

(2013) 07 GAU CK 0019

In the Gauhati High Court

Case No : Arbitration Appeal No. 2 of 2013

M/s. Brahmaputra Realtors Pvt. Ltd.

APPELLANT

Vs

M/s. G.G. Transport (P) Ltd. and Others

RESPONDENT

Date of Decision : 25-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 17, 37(1)(a), 42, 8
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 22 Rule 10, Order 39
Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 14(1)(a)
Transfer of Property Act, 1882 — Section 52, 54

Citation : (2014) 1 GLD 296

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : D. Baruah and Ms. B. Das, for the Appellant; P.K. Kalita, V. Sharma and Mr. G.J. Saikia, Advocates, for the Respondent

Judgement

A.C. Upadhyay, J.—This is an appeal u/s 37(1)(a) of the Arbitration and Conciliation Act, 1996, challenging the judgment and order dated 08.10.2012, passed by the Additional District Judge, No. 1, Kamrup, in Misc. (Arb) Case No. 366/2012, u/s 9 of the Arbitration and Conciliation Act, 1996, whereby direction was issued to the parties in litigation to maintain Status-quo in respect of the suit land in question, described in Schedule-C of the petition. Brief facts of the case is that the appellant is a Private Limited Company under the Companies Act, 1956, having its registered office at C-2054, A Sushant Lok-1, Gurgaon, Haryana, and being represented by its Director Sri Pradeep Harlalka. Whereas Respondent No. 2 and other respondents are joint owners of different plots of land including the suit land and Respondent No. 3 is a resident of Boko, in the district of Kamrup. On mutual arrangement, the Respondent No. 2 and the other respondents are occupying different plots of land and utilizing their share of land for their own purpose.

2. The Respondent No. 2 for proper management, control and supervision of his

share of land and also to develop his share of land described in the Schedule-A, appointed Respondent No. 3 as his lawful attorney by executing Deed No. 1259/11 dated 19.4.11 for doing the acts and deeds mentioned in the Irrevocable Power of Attorney, in favour of the Respondent No. 3. Apart from that the said Irrevocable Power of Attorney, the Respondent No. 2 earlier executed another registered Power of Attorney being Deed No. 221/11 (corrected as 94/11 dated 10.01.11), in favour of the Respondent No. 3.

3. By the said Power of Attorney, the Respondent No. 2 had given power to Respondent No. 3 to sell the plot of land mentioned in the Schedule of the said Power of Attorney and to receive consideration of such sale. By the said Power of Attorney, the Respondent No. 2 gave power to Respondent No. 3 to apply for permission for such sell and after obtaining of such permission from the competent authority to receive sale price and to deliver possession of the land to the purchaser.

4. That on the strength of the said registered Power of Attorney being Deed No. 221/11 dated 10.01.11, the Respondent No. 3 on behalf of the Respondent No. 2 entered into an agreement with the appellant for sale of land measuring 36 Bighas 3 Kathas 2 Lechas covered by different Dag Nos. and Patta Nos., for total consideration of Rs. 1,80,00,000/- and the said agreement for sale was registered as Deed No. 897/11 dated 1.2.11. However, the Respondent No. 2 revoked the Power of Attorney on 13.6.2011, executed in favour of Respondent No. 3 being Deed No. 94/11 dated 10.1.11 and Deed No. 1259/11 dated 19.4.11, which was earlier executed in favour of Respondent No. 3 on 16.6.2011, a suit was filed by Respondent No. 3 against the Respondent No. 2 for declaration and permanent injunction in respect of the revocation of Power of Attorney dated 10.1.2011. The suit was numbered as Title Suit No. 174/2011. However, the Respondent No. 3 sought to withdraw the suit on the ground of amicable settlement of the dispute without seeking any liberty. Subsequently on 6.9.2011, the agreement for sale, which is the bone of contention, executed by and between the Respondent No. 1 and Respondent No. 3 was also formally cancelled by mutually signing the deed of cancellation. In the meantime Respondent No. 1 filed a suit against the Respondent No. 2 to 6 seeking specific performance of the contract for sale and other consequential relief. The Respondent No. 2 in a suit being T.S. No. 342/11, had taken the plea that there was an arbitration clause in the agreement for sale and as such the matter should be referred to the Arbitrator as per Arbitration Clause and accordingly the learned Civil Judge No. 3 disposed of the title suit directing the parties to appear before the Arbitrator to settle their dispute. In the meantime, the respondents already sold out their respective shares to the appellant. The appellant started construction over the suit land and the respondents approached the Court of District Judge u/s 9 of the Arbitration and Conciliation Act 1996, praying for restraining the appellant in constructing any structure over the suit land. On an application filed u/s 9 of the Arbitration and Conciliation Act, 1996, the learned Addl. District Judge, Kamrup, vide impugned order dated 8.10.12 granted Status-

quo in respect of the suit land described in Schedule-C of the application.

5. The appellants have challenged the impugned order dated 08.10.2012 passed by the Court of the Additional District Judge No. 1, Kamrup at Guwahati in Misc. (Arb) Petition No. 366 of 2012 inter-alia, on the following grounds:

i) The Learned Court below failed to take note of the fact that the Agreement dated 01.02.2011, which contained the Arbitration Clause was not an Agreement between the Proforma Respondent Nos. 2, 4, 5 and 6 with the Respondent No. 1 but was an Agreement between the Respondent No. 3 with the Respondent No. 1 and as such the Arbitration Clause could not have been invoked against the Proforma Respondent Nos. 2, 4, 5 and 6 as the said proforma Respondent were not parties to the Agreement for Sale dated 01.02.2011.

ii) A perusal of the Agreement dated 01.02.2011 would go to show that the Proforma Respondent No. 3 had executed the said Agreement for and by himself and not as an Attorney of the Proforma Respondent No. 2. A closer scrutiny into the terms of the Agreement dated 01.02.2011 would further go to show that the Proforma Respondent No. 3 had executed the Agreement for and by himself stating inter-alia that he being the attorney and authorized representative of the Proforma Respondent No. 2 was authorized to sell the land mentioned in the Power of Attorney. This exercise of power by the Proforma Respondent No. 3 cannot be equated with a circumstance where the Agent signs for and on behalf of the Principal. In order to substantiate the above facts, the appellant drew the attention of the Court to the following extracts of the Agreement for Sale, which are quoted herein below:-

