

Unknown vs Order on 3 December, 2010

Author: V.Periya Karuppiah

Bench: V.Periya Karuppiah

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.12.2010

CORAM

THE HON'BLE MR. JUSTICE V.PERIYA KARUPPIAH

O.A.Nos.40 and 41 of 2010

and

A.No.134 of 2010

ORDER

O.A.Nos.40 and 41 of 2010: This is an application filed by the applicant to pass an order of interim injunction, restraining the respondents, their men, employees, servants, agents or any other person(s) claiming or acting under them from in any manner selling, alienating, entering into any sale or sale agreement with third parties, the properties situate at Kondappanaickenpatti Village, Salem Taluk, Salem District, morefully described in the schedule to the judges Summons pending arbitration.

2. A.No.134 of 2010 : This is an application filed by the applicant to appoint an Advocate Commissioner to inspect the property situate at Kondappanaickenpatti Village, Salem Taluk, Salem District, morefully described in the schedule to the judges summons to note down the physical features of the same including taking of photographs and to file a report thereon.

3. The brief facts of the case of the applicant would be as follows:- The applicant concern is engaged in the business of real estate development and incidental activities, including preparation of sites for commencement of construction activities. In the course of its business, the applicant entered into a development agreement dated 17.05.2006 with the respondents herein whereby the applicant undertook, inter alia, developmental activities such as leveling, filling, clearing and cutting of trees and erection of a compound wall in the respondents' lands admeasuring 18.32 acres in

kondappanaickenpatti village, Salem Taluk, Salem District. The details of the lands, including survey numbers and the extent belonging to each of the respondent has been set out in the schedule to the development agreement dated 17.05.2006 which are morefully set out in the schedule to the judges summons filed in the above application. The independent and separate agreement dated 17.05.2006 with the respondents, the said company has undertaken to develop an integrated township/gated community by forming a layout and constructing row of houses thereon for the purpose of sale of houses to third parties. Under the aforesaid agreement, it was the respondent's obligation to level/fill the land which was then an uneven terrain, clear the bushes and undergrowth in the agreement schedule mentioned property and hand over the vacant possession so as to enable the construction company to commence construction activities. Such clearing and preparation of the site for construction activities were the responsibility of the respondents at their cost.

3 (2) In view of the aforesaid obligation cast upon them, in May 2006, the respondents approached the applicant requesting the applicant to undertake the work of clearing the aforesaid uneven land and terrain of the property, in all admeasuring 18.32 acres in Kondappanaickenpatti village, Salem District at the cost of the respondents so as to make it suitable for development, which work involved leveling, removing encroachments etc., Thereafter, the parties herein entered into an agreement dated 17.05.2006 for the aforesaid work.

3(3) The applicant states that pursuant to the aforesaid joint development agreement dated 17.05.2006 were considered necessary the parties herein held mutual discussions which culminated in the execution of supplemental agreement on 11.06.2008. Pursuant to the aforesaid agreement dated 17.05.2006 and the supplementary agreement dated 11.06.2008 and based on the obligations undertaken by the respondents under these agreements, the applicant commenced the work of leveling and filling the uneven terrain removing encroachments and unauthorised occupants and other related works, including construction of compound wall in the schedule mentioned property.

3(4) However, during implementation of the work, there arose certain disputes and difference of opinion between the parties herein. In view thereof, the parties resorted to resolve their disputes through conciliation and accordingly on 22.08.2009, a Memorandum of Understanding came to be entered into between the applicant on the one hand and the respondents on the other, in presence of learned Senior Counsel, Mr.K.M.Vijayan. Pursuant to eh said Memorandum of Understanding dated 22.08.2009, the applicant herein proceeded to undertake the work in the schedule mentioned property as envisaged under the aforesaid agreements and the Memorandum of Understanding by spending a huge sum of Rs.6,00,00,000/- (Rupees Six Crores Only) and the same has been completed. When, the applicant approached the respondents and requested them to pay the pending amount as agreed under the agreement herein for the leveling and developmental activities, the respondents refused to make any payments and did not heed to the request of the applicant herein and thereby failed to perform their obligations as per the agreement.

3(5) While so, on 05.01.2010, the applicant came to know that the respondents have cancelled the Power of Attorney executed by them on 13.10.2009 in favour of the builder Viajy Shanthi Builders Limited and after doing so, the respondents are now attempting to sell the properties to pay the amount of a sum of about Rupees Five Crores due and owing by them to the applicant under the

supplementary agreement dated 11.06.2008.

