Karnataka High Court
M/S Vaswani Estates Developers ... vs M/S Bangalore Baptist Church on 1 September, 2017
Author: B.Veerappa

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1st DAY OF SEPTEMBER, 2017

BEFORE

THE HON'BLE MR. JUSTICE B. VEERAPPA

MISCELLANEOUS FIRST APPEAL NO.10331/2013 (CPC)

BETWEEN:

M/S VASWANI ESTATES DEVELOPERS
PRIVATE LIMITED,
A COMPANY INCORPORATED
UNDER THE COMPANIES ACT, 1956,
HAVING ITS REGISTERED OFFICE AT NO.30,
VICTORIA ROAD, BANGALORE 560047,
REPRESENTED BY ITS
GENERAL MANAGER-LIAISON,
MR. LAVA KUMAR
... APPELLANT

(BY SRI G. L. VISHWANATH, ADVOCATE)

AND:

1. M/S BANGALORE BAPTIST CHURCH,
A REGISTERED TRUST AND
HAVING ITS OFFICE AT NO.11,
COMMISSARIAT ROAD,
BANGALORE-560025.
REPRESENTED BY ITS CHAIRMAN
AND PASTOR REV. A. DANIEL BHASME.

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2. PASTOR DANIEL A BHASME,
AGED ABOUT 45 YEARS,
S/O LATE B. ANANTH,
RESIDING AT NO.11, COMMISARIAT ROAD,
BANGALORE 560025

3. MR. HENRY COX

AGED ABOUT 58 YEARS,
S/O LATE C.D SAMUEL,
NO.10, NANDINI STREET,
RAMMURTHY NAGAR,
BANGALORE 560016.

4. MUTHUSWAMYBHAGYA RAJ,
AGED ABOUT 44 YEARS,
S/O LATE MUTHUSWAMY,
RESIDING AT 629/2, 1ST MAIN,
12TH CROSS, VINAYAKANAGARA,
AFP EXTENSION, BANGALORE 560017.

5. MR. JAMESH THEOPHILUS BHASME,
AGED ABOUT 55 YEARS,
S/O MR. B. ANANTH,
RESIDING AT 1472,
PEACE HOME, 14TH CROSS,
PRASHANTH NAGAR, DASARAHALLI,
BANGALORE 560057.

6. MR. PREMASUNDAR K. MANUKUMARAN,
AGED 55 YEARS,
S/O LATE MUNUKUMARAN,
RESIDING AT NO.29, 1ST FLOOR,
KARIYAPPA LAYOUT,
2ND MAIN ROAD, YERENAPALYA,
RAMMURTHY NAGAR POST,
BANGALORE 560016.

7. MR. SHANTH RAJ,
AGED ABOUT 68 YEARS,
S/O LATE NARASAPPA,
NO.28, SUVERNANILAYA,
2ND CROSS, 3RD BLOCK,
NAGARBHAVI, BANGALORE 560072.

8. BANGALORE BAPTIST CHURST TRUST,
CLAIMING TO BE A TRUST AS PER A
SUPPLEMENTAL TRUST DEED,
DATED 21.09.2005 AND CLAIMING
TO HAVE ITS OFFICE AS PER
CAVEAT PETITON DATED 31.10.2011
AT NO.7, COMMISSARIAT ROAD,
BANGALORE 560025.
REPRESENTED BY ITS MANAGING TRUSTEE.

9. MR. WILFRED SAMUEL,
AGED ABOUT 78 YEARS,
S/O MR. SAMUEL RAJAGOPAL,

NO.16, BALAJI LAYOUT, COOKE TOWN,
BANGALORE 560084.

10. MR. R. ABSOLOM,
AGED ABOUT 85 YEARS,
S/O MR. ROBERT,
NO.126, CAIVERU STREET,
9TH CROSS, RAMAMURTHY NAGAR,
BANGALORE 560016.

11. MR. S.C. EMMANUEL,
AGED ABOUT 77 YEARS,
S/O MR. JACOB SAMUEL,
RESIDING AT NO.8, CALRION APARTMENT,
NO.301, RAMAMURTHYNAGAR ROAD,
KAMMANNAHALLI, BANGALORE 560084.

12. MR. GLENDOUR KARL ROBSON,
AGED ABOUT 65 YEARS,
S/O MR. N.B. ROBSON,
RESIDING AT NO. 1681, 2ND CROSS,
SHIVARAMAIAH LAYOUT,K.K HALLI,
BANGALORE 560043.

13. MR. THOMAS KURIEN,
FATHER"S NAME NOT KNOWN
TO THE APPELLANT, AGED: MAJOR,
RESIDING AT "CHAGEAU MARIA",
NO.27, HUTCHINS ROAD,
FRAZER TOWN,
BANGALORE 560005.

14. MR. GEORGE VARKEY
FATHER"S NAME NOT KNOWN
TO THE APPELLANT, AGED: MAJOR,
RESIDING AT SHELTER NO.29, 2ND MAIN,
MUNIREDDY LAYOUT, HORAMAVU MAIN ROAD,
BANGALORE 560043.

