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§~36

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

+ FAO(OS) 144/2024, CM APPL. 59974/2024, CM APPL. 59975/2024 & CM APPL. 59976/2024

BCC DEVELOPERS & PROMOTERS PVT. LTD.....Appellant
Through: Mr. Rahul Malhotra, Advocate
with Mr. Rishabh Singh and Mr.
Kaustbh Punj, Advocates.

versus

BHUPENDER SINGH & ANRRespondents
Through: None.

% Date of Decision: 9th October, 2024

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, CJ : (ORAL)

1. Present appeal has been filed under Section 37 of the Arbitration & Conciliation, Act, 1996 read with Section 10 of the Delhi High Court Act, 1966 challenging the order dated 2nd September, 2024 passed by the learned Single Judge in O.M.P.(I) 9/2024 titled "*Bhupender Singh & Anr vs. M/s. BCC Developers & Promoters Pvt. Ltd*", under section 9 of the Arbitration & Conciliation Act, 1996 (for short 'the Act') and granted pre arbitral interim relief by holding that the appellants are restrained from taking any steps towards transfer or alienation of the land forming subject matter of the Agreement to Sell dated 5th August, 2023.

2. Mr. Rahul Malhotra, learned counsel for the appellant submits that the appellant and the respondents had executed an Agreement to Sell dated 5th August, 2023 for a consideration of Rs. 8.21 crores and the
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respondents paid Rs. 1.65 crores in advance and the balance payments were to be remitted in four (4) tranches. He states that a Memorandum of Understanding (for short 'MoU') was also executed on the same day, wherein the appellant had agreed to execute and register the sale deeds in favour of the nominees of the respondents. He states that on 3rd January, 2024, in view of the default on part of the respondents in remitting the first and second tranches, the appellant intimated the respondents that they are in breach of clause 4 of the Agreement to Sell dated 5th August, 2023 and called upon to rectify the breach and remit the payments within a period of fifteen (15) days', failing which the said agreement shall stand terminated.

3. Learned counsel for the appellant submits that since the respondents had failed to make payments in terms of clause 3 of the Agreement to Sell, the appellant had terminated the Agreement to Sell. He states that out of the advance payment of Rs.1.65 crores, a sum of Rs. 65 lakhs was forfeited and a sum of Rs. 1 crore was remitted back to the respondents on 9th February, 2024. He further states that upon failure of any communication on part of the respondents, the appellant entered into an Agreement to Sell dated 24th April, 2024 in respect of the subject property with one Mr. Girraj Yadav who agreed to purchase the subject property on the same terms and conditions. He further states that on 12th June, 2023, the respondents had filed the petition under section 9 of the Act seeking an order of restraint against the appellant. Since there was no interim order passed at the initial stage of the proceedings, the appellant had sold 84% of the subject property in favour of third parties.

4. He states that *vide* impugned order dated 2nd September, 2024, the learned Single Judge restrained the appellant from taking any steps towards transfer and alienation of the subject property. He states that
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aggrieved by the same, the appellant has filed the present appeal.

5. Mr Rahul Malhotra, learned counsel for the appellant at the outset draws attention of this Court to the jamabandi proceedings in respect of the khasra numbers 366 and 367 of Village Shahjahanpur area Neemrana to state that the appellant was not party to the proceedings before the Civil Court which is *in seisin* of the dispute between third parties in respect of the aforesaid khasra numbers. He states that though the appellant has 1/4th share in the aforesaid khasra numbers, yet the said share is not subject matter of the sale agreement executed between the appellant and the respondents.

6. He also invites attention to another jamabandi proceedings at page 106 of the paperbook in respect of khasra numbers 1325 and 1326 of the same village, apart from others to state that the appellant alone is the owner of the entire khasra numbers. He states that these were the lands which are subject matter of the agreement to sell executed between the parties. He states that thus, there was no occasion for the respondent to doubt the ownership of the appellant over the subject khasra numbers.

7. He states that there is no overlap between the lands which are the subject matter of the suit pending before the Judicial Additional Collector, Behrod District Alwar, Rajasthan and those falling within the khasra numbers 1325 and 1326 forming part of the Agreement to Sell. He states that the learned Single Judge has committed an error on facts. He submits that once it is clear that there is no overlap of properties, the reason to pass interim restraint order *vide* the impugned order, vanishes. On that basis, he states that the impugned order be set aside.