3(6) The respondents are acting in a high handed manner and have threatened to put third parties into possession of the property and dispossess the applicant herein without clearing its dues for the work done. The clause 9 of the development agreement dated 17.05.2006 provides for resolution of disputes between parties by resort to arbitration. In the said circumstances, being left with no other option, the applicant has decided to invoke the arbitration clause No.9 as contained in the agreement dated 17.05.2006 and the supplementary agreement dated 11.06.2008. In the meanwhile, the respondents after cancellation of the Power of Attorney dated 13.10.2009 executed by them in favour of the said builder are now taking active steps to alienate the property subject matter of the aforesaid two agreements. Unless and until urgent interim orders as prayed for are not granted, the petitioner would be put to grave and irreparable prejudice and hardship in as much as the applicant has already expended sum exceeding Rupees Six Crores towards leveling, filling of lands of uneven terrain, clearing bushes etc., and the loss that would be suffered by the applicant in view of the acts of breach committed by the respondents would be incalculable. An appointment of advocate commissioner is necessary to inspect the property forming subject matter of the joint development agreement dated 17.05.2006 and the supplementary agreement dated 11.06.2008, to note down the physical features of the said property and to submit a report thereon, which would amply demonstrate the quantum of work undertaken by the applicant under the aforesaid agreements and the liability of the respondent to the applicant in respect of the works undertaken by the applicant. Prima facie case and the balance of convenience entirely lie in favour of the applicant for grant of interim orders as prayed for.

4. The facts of the case of the respondents in the form of Counter as follows:-

The respondents in their counter affidavit have stated that the applicant having filed the applications under Section 9 of the Arbitration Act, also filed Civil Suit in C.S.No.36/2010 on the very same cause of action and obtained an order of injunction in O.A.Nos.49 and 50 of 2010 on the same day when these applications came up for admission i.e on 12.1.2010. It is further stated in the counter that the respondents had already invoked the Arbitration and Conciliation Proceedings by way of three communications to the applicant calling upon the applicant to resume the voluntarily abandoned work on or before 31.12.2009, otherwise the applicant would face the consequence of cancellation of power of attorney and without even replying to the same the applicant filed the applications under Section 9 of the Arbitration Act. The respondents have also stated in the counter that the applicant having disclosed the communication dated 5.1.2010 alone, deliberately suppressed the other communications.

4(2) It is further stated by the respondents that the applicant had not invoked the Arbitration clause by calling upon them to resolve the dispute and hence the benefit of Section 9 of the Arbitration Act should not have been allowed to go to the applicant for obtaining interim orders alone, which had moved two Courts for the same cause of action. The respondents have further stated that it is well established principle of

law that a person who wants to invoke Arbitration jurisdiction, cannot file a suit parallelly for the same cause of action and the Court would not grant the equitable remedy of interim injunction to a person who comes with unclean hands.

4(3) It is further stated in the counter that the applicant entered two joint development agreements with them on the same dates and the understanding was to make development in the ratio of 65% for the applicant and 35% for the respondents in the total area proposed to be developed. The respondents have further stated that due to delay in beginning of development work, further supplemental agreement was made on 11.6.2008 and even after that work was not commenced and dispute arose with regard to inconsistency prevailed in the implementation of clauses which relates to cost that were in variance with 65% and 35% ratio. It is further stated that with regard to delay in getting planning permission, commencement and completion of work, by conciliation, a Memorandum of Understanding was entered on 22.8.2009 which obligated the applicant to get planning permission before 30.9.2009, commence the work on 1.11.2009 and to complete the same within 18 months thereof and further cost of construction was restricted to 65:35 ratio without any escalation. The respondents have further stated that without even a notice to them, the applicant abruptly abandoned the work on 15.11.2009 and sent a draft Joint Development Agreement to incorporate the Memorandum of Understanding dated 22.8.2009, which also contained a demand over and above the cost of 65:35 ratio and hence they informed the applicant that it is not in tune with the Memorandum of Understanding dated 22.8.2009.