SRI PRANAB MAHANTA, son of Late Padma Kanta Mahanta, aged about 40 years, by occupation business, by faith Hindu, and a resident of Boko Police Station, in the District of Kamrup(S), Assam, hereinafter referred to as "PROSPECTIVE SELLER/FIRST PARTY" (which expression shall unless repugnant to the context and meaning thereof shall include his heirs, executors, administrators and assigns) of the FIRST PART;

WHEREAS, the "PROSPECTIVE SELLER/FIRST PARTY" is the duly constituted Attorney and Authorised Representative of the absolute owner of the Scheduled Plot of Land, namely, Sri Bhupendra Sing Anand, son of late Santosh Singh Anand of Fatasil, Kalapahar, Guwahati-35,(Reference: Irrevocable General Power of Attorney, dated 10.01.2011, Sl. No. 275 and Deed No. 94 and Deed of Agreement, dated 10.01.2011, Sl. No. 276 and Deed No. 221.)

6. According to the learned counsel for the appellant, the Arbitration Clause which is contained in Clause 15 of the Agreement for Sale cannot be invoked against the Proforma Respondent No. 2 and not to speak of Proforma Respondent Nos. 4, 5 and 6, who had nothing to do with the Agreement dated 01.02.2011.

7. Learned counsel for the appellant relying on the judgment of the Hon'ble Supreme Court in Ganga Saran Vs. Ram Charan Ram Gopal, submitted that the

true construction of an Agreement must depend upon the import of the words used and not upon what the parties chose to say afterwards. The relevant extract of paragraph 6 is quoted here-in-below:

..... Since the true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards, it is unnecessary to refer to what the parties have said about it.

8. Learned counsel for the appellant submitted that the Agreement dated 01.02.2011, cannot be legally enforced against the Proforma Respondent Nos. 2, 4, 5 and 6, and as the said Agreement cannot be legally enforced against the said Proforma Respondents, the passing of the impugned order by the Learned Court below is illegal and arbitrary.

9. Learned counsel for the appellant further pointed out that without prejudice to the aforementioned submission, for the sake of argument, if it is construed that the Agreement for Sale was between the Proforma Respondent No. 2 and the Respondent No. 1 then also the dispute in question cannot be settled by Arbitration, in terms with Clause 15 of the Agreement dated 01.02.2011, inasmuch as the Appellant is not a party to the Arbitration Agreement. The dispute so raised by the Respondent No. 1 is for the alleged breach of the Agreement dated 01.02.2011 by the Proforma Respondent No. 2, for which it has sought for a decree for specific performance of the Agreement dated 01.02.2011. This aspect of the matter is apparent from a reading of the reliefs claimed in Title Suit No. 342/2011. But the question which arise for consideration is as to whether the said specific performance of the Agreement dated 01.02.2011 could be sought for in absence of the Appellant, who admittedly had purchased a part of the Schedule - "C", property from the Proforma Respondent Nos. 2, 4, 5 and 6 vide Registered Deeds of Sale and more so, in terms of Section 54 of the Transfer of Property Act, 1882, the right, title and interest in respect to the said lands stood transferred by way of sale.

10. Learned counsel for the appellant pointed out that there cannot be an Arbitration in respect to a dispute which involves parties, who are not parties to the Arbitration Agreement. Another relevant question was also indicated as to whether an Arbitral Tribunal can decide a dispute of specific performance of the Agreement for Sale dated 01.02.2011, without taking into consideration the admitted position that the lands against which specific performance has been sought for have already been sold off. All these above questions are relevant for adjudication of the instant dispute, inasmuch as the aforesaid aspects touches on the very jurisdiction of the learned Court below, for grant of interim measures.

11. Undisputedly, as a matter of fact, a proceeding u/s 9 of the Act of 1996 is meant for formulating interim measures, so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Meaning thereby that the proceedings u/s 9 of the Act of 1996, is to grant interim measures during the period of pre and post Arbitration proceedings. However, during the

Arbitration proceedings, the parties would at liberty to take recourse of Section 17 of the Act of 1996.

12. In the proceedings u/s 9 of the Act of 1996 are akin to proceedings under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908 save and except that the proceedings under Order XXXIX Rule 1 and 2 of the Code has to be resorted to during the pendency of the Suit, whereas the proceedings u/s 9 of the Act of 1996 is to be done pre and post Arbitration Proceedings. However, it is not disputed that the principles for grant of injunction in a proceedings under order XXXIX Rule 1 and 2 of the CPC as well as for grant of interim measures u/s 9 of the Act of 1996 are the one and the same.

13. The existence of a prima-facie case is to be tested on various factors and one amongst them is as to whether the Arbitration proceedings, which in the instant case is to be initiated would be maintainable against the appellant. To lend support to the aforesaid proposition, learned counsel for the appellant drew attention of this Court to the Judgment of the Apex Court rendered in the case of Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, wherein it was observed that the purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principles - *ex debito justitiae*. Before any such order is passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

14. In order to analyze the above principle, it would be relevant to take note of the facts of the instant case. The case of the Respondent No. 1 as alleged in the Application filed u/s 9 rests on an Agreement dated 01.02.2011, for sale of 36 Bighas of land between the Proforma respondent No. 2 with the Respondent No. 1. The case of the Respondent No. 1 that after the cancellation of the Power of Attorney dated 10.01.2011, the Respondent No. 1 requested the Respondent No. 2, for filing applications for seeking permission to sale so that the land could be sold out. However, the Respondent No. 2 did not do so, for which a Suit for specific performance was filed against the Respondent No. 2 as well as the Respondent Nos. 3, 4, 5 and 6. The said Suit was registered and numbered as Title Suit No. 342/2011. In the meantime, Respondent No. 2 had filed an application u/s 8 of the Act of 1996, for referring the matter to the Arbitration. However, during the pendency of the said Suit i.e. Title Suit No. 342/2011, the lands in question were sold out to the Appellant. The learned Court of Civil Judge No. 3, Kamrup at Guwahati referred the parties to Arbitration on 19.12.2011. In the meantime, the Respondent No. 1 had filed the Application u/s 9 of the Act of 1996, seeking interim measures restraining the Appellant from carrying out any construction over the Suit land.