15. MR. CHARLES ISSAC,
FATHER"S NAME NOT KNOWN
TO THE APPELLANT, AGED: MAJOR,
RESIDING AT 316, 1ST CROSS, 3RD BLOCK,
H .R.B.R LAYOUT, ST.THOMAS TOWN,
BANGALORE 560084.

16. MR. CHARLES PRABHAKAR,
FATHER"S NAME NOT KNOWN
TO THE APPELLANT, AGED: MAJOR,

RESIDING AT HITANANDA-2,
1ST FLOOR, NO.48, LAVELLE ROAD,
BANGALORE 560001.
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17. M/S.NITESH ESTATES LIMITED,
NITESH TIMESQUARE LEVEL 7,
8, M.G. ROAD, BANGALORE 560001.
BY ITS MANAGING DIRECTOR,
... RESPONDENTS

(BY SRI J. RAVICHANDRAN, ADVOCATE FOR R2;
SRI PADMANABHA MAHALE, SENIOR COUNSEL FOR
SRI NAVEEN AHMED, ADVOCATE FOR R8;
SRI S.S. NAGANAND, SENIOR COUNSEL FOR
SRI SRIRANGA, ADVOCATE FOR R17;
SRI BIPIN HEGDE, ADVOCATE FOR R11, R15 AND R16;
R4 IS SERVED, BUT NOT REPRESENTED;
VIDE ORDER DATED 16.02.2017 NOTICE TO R1, R3,
R5 TO R10 AND R12 TO R14 IS DISPENSED WITH)

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THIS MFA IS FILED UNDER ORDER 43, RULE 1(r) OF CPC, AGAINST THE ORDER DATED:5.9.2013 PASSED ON IA NO.2 IN O.S.NO.1884/2013 ON THE FILE OF THE 5TH ADDITIONAL CITY CIVIL JUDGE, BANGALORE, DISMISSING IA NO.2 FILED UNDER ORDER 39, RULES 1 & 2 OF CPC.

THIS MFA IS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:
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JUDGMENT

This is the plaintiff's Miscellaneous First Appeal against the order dated 5.9.2013 on I.A. No.2 in O.S. No.1884/2013 on the file of the 5th Additional City Civil Judge, Bangalore city dismissing the application - I.A. No.2 filed by the plaintiff under Order XXXIX Rules 1 and 2 of Code of Civil Procedure, 1908.

I. BRIEF FACTS OF THE CASE

2. The appellant - plaintiff filed the suit for declaration that the defendant Nos.8 to 16 have no manner of right, title or interest to deal, transact or meddle in respect of the suit schedule property and for specific performance directing the defendant Nos.1 to 7 to execute a Joint Development Agreement in favour of the plaintiff in respect of the schedule property in terms of the Memorandum of Understanding dated 2.9.2011 and for Permanent Injunction restraining the defendant Nos.1 to 16, their agents etc., from entering, alienating, dealing or otherwise encumbering the schedule property to the detriment and exclusion of the plaintiff's rights as per the Memorandum of Understanding dated 2.9.2011 and for Permanent Injunction restraining the defendant No.17 from interfering or developing the suit schedule property in collusion with the defendant Nos.1 to 16 and to direct the defendants to pay the costs of litigation expenses.

3. It is the case of the plaintiff that it is a private limited company incorporated under the provisions of the companies Act, 1956 and it is a reputed builder and developer of real estate in Bangalore and certain other cities in India. The defendant Nos.2 to 7 represented to the plaintiff that one Rev. Edmund Marasden had purchased the property bearing Old No.97, New No.11 situated at Commissariat Road, Bangalore morefully described in the schedule to the plaint from the Government of Mysore in the year 1854 for a sale consideration of Rs.900/-. The said property was purchased to establish a place for worship known as Ebenezer Chapel and accordingly church building was constructed.

4. It is further case of the plaintiff that defendant Nos.2 to 7 had also represented that 1st defendant is a registered Trust formed and established on 12.12.1867 by Pastor Rev. Edmund Marasden and the suit schedule property was transferred to the said trust and the same became the property of the Trustees. The trust deed came to be registered on 12.12.1867. It is further case of the plaintiff that defendant Nos.2 to 7 had further represented that 2nd to 7th defendants are the Trustees of the 1st defendant and that the 1st defendant is the absolute owner of the schedule property and the title of the 1st defendant to the suit schedule property is good, valid, subsisting, clear and marketable and that no one else has right, title or interest or share in the suit schedule property. Defendant Nos.2 to 7 on behalf of defendant No.1 had further represented that they were desirous of developing the schedule property on a joint development basis and hence arrived at an understanding with the plaintiff. Consequently defendant Nos.2 to 7 offered the schedule property for joint development on a lease basis for a period of 99 years. Accordingly a resolution came to be passed on 21.8.2011 to develop the suit schedule property through the plaintiff and the 2nd defendant was authorized to act on behalf of defendant No.1 and defendant Nos.3 to 7.