4(4) It is further stated by the respondents that since the applicant did not commence the development work nearly for three years even after the time schedule, the third party purchasers with the applicant and respondents, started for demanding the return of advance money. The respondents have further stated that they being the land owners and very reputed persons in Salem district, put to lot of embarrassments with third party agreement holders and hence a request was made to the applicant to commence the abandoned work before 30.12.2009. It is further stated by the respondents that only due to the failure on the part of the applicant to commence the work on the said date, the power of attorney was cancelled on 5.1.2010. The respondents have further stated in the counter that at no point of time they had any intention to terminate the contract and because of the callous attitude of the applicant in not acting on the call of the respondents to resolve the dispute, they were forced to cancel the power of attorney. It is also stated by the respondents that the cause of action to file the applications before this Court is barred by Section 2(e) of the Act and they also denied the demand and claim of applicant regarding any payment of consideration from them when it had been restricted to a ratio of 65:35. At this juncture, the respondent is interested in only in completion of the entire work development in accordance with Memorandum of Understanding dated 22.08.2009, if the applicant proceeds and resumes the work and makes the development in time, it is possible for the respondent to execute a fresh power of attorney. It is therefore,

the respondents states that if the applicant resolves that the dispute by conciliation with men of his choice along with the respondents, the same can be agreed upon and can resolve this dispute without making any further adjudication. For the above reasons the respondents prays this Court to dismiss the above applications as vexatious litigation.

5. The facts of the case of the respondents in the additional counter as follows:-

The respondents are the owner of the land situated at Kondappanaickenpatti village, Salem. The crux of the agreement being for developing the properties in the entire area as a gate communities, it is agreed that the respondent will give the land, which is owned by them and the applicant will develop the land including selling it to third parties. It was agreed whatever be the area of construction permitted under law, the applicant and the respondent shall have the ratio of 65:35 respectively. The applicant split the work into two agreements, one as a partner of Akash housing and the other in the name of Vijay Shanthi Builders. The crux of the two agreements is 65:35 ratio between the applicant and the respondent in the development/profit and no separate consideration for any development separately was agreed. It is necessary to state that both these agreements contained arbitration clauses.

5(2) At this stage, another supplemental agreement was made on 11.06.2008 between the applicant and the respondents, in modification of the earlier agreements dated 17.05.2006, due to the fact that the respondent offered an additional land to an extent of 18.92 acres as against 17.66 acres in the earlier agreement, it is at this stage altering the sharing of profit between the applicant and the respondent, the applicant unilaterally claimed a consideration for construction of compound wall, in lieu of giving up the profit share as agreed in clause 1 and 2 of agreement dated 17.05.2006. On the same day a joint development agreement was entered with Vijay Shanthi Builders, in which Mr.Suresh Kumar was the Managing Director. But the said agreement did not contain any other consideration other than sharing of the development in the ratio of 65:35 as found in the schedule.

5(3) On 19.05.2006 and 24.06.2008 a Power of Attorney was executed by the respondent for the purpose of development work, which was subsequently cancelled by the applicant himself and substituted by a power of attorney dated 13.10.2009.

5(4) The most disturbing factor is all agreements including the last Memorandum of Understanding dated 22.08.2009 contained an arbitration clause. There is a deliberate suppression of the material fact relating to the composite agreement varied twice, having the effect of novation, reliefs were claimed. The applicant had without any basis claimed huge cost incurred as a sum of Rupees Six Crores towards part performance in the application under Section of the arbitration Act and Rupees Eleven Crores and above in the civil suits, which are inconsistent to the averments in the applications under Section 9 of the Arbitration and Conciliation Act.

5(5) The respondent is advised to state that the applicant cannot approbate and reprobate in resolving the dispute relating to immovable properties situated at Salem, before this Court, one by a civil suit and the other by Arbitration proceedings.

6. Heard Mr.V.C.Janarthanan, learned counsel for the applicant and learned Senior Counsel Mr.K.M.Vijayan appearing for Mr.R.Suresh Kumar, counsel for the respondents 1 to 3.

