparable injury has to be answered against the appellant and in favour of the respondent, since any injury that would be caused to the owner can be compensated in terms of money.

27. Adverting to the balance of convenience, we find that it is necessarily with the builder. As we had already pointed out, the very nature



and the magnitude of the project requires its continuance than stoppage.

Unless the project is allowed to continue its logical conclusion, it will affect several thousands of purchasers as well as Financial Institutions which had advanced several crores of rupees for the project. That will have a spiraling impact on various other sectors, which will not be in the interest of either of the parties, particularly, economic interest.

28. We are not getting into the factual matrix of the arguments that have been advanced by the learned counsel on either side, considering the fact that we are dealing with an appeal under Section 37 of the Arbitration and Conciliation Act against orders passed under Section 9 of the Act, which are purely interlocutory in nature and any observation passed on the merits of the dispute would definitely have a bearing on the proceedings before the Arbitral Tribunal.

29. Mr. AR. L. Sundaresan, learned Senior Counsel appearing for the appellant would submit that taking cover under the injunction that had been granted by the learned single Judge, the respondent has been going ahead with constructions, which are not approved and notices they have been



again received from the Financier for default in payment of installments.

Applications for receipt of additional documents have been filed by the appellant to demonstrate that the continuance of the project by the builder would be prejudicial to its interest.

30. We do not think, we can base our conclusions on those documents, which are not part of the record before the learned single Judge. We however, permit the appellant to move the Arbitral Tribunal, if it gets hold of some other fresh material including the documents that are now sought to be filed before us and seek modification of the order of injunction granted by the learned single Judge. We make it clear that the cause of action for the modification should be the one that accrues subsequent to the orders of the learned single Judge and not prior. We are therefore, of the considered opinion that the appellants have not made out the case for interference with the orders of the learned single Judge. These appeals in O.S.A.Nos.82, 83, 84, 85, 87 & 89 of 2023 are therefore, fail and they are accordingly, **dismissed.**



31. In fine, O.S.A.Nos.82, 83, 84, 85, 87 & 89 of 2023 are dismissed, O.S.A.No.86 of 2023 is disposed of with the observations and O.S.A.No.88 of 2023 is dismissed as having become infructuous. However, in the circumstances, there will be no order as to costs. Consequently, connected miscellaneous petitions, if any, are closed.

(R.S.M., J.) (R.S.V., J.)
11.03.2024

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