5. It is further case of the plaintiff that the plaintiff and defendant Nos.1 to 7 had entered into Memorandum of Understanding ('MoU' for short) on 2.9.2011. As per clause 2(i) of the MoU dated 2.9.2011, on the execution of a Joint Development Agreement, the plaintiff shall pay an amount of Rs.3,00,00,000/- (Rupees three crores only) to the 1st defendant as interest free refundable security deposit. Out of the said Security Deposit, the plaintiff has paid Rs.10,00,000/- (Rupees ten lakhs only) on 5.9.2011 by way of Pay Order and the same was acknowledged by defendant NOs.1 to 7. As per Clause 3 of the MoU, the plaintiff was entitled to take out a public notice regarding the proposed transaction and in the event of any objections, claims or demands being received, the same would have to be fully satisfied and rectified by defendant Nos.1 to 7. Accordingly the public notice was

issued in "Times of India", an English Daily newspaper on 10.9.2011 informing the general public about the plaintiff's intention of going ahead with the aforesaid transaction. In reply to the same, certain objections were raised by the 8th defendant. Subsequently certain payments were made by the plaintiff to the defendant no.1, totaling a sum of RS.18,95,814/-. The plaintiff has patiently waited for resolution of certain objections raised by the 8th defendant. When things stood thus, the 2nd defendant issued a letter dated 25.9.2012 on behalf of the 1st defendant purporting to cancel the MoU dated 2.9.2011 citing false and flimsy reasons and the plaintiff was shocked to receive the said letter and was unable to fathom the reasons for seeking cancellation.

6. The plaintiff further contended that as per Clause 13 of the MoU dated 2.9.2011, the parties are bound to submit all disputes and differences arising out of or in connection with the agreement to arbitration in terms of the provisions of the Arbitration & Conciliation Act, 1996. The plaintiff was intended to refer the dispute to arbitration in terms of the said clause. Since the conduct of defendant Nos.1 to 7 in making illegal attempts to unilaterally terminate the said contract was wholly illegal, the plaintiff was constrained to take recourse to the provisions of Section 9 of the Arbitration & Conciliation Act. Accordingly, the plaintiff had filed Arbitration Application No.755/2012 and the City Civil Court was pleased to grant an exparte order of status-quo on 17.10.2012 in respect of the suit schedule property and same was extended from time to time and the defendant Nos.1 to 7 have violated the said order and permitted the 17th defendant to place his name plate on the temporary structures in the suit schedule property. Defendant Nos.9 to 12 alongwith late Mr. A.J. Rathnam Philip claim to have resolved on 6.7.2005 to review the terms and conditions of the original trust deed of 1867 and thereafter defendant Nos.13 to 16 have colluded with defendant Nos.9 to 12 and appear to have been inducted into the fake trust deed. It is further contended that defendant Nos.1 to 16 have colluded among themselves and joined hands with the 17th defendant, a real estate developer and attempting to alienate or encumber the suit schedule property to the determinant of the plaintiff's contractual rights. Therefore the plaintiff was constrained to file the suit for the reliefs sought for.

7. The plaintiff also filed I.A. No.2 for Temporary Injunction restraining the 17th defendant from changing the nature of the suit schedule property and from developing the schedule property and putting up any construction till the disposal of the suit, reiterating the averments made in the plaint. The defendants, muchless defendant No.17 has not filed the objections to I.A. No.2.

8. The trial Court considering the application and the material documents produced by the plaintiff by the impugned order dated 5.9.2013 dismissed I.A. No.2 for Temporary Injunction filed by the plaintiff under Order XXXIX Rules 1 and 2 of Code of Civil Procedure. Hence the present Miscellaneous First Appeal is filed. II. RIVAL CONTENTIONS OF LEARNED COUNSEL FOR THE PARTIES

9. I have heard the learned counsel for the parties to the lis.

10. Sri G.L. Vishwanath, learned counsel for the appellant vehemently contended that the impugned order passed by the trial Court rejecting the application for Temporary Injunction is erroneous and contrary to the material on record. He further contended that the plaintiff filed the suit for specific

performance of contract dated 2.9.2011 wherein defendant Nos.1 to 7 have specifically agreed to develop the property with the appellant-plaintiff and share the built up area on lease basis for a period of 99 years and the defendant Nos.1 to 7 have unilaterally terminated the MoU without any valid grounds. The trial court ought to have to granted Temporary Injunction. He further contended that the 17th defendant has not filed either the written statement or the objections. Inspite of the same, the trial Court proceeded to reject the application erroneously. He further contended that the relief sought in the suit is to declare that defendant Nos.8 to 16 have no manner of right, title and interest to deal, transact or meddle in respect of the suit schedule property and for specific performance directing the defendant Nos.1 to 7 to execute the Joint Development Agreement in favour of the plaintiff. The trial Court has not considered the material documents produced while rejecting the application filed for Temporary Injunction erroneously. He further contended that Clause 10.3 of the MoU states that upon execution of and registration of the JDA and GPA, the first party aggress to grant license to the developer to enter upon the schedule property to develop the same. During the interregnum, the developer will be entitled to do soil testing, installation of borewell, excavation of land and site preparatory work so that there is less loss of time. He would further contend that Clause 13.1 of the MoU states that in the event of any dispute or difference between the parties related to the terms of the MoU or any part thereof, the same shall be resolved through arbitration under the provisions of the Arbitration and Conciliation Act, 1996. Clause 14 of the MoU deals with regard to specific performance. He further contended that defendant Nos.1 to 7 have colluded with defendant Nos.8 to 16 to deprive the rights of the plaintiff. Therefore plaintiff filed Arbitration Application No. No.755/2012 against defendant Nos.1 to 7 and there is an interim order granted by the Court below. He further contended that the trial Court while considering the application for Temporary Injunction has decided the rights of the plaintiff which is impermissible in law. The trial Court without considering the primafacie case made out by the plaintiff has proceeded to reject the application for Temporary Injunction erroneously.

