

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 16131 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

VIJAY ARVIND JARIWALA
 Versus
 UMANG JATIN GANDHI

Appearance:

MR. SANDIP C BHATT(6324) for the Petitioner(s) No. 1
 MR DHAVAL D VYAS(3225) for the Respondent(s) No. 1

CORAM: **HONOURABLE MR. JUSTICE N.V.ANJARIA**
 and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date :06/05/2022

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Civil Miscellaneous Application No.20 of 2021, was an application filed under Section 9 of the Arbitration and

Conciliation Act, 1996. The same was filed by Umang Jatin Gandhi against the petitioner Vijay Arvind Jariwala, who were the two partners of the partnership firm - Blue Feathers Infracon. In the said proceedings, the petitioner herein filed application Exhibit 49 seeking to implead one Falguni Sandip Naik and Sandip Balwantraai Naik persons as parties.

2. The said application Exhibit 49 came to be dismissed by the Commercial Court - learned 9th Additional District Judge, Surat, Bardoli by his order dated 29.9.2021. It is this order which is sought to be challenged by the petitioner by filing the Special Civil Application.

3. The relevant facts are that the partnership firm in the name and style of Blue Feathers Infracon created by deed dated 23.2.2012 which then was consisted of partners named Sandip Balwantraai Naik, Umang Jatin Gandhi- respondents herein, Vijay Arvindlal Jariwala and Sandip Balwantraai Naik in capacity of partner of another firm named called Blue Feathers Incorporation. In the year 2014, two partners Sandip Naik in individual capacity and Sandip Naik in capacity of partner Blue Feather Incorporation separated from the firm. The retirement deed was executed on 17.7.2014. The petitioner and the respondent herein remained two partners of the firm with profit sharing ratio 50% each. The rest of the conditions of original partnership deed remained unchanged.

3.1 It appears that the partnership firm- Blue Feathers purchased land property bearing Final Plot No.136 Paiki admeasuring 4146.25 sq.meters from one Mohammad Yakub for consideration of Rs.2,51,27,500/-. Agreement dated 23.5.2017 and subsequently registered sale deed dated 3.6.2017 were

executed between the existing partners of the firm and the vendor. On the land purchased by the firm as above the scheme known as 'Lotus' for construction of residential flats was floated. The construction of the scheme was earlier stopped which was restarted by the existing partners after obtaining necessary permission from the authorities. The existing partners- the petitioner respondent herein- obtained loan of two crores for the project by mortgaging the said land, it was stated.

3.2 The construction of the said project faced rough weather. It was not completed. The existing partners made allegations against each other about irregularities committed in the conduct of the project. The petitioner herein alleged that the respondent- Umang Gandhi acted fraudulently and allotted several flats/units in the name of 'Mann Developers' which was a sham firm created by him. The investors who invested their money in the scheme registered complaints and also filed court cases.

3.3 Respondent Umang Gandhi, in view of the Arbitration Clause in the condition No.20 of the partnership deed, filed on 2.3.2021 application seeking interim measures under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act'). Therein he alleged that the other partner- petitioner herein was non co-operative in the project Lotus, that he was not giving signatures, was not allowing the execution of signatures of agreement to sale etc. and that construction was required to be discontinued since November, 2020 because of the conduct of the petitioner. It was alleged that the payment of materials on the site, the payment to the contractor and payment to the labourers were not made and even the time period for cash credit facility obtained from the Bank had got over. It was stated that the prestige of the firm had

thereby suffered.

3.4 The interim prayers were sought for asking direction against the petitioner partner to co-operate in the completion of the project Lotus and in conducting all affairs relating thereto, in the alternative, it was prayed to allow the applicant to take all the steps to complete the same. Prayer was also made to permit to operate the bank account and to execute the necessary documents in favour of the purchasers.

3.5 It was in the above proceedings of Section 9 that the petitioner herein filed application Exhibit 49 on 4.9.2021. In the said application filed under Order I Rule 10 of the Code of Civil Procedure, 1908, the petitioner prayed to join two parties as respondents- one Falguni Sandip Naik as respondent No.2 and Sandip Balwantraai Naik as respondent No.3. The petitioner stated that the firm Blue Feathers gave to said Falguniben unsecured loan of Rs.4,26,35,000/- by cheque and Rs.2,54,00,000/- by cash. Falguniben was wife of the partner Sandip Balwantraai Naik- the erstwhile partner who had retired from the firm as stated above. It was stated that these amounts were paid during the years 2011 to 2014. Out of the said total amount given unsecured loan, Rs.19 lakhs by cheque and Rs.1,75,10,000/- by cash were repaid to the firm by said Falguniben, and the remainder amount was required to be recovered.

