

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Civil Miscellaneous Appeal No. 478/2020

1. Nawal Kishore Dangayach, S/o. Jugal Kishore Dangayach, Aged About 47 Years, By Caste Khandelwal, Resident Of A-34-A, Ram Nagar, Shastri Nagar, Jaipur (Raj.)
2. Archana Dangayach W/o Shri Nawal Kishore Dangayach, Aged About 46 Years, By Caste Khandelwal, Resident Of A-34-A, Ram Nagar, Shastri Nagar, Jaipur (Raj.)

----Appellants

Versus

1. Govind Kripa Build Heights LLP, a Limited Liability Partnership Duly Registered Under Llp Act Having Its Registered Office At The Crest , Suit No.9, Plot No.a-4, Airport Enclave Scheme, Tonk Road, Jaipur-302018 Through Its Designated Partner Charan Singh Khangarot S/o. Mukut Singh Khangarot
2. Charan Singh Khangarot S/o Mukut Singh Khangarot, Aged About 40 Years, Resident Of M-28, Income Tax Colony, Tonk Road, Jaipur-302018
3. Narendra Singh Laxman Singh Rathore S/o Shri Laxman Singh Rawat Singh Rathore, Aged About 46 Years, Resident Of Plot No.6, Gomes Defence Colony, Jaipur (Raj.)
4. Vinod Kanwar W/o Shri Bhupendra Singh Rathore, Aged About 34 Years, Resident Of 101/28, Patel Marg, Mansarovar, Jaipur (Raj.)-302020
5. Bhupendra Singh Rathore S/o Shri Jagmohan Singh Rathore, Resident Of 101/28, Patel Marg, Mansarovar, Jaipur (Raj.)-302020
6. Ahsok Goyal S/o Shri Manna Lalgoyal, Aged About 48 Years, Resident Of 1-554, Opposite Dwarka Sweets, Sector-1, Vidhydhar Nagar, Jaipur (Raj.)-302039
7. Savita Goyal W/o Shri Ashok Goyal, Aged About 47 Years, Resident Of 1-554, Opposite Dwarka Sweets, Sector-1, Vidhydhar Nagar, Jaipur (Raj.)-302039
8. Shikha Meel W/o. Shri Amit Barala, Aged About 34 Years, Resident Of D-15, Indira Nagar, Subhash Marg,

Jhunjhunu (Raj.)-333001

9. Shrishti Chodhary W/o. Shri Hanuman Sahai Barala, Aged About 35 Years, Resident Of Ward No.17, Barala House, Kacholia Road, Chomu, Jaipur (Raj.)-303802
10. Ruchi Agarwal W/o. Shri Pankaj Gupta, Aged About 32 Years, Resident Of Ie-35, Subhash Colony, Shastri Nagar, Jaipur (Raj.)-302016
11. Pankaj Gupta S/o. Shri Sitaram Gupta, Aged About 30 Years, Resident Of Ie-35, Subhash Colony, Shastri Nagar, Jaipur (Raj.)-302016
12. Mukesh Ramawat W/o. Shri Babudas Ramawat, Aged About 27 Years, Resident Of 160 Officers Campus, Janak Marg, Khatipura, Jaipur.
13. Ajeet Chhajer S/o. Shri Amar Singh Chhajer, Aged About 40 Years, Resident Of S-2, Satluj Apartment, Sector-2 Vidhyadhar Nagar, Jaipur (Raj.)-302039
14. Deep Shikha Chhajer S/o. Shri Ajeet Chhajer, Aged About 38 Years, Resident Of S-2, Satluj Apartment, Sector-2 Vidhyadhar Nagar, Jaipur (Raj.)-302039
15. Amit Kumar Kandoi S/o. Shri Basant Kumar Kandoi, Aged About 34 Years, Resident Of Ward No.32, Chandak Street, Aathuna Bazar, Sardar Sahar, Churu (Raj.)-302039
16. Jyoti Kandoi W/o. Shri Anit Kumar Kandoi, Aged About 32 Years, Resident Of Ward No.32, Chandak Street, Aathuna Bazar, Sardar Sahar, Churu (Raj.)-302039
17. Atul Ram Swaroop Chotia S/o. Shri Ramswaroop Sohanlal Chotia, Aged About 34 Years, Resident Of C-203, Prathishtha Apartment, Opposite Nirma Vidhya Vihar School, Bodakdev, Ahemdabad, Gujrat 380054
18. Nikita Chotia S/o. Shri Atul Ram Swaroop Chotia, Aged About 33 Years, Resident Of C-203, Prathishtha Apartment, Opposite Nirma Vidhya Vihar School, Bodakdev, Ahmedabad, Gujrat 380054.