11. In support of his contentions, the learned counsel for the appellant-plaintiff relied upon the judgment of this court in the case of KRISHNA MOORTHY .vs. BANGALORE TURF CLUB & OTHERS reported in (1975)2 Kar.LJ 428 wherein this Court observed that the traditional theory underlying the grant or refusal of interlocutory injunctions has always been that the Court abstains from expressing any opinion upon the merits of the case until the hearing, but acts merely to minimize the sum total of irreparable damage to the litigants.

12. Learned counsel for the appellant further relied upon the judgment of the Hon'ble Supreme Court in the case of MAHARWAL KHEWAJI TRUST (REGD.), FARIDKOT .vs. BALADEV DASS reported in AIR 2005 SC 104. In the said judgment, the Hon'ble Supreme observed as under:

> 10. Unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the 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 the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the schedule property to better

> use. We do not think in the facts and circumstances of this case, the lower appellate Court and the High Court were justified in permitting the respondent to change the nature of property by putting up construction as also by permitting the alienation of the property, whatever may be the condition on which the same is done. In the event of the appellant's claim being baseless ultimately, it is always open for the respondent to claim damages, or in an appropriate case, the Court may itself award damages for the loss suffered.

13. Learned counsel for the appellant further relied upon the judgment of the Hon'ble Supreme Court in the case of ANAND PRASAD AGARWALLA .vs. TARAKESHWAR PRASAD AND OTHERS reported in AIR 2001 SC 2367 wherein the Hon'ble Supreme Court held that it may not be appropriate for any Court to hold mini trial at the stage of grant of Temporary Injunction.

14. Therefore Learned counsel for the appellant sought to set aside the impugned order passed by the trial Court by allowing the present appeal

15. Per contra, Sri S.S. Naganand, learned senior counsel appearing for the 17th respondent - 17th defendant sought to justify the impugned order passed by the trial Court and contended that admittedly the alleged MoU entered into between defendant Nos.1 to 7 and the plaintiff on 2.9.2011 is an unregistered document. The 17th defendant has entered into JDA with 8th defendant on 27.10.2011. Later it was submitted for registration on 27.6.2012. However, it was registered only on 27.2.2015 due to non-payment of the stamp duty within time. He further contended that as on the date of filing of the suit, the very alleged MoU relied upon by the plaintiff dated 2.9.2011 was not existing as admitted by the plaintiff in paragraph-19 of the plaint averments. In paragraph-19 of the plant, it was admitted that MoU was cancelled on 25.9.2012. Therefore the very suit filed by the plaintiff is not maintainable and hence question of granting Temporary Injunction does not arise. Learned senior counsel further contended that in view of the arbitration clause included in the MoU dated 2.9.2011, the plaintiff also initiated proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 before the City Civil Court, Bangalore in AA No.755/2012 and sought for injunction and the said Court has directed the parties to maintain status-quo as regards title of the suit schedule property. Hence the plaintiff cannot maintain parallel proceedings for the same relief simultaneously and the same is impermissible. The learned senior counsel further contended that admittedly the plaintiff has not sought to set aside the letter dated 25.9.2012 issued by the 2nd defendant on behalf of the 1st defendant canceling the MoU dated 2.9.2011 and therefore the plaintiff has no locus standi to file the suit. Therefore the trial court was justified in rejecting the application for Temporary Injunction. Therefore he sought to dismiss the present appeal.

16. In support of his contentions, the learned senior counsel appearing for the Respondent No.17 relied upon the judgment of this Court in the case of M. CHIDAMBARAM .vs. N. SARGUNAM reported in ILR 1989 KAR 1357 wherein this held that the suit filed for specific performance of contract to enforce the agreement of sale does not create a right in the property, it creates a personal right to demand specific performance.

17. The learned senior counsel further relied upon the Judgment in the case of STAR APPARELS PRIVATE LIMITED .vs. PARMPREET SINGH BINDRA @ KING BINDRA AND OTHERS reported in 2009(2) Mh.LJ 76 wherein it is observed that: "Since there were no legal rights that the plaintiffs could seek to enforce under their initial MoU with defendant No.1 or upon the MoU between defendant NO.3 and defendant NO.1, the acts that culminated into the final contract between the defendant NO.1 and defendant No.7 need not be considered by the Court. The fact remains that the negotiations did not culminate into an agreement in favour of the plaintiffs."

