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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(I) (COMM.) 430/2023**
MR ATUL MALIK & ORS.

.....Petitioners

Through: Mr. Rajesh Mohan Sinha,
Mr. Gaurav, Mr. Prateek
Mohan Sinha & Ms. Namita
Sinha, Advs.

versus

MRS ROHINI SAWHNEY & ORS.

.....Respondents

Through: Mr. Akshay Makhija, Sr. Adv.
with Mr. Imran Moulaey, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER
17.09.2024

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I.A. 39616/2024

1. This application has been filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 (in short, '**CPC**'), seeking an amendment to the petition which has been filed by the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996 (in short, '**Act**').
2. The learned senior counsel for the respondents, without prejudice to the rights and contentions of the respondents, does not oppose the present application.
3. The application is accordingly allowed. The amended petition is taken on record.



O.M.P.(I) (COMM.) 430/2023 & I.A. 39617/2024

4. This petition has been filed under Section 9 of the Act, praying for the following reliefs:

“(a) The termination vide letter dated 05.01.2024 terminating the MOU dated 02.03.2021 pursuant to clause 7, with its further extensions, is non-est thus cannot be given effect to thus treated as null and void, as the alleged termination itself is violative of clause 7 of the MOU dated 02.03.2021, since the amount of Rs. 38.5 Crores has not been refunded along with interest @ 12% p.a. to the petitioners within six months from the date of alleged termination, as envisaged in clause 7 of the MOU and that the physical possession of the suit property has already been handed over to the petitioners herein in part performance thereof OR such other interim measure of protection as may appear to the Court to be just and convenient, in the interest of justice.

(b) (i) The statement of the respondents not to dispossess the petitioners from the property in question except with due process of law given to this court may be made absolute till the litigation i.e., suit no 212 of 2018 between the respondents and its erstwhile owner qua the suit property, is finally concluded and given effect to;

(ii) The operation of the termination order dated 05.01.2024 may be Stayed, till the litigation vide suit no 212 of 2018 between the respondents and its erstwhile owner is finally concluded and given effect to;

because the CAUSE to initiate the arbitrable proceedings for the execution of the title deed of the property in question in favour of the petitioners against the respondents pursuant to MOU dated 02.03.2021 is NEITHER ACCRUED/ AROSE nor IS ARBITRAL IN NATURE during pending litigation.”



5. In the amended petition, the petitioner himself asserts as under:

(vii) IN FACT, THE ONLY ISSUE is that “Whether the petitioners are entitled for the specific performance of the MOU dated 02.03.2021 with extensions against the respondents with a direction to the respondents to rectify their title from their erstwhile owner”

(a) But this issue is premature as the cause to initiate the arbitral proceeding, to adjudicate the issue is yet to accrue since the suit between the respondents and its erstwhile owner is pending.

(b) This issue cannot be said to be an arbitral issue in view of the judgment of the Hon'ble Supreme Court in “Vidya Drolia & Ors. Vs. Durga Trading Corporation” cited as (2021) to Supreme Court Cases 1 - 2020 SCC online SC 1018, wherein, fourfold tests have to be applied to determine as to whether any dispute is arbitrable. One of the tests is “The cause of action and the subject matter of the dispute affects the third party's right, have erga omnes effect i.e. where right or obligation are owed towards all, require centralized adjudication and mutual adjudication would not be appropriate and enforceable” therefore, the issue is not arbitrable.

Needless to submit that the erstwhile owner of the respondents is not the signatory of MOU dated 02.03.2021 containing arbitration clause and therefore, the matter cannot be decided in arbitration between the petitioners and the respondents till the litigation vide suit bearing 212 of 2018 is pending adjudication between respondents and their erstwhile owner in finally disposed of.

(c) The cause to claim the title on the suit property through arbitral tribunal shall accrue in favour of the petitioner and against the



respondents who, when succeed against their erstwhile owner.

(d)Needless to submit that the respondents though invoked the arbitral proceedings vide letter dated 18.01.2024 to justify its illegal act of termination dated 05.01.2024 but till today have not made any efforts for constitution of arbitral tribunal for adjudication.”