----Respondents

For Appellant(s) : Mr. S.S. Hora
 For Respondent(s) : Mr. R.K. Agarwal, Sr. Adv. With
 Mr. Mamoon Khalid
 Mr. Pradeep Kumar for resp.1 to 5

HON'BLE MR. JUSTICE ABHAY CHATURVEDI**Judgment****31/08/2020**

Notice upon respondent No. 6, 7,10, 11, 12 and 14 are unserved. Notice upon respondent No. 1 to 5 and 13 has been served and notice of respondent No. 8, 9 and 15 to 18 are awaited.

Counsel for both the parties have requested and urged that the instant civil misc. appeal contains sharp urgency therefore, the same may kindly be heard and adjudicated today.

In view of the above, the matter has been heard finally.

This Civil Misc. Appeal has been filed by the appellant-plaintiffs feeling aggrieved against the order of the learned Trial Court dated 10.01.2020 whereby the learned Trial Court rejected the prayer for ad-interim injunction of status quo of the disputed property.

Succinctly, brief facts giving rise to this appeal are that the plaintiff-appellants filed a civil suit for a specific performance of the contract before the Commercial Court with the averments that Limited Liability Partnership (for short "LLP") comprising of plaintiff Nos. 1 & 2 purchased land in auction and a new LLP came into existence, wherein, the plaintiff No.2 retired and defendant No.2 became a partner in LLP to the extent of profit of 25%. Thereafter, on 21.03.2017, the defendant Nos.2 & 3 took over the complete LLP. The plaintiff No.1 retired and defendant No.3 join in partner and another amended LLP agreement was executed showing only defendant Nos.2 & 3 are

partners. It was agreed in clause 7 (VI & VII) that the balance sheet was prepared for the period, prior to the retirement of the outgoing partner and an amount of Rs.18,94,44,262.43/- was outstanding which was payable to the outgoing partner along with interest @ 18% per annum.

It is further submitted that plaintiff was offered allotment of flats in the building being constructed by LLP in lieu of Rs.18,94,44,262.43/- lying in the firm and LLP executed 17 flats fully paid up agreement to sale in favour of the plaintiffs. Thereafter, the defendant Nos.1 & 3 approached the plaintiffs to cancel four agreements to sale and Rs.5,40,00,000/- was paid against cancellation of four flats. Remaining 13 flats whose agreement to sale were executed with fully paid up consideration against Rs.13,54,44,262.43/- remained operative in favour of the plaintiff.

It is further case of the plaintiffs that the defendant Nos.1 to 3 entered into agreement to sale 13 flats in favour of the defendant Nos.4 to 18. The plaintiffs, on coming to know that flats sold to the plaintiffs, have been dishonestly and fraudulently sold to other defendants vide subsequent agreement to sale, and they filed civil suit before the Commercial Court along with application for temporary injunction. The plaintiffs also got the FIR No. **258/2019** for the offences under Sections 420, 406 & 120B of IPC, registered at Police Station, Vidhyadhar Nagar, Jaipur. The Commercial Court returned the plaint under the provision of order VII Rule 10 of CPC vide order dated 21.12.2019 to file the same in the Competent Court. Civil Suit returned by the Commercial Court was presented before the District Court and the same was

transferred to Additional District Judge, No.15 and notices were issued to defendants. After service upon defendants, the prayer for ad-interim stay was prayed for, which was rejected by the Court vide order dated 10.01.2020, observing that no proof of payment of consideration exists, so, no prima facie case was made out in favour of the appellants.