18. The learned senior counsel appearing for the respondent further relied upon the judgment in the case of HERITAGE LIFESTYLE AND DEVELOPERS LTD., .vs. COOL BREEZE CO-OPERATIVE HOUSING SOCEITY LIMITED AND OTHERS reported in 2014(3) Mh.LJ 376 wherein it is observed at paragraphs 36 and 37 as under:

> "36. At this stage it would be appropriate to refer to one of the arguments advanced by the learned counsel appearing for the petitioner that the said MOU would not require payment of any stamp duty as the same did not grant any development rights but provided that the development agreement would be entered in future. No rights had been created in favour of the petitioner till conditions set out in the said MOU were satisfied. At the same breath the petitioner also submits that nothing is left for negotiation or to be agreed upon between the parties in future. In my view, the argument of the petitioner that all the terms and conditions are already agreed upon in the MOU and nothing further was to be agreed upon by entering into a development agreement is self destructive and is contrary to the submissions of the petitioner that under the said MOU, no development rights are created in favour of the petitioner but it provided that the development agreement would be entered into in future and no rights had been created in favour of the petitioner till conditions set out in the MOU were satisfied.

37. xxx xxx, the said MOU at the most could be considered as an agreement to enter into an agreement in future subject to various contingencies set out therein. In my prima-facie view such MOU thus cannot be specifically enforced. In my prima facie view specific performance of an agreement to enter into an agreement cannot be granted."

19. Learned senior counsel appearing for the Respondent No.17 further relied upon the Judgment of the Hon'ble Supreme Court in the case of PURPLE MEDICAL SOLUTIONS PRIVATE LIMITED .vs. MIV THERAPEUTICS INC. AND ANOTHER reported in (2015)15 SCC 622 wherein the Hon'ble Supreme Court held as under:

> "xxx xxx it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e., non-signatory party, is claiming or is sued as being directly affected through a party

> to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

20. Learned senior counsel appearing for Respondent No.17 lastly relied upon judgment of this Court in the case of LAKSHMINARASIMHIAH AND OTHERS .vs. YALAKKI GOWD reported in AIR 1965 Mysore 310 wherein it is held that injunction cannot be granted in doubtful cases.

21. Sri Padmanabha Mahale, learned senior counsel appearing for Respondent No.8; Sri J.Ravindran, learned counsel appearing for Respondent No.2 and Sri Bipin Hegde, learned counsel appearing for Respondent NOs.11, 15 and 16 sought to justify the impugned order and also supported the arguments of the learned senior counsel appearing for the respondent No.17 and sought for dismissal of the appeal.

III. POINTS FOR DETERMINATION

22. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the points that arise for consideration in the present Miscellaneous First Appeal are:

> 1. Whether the trial Court is justified in passing the impugned order dismissing the application for Temporary Injunction filed under Order XXXIX Rules 1 and 2 of Code of Civil Procedure ?
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> 2. Whether the appellant has made out any primafacie case for interference by this Court exercising the powers of the appellate jurisdiction under Order XLIII Rule 1(r) of Code of Civil Procedure ?
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> IV. CONSIDERATION
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> 23. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties and perused the materials available on record carefully.

24. It is an admitted fact that the present appellant who is the plaintiff before the trial Court filed the suit for declaration that defendant Nos.8 to 16 have no manner of right, title or interest to deal, transact or meddle in respect of the suit schedule property and for specific performance directing the defendant Nos.1 to 7 to execute a Joint Development Agreement in favour of the plaintiff with respect to the suit schedule property in terms of the MoU dated 2.9.2011 and for Permanent Injunction restraining the defendant Nos.1 to 16 from entering or, alienating, dealing or otherwise encumbering the suit schedule property and also for Permanent Injunction restraining the defendant No.17 from interfering or developing the suit schedule property, contending that the plaintiff has entered into MoU with the defendant Nos.1 to 7 on 2.9.2011 and paid a sum of Rs.18,95,814/- to the defendants 1 to 7 pursuant to the MoU. It is further case of the plaintiff that

though the plaintiff was awaiting to pass a resolution to enter into an agreement in terms of the MoU, the 2nd defendant issued letter on 25.9.2012 on behalf of the 1st defendant purporting to cancel MoU dated 2.9.2011 citing false and flimsy reasons.

25. It is further case of the appellant-plaintiff that defendant Nos.1 to 16 have colluded among themselves and have joined the hands with 17th defendant, a real estate developer and attempting to alienate/encumber the schedule property to the detriment and exclusion of the plaintiff's contractual rights. The plaintiff initially intended to resolve the dispute with defendant Nos.1 to 7 through arbitration. However, since defendant Nos.1 to 7 have colluded with defendant Nos.8 to 17 with whom the plaintiff does not have an arbitration agreement, the plaintiff has filed comprehensive suit seeking specific performance of its rights under the MoU dated 2.9.2011 and for Permanent Injunction against defendant Nos.1 to 17. It is also stated in the plaint that plaintiff would take steps to withdraw the arbitration application pursuant to the suit.