3.6 It was further stated that when the partnership firm purchased land Final Plot No.136 paiki, by registered deed dated 3.6.2017 on which the scheme 'Lotus' was started, at the time of said transaction, Rs.1,99,00,000/- came to be readjusted while paying the purchase price, from the total dues recoverable

by the firm from said Falguniben. The said third party however, was yet to pay the balance amount.

3.7 It was alleged in the application Exhibit 49, that the said Umang Gandhi was solely responsible in derailing the construction project and in not making payment to the vendors and to the financial institutions from whom the loan was availed and had defrauded the firm. It was stated that Umang Gandhi, during the proceedings of Section 9 issued notice dated 27.5.2021 through his advocate demanding the amount of Rs.10,29,97,150/- from Falguni Naik. It was further stated that Umang Jatin Gandhi in capacity of partner of Blue Feathers Infracon filed criminal complaint under Section 138 of the Negotiable Instruments Act, 1882 and also instituted Special Civil Suit No.135 of 2021 against the said Falguni Naik.

3.8 On the basis of all the above facts pleaded and averred, the petitioner invoked provisions of Order I Rule 10, CPC seeking to join said two persons as parties in the proceedings of Section 9 of the Arbitration Act initiated by the Umang Gandhi. In was the case that in the facts and circumstances, the said two proposed respondents were proper and necessary parties in Section 9 proceedings. The Commercial Court dismissed the application.

4. Learned senior advocate Mr.R.R.Marshall with learned advocate Sandip C. Bhatt for the petitioner submitted about creation of partnership firm and the subsequent retirement of partner Sandip Balwantraai Naik, submitted that the Falguni Naik who happened to the wife of the retired partner, was given large sum of money from the firm and that part of the amount was also adjusted in the sale consideration by the firm paid to the vendor while the land was purchased. It was submitted that the account

was required to be settled with said proposed parties, that the disputes had arisen between the partners in relation to the project sought to be put up on the land purchased.

4.1 It was further submitted by the petitioner that during the proceedings of interim measure, the original applicant Umang Gandhi had issued notice to the said parties to refer the amount which showed that the amount was recoverable by the firm from the said parties. Reference was also made about filing of criminal complaints, the complaint under Negotiable Instruments Act and about filing of the civil suit. It was the submission that the retiring partner continues to be liable to the third parties in respect of his dealings with the third party while he was a partner. It was also submitted that the liability of the retiring partner remained continued and that he had not given the public notice of dissolution. It was submitted that for all these facts and reasons, the said two proposed persons were proper and necessary parties.

4.2 On behalf of the respondent, on the other hand, learned senior advocate Mr. Jal Unwala with learned advocate Mr. Dhaval Vyas who appeared on caveat submitted that filing of application Exhibit 49 was dilatory tactic, it was submitted that arbitration was the mechanism to resolve the disputes between the parties concerned and that the disputes were between the existing partners, one of them filed application Section 9 for interim measures in view of the intended arbitral proceedings between them. It was submitted that the proposed respondent No.3 parties who were not concerned in the proceedings, it was submitted that they were neither proper nor necessary parties in the proceedings of Section 9 of the Arbitration Act. Learned senior advocate relied on the decision of the Supreme Court in

the **Firm Ashok Traders Vs. Gurumukh Das Saluja and Other [(2004) SCC 155]**, in order to buttress his submissions.

5. In light of the prayer of the petitioner seeking to join the proposed respondents who were third parties in the proceedings of Section 9 of the Arbitration Act, the question in principle arises that whether a third party who is not party to the arbitration agreement, could be impleaded as parties. In the present case as seen above, respondent partner in the proceedings of Section 9 initiated by other existing party, wants to join Falguni Naik and Sandip Balwantrai Naik on the ground that the partnership firm had certain dealings and transactions with them and in that context they were required to be joined in the proceedings of the interim measures initiated by the respondent existing partner.

5.1 The Arbitration Act, 1996 is a special Act, designed to provide machinery in law to facilitate the disputes between the parties till the process of arbitration. The parties who have entered into arbitration agreement, are entitled to seek constitution of arbitral tribunal in accordance with the provisions of the Act. The provisions of Arbitration Act, 1996 are made to apply to the parties who are bound by arbitration clause and their relationship in the resolution of disputes between them, in the process of arbitration is governed by the provisions of the Act.