Hence, the appeal has been filed challenging the order dated 10.01.2020.

Heard learned counsel for the parties.

Learned counsel for the plaintiffs submits that the impugned order passed by the Court below is erroneous, perverse and against the material available on record inasmuch as, the Court held that the amount for consideration under agreement was paid to the respondent-defendants, is not borne out from the evidence placed on record. Counsel further submits that the agreement to sale was fully paid up as Rs.18,94,44,262.43/- was lying with the defendant No.1 being outstanding amount, which was to be paid to plaintiffs along with interest @ 18% per annum and in lieu of payment of outstanding amount, defendant Nos.1 to 3 executed the agreement to sale in favour of the plaintiffs.

Counsel further submitted that in a suit, like a suit for specific performance of the contract, the Court protects the *status quo* existing on the date of suit and should not permit the nature of the property being changed which also includes alienation or transfer of property which may lead to loss or damage being caused to the party, who may ultimately succeed and may further lead to multiplicity of proceedings. In support of his contention, he relied upon the following judgments:-

- 1. *Maharwal Khewaji Trust (Regd.) V/s. Baldev Dass (2004) 8 SCC 488.***
- 2. *N. Srinivasa V/s. Kuttukaran Machine Tools Limited (2009) 5 SCC 182.***
- 3. *Harish Chander Verma V/s. Kayastha Pathshala Trust 1988 (1) JT 625.***

Per-contra, the learned counsel for the respondent-defendant Nos. 2 & 3, has vehemently opposed the contentions made by counsel for the appellant-plaintiffs and further raised mainly two objections; firstly, the appeal against refusal of ad-interim injunction order is not maintainable and secondly, regarding maintainability of the suit as there is an "Arbitration Clause" in the agreement itself sought to be enforced by the plaintiffs.

Counsel for the respondent-defendants drew attention of the Court towards the provisions of Section 5 & 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") which provides a Bar for intervention by the Judicial Authority in case the agreement containing the "Arbitration Clause". Counsel further submits that admittedly there is an Arbitration Clause in the agreement sought to be enforced by the plaintiffs, therefore, the defendants in its reply, has raised the objections that the suit is not maintainable under the provisions of Section 5 of the Arbitration Act. It is further submitted that when there is a Bar of civil suit before the Civil Court then the prayer of *status quo* cannot be allowed by the Civil Court. In support of his contentions, he relied upon following judgments of the Supreme Court in case of **Ramdhani Vs. Rajaram: AIR 2011 Allahabad 121, Sawai Singh Bhati**

Vs. Manak Singh:2018 2 SCC 820 (Raj.) and Shiv Kumar Chaddha Vs. Municipal Corporation Delhi: (1993) 3 SCC 161.

Controverting the arguments and objections raised by learned counsel for the respondent-defendants, counsel for the appellant-plaintiffs urged that the civil suit is between plaintiffs and 18 defendants. Defendant Nos. 4 to 18 are not parties to the agreement so they are not bound by the Arbitration Clause nor Arbitrator can pass Arbitration award against them. It was also urged that defendant Nos.4 to 18 being parties under agreement to sell are not assignees of defendant No.1, as entered into agreement to sell on principle to principle basis. Those who have got sale deed in their favour, are taking a defence that they are transferees for value in good faith without notice of earlier agreement and such they are not claiming under title of defendant No.1.