15. Apparently, Respondent No. 1 contemplated initiation of Arbitration proceeding for breach of the Agreement dated 01.02.2011, for specific

performance of the said Agreement, which is evident on a perusal of the relief sought for in Title Suit No. 342/2011.

16. Learned counsel for the appellant raised a question as to whether the said dispute, in view of the various developments, be arbitrated upon, since in a Suit for specific performance of an Agreement for Sale, a purchaser with or without notice of the said Agreement is a necessary party, as he would be affected by any award so passed. In the instant case, the Appellant admittedly is a purchaser of the Suit land and any award passed by any Arbitrator would affect his rights. Unless the right over the suit land acquired by the appellant is negated, the arbitral Court would not have jurisdiction to disturb his rights. In order to substantiate the said submission, learned counsel for the appellant relied on the Judgment of the Hon'ble Supreme Court rendered in the case of Kasturi Vs. Iyyamperumal and Others, wherein it was observed as follows:

7. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.

17. Learned counsel for the appellant pointed out that there is no scope for the appellant to participate in the Arbitration proceedings in view of the well established principle of law that it is only the parties to the Arbitration Agreement, who can be parties to the Arbitration proceeding. In order to establish the aforesaid submission, learned counsel for the appellant relied on the decision of the Apex Court rendered in the case of S.N. Prasad, Hitek Industries (Bihar) Ltd. Vs. Monnet Finance Ltd. & Ors., reported in S.N. Prasad Vs. Monnet Finance Ltd. and Others, wherein it was observed as follows:

8.....Thus there can be reference to arbitration only if there is an arbitration agreement between the parties. The Act makes it clear that an Arbitrator can be appointed under the Act at the instance of a party to an arbitration agreement only in respect of disputes with another party to the arbitration agreement. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitrator can be only with respect to the parties to the arbitration agreement and not the non-parties.

24. The apprehension of the first respondent that an anomalous situation may arise if there are two proceedings (one arbitration proceedings against the borrower and one guarantor and a suit against another guarantor), is not a relevant consideration as any such anomalous situation, if it arises, would be the own-making of the first respondent, as that is the consequence of its failure to require the appellant to join in the execution of the loan agreements. Having made only one of the guarantors to execute the loan agreements and having failed to get the appellant to execute the loan agreements, the first respondent cannot contend that the appellant who did not sign the loan agreements containing the arbitration clause should also be deemed to be a party to the arbitration and be bound by the awards. The issue is not one of convenience and expediency. The issue is whether there was an arbitration agreement with the appellant.

25. As there was no arbitration agreement between the parties (the first respondent and appellant), the impleading of appellant as a respondent in the arbitration proceedings and the award against the appellant in such arbitration cannot be sustained. As a consequence, both the arbitration awards, as against the appellant are liable to be set aside. If the first respondent wants to enforce the alleged guarantee of the appellant, it is open to the first respondent to do so in accordance with law.

18. Mr. Baruah, learned counsel for the appellant submitted that the Arbitral Tribunal would have no jurisdiction to arbitrate upon the instant dispute and to pass an effective award in as much as, on date, the lands in question have already been sold by Registered Deeds of Sale and mutations have been granted in favour of the Appellant. As on date, the Proforma Respondent No. 2, 4, 5 and 6 has no authority in respect to the Schedule-"C" land and as such the Arbitral Tribunal would not be in a position to enforce the Agreement dated 01.02.2011 without first setting aside the Deeds of Sale executed in favour of the Appellant. Learned counsel for the appellant further pointed out that the said Deeds of Sale cannot be set aside and cancelled by the Arbitral Tribunal primarily for two reasons - i) without the presence of the Appellant, the Sale Deeds executed in favour of the Appellant cannot be set aside and cancelled and as already submitted herein above, the Appellant cannot be a party to the Arbitration proceedings, and ii) the Arbitral Tribunal does not have the jurisdiction to arbitrate on disputes which relate to rights in rem. In the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, the Apex Court observed that-

35. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary

implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

36. The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

19. In the Case of Atul Singh and Others Vs. Sunil Kumar Singh and Others, it was also observed that in order to get share of profits from the partnership business, it was absolutely essential for the plaintiff appellants to have the partnership deed dated 17.2.1992 declared as illegal, void and inoperative. The relief for such a declaration could only be granted by the civil Court and not by an arbitrator as they or Shri Rajendra Prasad Singh through whom the plaintiffs derived title, are not party to the said deed. The trial Court had, therefore, rightly held that the matter could not be referred to arbitration and the view to the contrary taken by the High Court is clearly illegal.

20. Learned counsel for the appellant submitted that it would be very much clear that the Arbitration proceedings, which the Respondent No. 1 proposes to initiate cannot be effectively disposed of in the facts and circumstances of the instant case and consequently, there is no prima-facie case for grant of any interim measures.

21. Learned counsel for the appellant pointed out that in the instant case, a ridiculous situation has emerged, whereby the rights and liabilities of the Appellant, would be decided in an Arbitration proceedings, wherein the Appellant

cannot participate and the learned Court below failed to take into account the said aspect of the matter in the proper perspective.

22. Learned counsel for the Respondent No. 1 submitted that a lis was created in respect of the suit land during the pendency of Title Suit No. 342/2011 and during the pendency of the said lis, the suit land was sold and as such in view of Section 52 of the Transfer of Property Act, 1882, the purchase of the suit land was not legally enforceable. The learned Court below in the impugned Judgment had also given a categorical finding to that effect that as the lis was created during the pendency of the suit, the purchase of the suit land during lis by the Appellant was not legally enforceable. Learned counsel for the appellant pointed out that the said observations and findings of the learned Court below are against the doctrine of lis pendens.