5.2 Section 9 of the Act enables a party to seek interim measures before or during a arbitral proceedings, which are intended inter alia to balance the rights between the parties who would subject themselves to arbitral proceedings for resolution of disputes, until such disputes are decided by arbitrator. In the

Act the term 'party' is defined in Section 2 (h) to mean a party to an arbitration agreement. When the statutory provisions under the Act are acted upon between the parties, they are the parties with the arbitration agreement.

5.3 In relation to the aspect as to whether in the proceedings of appointment of arbitrator under Section 11 read with Section 7 of the Act, who could be the parties that may be impleaded as respondent, the law has found a definite exposition. Section 7 deals with the arbitration agreement which means an agreement between the parties to submit to arbitration the disputes, whereas Section 11 is about appointment of arbitrators. In **Deutsche Post Bank Home Finance Limited Vs. Taduri Sridhar and Another [(2011) 11 SCC 375]** there was tripartite housing development agreement with developer as guarantor. Inter se dispute arose between the guarantor and the borrower in respect of the construction agreement and in that view arbitration clause was invoked. It was held that the lender was not party to the arbitration agreement, could not have been impleaded. The order of appointment of arbitrator the same related to the lender was set aside and to the extent it related to disputes between borrower and lender was upheld.

5.4 Similar proposition was laid down in other decisions in **Jagdish Chandar Vs. Ramesh Chandar [(2007) 5 SCC 719]**, **Yogi Agarwal Vs. Inspiration Clothes & U, [(2009) 1 SCC 372]**; **(2009) 1 SCC (Civ) 169**, **S.N.Prasad Vs. Monnet Finance Limited [(2011) 1 SCC 320]**; **(2011) 1 SCC (Civ) 141**, that a person who is not party to the arbitration agreement, if impleaded as party in the petition under Section 11 of the Act, the court should delete such party or while accommodating arbitrator it should make clear that arbitrator will decide only

disputes between the parties to the arbitration agreement.

5.5 It is the 'party' defined under Section 2(h) of the Act which may initiate proceedings under Section 9 for interim measures. The very basis of Section 9 proceedings is the arbitration clause under which the arbitration proceedings could be initiated. The interim measures could be prayed for and would operate between the parties who would be going for or have gone, for arbitration, namely the parties to the arbitration. By analogical reasoning it would imply that third party has no concern with the proceedings of Section 9 nor with the said provision recognizes the inclusion of the third party, who may be independently claiming the rights against the parties to the arbitration and vice versa.

5.6 In **Firm Ashok Traders (supra)** in which the Supreme Court considered the question of nature of and maintainability of application Under Section 9 in view of the Section 69 of the Partnership Act, 1932 when filed by partner of unregistered firm, inter alia observed that an application under Section 9, under the scheme of the Arbitration Act, 1996 is not a suit, though the application may result into initiation of civil proceedings. The Supreme Court observed that 'the right conferred by Section 9 cannot be said to be one arising out of contract. The qualification which the person invoking jurisdiction of the court under Section 9 must possess is of being a 'party' to an arbitration agreement.' It was further observed, '*a person not party to an arbitration agreement cannot enter the court for protection under Section 9*'.

5.7 The position of law that the proceedings under the Arbitration Act which would include the proceedings under

section 9 proceedings are confined between the parties to the arbitration agreement stand buttressed also by decision of the Supreme Court in the context of section 11 (6) of the Act. It was held in **S. N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Limited and Others [(2011) 1 SCC 320]** in the context of section 7 and 11 of the Arbitration Act, 1996, that a guarantor cannot be made a party to a reference to arbitration and subjected to arbitration award, who was not party to loan agreement contained in the arbitration clause. In that case, there was arbitration agreement between the lender, borrower and one of the guarantors and it was held that it could not be deemed or construed to be arbitration agreement in respect of another guarantor in a party to arbitration agreement. In the proceedings of section 11, a person who is not a party to the agreement, has no association in eye of law. On the same footing, a third party cannot be a party in the proceedings under section 9 of the Act for interim measures wherein by very nature of the proceedings, third party cannot be said to have a legal participatory right.

5.8 As a stranger to the arbitration agreement has no *locus standi* to invoke the provisions of Section 9, since this provision whereunder a party to the arbitration agreement may seek interim protective measures against the another party to the agreement, a third party who is not party to the arbitration agreement cannot have any role to play in the proceedings to play in to the entitlement to be impleaded. Only if the third party is one, who is claiming through party to the arbitration agreement, in such context of given fact situation, different complexion may arise.