It is further urged that the defendant Nos. 4 to 18 are necessary or at least proper parties to the suit without which full relief cannot be granted to plaintiffs. It was further urged that the impugned order of the Trial Court shows that no such point was raised and having filed the reply on merits, even under Section 8 of the Arbitration Act, the defendants are precluded from raising such an argument. It is further submitted that it is an admitted position that no application under Section 8 of the Arbitration Act has ever been filed before the Court below, therefore agreement based on Section 8 of the Arbitration Act is **after througing it and is not acceptable**. In support of his contention, he relied upon the judgments of Hon'ble Supreme Court in the case of **Indowind Energy Ltd. Vs. Wescare (I)**

Ltd. & Ors. (2010) 5 SCC 306, S.N. Prasad Vs. Monnet Finance Ltd. & Ors. (2011) 1 SCC 320 and Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. & Ors., (2013) 5 SCC 397.

I have given my thoughtful consideration to the arguments advanced at the Bar and has gone through the material placed on record as well as case law cited.

Before proceeding further on merits of the case, it would be appropriate to deal with the objections raised by the counsel for the respondent-defendants regarding maintainability of the appeal.

A perusal of the order dated 10.01.2020 passed by the learned Court below goes to show that the Trial Court declined the prayer of ad-interim stay, after observing that there is no evidence, prima facie, to prove that the respondents received the amount of consideration shown in the buyer's agreement (Annexure-6 to 18) and therefore, it is clear that the Court below before rejecting the prayer of the plaintiff-appellants, gone into the merits of the case and after observing that the consideration amount was not proved to be made by the appellants to respondent-defendants, therefore, no prima facie case was found in favour of the appellant-plaintiffs.

*In case of **Akmal Ali & Ors., etc Vs. State of Assam and Ors. AIR 1984 Gau 86***, the Full Bench of the Guwahati High Court, observed as under:-

We hold that an order made under Order 39 Rules, 1, 2 and 4 refusing to grant an ex-parte order of ad-interim injunction is appealable because Order 43 Rule, 1(r) enables a party to prefer an appeal against "an Order", positive or negative, passed under Rules, 1, 2, 2-A & 4 of

Order 39. An order refusing an ad-interim injunction is a negative order, but falls within the expressions "an order".

In the case of **Jagdish Singh Vs. Amba Lal & Ors., reported in (2015) 3 RLW 2711 (Raj.)**, this Court held as under:-

6. Before examining the impugned order on merits, it is desirable to consider the preliminary objection of the respondent-plaintiff regarding maintainability of the appeal against ex-parte interim injunction order. **The legal position is no more res integra that order granting or refusing temporary injunction under Order 39 Rule 1 & 2 CPC is appealable under Order 43 Rule 1(r) CPC.** A bare perusal of the impugned order makes it abundantly clear that by the said order in emunctory relief has been granted ex-parte against the appellant-defendant. True it is that appellant was well within his right to contest the matter before the learned trial Court against the grant of temporary injunction but the proposition canvassed by the learned counsel for the respondent that order is not appealable is per-se not tenable. Any order of temporary injunction, may be ex-parte, granted by a civil Court under Order 39 Rule 1 & 2 CPC, an aggrieved party has got right to avail remedy of appeal under Order 43 Rule 1 (r) CPC.

7. Hon'ble Supreme Court, in A. Venkatasubbiah Naidu v. S. Challappan & Ors., (AIR 2000 SC 3032), while examining the scope of Order 43 Rule 1 CPC, has held that appeal against ex-parte temporary injunction is maintainable. The Court held:

"It cannot be contended that the power to pass interim ex-parte orders of injunction does not emanate from the said Rule. In fact, the said rule is the repository of the power to grant orders of temporary injunction with or without notice, interim or temporary, or till further orders or till the disposal of the suit. Hence, any order passed in exercise of the aforesaid powers in Rule 1 would be appealable as indicated in Order 43, Rule 1 of the Code. The choice is for the party affected by the order either to move the appellate Court or to

approach the same Court which passed the ex parte order for any relief."

In the light of law laid down by the judgments of Full Bench of the Guwahati High Court and the Rajasthan High Court, the impugned order is an order against which appeal is maintainable, particularly when the Court below, before rejecting the prayer for ad-interim injunction, has applied mind to the facts and evidence placed on record. As such, the law relied upon by the counsel for the respondent-defendants on this point, is not applicable in the facts and circumstances of the case at hand.