7. The learned counsel for the applicant would submit in his argument that the respondents are the land owners of the property of an extent of 18.32 acres situate at Kondappanaickenpatti village, Salem. Mr.Suresh Kumar representing for the applicant herein and also M/s.Vijayashanthi builders cum promoters have entered into two joint development agreements on 17.05.2006, for the purpose of developing the gated community of row of houses and the out coming profits from the said agreement by selling the constructed area with land would be 65% to the applicant and 35% to the respondents and the applicant was given a higher ratio and the respondents as land owners to get a lower ratio and in accordance with the said agreement a Power of Attorney was executed in favour of the applicant in his individual capacity representing both the applicant and the Vijay Shanthi builders and thereafter, on 11.06.2008, two supplemental agreements were executed by Mr.Suresh Kumar, on behalf of the applicant and thereafter, due to the better understanding in between parties regarding the dispute of ratio of sharing the profits a Memorandum of Understanding, was entered into between parties on 22.08.2009 and the ratio of 65:35 was reiterated by specifically deleting any other additional cost. He would further submit in his argument that the respondents have revoked the earlier Power of Attorney dated 19.05.2006, on 13.10.2009 and therefore, the agreement as well as Memorandum of Understanding entered into between parties could not be proceeded further and therefore, it has become necessary for the applicant to file a suit in respect of the agreement entered with M/s.Vijay Shanthi Builders, in C.S.No.36 of 2010 for specifically enforcing the said agreement. He would also submit that the agreement entered into between parties and the Memorandum of Understanding reached in between parties is admittedly have arbitration clauses and the disputes in between parties should have been sorted through arbitral adjudication. He would also submit that in the meanwhile the respondents are acting in a high handed manner and had threatened to put the third parties into the possession and dispossess the applicant without settling the disputes and the costs for the work done. Therefore, he would request the Court to preserve the subject matter of the property which is about twenty acres of land at the central part of Salem town, by restraining the respondents from in any way alienating the property to third parties towards the protection of the amount spent at Rs.6,00,00,000/- (Rupees Six Crores Only) by the applicant for leveling, filling lands removing encroachments, constructing the compound wall etc, and also restraining the respondents from in any way encumbering otherwise through any other person pending arbitration. He would also request the Court to appoint an advocate commissioner to inspect the said property situate at Kondappanaickenpatti, Salem District, as described in the judges summons to note down the physical features of the same by taking photographs and to file report before this Court within a time to be fixed by this Court.

8. He would also submit in his argument that even though the properties are situated at Salem town, this Court has got jurisdiction to entertain the arbitral proceedings since the office of the petitioner is situate within the jurisdiction of this Court, as well, this Court being a chartered High Court

governed under the articles of Letters Patent would certainly has the jurisdiction to pass orders, under Section 9 of the Arbitration and Conciliation Act., 1996. He would also draw the attention of the Court to a judgment of Hon'ble Apex Court reported in 2006 (11) SCC 521 in between Jindal Vijayanagar Steel (JSW Steel Ltd) v. Jindal Praxair Oxygen Co. Ltd., for the proposition that a chartered High Court exercising ordinary original civil jurisdiction under its Letters Patent has jurisdiction under Section 9 of the Arbitration and Conciliation Act., 1996, despite the cause of action have arisen outside its territorial jurisdiction and part of cause of action has arisen within its limit where the petitioner is having its office within the jurisdiction of the said Court. He would also submit in his argument that the judgment of Hon'ble Apex Court had dealt with Section 2 (1) (e) of the Arbitration and Conciliation Act., 1996 and had come to the conclusion that the Chartered High Courts under its Letters Patent are empowered to assume jurisdiction. He would therefore request the Court to pass orders of temporary injunction and to appoint an advocate commissioner as sought for by the applicant, for the protection and preservation of the subject matter pending arbitration.

9. The learned Sr.Counsel Mr.K.M.Vijayan, would submit in his argument that it is true that the respondents are the owners of 17.66 acres situate at Kondappanaickenpatti village, Salem and the applicant and one M/s.Vijay Shanthi Builders, had entered into joint development agreement on 17.05.2006 with the respondents for the purpose of developing gated community of row of houses. He would further submit that the applicant was under the obligation to make a compound wall and also to construct row of houses and on such completion of joint development agreement to sell them to intending purchasers and both parties to share the profits at the ratio of 65:35. It is also true that the respondents executed a Power of Attorney on 19.05.2006, for the performance of the said agreement and the clauses 9 and 10 in the said document were struck off since they were beyond the scope of the agreement and thereafter, on 11.06.2008, two supplementary agreements were executed in between parties for the same development, reiterating the profit sharing at the same ratio. He would also submit that the agreement already entered into between on 17.05.2006, subsequently on 11.06.2008 cannot stand independently without support to other and both the agreements are to go with each other. He would also submit in his argument that the agreement dated 11.06.2008 did not contain an arbitration clause but it contain only a provision for settling through discussion under clause 6 of the agreement. He would further submit in his argument that there was a conciliation in between parties regarding the completion of the approach and the dispute regarding the ratio of sharing profits, a Morandum of Understanding was entered into between parties on 22.08.2009 with the assistance of Sr.Counsel Mr.K.M.Vijayan and the applicant's auditor by Mr.Krishnamurthy and 65:35 ratio of share was reiterated. He would also submit that by virtue of Memorandum of Understanding reached in between parties novation take steps and the earlier agreements stand modified. He would further submit that the applicant, even though, obtained planning permission in the year 2009 and commenced work on 1st November 2009, he abandoned the work on 15.11.2009 against the Memorandum of Understanding and he demanded additional construction costs, which was never made at the request of the respondent. It has been agreed in between parties that they would share the profit at 65:35 without any additional cost to be incurred. Thereafter, e-mails were exchanged in between parties and the applicant had abandoned the additional construction and the resolution to decide the dispute by mutual discussion has also failed. He would further submit that it has become necessary for the respondents