26. The trial Court considering the application as well as the documents produced by the plaintiff has recorded a finding on scrutiny of the entire I.A. and the affidavit that it is not clear as what is the document executed by defendant Nos.1 to 7 in favour of defendant Nos.8 to 16 or what is the document executed by defendant Nos.1 to 7 in collusion with defendant Nos.8 to 16 in favour of defendant No.17; It is only the apprehension of the plaintiff that the 17th defendant has displayed the Board for developing the property and therefore it has sought for Temporary Injunction without showing any hardship, primafacie case and balance of convenience in its favour; On reading each and every line in the MoU, the right of the plaintiff is uncertain; The plaintiff will get right only after execution of the JDA between the plaintiff and defendant Nos.1 to 7. The trial Court further recorded a finding that the plaintiff has already approached the arbitration Court and the lis is pending for adjudication. It is settled law that no party can accrue two causes of action to file the suit as well as the Arbitration Proceedings. Therefore the trial Court was of the specific opinion that the application for Temporary Injunction is not maintainable in view of the dictum of the Hon'ble Supreme Court in the case of SUKANYA HOLDINGS PRIVATE LIMTIED .vs JAYESH H. PANDYA reported in AIR 2003 SC 2252. The trial Court also recorded a finding that the plaintiff has utterly failed to establish primafacie case, balance of convenience and that if the order of the Temporary Injunction is not granted, he will be subjected to greater hardship. Therefore the trial Court rejected the application.

27. On plain reading of the averments made in the plaint, it is clear that the plaintiff has entered into MoU with defendant Nos.1 to 7 on 2.9.2011 and the 2nd defendant on behalf of the 1st defendant has cancelled the MoU on 25.9.2012 and same is admitted by the plaintiff in the plaint averments. Admittedly the plaintiff has not sought for setting aside the said cancellation letter dated 25.9.2012 issued by defendant Nos.1 and 2. Therefore as on the date of filing of the suit i.e., 7.3.2013 the MoU dated 2.9.2011 was not existing.

28. It is also not in dispute that as per the terms and conditions of the MoU dated 2.9.2011 i.e., in view of Clause-13 of the MoU, the appellant - plaintiff already approached the Prl. City Civil & Sessions Judge in AA No.755/2012 against defendant Nos.1 to 7. The trial Court by the interim order dated 17.10.2012 directed defendant Nos.1 to 7 to maintain status-quo as regards title of the suit

schedule property and the order of status-quo was extended until further orders on merits of the main matter on 18.11.2015 and admittedly the said Arbitration Application between the parties is now posted for orders on I.A. by 14.9.2017.

29. The plaint averments clearly depict that since defendant Nos.1 to 7 have colluded with defendant Nos.8 to 17 and defendant Nos.8 to 17 are not parties to the MoU, the comprehensive suit is filed. The fact remains that in respect of the very property in question, the plaintiff already filed AA No.755/2012 and obtained an order directing the defendant Nos.1 to 7 to maintain status-quo till further orders on merits on main matter. In view of the same, there is no prohibition to implead the defendant Nos.8 to 17 in the said arbitration case. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e., non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements and such 3rd party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, it may be possible to say that even such third party can be referred to arbitration. Admittedly in the present case, it is the specific case of the plaintiff that subsequent to the MoU entered into between the plaintiff and defendant nos.1 to 7, the defendant Nos.1 to 7 executed a subsequent deed/agreement in favour of defendant Nos.8 to 16 and in turn defendant Nos.8 to 16 executed an agreement/document in favour of the 17th defendant. Therefore the plaintiff ought to have impleaded the subsequent agreement holders who stepped into the shoes of the original defendants in the arbitration proceedings pending between the plaintiff and defendant Nos.1 to 7.

30. My view is fortified by the dictum of the Hon'ble Supreme Court in the case of CHLORO CONTROLS INDIA (P) LIMITED .vs. SEVEN TRENT WATER PURIFICATION INC. reported in (2013)1 SCC 641 and the same is reiterated in the latest judgment of the Hon'ble Supreme Court in the case of PURPLE MEDICAL SOLUTIONS PRIVATE LIMITED .vs. MIV THERAPEUTICS INC. AND ANOTEHR reported in (2015)15 SCC 622 wherein at paragraphs 12 and 14, the Hon'ble Supreme Court held as under:

> 12. According to the petitioner, the second respondent is an alter ego of the first respondent. The first respondent is merely a corporate veil of the said respondent. All acts/deeds/transactions on behalf of the first respondent were performed by the second respondent including signing of the two agreements; the representations made; and the commitments and undertakings furnished. It is, therefore, submitted that the appointment of an arbitrator to be made by the Court should not only be on behalf of the first respondent but also on behalf of the second respondent. To support the above, reliance has been placed on the decision of this Court in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. [(2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] The relevant paragraphs placed before the Court may be extracted hereinbelow: (SCC pp. 694-95, paras 102-04 & 107).
>
> "102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958

> New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is 'no' and the same is supported by a number of reasons.
>
> 103. Various legal bases may be applied to bind a non-signatory to an arbitration agreement:
>
> 103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle.

They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called 'the alter ego'), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of City of Prince George v. A.L.

Sims & Sons Ltd. [(1998) 23 YCA 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

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107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

14. A perusal of the relevant clauses of the agreements providing for arbitration and the facts set out herein adequately satisfies the Court that disputes and differences between the petitioner and the respondents have arisen which require resolution by a process of arbitration as contemplated in the

agreements between the parties. The petitioner had appointed its arbitrator (Mr Justice S.H. Kapadia, a former Chief Justice of India) and despite notice, the respondents have failed to make the requisite appointment. The said lapse/failure would confer jurisdiction under Section 11(6) of the Arbitration Act to appoint an arbitrator on behalf of the respondents. The facts stated in the present applications showing the involvement of the second respondent and the decision of this Court in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., [(2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689], in my considered view, would justify appointment of an arbitrator on behalf of both the respondents and permit the process of arbitration to be conducted by lifting the corporate veil to ascertain the role of the second respondent in the transactions in question as claimed by the petitioner.