6. The learned senior counsel for the respondents submits that with the above assertion, the present petition would no longer be maintainable. He submits that as it is the own case of the petitioners that the dispute between the parties is non-arbitrable and has not arisen so far, therefore, a petition under Section 9 of the Act is not maintainable.

7. On the other hand, the learned counsel for the petitioners submits that in the Agreement to Sell dated 06.10.2017 itself, it has been recorded that the said Agreement is subject to the respondents confirming their title in the suit filed against them, being Suit No. 212/2018. He submits that the said suit is pending adjudication and, therefore, the Agreement to Sell dated 06.10.2017 cannot be performed till the said suit is decided. He submits that, therefore, as of today, there is no arbitrable dispute between the parties, and the notice issued by the respondents under Section 21 of the Act is premature.

8. Placing reliance on the judgment of the Supreme Court in ***Vidya Drolia and Others v. Durga Trading Corporation***, (2021) 2 SCC 1, he submits that it is only rarely that a court may interfere at the stage of Section 8 or Section 11 of the Act, and only when it is manifestly and *ex facie* clear that the Arbitration Agreement is non-existent, invalid, or the disputes are non-arbitrable. He also places reliance on



the judgment of the Supreme Court in ***Firm Ashok Traders and Anr. Etc v. Gurumukh Das Saluja and Ors.***, (2004) 3 SCC 155, to contend that a petition under Section 9 of the Act is maintainable even prior to the commencement of the arbitral proceedings, however, the petitioner must be able to satisfy the court that the arbitration proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. He submits that what constitutes a reasonable time will depend on the facts and circumstances of each case, and the nature of the interim relief sought would itself give an indication thereof. He submits that in the present case, the arbitral proceedings cannot commence till the suit referred to above is finally decided by the court hearing the same.

9. I have considered the submissions made by the learned counsels for the parties and also perused the record.

10. From the above, it is evident that it is the own case of the petitioners that as of today, there is no arbitral dispute between the parties. The petitioners assert that the dispute is premature and that the cause to initiate arbitral proceedings to adjudicate the issue is yet to accrue, since the suit between the respondent and his erstwhile owner is pending. In the absence of a dispute, I fail to understand how a petition under Section 9 of the Act would be maintainable. Section 9 of the Act reads as follows:

***“9. Interim measures, etc. by Court.—[(1)]A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—
(i) for the appointment of a guardian for***



a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which



may not render the remedy provided under section 17 efficacious.”

11. A bare reading of the above would show that though a prayer under Section 9 of the Act can be made even prior to the commencement of the arbitral proceedings, however, there must be a dispute which requires interim measures of protection in respect of, *inter alia*, the preservation of the subject matter of the Arbitration Agreement. If it is the own case of petitioners that a dispute between the parties is, as of today, premature, then the petitioner certainly cannot maintain a petition under Section 9 of the Act. A petition under Section 9 of the Act presupposes that there is an arbitration agreement in existence and a dispute has arisen between the parties in relation to such an agreement. Section 9 of the Act is intended to be only a measure of interim protection and preservation until the arbitration proceedings are initiated or during the pendency of such proceedings. Where the petitioner itself contends that there is no arbitrable dispute, it cannot maintain a petition under Section 9 of the Act.

12. Sub-Section 2 of Section 9 of the Act further states that the arbitral proceedings shall be commenced within a period of 90 days from the date of any order, or within such further time as the court may determine. In the present case, if the petitioners themselves are asserting that arbitral proceedings cannot be commenced as there is no dispute to be adjudicated between the parties, the present petition is not maintainable.

13. In view of the above, the judgments cited by the learned counsel for the petitioners also cannot come to avail.



14. Accordingly, I do not find any merit in the present petition.
15. The same is dismissed.
16. The pending application also stands disposed of.
17. The next date of hearing, that is, 12.11.2024, shall stand cancelled.

NAVIN CHAWLA, J

SEPTEMBER 17, 2024/rv/DG

Click here to check corrigendum, if any