to revoke the Power of Attorney, already executed on 19.05.2006, by 13.10.2009.

10. He would also submit in his argument that the applications filed by the applicant invoking the provisions under Section 9 of the Arbitration and Conciliation Act., before this Court is not at all sustainable, when the properties are situated at Salem Town and the Salem District Court alone has got jurisdiction regarding any dispute over the land . He would also draw the attention of the Court under Section 2(1) (e) of the Arbitration and Conciliation Act, the District Court, which has got civil jurisdiction would be competent to entertain the application under Section 9 of the Arbitration and Conciliation Act, and therefore, the applications filed before this Court are not sustainable. He would further submit that there is no arbitration clause in the agreement dated 11.06.2008 to invoke under Section 9 of the Arbitration and Conciliation Act. He would further submit in his argument that the applicant had elected to proceed with the agreement in respect of M/s.Vijay Santhi builders, by way of civil suit and therefore, it cannot be maintained without clubbing the said composite agreement. He would further submit that the applicant did not attempt to get the appointment of Arbitrator and he has not stated what steps he has taken so far for such appointment. He would further submit that even after the long pendency of the applications he has not chosen to proceed with the appointment of arbitrator. Therefore, the intention of the applicant should be, to protract the proceedings as long as possible having the interim arrangement in his favour. He would also draw the attention of the Court to a judgment of this Court reported in 2009 (5) CTC 97 in between Kirloskar Construction and Engineer Ltd., rep. by its Co. Secretary, S.UmaShankar v. Fast Track Associates for the proposition of law that parties to the arbitration cannot confer the jurisdiction of Madras High Court under Section 9 of the Arbitration and Conciliation Act., unless disputes involved in the contract in which subject matter of arbitration is situated within jurisdiction of that Court. He would also rely upon the same judgment for the proposition that the Courts having territorial jurisdiction regarding landed properties should be the District Courts under the definition of Section 2(1) (e) of the Arbitration and Conciliation Act. He would further submit that the applications filed by the applicant are not sustainable and therefore they are liable to be dismissed.

11. I have given anxious thoughts to the arguments advanced on either side.

12. The undisputed facts upon the submissions of both parties would be that the applicant and the respondents have entered into a joint development agreement, in respect of the land belonging to the respondents, to an extent of 17.66 acres situate at Kondappanaickenpatti Village, Salem on 17.05.2006, for the purpose of developing gated community of row of houses. It is also not disputed that two such agreements were entered into between parties on the same day by the respondents one with applicant and another with one M/s.Vijay Shanthi Builders, in respect of the said properties. According to the said agreement, the applicant has to put up a compound wall and also to construct row of houses, in order to sell the units to various intending purchasers and to share the profits at the ratio of 65:35 in between the applicant and the respondents. The power of attorney was executed on 19.05.2006 by the respondents in favour of the applicant for performing the said agreements, on the part of the applicant. However, two supplemental agreements were necessiated to be executed in between parties, for the same development on 11.06.2008 and both earlier agreements and the supplemental agreements are inter dependent, but the terms of the agreement on profit sharing is same at the ratio of 65:35. The execution of the said supplemental agreements