23. The doctrine of lis pendens as enshrined in Section 52 of the Transfer of Property Act, 1882 is that if there is any transfer of any immovable property pendent-lite, the same shall not affect the rights of the parties in respect to the immovable property. Alternatively, any Judgment or Decree passed by the Court in the matter during the pendency of which the transfer had taken place would be binding upon the purchaser, who purchased the property pendente lite. The Hon"ble Supreme Court in the case of Nagubai Ammal and Others Vs. B. Shama Rao and Others, observed that sale was no doubt pendente lite, but the effect of section 52 is not to wipe it out altogether but to subordinate it to the rights based, on the decree in the suit. As between the parties to the transaction, however, it was perfectly valid, and operate to vest the title of the transferor in the transferee.

24. The Apex Court while dealing with lis pendense in the case of T.G. Ashok Kumar Vs. Govindammal and Another, observed as follows:

12. In Jayaram Mudaliar Vs. Ayyaswami and Others, this court held that the purpose of Section 52 of the Act is not to defeat any just and equitable claim, but only to subject them to the authority of the court which is dealing with the property to which claims are put forward. This court in Hardev Singh Vs. Gurmail Singh (Dead) by LRs., held that Section 52 of the Act 8 does not declare a pendente lite transfer by a party to the suit as void or illegal, but only makes the pendente lite purchaser bound by the decision in the pending litigation.

13. The principle underlying Section 52 is clear. If during the pendency of any suit in a court of competent jurisdiction which is not collusive, in which any right of an immovable property is directly and specifically in question, such property cannot be transferred by any party to the suit so as to affect the rights of any other party to the suit under any decree that may be made in such suit. If ultimately the title of the pendente lite transferor is upheld in regard to the transferred property, the transferee's title will not be affected.

14. On the other hand, if the title of the pendente lite transferor is recognized or accepted only in regard to a part of the transferred property, then the

transferee's title will be saved only in regard to that extent and the transfer in regard to the remaining portion of the transferred property to which the transferor is found not entitled, will be invalid and the transferee will not get any right, title or interest in that portion.

15. If the property transferred pendente lite, is allotted in entirety to some other party or parties or if the transferor is held to have no right or title in that property, the transferee will not have any title to the property. Where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred pendente lite, to the share of the transferor, so that the bonafide transferee's right and title are saved fully or partially.

25. In view of the above observations, it is apparent that there is no bar in transferring a property during the pendency of litigation, but the pendent-lite purchaser would be bound by the decision in the pending litigation. If the suit is concluded before passing of any decree, obviously, no final decree would be forthcoming to negate and/or subordinate the transfer of property to pendent-lite purchaser and in such a situation the doctrine of lis-pendense would not have application. But there would be no legal bar on such transfer, if the litigation is not pending any more.

26. In the case of Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, it was observed that Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immovable property is directly and specifically in question.
4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

27. The doctrine of lis pendens applies only where the lis is pending before a

court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

28. The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the court at any stage of the proceedings. Under this rule, a person may be added as a party to a suit in the following two cases:

(1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or

(2) when, without his presence, the questions in the suit cannot be completely decided.

29. The power of a court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable legal right.

30. Now question arises, whether the concept of lis pendens as provided u/s 52 of the Transfer of Property Act can be imported in an arbitration proceeding.

31. Once the suit is disposed of in terms of arbitration agreement by referring the matter to the arbitration, all obligations would be governed in terms of the Arbitration and Conciliation Act, 1996, after the matter is referred to the Arbitrator. The suit which was filed initially would not remain stayed; rather it stands disposed of upon allowing an Application u/s 8 of the Act. The rights of the parties would be adjudicated in terms of the agreement between them not otherwise. Therefore, as held by the learned trial court, the doctrine of lis-pendens cannot be stretched to an arbitration proceeding.

32. It would be pertinent mention herein that the provisions of Section 8 of the

Act of 1996 is a reference of the dispute to Arbitration and as such the lis would not continue till the disposal of the Arbitration proceedings. The position of law is when an Order is passed u/s 8 of the Act of 1996, it is the reference of the parties to Arbitration, whereby the judicial authority only refuses to decide the action before it leaving the parties at their own sweet will to have recourse to the remedies by way of Arbitration if they so wish. The Suit proceedings come to an end after an Order allowing the said Application u/s 8 of the Act of 1996 is passed. In this regard, the judgment of the Hon'ble Supreme Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, observed that the language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in clause (e) of Section 2 of the new Act and not the Court to which an application u/s 8 of the new Act is made. An application before a Court u/s 8 merely brings to the Courts notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated u/s 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act.

33. In the case of State of Goa Vs. M/s Praveen Enterprise (Civil Appeal No. 4987/2011), the Apex Court observed the effect of an Order u/s 8 of the Act of 1996, in the following words:

.....When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. When such an order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application u/s 11 of the Act for appointment of an arbitrator. The judicial authority "referring the parties to arbitration" u/s 8 of the Act, has no power to appoint an arbitrator. It may however record the consent of parties to appoint an agreed arbitrator.

34. In view of the above, the Suit stands disposed off upon an Application u/s 8 being allowed. In the present case also the trial Court by its Order dated 19.12.2011, allowed the application filed u/s 8 Application and thereby nothing remained in the said Suit proceedings. As rightly pointed out by the learned counsel for the appellant, there was no Judgment and Decree by which any rights of the parties have been decided and as such the rights which had flowed upon the Appellant by virtue of the Registered Deeds of Sale is perfectly valid

without any fetters and operates to vest the title of the Suit land upon the Appellant. The doctrine of lis pendense would not operate, if the suit is disposed of directing parties to approach for adjudication in terms of Arbitration clause.