In view of the above, the objections raised by the counsel for the respondents-defendants regarding maintainability of the appeal liable to be rejected.

Coming to the next objection raised by counsel for the respondent-defendants regarding arbitration clause in agreement sought to be enforced by the plaintiff-appellants in the civil suit filed before Court below.

A perusal of the agreement goes to show that Clause 29 of the buyer's agreement dated 17.04.2017 is as under:-

"Arbiration:-

29. All or any dispute arising out of or touching upon or in relation to the terms of this buyer's Agreement/Provisional allotment letter or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions between the parties, failing which the same shall be settled through arbitration. The proceedings shall be governed by the Arbitration and Conciliation Act, 1996, or any statutory amendments and modifications or re-enactment thereof for the time being in force. A

sole arbitrator shall hold the arbitration proceedings at the registered Office of the promoter in the Jaipur and the award passed by the Arbitrator shall be final and binding upon the parties."

Under Section 5 & 8 of the Arbitration and Conciliation Act, 1996, reads as under:-

5. *Extent of judicial intervention-*

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

8. *Power to refer parties to arbitration where there is an arbitration agreement-*

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Respondent-Defendant Nos.1 & 2 filed reply to the stay application and in para No.10 has taken objections regarding

maintainability of the suit on the ground of specific arbitration agreement/clause in the agreement between the parties.

A perusal of the Clause-29 of buyer's agreement goes to show that there was an agreement between the parties that all disputes arising out of or in relation to the terms of the buyer's agreement shall be settled amicably by mutual discussions between the parties failing which, the same shall be settled through Arbitration. This Clause being part of the agreement is not disputed. The provisions of Section 5 of the Arbitration Act, specifically Bars the intervention of Judicial Authority in matters covered by Arbitration Agreement/Clause.

Counsel for both the parties argued at length raising rival contentions regarding applicability of Arbitration Clause in the buyer's agreement to the present matter as well as on merits of the case, but a perusal of the impugned order dated 10.01.2020 goes to show that the objection regarding Arbitration Clause in the buyer's agreement was not considered by the Court below.

It is true that courts generally protects the subject matter in a suit for specific performance of the contract, but when agreement sought to be enforced itself contains the Arbitration Clause and the suit was returned by the Commercial Court under the Provisions of Order 7 Rule 10 CPC for presentation before the Competent Court, then the Court should apply its judicial mind on the maintainability of the suit before proceeding further on merits of the case. Since, the Court below seized of the applications for temporary injunction, so it will be appropriate that the application for

temporary injunction be decided by the Trial Court, after considering all the objections including non-maintainability of the suit on the ground of Arbitration Clause in the agreement sought to be enforced by the appellants. Without there being any findings by the Courts below, it will not be appropriate for this Court to decide the objections raised by the respondent-defendants and then decide the matter on merits in light of the arguments advanced by the counsel for the parties. In the case of **Manglaram Vs. Rameshwar reported in 2020 (2) DNJ (Raj.) 423**, this Court held that when the question of jurisdiction of civil court was raised, the issue was required to be decided first and thereafter the application for temporary injunction ought to have been adjudicated.

In view of the above, the case is remanded back to the learned Trial Court to decide the application for temporary injunction, after hearing learned counsel for both the parties. The parties are directed to remain present before the learned Trial Court on 07.09.2020.

In the facts and circumstances of the case and also for interest of Justice, the Court deems it appropriate to order that, in case, disputed property is alienated by the respondents, a note regarding pendency of the present suit shall be made in the sale deed, till the disposal of application for Temporary Injunction by the trial Court.

The Trial Court is directed to decide the application for temporary injunction within a period of 15 days' after receipt of the order without being prejudiced by any observations made in this order.

The appeal stands disposed of in above terms and stay application also stands disposed of accordingly.

TN/