coupled with joint development agreements were delayed and therefore a conciliation was entered in the presence of Mr.K.M.Vijayan, learned senior counsel and one Mr.M.Krishnamurthy, the applicant's Auditor and a Memorandum of Understanding was executed on 22.08.2009 and in the said Memorandum of Understanding also the profit sharing was maintained at the same ratio of 65:35. As per the Memorandum of Understanding dated 22.08.2009 the applicant obtained planning permission during September 2009 and commenced the work on 01.11.2009. According to the applicant, he had spent a huge money on the basis of the joint development agreements and the subsequent agreements entered into between parties and also in terms of Memorandum of Understanding dated 22.08.2009, he had put up huge compound wall, filled and leveled the earth and had made the grounds evenly for the purpose of putting up constructions. According to the respondents the applicant has abandoned the performance on and from 15.11.2009. However, the power of attorney executed by the respondents on 19.05.2006 was revoked on 13.10.2009 and it has also been misunderstood in between parties that profit sharing to be maintained at the same ratio without any additional cost. It can also be seen that exchange of emails were also there in between parties, in respect of the said dispute. On the dispute arose in between parties, the applicant had approached this Court for interim reliefs pending arbitration, quoting the clause of arbitration in the joint development agreement. However, the respondents would deny that the Memorandum of Understanding was entered into between parties on 22.08.2009, and it should be amounting to a novation of earlier agreements and it does not contain any arbitration clause except by way of sorting out the disputes by mutual discussion. It is also contended by the respondents that the Memorandum of Understanding had taken novation to supersede the earlier agreements and therefore there is no question of any arbitration clause existing for the invocation of Section 9 of the Arbitration and Conciliation Act. Apart from that the filing of the suit by the applicant on behalf of M/s.Vijay shanthi Builders, on the original side with leave to sue was filed and it is pending before the Court and the present agreement is also a composite agreement with that suit agreement cannot also be enforced for an arbitration.

13. But, it has been the consistent submission on the part of the applicant that the joint development agreement have admittedly got the arbitration clause and the Memorandum of Understanding has also got the clause with a wider and all these agreements would go a long way to show that a dispute in between parties should have been referred to arbitration only.

14. No doubt, it is a settled law that the arbitration can be inferred by subsequent agreement reached in between parties and even through the ancillary documents relied upon by both the parties. In the judgment of the Hon'ble Apex Court reported in 2009(1) MLJ 936 (SC) in between Unissi (India) Pvt. Ltd., v. P.G. Institute of Medical Education & Research, the principle that the arbitration can be inferred from even the tender documents indicating certain conditions of contract contained arbitration clause and no formal agreement need be executed, for arbitration has been laid down. The relevant passage would run thus:-

"14. Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that although no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was

accepted and the appellant acted upon it."

15. Yet another judgment of Hon'ble Apex Court reported in AIR 2001 SC 3730 in between Smita Conductors Ltd., v. Euro Alloys Ltd., has laid down the same principle. He would also submit in his argument that the petitioner has stated false particulars in the affidavit and therefore, the lower Court did not accept the versions of the petitioner and had correctly rejected the claim of condonation. The relevant passage would run thus:-

"6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para 2 of Art.2. If we break down para 2 into elementary parts, it consists of four aspects. It includes an arbitral clause, (1) in a contract containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams. If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing.....

..... May be, the appellant may not have addressed letters to the respondent in this regard but once they state that they are acting in respect of the contracts pursuant to which letters of credit had been opened and they are invoking the force majeure clause in these two contracts, it obviously means that they had in mind only these two contracts which stood affirmed by reason of these letters of credit. If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."

16. The relevant passage would go to show that an arbitration clause can be inferred from the circumstances or the documents entered into between parties. Admittedly, the joint development agreement entered into between parties have the arbitration clause for a dispute to be solved through the arbitration proceedings only. When that joint development agreement has been clubbed to the subsequent agreement and the Memorandum of Understanding entered in between parties, we could easily understand that arbitration clause is still pending in between parties and any dispute arise in between parties should have been referred to the arbitration. The incidence of novation would not arise in this case, since the terms of all the agreements are still applicable. As the agreement entered by the respondents with another entity namely M/s. Vijayshanthi Builders and the suit filed by the said concern will not in any way estop the applicant to seek his remedy under law.