35. Learned counsel for the appellant by referring to the question of prima-facie case submitted that the Agreement between the parties i.e. Agreement dated 01.02.2011 was not enforceable. The contract in question was a contract for sale and purchase of property within a period of four months from the date execution of the said Agreement. In this regard, Clauses 2, 3 and 4 of the Agreement dated 01.02.2011 is relevant wherein it was specifically mentioned that the execution and registration of the Sale Deed shall be done within a period of four months. Thus, the intentions of the parties were very clear in respect to the Agreement in question that the Registered Deeds of Sale would be executed within a period of 4 months. It was the responsibility of the Respondent No. 1 to obtain permission for sale. However, there is nothing on record that the Respondent No. 1 had taken steps for taking out permission, within the period of four months from the date of execution of the Agreement i.e. 01.02.2011. It was only on 09.09.2011, for the first time, the Respondent No. 1 took steps for applying for permission by writing a letter to the Proforma Respondent No. 2 to submit certain applications.

36. It was the responsibility of the Respondent No. 1 in terms of the contract to apply for the permission from the concerned authorities and obtain the same so that the Deeds of Sale could be executed and registered within a period of four months, the Respondent No. 1 having failed to do so, now cannot claim specific performance of the contract. In order to substantiate the said submission, appellant relied on the decision of the Apex Court rendered in the case of Citadel Fine Pharmaceuticals Vs. Ramaniyam Real Estates P. Ltd. and Another, wherein it was observed as follows:

46. The instant case obviously relates to a contract in commercial transaction and the Court can take judicial notice of the fact that in the city of Chennai the price of 34 real estate is constantly escalating and the clear intention of the parties, as it appears from the stipulations of the agreement, was to treat time as the essence of the contract.

47. Having regard to the aforesaid principles the court cannot attribute a different intention to the parties and cannot specifically enforce the contract at the instance of the plaintiff-purchaser who has failed to perform his part of the obligation within the time stipulated.

48. In K.S. Vidyanadam and Others Vs. Vairavan, this Court explained how discretion is to be exercised by the Court before granting specific performance. This Court held that in cases of urban properties in India it is well known that prices are going up 35 sharply over the last few decades particularly after 1973. In Vidyanadam (supra) the court was dealing with a property in Madurai in the State of Tamil Nadu and it was argued before this Court by referring to the Madras High Court judgment in S.V. Sankaralinga Nadar Vs. P.T.S. Ratnaswami

Nadar and Others, that mere rise in price is no ground for denying the specific performance. This Court did not agree with the decision of the Madras High Court and held that the Court cannot be oblivious of the reality of constant and continuous rise in the value of urban properties. In that context the time limit set in the contract has to be strictly construed. In the case of Vidyanadam (supra) there is no such strict stipulation as time being of the essence of the contract as is in the instant case even then the Court refused 36 to grant the relief of specific performance.

37. Learned counsel for the appellant submitted that if there is a breach of the terms of the Agreement dated 01.02.2011, by the Proforma Respondent No. 3 after obtaining the Sale Permission, then the said Proforma Respondent would have to return the entire advanced consideration of Rs. 25,00,000/- alongwith partial payment if any made in terms with Clause 7 to the Respondent No. 1 within 15 days without any delay. In the present case admittedly, no sale permission was obtained. Ex-facie in view of the provisions contained in the Agreement dated 01.02.2011, the parties having predetermined and quantified the damages amongst themselves, in the eventuality of breach, and as such in terms with Section 14(1)(a) of the Specific Relief Act, 1963, the Agreement in question was not specifically enforceable. Learned counsel for the appellant submitted that apparently the compensation having been quantified by the parties to the agreement, there is no scope to hold that there would be irreparable loss.

38. However, the balance of convenience is another important factor to be taken into consideration, for grant of an injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which may be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury, the Court in its discretion finds that the party complaining would suffer more, than in that event only, an injunction can be granted.

39. Keeping in view the principle as regards balance of convenience, it would be pertinent to examine the facts relevant to determine the issue.

40. Learned counsel for the appellant contended that the Respondent No. 1 in its Application u/s 9, at paragraph 31 had stated that the balance of convenience lies in its favour on the ground that the Respondent No. 1 had entered into an Agreement for Sale dated 01.02.2011 and the Respondent No. 1 is always ready and willing to perform its part for completion of the sale transaction and if the Appellant is not restrained, the whole Arbitration proceedings would be frustrated. It is on this specific ground, the Respondent No. 1 claimed that the balance of convenience is in favour of the Respondent No. 1. It is respectfully submitted in this regard that the said submission of the Respondent No. 1 has an inherent defect on two counts. First, the Arbitration proceedings which the Respondent No. 1 contemplates is not maintainable for the reasons already

stated hereinabove and secondly, the terms and conditions of the Agreement dated 01.02.2011 clearly goes against the Respondent No. 1 in as much as on one hand, the Agreement states that if there is a failure to execute the Deed of Sale after obtaining the permissions, the entire advanced amount of Rs. 25,00,000/- and the part payment as per Clause 7 would be refunded back within 15 days and on the other hand, the said Agreement for Sale entrusts the responsibility of obtaining the permissions from the concerned authority and consequent execution of the Deed of Sale within a period of four months making the time the essence of the contract. Under such circumstances, the balance of convenience could not have been in favour of the Applicant for grant of an injunction. On the other hand, the Appellant is a bonafide purchaser of the Schedule Land by investing huge amounts of money and is in possession of the Schedule Land. There was no challenge to the Deeds of Sale in any manner whatsoever and as such the Appellant's rights over the Schedule Land would be infringed if only any interim measures as in the present case was granted against the Appellant. This valuable right of the Appellant in respect to the Suit land cannot be taken away without following the due process of law. Learned counsel for the appellant submitted that under such circumstances, the balance of convenience was in favour of the Appellant for not granting any interim measures.

41. Learned counsel for the appellant pointed out that the third and very important condition to be satisfied for the grant of an injunction is - whether non-interference by the Court would result irreparable injury to the party seeking relief. Further, is there any other remedy available to the party except the one to grant injunction and the party needs protection from the consequences of apprehended injury?