8. He also states that it is the respondents, who have committed default of payment schedule as stipulated in the Agreement to Sell. He states that the appellant had diligently performed his part of the



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Agreement to Sell, even to the extent that a sum of Rs.1 crore was remitted back to the respondents after forfeiture of Rs.65 lakhs purely in terms of the termination of agreement to sell. He states that in that view of the matter, no restraint order from selling the remaining portion of the property could at all have been passed against the appellant.

9. Mr. Rahul Malhotra, learned counsel for appellant also relies on the judgement of the Supreme Court in *Ambalal Sarabhai Enterprise Ltd vs KS Infraspac LLP Ltd., AIR 2020 SC 307* and the judgement of the Division Bench of this Court in *C.V.Rao vs. Strategic Port Investments KPC Ltd., 218 (2015) DLT 200*.

10. This Court has heard the arguments of learned counsel for the appellant and perused the record.

11. This Court, in exercise of powers under Section 37 of the Act, is not obligated to consider the merits or otherwise of the facts as stated by the appellant. Suffice it to state that the High Court under Section 9 of the Act is empowered to exercise jurisdiction as an interim measure to protect the property, items or goods from being wasted.

12. In the present case, the question as to for what reasons or on what grounds the respondents did not tender the remaining tranches of payment as scheduled in the Agreement of Sell or the version of the appellant and its veracity does not arise nor is it to be tested. Such consideration would arise at a stage when an arbitrator in accordance with the arbitration agreement is appointed and the arbitration proceedings commence in accordance with law. These are, in our opinion, disputed questions of facts which would require evidence to be led. However, in the meanwhile, it cannot be countenanced that this Court cannot exercise jurisdiction under Section 9 of the Act. Particularly in situations where the Court finds justifiable reasons to

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exercise such jurisdiction.

13. This Court finds that the learned Single Judge, on a *prima facie* consideration of the facts obtaining on record, has rightly exercised the jurisdiction so vested. The learned Single Judge has clearly delineated the portions of the land along with its measurement which are clearly overlapping in respect of the khasra numbers belonging to the appellant in context with those which are subject matter of a civil dispute pending before the Judicial Additional Collector, Behrod District Alwar, Rajasthan between Lakhan Devi as the plaintiff and Jatan Singh and Om Pal Singh, as the defendants. At the stage of examination under section 9 of the Act, a detailed inquiry or evaluation of evidence is neither envisaged nor required. *Prima facie* satisfaction is all that is to be seen. Moreover, it is relevant to note that a stay order in respect of the civil dispute already stands passed on 17th September, 2013 by the said Civil Court. The appellant has not shown any order rejecting or varying the said stay order. This fact too, compels this Court to disagree with the argument of the appellant.

14. So far as the submission regarding sale of 84% of the land during the pendency of the proceedings under Section 9 of the Act is concerned, this Court is not inclined to make any observations thereon, lest it prejudices any of the parties. However, with respect to the remaining portion of the land, which is subject matter of the agreement to sell, this Court too is of the opinion that the same needs to be preserved till the arbitration proceedings in that regard commence and conclude. To that extent the order of the learned Single Judge is clearly justified.

15. Section 9(2) of the Act envisages that where a Court passes an order for any interim measure or protection, the arbitral proceedings shall be commenced within a period of ninety (90) days from the date of
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such order or within such time as the Court may determine. It is manifest that the said period of ninety (90) days would commence from 2nd September, 2024, the day when the impugned order was passed. As such, the apprehension expressed by the appellant that the arbitration proceedings may get delayed, is unfounded. The appellant would be at liberty to take appropriate recourse to law in case so advised.

16. So far as the reliance by the appellant on the judgement of the Supreme Court in *Ambalal Sarabhai (Supra)*, particularly paragraphs 18 and 19 are concerned, there is no quarrel with the proposition so laid. On facts, this Court finds that learned Single Judge was satisfied about the triple test before granting the interim relief. It appears that the reasoning was based on a *prima facie* finding of overlapping of the properties as also the fact that the appellant had forfeited a sum of Rs.65 lakhs. The said *prima facie* finding appears to be, in the facts of the case, justifiable. The reliance upon the judgment of the Division Bench of this Court in *C.V. Rao (supra)* is concerned, this Court finds that the learned Single Judge has in fact satisfied himself about the principles encompassing the triple test before grant of any interim order. In that view of the matter, this Court does not find any violation of law by the learned Single Judge.

17. In view of the above, there is no merit in this appeal and the same is dismissed along with the pending applications.

CHIEF JUSTICE

TUSHAR RAO GEDELA, J

OCTOBER 9, 2024/ms/rl