17. Now, whether such reference to arbitrator can be resorted in this Court to initiate the proceedings under Section 9 of the Arbitration and Conciliation Act for protection of the subject matter of the arbitration, even though the properties are located out side the jurisdiction of this Court. According to Section 2(1) (e) of the Arbitration and Conciliation Act the District Court having territorial civil jurisdiction, in respect of the properties would be the Court to entertain to question the arbitral award made under Section 34 of the Act, in the said process of arbitral proceedings. The

judgment of this Court relied upon by the learned senior counsel reported in 2009 (5) CTC 97 in between 2009 (5) CTC 97 in between Kirloskar Construction and Engineer Ltd., rep. by its Co. Secretary, S.UmaShankar v. Fast Track Associates, would also go to show the following principles:-

"15..... It is, in this regard, relevant to refer to the definition of 'Court' under Section 2(1)(e) of the Act, which reads as follows:

"2. Definitions:

(1) (a) to (d)

(e) "Court" means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original Civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same and had been the subject-matter of a Suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes."

.....

17. By constructing the said provisions, it is clear that even if an arbitration award is made, the Court in which such an award can be challenged under Section 34 of the Act will be the competent Court having jurisdiction where the question under the arbitration agreement can be decided."

18. As per the decision of this Court we could see that the Principal Judge, having original jurisdiction in a District would be having a competent jurisdiction since it has got the power to decide the question under the arbitration agreement under Section 34 of the Act.

19. However, the learned counsel for the applicant would rely upon the judgment of Hon'ble Apex Court reported in 2006 (11) SCC 521 in between Jindal Vijayanagar Steel (JSW Steel Ltd) v. Jindal Praxair Oxygen Co. Ltd., to the principle that this Court being a chartered High Court constituted under the Letters Patent, can take cognizance of the arbitration matters provided part of cause of action arose within the territorial jurisdiction including the location of its registered office of the applicant. The relevant passage would run thus:-

"40. This Court in Food Corporation case while considering the definition of "Court" under Section 2(c) of the 1940 Act, has held that:

(i)jurisdiction of a Chartered High Court is to be determined by clause 12 of the Letters Patent;

(ii)by virtue of Section 120 CPC, 1908, the provisions of Section 20 CPC do not apply to Chartered High Courts (such as Bombay) exercising original civil jurisdiction;

(iii)that under clause 12 of the Letters Patent, the Bombay High Court would have jurisdiction over the subject-matter of arbitration if the respondent has an office in Mumbai, regardless of the fact that no cause of action may have arisen at Mumbai.

By such judgment this Hon'ble Court merely expressed the law as it stands and as it ex facie clear from the applicable statutes/provisions of law.

41.The appellant, in the present case, concedes that by virtue of the judgment of Food Corporation of India case the Bombay High Court would have jurisdiction to entertain and try Section 9 petition. However, the appellant contends, the judgment in Food Corporation of India case is per incuriam requiring reconsideration and should be referred to a larger Bench of this Court since it failed to consider the judgment of this Court in Patel Roadways Ltd.

42. This Court in Patel Roadways Ltd., case held:

(i)An action can be filed in a Court where a subordinate office of the defendant is situated if a part of the cause of action has arisen thereat.

(ii)No action would lie in a Court within whose jurisdiction the principal office of the defendant is situated if no cause of action has arisen thereat.

43. Section 20 CPC reads as under:

"20. Other suits to be instituted where defendants reside or cause of action arises. - Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the business, or personally work for gain, as aforesaid, acquiesce in such institution; or) the cause of action, wholly or in part, arises.

Explanation- A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

44. It is ex facie clear from the section that a suit can be filed where a part of the cause of action arises or where the principal office is located meaning thereby that what their Lordships in Patel Roadways case held was that a suit can be filed where a subordinate office is situate if a part of the

cause of action arises or otherwise only where the principal office is situate."

20. In the same judgment it has also been referred in respect of the uniformity of the rules to be followed as laid down in paragraph 55, which would run as follows:-

"55. There is no question of uniformity rules applying since Section 2(1)(e) of the 1996 Act expressly recognises that not only the District Courts but also the High Courts exercising original civil jurisdiction would have jurisdiction under the 1996 Act. The Act thus recognises that the Chartered High Courts exercising original civil jurisdiction would exercise jurisdiction. It is submitted that apart from the three Chartered High Courts which are governed by the Letters Patent only two other High Courts in the Country (Delhi and Jammu & Kashmir under their respective High Courts Acts) exercise original jurisdiction. This issue is therefore not a question of all-India application as it does not affect the jurisdiction of most High Courts. There is therefore no question of a "uniformity rule" being required to be applied. There cannot be a rule of uniformity applied between unlikes. The appellant seeks to apply such uniformity rule between the subordinate courts (governed by CPC) and the High Courts (governed) by the Letters Patent)."