42. An irreparable injury does not connote that there must be no physical possibility of repairing the injury, but it means only that the injury must be a material one, namely, one that cannot be compensated by way of damages. In this context the relevant decision of the Apex Court rendered in the case of Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. and Others, reads as follows.

26. It has been held by this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corpn.* that it is well established that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the Court is required to consider:

- (i) whether there is a prima facie case in favour of the plaintiff;
- (ii) whether the balance of convenience is in favour of passing the order of injunction; and
- (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for.

Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the

High Court.

29. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable.

36. To quote the words of Alderson, B. in *Attorney General v. Hallett*: (ER p. 1321)

... I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the court can pronounce in the result of the cause.

43. Learned counsel for the appellant rightly pointed out that a perusal of the Agreement dated 01.02.2011, on the basis of which the Respondent No. 1 claims all its rights, the clauses therein and more particularly Clauses 4, 5, 6, 7 and 10 would go to show that if there is a breach on the part of the Proforma Respondent No. 3, the Respondent No. 1 would be entitled to the entire advanced amount alongwith the part payments made in terms with Clause - 7 and nothing more. Furthermore, since the amount has already been returned along with the Deed of Cancellation, the question of irreparable loss, harm and injury ex-facie does not arise in the facts of the case.

44. Learned counsel for the appellant raising the question of appellant Court's jurisdiction to interfere with the grant of an injunction submitted that the Appellate Court in normal course would not interfere with the exercise of discretion of the Court of the first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the well settled principles of law regulating grant or refusal of interlocutory injunction.

45. In this regard, the Hon'ble Supreme Court in the case of *Wander Ltd. and Another Vs. Antox India P. Ltd.*, observed that the appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellant court will not interfere with the exercise of discretion of the court of the first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different

view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar J. in *Printers (Mysore) Ltd. Vs. Pothan Joseph*-

These principles are well settled, but as has been observed by Viscount Simon in *Charles Ostenton and Co. Vs. Jhanaton* ".....the law as to the reversal by a court of appeal of an order by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of the well settled principles in an individual case".

46. Mr. Baruah, learned counsel for the appellant referring to the impugned order submitted that the findings arrived at by the learned Court below that- "It is not the duty of the Court to look out whether its Order passed as an interim measure in respect to the subject matter of the dispute is affecting any third party or not" is on the face of it an arbitrary, unreasonable and a capricious finding inasmuch as Courts are fountain head of justice and to be not bothered about any order passed against a third party, who cannot participate in the Arbitration proceedings is in basic violation of the fundamental principles of natural justice.

47. Mr. Baruah, learned counsel for the appellant pointed out that the non application of mind into the three golden principles which regulates the grant of an injunction and the non recording of any finding on the issue of irreparable loss, harm and injury in the impugned order is on the face of it in violation to the well settled principles, for grant of an injunction and submitted that this is a fit case that the impugned Judgment and Order is liable to be set aside.

48. Learned counsel for the Respondent No. 1 submitted that the Appellant having purchased the property during the pendency of the Civil Suit No. Title Suit No. 342/2011 and as such the Appellant is bound by the orders passed in the said Suit and till the disposal of the Arbitration proceedings, the Appellant is not entitled to change the nature and character of the land in dispute.

49. In reply to the above submission, learned counsel for the appellant pointed out that while disposing of the Title Suit No. 342/2011, there has been no directions passed adjudicating any rights of any of the parties in the said Suit. What the learned Court of the Civil Judge No. 3, Kamrup at Guwahati did was by an Order dated 19.10.2011, allowed the Application u/s 8 of the Act of 1996 and thereby referred the parties to Arbitration without deciding anything on merits, thereby leaving the parties to initiate the Arbitration proceedings, if they desired so. Under such circumstances, the contention so made by the Respondent No. 1 as already stated herein above is not tenable.

50. Learned counsel for the respondent submitted that the right of the Appellant is not an independent right, but it flows from the Proforma Respondent No. 2 and the Proforma Respondent No. 2 being a party to the Arbitration Agreement and if any decision is made in the Arbitration proceedings, whereby the Proforma Respondent No. 2 is deprived of any property, the same shall affect the Appellant being the purchaser.

51. In reply to the above submission, learned counsel for the appellant pointed out that the Arbitrator while deciding the disputes cannot be oblivious of the fact that the property in question had already been transferred to the Appellant and therefore, unless the aforesaid transfer is set aside by a Court of competent jurisdiction, by no award can the Arbitrator direct the Proforma Respondent No. 2 to execute the Deed of Sale in execution of the award.

52. Learned counsel for the appellant submitted that the Arbitration proceedings cannot be maintained against the Appellant or touching upon the rights of the Appellant, inasmuch as the Appellant is not a party to the said Arbitration proceedings nor he was party to the agreement between them. Therefore, the injunction against the appellant's right is arbitrary and illegal.

53. Learned counsel for the respondent submitted that u/s 9 of the Act of 1996, the Court before whom the Application is pending has right and jurisdiction to issue any interim order restraining the third party. In support of the said submission, learned counsel for the Respondent No. 1 relied upon two Judgments of the Bombay High Court rendered in the case of Girish Mulchand Mehta and Durga Jaishankar Mehta Vs. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd., and Heritage Lifestyles and Developers Pvt. Ltd. Vs. Amarvilla Co-operative Housing Society Ltd., Mrs. Sandhya R. Rao and Mr. Navnitlal P. Shroff,

54. An order u/s 9 of the Act of 1996 can be passed against a third party, is not an absolute proposition of law in as much as if the said proposition is accepted it would mean that as interim measures could be sought even against a person, who is not connected with the subject matter of an arbitration agreement. Learned counsel for the appellant submitted that the Judgments to which the Respondent No. 1 has referred to had categorically stated that Order u/s 9 of the Act of 1996 can be passed against a third party, if such person is claiming under the party to the Arbitration Agreement. In the instant case, however, the Appellant is claiming an independent right on the basis of Registered Deeds of Sale being executed in its favour and also being in possession of the Schedule land in question. Learned counsel for the appellant pointed out that the appellant is not claiming any right under the Respondents and as such no interim measures could be passed against the appellant, but the learned Court below however failed to appreciate very vital distinction between a person claiming under and the person who had purchased the property from the vendor with or without notice of the Contract and therefore, submitted that the ratio of the judgments rendered by the Hon''ble Bombay High Court has no relevance to the instant dispute.