31. It is also not in dispute that as on the date of filing of the suit by the plaintiff on 7.3.2013, the alleged MoU dated 2.9.2011 was not existing as the same was terminated by defendant Nos.1 to 7 on 25.9.2012 as admitted in the plaint at paragraph-19, which reads as under:

> 19. Whenever the Plaintiff confronted the Defendant Nos.2 to 7 regarding the clearance of objections and litigations, the reply was that it would be done at the earliest. The Plaintiff has patiently waited for the resolution of the same. When things stood thus, the 2nd Defendant issued a letter dated 25.09.2012 on behalf of the 1st Defendant purporting to cancel the MoU dated 02.09.2011 citing false and flimsy reasons. The letter dated 25.09.2012 states that the members of the Church have decided not to develop the property since there have been issues and has hence purported to cancel the MoU dated 25.09.2012.

32. In view of the cancellation letter dated 25.9.2012 stated supra cancelling MoU entered into between the plaintiff and defendant Nos.1 to 7, there were no legal rights to the plaintiff to seek to enforce the initial MoU dated 2.9.2011 entered into with defendant Nos. 1 to 7. The fact remains that negotiations between the plaintiff and defendants did not culminate into agreement in favour of the plaintiff and have culminated into the registered joint agreement between the defendant Nos.1 to 7 and defendant Nos.8 to 16. Therefore the very maintainability of the suit filed by the plaintiff on the basis of the non- existing MoU dated 2.9.2011 is doubtful.

33. On reading of the entire MoU entered into between the plaintiff and defendant Nos.1 to 7 dated 2.9.2011, it is clear that it would not require any payment of stamp duty as the same did not grant any development right and it only provides that the development agreement would be entered in future. No rights had been created in favour of the plaintiff till the conditions set out in the said MoU were satisfied. Admittedly in the present case as on the date of filing the suit, the alleged MoU was not existing. Therefore primafacie such MoU cannot be enforced.

34. According to the learned counsel for the appellant- plaintiff, none of the defendants have filed objections to I.A. no.2 for Temporary Injunction before the trial Court. The documents produced 1st time before this Court by the learned counsel for the defendants cannot be looked into. It is well settled principles of law that the plaintiff who approaches the Court for specific performance and other reliefs has to establish his case independently and he cannot succeed on the weakness of the

case of the defendants. So far as non-filing of the objections, is immaterial while considering I.A. for Temporary Injunction. It is for the plaintiff to prove primafacie case for grant of Temporary Injunction sought for by him. The plaintiff himself admitted in the plaint that MoU dated 2.9.2011 was cancelled by defendant Nos.1 to 7 on 25.9.2012 and suit filed on 7.3.2013. Therefore the plaintiff's right is uncertain in view of the non-existing MoU as on the date of filing the suit. The plaintiff has not made out any primafacie case to grant an order of Temporary Injunction exercising the powers under Order XXXIX Rules 1 and 2 of Code of Civil Procedure restraining the defendants or their agents, servants from changing nature of the schedule property or from developing the schedule property and not to put up any construction. The trial Court has recorded a finding that the plaintiff has failed to prove primafacie case and balance of convenience in his favour and therefore dismissed the application for Temporary Injunction.

35. For the reasons stated above, the 1st point raised in the present appeal is answered in the affirmative holding that the trial Court is justified in passing the impugned order dismissing the application filed by the plaintiff for Temporary Injunction under Order XXXIX Rules 1 and 2 of Code of Civil Procedure.

36. It is further contention of learned counsel for the appellant-plaintiff that in view of the MoU dated 2.9.2011, the defendant Nos.1 to 7 have taken payments out of the security deposit from the plaintiff stating reasons like security, investigation, new year and Christmas parties etc., in all a sum of Rs.18,95,814/-. The present appeal arises out of the order dated 5.9.2013 dismissing I.A. No.2 filed under Order XXXIX Rules 1 and 2 of Code of Civil Procedure for Temporary Injunction. Therefore this Court desists to observe anything on payment made by the plaintiff to defendant Nos.1 to 7. It is for the plaintiff to take proper steps against defendant Nos.1 to 7 to recover the said amount.

37. It is relevant to state at this stage that the plaintiff in the plaint averments has specifically stated that since the present suit is filed against all the defendants as a comprehensive suit seeking consolidated reliefs, the plaintiff would take steps to withdraw Arbitration Application No.755/2012 pursuant to the suit. Admittedly AA No.755/2012 was filed on 27.9.2012 and obtained an order directing the defendant Nos.1 to 7 to maintain status-quo as regards title of the schedule property till filing of the objections by an order dated 17.10.2012 and the said interim order continued from time to time and ultimately on 18.11.2015 it was extended till further orders on merits on main matter and admittedly now the matter is posted for orders on I.A. to 14.9.2017. Therefore it is clear from the material on record and as per the order sheet maintained in AA No.755/2012 that the said arbitration proceedings are also pending for adjudication and admittedly the plaintiff has not withdrawn the said arbitration proceedings as stated in paragraph-32 of the plaint in the present suit. The interim relief sought under Order XXXIX Rules 1 and 2 in the said AA No.755/2012 is for restraining the defendant Nos.1 to 7 or their agents or nominees or anybody claiming through or under them from encumbering or alienating or in any way parting with the possession of the schedule property or part thereof, or inducting any third parties into the schedule property. In the present suit, the plaintiff is seeking Permanent Injunction against defendant Nos.1 to 17 and in I.A. No.2 filed in the present suit, the plaintiff is seeking an order of Temporary Injunction restraining the 17th defendant, its agents, henchmen, representatives and assigns or any person/s claiming