21. The aforesaid judgment would go a long way to show that all the chartered High Court's including this Court could entertain the arbitral proceedings in the Court provided part of cause of action arise within the territorial jurisdiction of this Court, including the location of the applicant's office is at Madras. The registration certificate issued by the Registrar of Firms was also produced to evidence the same and therefore, the principles laid down by the Hon'ble Apex Court in the aforesaid judgment would squarely applicable to the present case. Therefore, the judgment of this Court reported in 2009 (5) CTC 97 in between Kirloskar Construction and Engineer Ltd., rep. by its Co. Secretary, S.UmaShankar v. Fast Track Associates, which is on a different footing is not applicable to the present case. Therefore, I am of the considered view that this Court has got jurisdiction to entertain the arbitral proceedings under Section 9 of the Arbitration and Conciliation Act, as part of cause of action namely the location of the applicant office is situate within Madras city under clause 12 of the Letters Patent, read with Section 2(1) (e) of the Arbitration and Conciliation Act this Court is having jurisdiction. Therefore, the applications filed by the applicant are found maintainable before this Court.

22. Admittedly, the joint development agreement were performed to some extent and it was complained by the applicant that the respondents have revoked the Power of Attorney in between parties. The respondent complained that the applicant did not evince interest in performing and to fulfill the obligations so as to share the profits at 65:35. Certainly the rival contentions raised by both parties are attracted the definition of the disputes in between them which are within the domain of the Arbitrator, to be appointed for adjudication. There is no need for this Court to go into details of the disputes and to decide a prima facie case for that purpose. It has been categorically found that there is an existing arbitration between parties and this Court has jurisdiction to maintain the applications and found that the dispute are existing in between parties for adjudication. Naturally the subject matter namely, the described extent of properties in the

schedules to the judges summons and the extent of development said to have been performed and the possession of properties should have been kept in tact for the purpose of safeguarding them at the end of the arbitral proceedings. The applicant has sought for injunction from alienation or from making any encumbrance or joint development agreements with third parties or to alienate, transfer or sale in between any parties by the respondents till the arbitral proceedings are over.

23. The contentions of the respondents would be that even though the applicant has obtained undertaking from the respondents, he had not elected to go for appointment of an arbitrator and therefore, the arbitration even if available to the applicant, it should have been considered as waived. Such a submission made by the learned Senior Counsel appearing for the respondents 1 to 3 may be relevant, in the event, this Court had ordered for appointment of an arbitrator within such time and the applicant failed in its compliance. Therefore, the non-appointment of arbitrator itself is not sufficient to refuse the relief sought for. If for any reason, no order of interim injunction is granted to the applicant, there is a likelihood of respondents 1 to 3 to re-claim the properties belonging to them originally and thereby to frustrate the joint development agreement and thus the commitments of parties, over the agreements and the appropriate reliefs sought for by the applicant may be frustrated. In the aforesaid circumstances, this Court is of the considered view that not only a prima facie case is found in favour of the applicant, but also the balance of convenience would lie in favour of the applicant. In the event of no injunction order is granted to the applicant, the assessment of the loss of applicant may not be possible to be measured and therefore, this Court is of the considered opinion that the applicant is entitled for interim injunction as sought for in O.A.Nos.40 and 41 of 2010. At the same time, it may or may not be helpful for the parties, if a Commissioner is appointed for inspection of the disputed properties to note down the physical features and the development made thereon, for the purpose of adjudication of the claim of both parties. However, the said appointment of Commissioner will not be in any way helpful to this Court for preserving the said property, but it may be helpful to the arbitrator to decide the disputes in between parties. Therefore, the Commissioner need not be appointed at this stage, as sought for by the applicant. The said right can be exercised by the applicant if necessary either before the arbitrator or to seek the arbitrator himself to visit the place directly to note down the necessary features for the purpose of conducting arbitral proceedings. Therefore, this Court does not found any necessity of appointment of Advocate Commissioner at this stage.

24. For the aforesaid observations, the applications in O.A.Nos.40 and 41 are allowed and the application in A.No.134 of 2010 is dismissed. The parties are directed to bear their respective costs.

25. The applicant is directed to initiate arbitration proceedings within one month from today, if not initiated so far.

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