55. In the case of Girish Mulchand Mehta vs. Mahesh S. Mehta (supra), the Bombay High Court observed that the purport of Section- 9 has been expounded by the Apex Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., It considered the scheme of Section 9 of the Act. It has held that application u/s 9 is not a suit although such application results in initiation of civil proceedings. It went on to observe that the right

conferred by Section 9 is on a party to an Arbitration Agreement. That Section- 9 has relevance to the locus standi as an applicant. A person not party to an arbitration agreement cannot enter the Court for protection u/s 9 of the Act. In other words, the party to an Arbitration Agreement can invoke this jurisdiction for securing relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the Act.

56. The Apex Court had observed that Section 9 has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The Court is competent to grant reliefs to a party under Clauses (i) and (ii) of Section 9 which flow from the power vesting in Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose before it though the venue of the proceedings in relation to which the power u/s 9 is sought to be exercised is the Arbitral Tribunal. It is thus clear that the relief sought in such application is neither in a suit nor a right arising from a contract. The Court u/s 9 only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. It has been submitted on behalf of the appellant that remedy u/s 9 cannot be pursued against a person, who is not party to an arbitration agreement or arbitration proceedings.

57. The Appellant, however, placed reliance on the decision of the Kerala High Court in the case of Shoney Sanil Vs. M/s. Coastal Foundations (P) Ltd. and Others, In that case the question considered was whether the writ-petitioner, admittedly, a third party to an alleged Arbitral Agreement between the Respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, enjoined or subjected to other Court proceedings u/s 9 of the Act? The Kerala High Court held that orders u/s 9(ii)(c) can be passed only in relation to subject matter of dispute in arbitration, which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure u/s 9, the rights of third party holding possession on the basis of Court sale could be interfered with, enjoined or subjected to proceedings u/s 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders u/s 9 against a

third party if such person is claiming under the party to the Arbitration Agreement.

58. Therefore, Section 9 can be invoked even against a third party, who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures.

59. In the instant case, admittedly the appellant herein is claiming independent right in respect of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 alone, who is a party to the Arbitration Agreement. In such a situation, the Court would not have jurisdiction to pass appropriate order by way of interim measures against the appellant herein, since he is not a party to the Arbitration Agreement or the Arbitration Proceedings.

60. Again in the case of Heritage Lifestyles & Developers vs. Amar-Villa Co-operative Housing Society Ltd., Bombay High Court observed that-

4. Admittedly, there is an arbitration clause between the parties, and there exist an arbitrable dispute as raised. The scheme of Section 9 has been elaborated by the Apex Court in various judgments. It is now made clear that all the provisions of the CPC (CPC) which are necessary for passing an appropriate order u/s 9 needs to be taken note of which includes Section 9A, Order 37, Order 38, Order 39, Rules 1 and 2, Order 40 of C.P.C. Therefore, while passing any order u/s 9, from the facts and circumstances, the Court needs to consider all desired facets which are otherwise available for passing ad-interim, interim and/or even mandatory order. There is no bar and if case is made out, I see there is no reason that the Court u/s 9, cannot pass such order, even against the person who is not the party to the agreement, but specially when such third person is claiming protection or right through the party who is consenting party to the arbitration agreement.

18. The Division Bench in Girish Mulchand Mehta (supra) has affirmed above reasoning and observed as under:

12 The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers u/s 9 of the Act only against a party to an Arbitration Agreement or Arbitration proceedings. As is noticed earlier, the jurisdiction u/s 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition u/s 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration proceedings does not affect the jurisdiction of the Court u/s 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration

Agreement.

61. As a matter of fact, Section 9 can be invoked even against a third party, who is not party to an arbitration agreement or arbitration proceedings, if he is a person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. But in the instant case, the Appellant herein has substantiated that he is claiming independent right in respect of the property in question, which he purchased from other respondents including the Respondent No. 2, who is party to the arbitration agreement.

62. In the present case, the appellant has acquired an independent right. Therefore, the appellant cannot equated with a person claiming under the original vendor. The relief or any award in the arbitration proceeding in between the Respondent No. 1 and Respondent No. 3 would not be able to disturb the right acquired by the appellant by valid purchase from the original owners. Furthermore, the Arbitral Tribunal would not be able to take away the right acquired by the appellant by way of valid purchase from the vendors and original owners.

63. Section 9 of the Act is attracted only if the nature of dispute is subject matter of Arbitration proceedings or agreement. It does not contemplate any such relief which does not stem from the Arbitration Proceedings or the disputes referred to in arbitration for adjudication. The Kerala High Court in the case of Shoney Sanil Vs. M/s. Coastal Foundations (P) Ltd. and Others, was pleased to lay down as under: "The interim measures which are conceived by the Legislature while enacting S. 9 are those interim measures which relate to the arbitration agreement between the parties and being interim, they are to confine to the matters relating to the arbitration agreement between the parties. This intention is explicit from the opening words of S. 9, which provides for the party to apply for interim measure. On a plain reading of S. 9 and going by the scheme of the said Act, there is no room to hold that by an interim measures under S. 9, the rights of third party, holding possession on the basis of a Court sale could be interfered with, enjoined or subjected to proceedings under S. 9. Section 9 contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject matter of the arbitration agreement. This can be only as against the party to an arbitration agreement, or, at best, against any person claiming under him. The petitioner is a third party auction purchaser in whose favour is a sale certificate, followed by delivery of possession. He cannot therefore, be subjected to proceedings under S. 9, initiated on the basis of an alleged arbitral agreement between the respondents.