under or through it from changing the nature of the schedule property, from developing the schedule property and not to put up any construction in any manner. On perusal of the reliefs sought in the suit and in the arbitration proceedings, it clearly indicates that the appellant is seeking parallel remedies simultaneously on the same cause of action and against defendant Nos.1 to 7 in arbitration proceedings and defendant Nos.1 to 17 in the present suit and same is impermissible in law.

38. It is further contention of the learned counsel for the appellant - plaintiff that the trial court while considering the application for Temporary Injunction has decided the same on merits of the suit, which is impermissible. There is no quarrel with the said contention raised by the learned counsel for the appellant. It is well settled principle of law that while deciding the I.A. for Temporary Injunction, the trial Court cannot decide the same on the merits of the suit and further observations made by the trial Court while deciding I.A. for Temporary Injunction shall not come in the way of either of the parties to establish their case independently based on the oral and documentary evidence to be adduced and produced by the parties.

39. The learned counsel for the appellant further relied upon the dictum of the Hon'ble Supreme Court in the case of MAHARWAL KHEWAJI TRUST (REGD.) FARIDKOT .vs. BALDEV DASS reported in AIR 2005 SC 104 wherein the Hon'ble Supreme Court while dealing with the powers of the appellate Court under Order XLIII Rule 1 and Order XXXIX Rules 1 and 2 of Code of Civil Procedure has observed that unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the 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 those circumstances, it was observed that the appellate Court and the High Court were not justified in permitting the respondent therein to change the nature of the property by putting up construction or permitting the alienation of the property. There is no quarrel with regard to law laid down by the Hon'ble Supreme Court to the facts and circumstances of the said case. Admittedly in the present case, the very maintainability of the suit filed by the plaintiff is doubtful in view of non-existence of the MoU dated 2.9.2011 entered into between the plaintiff and defendant Nos.1 to 7 as on the date of filing the suit. Therefore the dictum relied upon by the learned counsel for the appellant in the case of MAHARWAL KHEWAJI TRUST (REGD.), FARIDKOT .vs. BALADEV DASS reported in AIR 2005 SC 104 has no application to the facts and circumstances of the present case.

39. For the reasons stated above, the 2nd point raised in the present appeal is answered in the negative holding that the appellant has not made out any case for interference by this Court exercising the powers of the appellate jurisdiction under Order XLIII Rule 1 of Code of Civil Procedure.

CONCLUSION

40. The material on record clearly depicts that admittedly the appellant - plaintiff filed Arbitration Application No.755/2012 against defendant Nos.1 to 7 and obtained an interim order and same is still in force and during the subsistence of the said interim order, the present suit is filed for specific

performance, injunction etc., and as on the date of filing of the suit, the alleged Memorandum of Understanding entered into between the plaintiff and defendant Nos.1 to 7 dated 2.9.2011 was not existing and that the same was cancelled by the 2nd defendant on 25.9.2012 as admitted by the plaintiff in the plaint averments. Therefore, the very maintainability of the present suit filed by the plaintiff is doubtful. In such circumstances, the grant of equitable order of Temporary Injunction would not arise. My view is fortified by the dictum of this Court in the case of LAKSHMINARASIMHIAH AND OTHERS .vs. YALAKKI GOWD reported in AIR 1965 MYSORE 310. Therefore the trial Court is justified in rejecting the application for Temporary Injunction and no interference is called for exercising the powers of this Court under Order XLIII Rule 1 of Code of Civil Procedure in the absence of any perversity made out from the impugned order by the appellant.

40. In view of the peculiar facts and circumstances of the present case, it is needless to observe that any observations made by the trial Court while deciding the application for Temporary Injunction filed under Order XXXIX Rules 1 and 2 of Code of Civil Procedure and this Court while deciding the present appeal, shall not come in the way of either of the parties to establish their respective case independently after adjudication. It is also relevant to observe at this stage that the defendant Nos.8 to 17 who alleged to have entered into subsequent Joint Development Agreement with defendant Nos.1 to 7 shall not claim any equity and any development made shall be always subject to the result of the original suit pending between the parties.

41. Further, alienation, if any by any of the defendants during the pendency of the suit is always hit by the provisions of Section 52 of the Transfer of Property Act and the defendants shall not claim any equity in case the plaintiff succeeds in the suit.

41. Since both the parties are agitating the legal battle for the rights in respect of the immovable valuable suit schedule property and the suit was filed in the year 2013, I hope and trust that the trial Court will decide the suit expeditiously subject to cooperation of the parties to the lis.

With the above observations, Miscellaneous First Appeal is disposed of.

Sd/-

JUDGE Gss/-