64. This Court is of the view that an order of injunction u/s 9 of the Act, cannot be granted against a third party in exercise of powers, who is not a party to arbitration agreement or arbitration proceedings and who has a distinct right over the property in question. Injunction order can be granted, u/s 9 of the Act against a third party if he is asserting or claiming his right through any of the

parties to the Arbitration. More so, when the agreement conceives of compensation for breach of terms of the agreement and an exclusive third party right is created on the property in question, then enjoyment of property by such third party should not be disturbed by passing injunction order.

65. If the parties to the arbitration agreement in order to defeat the arbitration agreement and in order to scuffle the right of the claimant deliver the goods, to the third party, then there will be no scope to refer the dispute to the Arbitrator.

66. In the case of Wander Ltd. and Another Vs. Antox India P. Ltd., it was observed that-

9. Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. The object of the interlocutory injunction, it is stated

...is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the "balance of convenience" lies.

The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted.

67. In the case of Seema Arshad Zaheer and Others Vs. Municipal Corpn. of Greater Mumbai and Others, the Apex Court observed as follows:-

30. The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff: (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is

not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands.

68. In the case of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., it was observed that-

14. Section 9 of the said Act corresponds to Article 9 of the UNCITRAL Model Law which is as follows:

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

This article recognises, just like Section 9 of the 1996 Act, a request being made before a court for an interim measure of protection before arbitral proceedings. It is possible that in some countries, if a party went to the court seeking interim measure of protection, that might be construed under the local law as meaning that the said party had waived its right to take recourse to arbitration. Article 9 of the UNCITRAL Model Law seeks to clarify that merely because a party to an arbitration agreement requests the court for an interim measure "before or during arbitral proceedings", such recourse would not be regarded as being incompatible with an arbitration agreement. To put it differently, the arbitration proceedings can commence and continue notwithstanding a party to the arbitration agreement having approached the court for an order for interim protection. The language of Section 9 of the 1996 Act is not identical to Article 9 of the UNCITRAL Model Law but the expression "before or during arbitral proceedings" used in Section 9 of the 1996 Act seems to have been inserted with a view to give it the same meaning as those words have in Article 9 of the UNCITRAL Model Law. It is clear, therefore, that a party to an arbitration agreement can approach the court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent, Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law.

69. In SREI Infrastructure Finance Ltd. Vs. Bhageeratha Engineering Ltd. and Others, this Court held that U/S 9 of the Arbitration and Conciliation Act a "Party" means a party to an arbitration agreement. In the said case the Hon"ble High Court rejected the prayer of a party, who is not a party to arbitration agreement, who filed a petition U/S 9 of the Act praying for interim relief and impleadment. The Hon"ble High Court held that only a party to an arbitration agreement can seek relief U/S 9 of the Act. Similarly, relief can be given against a party to the litigation not against a third party, if such third party proclaims distinct right.

70. In N. Srinivasa Vs. Kuttukaran Machine Tools Ltd., the Hon"ble Supreme Court held that in a petition U/S 9 of the Arbitration and Conciliation Act, it would be in the interest of justice to put parties in status quo till disposal of the Arbitration proceeding, otherwise in the event of transfer of interest in the property to third party, the Arbitration proceeding would become infructuous.

The Hon''ble Supreme Court held that vacating a status quo order would make proceeding before Arbitrator infructuous and hence there is no justification in vacating status quo order. But in the instant case, third party right has already been created in favour of the appellant. Moreover, the Arbitration would not be able to resolve or negate the third party right. Therefore, the above decision in N. Srinivasa (supra) is not applicable in the present case.

71. As has already been discussed above where the Hon''ble Court held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of a party to an arbitration agreement with regard to the subject matter of the arbitration agreement and this can be given only against the party to an arbitration agreement, or at best, against person claiming under him. But in the instant case, the appellant is not claiming under Respondent No. 2, since an independent third party right has already been created in his favour.

72. The appellant is not claiming any right under the Respondent No. 2. The appellant purchased the disputed land from the Respondent Nos. 2, 3, 4 and 5, which is the subject matter of the arbitration clause arising out of the agreement for sale. The right of the appellant is an independent legal right in respect of the property in dispute. Here a "party" as per Section 2(h) means a party to the arbitration agreement. It is the onerous duty of the Court to look out whether any order passed as an interim measure in respect of the subject matter of the dispute is affecting any third party having an independent right. If a third party interest has already been created, by some overt act of the parties to the arbitration agreement, for appropriate relief civil remedy may be appropriate remedy available to them.

73. It is also an admitted fact that the Respondent No. 2 revoked the power of attorney granted in favour of the Opp. Party No. 3 on 7.6.11. The Respondent No. 2 sold the suit land to the Opp. Party No. 3 on 12.10.11, 13.10.11 and 14.10.11. Therefore, the parties to the Arbitration agreement by their own overt action already created third party right, then in that case the dispute involving a third party would not be an arbitrable dispute. Rather, in the facts and circumstances, parties may choose to approach a civil court of appropriate jurisdiction for adjudication of their dispute.

74. Since third party interest has been created in favour of the appellant, and that the appellant has possession over the suit land, and the Agreement for Sale dated 1.2.11 became un-enforceable and pleaded that no injunction as temporary measure can be granted against the appellant.

75. Before granting any interim measures u/s 9 of the Act, the trial Court must see whether the agreement between the parties is still enforceable as against the third party. In the present case, the learned trial Court ought to have seen the status of the parties and as to how the appellant came into the picture. The appellant purchased the suit land on 12.10.11, 13.10.11 and 14.10.11 from the respondents.

76. On careful evaluation of the materials on record as well as the impugned Judgment and Order, it appears that the impugned order is arbitrary and perverse and the Court below apparently ignored the well settled principles of law regulating the grant or refusal of interim measures, as per provision of sec. 9 of the Arbitration and Conciliation Act, 1996. Therefore, the impugned order passed by the learned Court below is set aside. However, considering the facts and circumstances, I pass no order as to costs.