5.9 Primarily and for all purposes, the provision of Section 9 is intended to operate between the parties to the arbitration agreement. They are the proceedings which may be taken out before or during arbitration proceedings. An award which may be passed by the arbitrator would operate only between the parties to the arbitration agreement, in as much as the disputes between such parties would be arbitrator. Therefore if the interim measures proceedings, a non-party to the arbitration agreement is joined and the order regarding interim measure is addressed to such party, it would lead to chaotic situation, as such third party would not be amenable to the final resolutions of the disputes. The arbitrator will have no jurisdiction to decide in respect of or would have no domain over the rights of the third party. A person who is not party to arbitration agreement, remains stranger to the proceedings of Section 9 of the Arbitration and Conciliation Act. For such third party no *lis* is created in proceedings of Section 9. Even if the parties to the arbitration and the third party have some inter se rights and obligations to be enforced *vis a vis* each other, it would be a separate course of action.

6. **Shoney Sanil vs. Coastal Foundations (P) Ltd. and others (AIR 2006 Kerala 206)**, the writ petitioner had challenged injunction order issued by the District Court upon an application under section 9 of the Arbitration and Conciliation Act, 1996, filed by the respondents. The facts were that the respondent Nos.1, 3 and 4 entered into agreement to build on the land of which they were the owners. The petitioner was a third party filed suit before the Civil Court and obtained decree against respondent Nos. 2 to 4. In execution of which, the property in question was brought to sell. The writ petitioner before the High Court purchased it and share certificate was

issued in his favour, followed by delivery of the property. The petitioner 3rd party was just claimed possession of the property. As disputes arose amongst the respondent Nos. 1 to 4, the first respondent invoked section 9 of the Arbitration Act wherein injunction restraining the writ petitioner and respondent Nos. 2 to 4 from altering the nature of the property was passed.

6.1 The question addressed was whether the writ petitioner who was admittedly a third party to the arbitration agreement between the respondents and who had in his favour a confirmed court sale and certificate as well as delivery of possession, could be dispossessed, enjoined or subject to any other court proceedings under section 9 of the Arbitration Act, 1996. The Madras High Court appreciated the scope of section 9 in light of attendant provisions of the Arbitration Act observing thus,

“...the interim measures which were conceived by the Legislature while enacting Section 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 section 9, which provides for the party to apply for interim measure under Section 9. Therefore, only a party to the arbitration agreement can apply to a Court invoking Section 9, which consists two parts....”

6.1.1 It was observed that reading of provisions of section 9 was to show that the measures mentioned under the said provisions can be passed in relation to the subject matter of the dispute in arbitration and it is not the intention of the court to interfere with or interpolate with third party rights. It was stated that arbitral tribunal has its authority on the basis of the agreement between the parties in the arbitration agreement,

and it is not the court to interfere with third party rights, as may the courts authorize in that regard by the law of the land.

6.1.2 It was further observed that,

“...The issuance of interim injunction or appointment of receiver provided under clause (d) and the residuary provision to issue such interim measure of protection as may appear to be just and convenient in terms of clause (e) of Section 9(i) and (ii) have to be read in the backdrop of the extent of jurisdiction which can be exercised and, this is limited to the parties who are governed by the arbitral agreement and not in excess thereof. 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 under Section 9, the rights of the third party, holding possession on the basis of a Court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act.”

6.2 It is therefore clear that what Section 9 contemplates is issuance of interim measures by the court only at the instance of the party to an agreement with regard to the subject matter of arbitration agreement. The writ petitioner before the Madras High Court was an auction purchaser in whose favour sale certificate and also the delivery of possession, was held to be not to be subjected to proceedings under section 9 initiated on the basis of the alleged arbitral agreement between the respondents.

6.3 In another words, what is indicated by section 9 is that provisions for interim measures is confined and operate between the parties to the arbitration agreement. It is a provision for enabling a party to the arbitration agreement to have a protective interim measures either before or after the arbitral proceedings. The entire basis of the section is the operation of

arbitration agreement between the parties. The concept of interim measures enacted by the Legislature in section 9 excludes the third party- one who is not party to the arbitration agreement. The only exception which could be carved out is in respect of those who may be claiming through the party to the arbitrator. Such is not the case here.

6.4 Therefore looking from the standpoint of the facts involved also, the proposed parties cannot be said to have any inclusive right in the proceedings of Section 9, which are the proceedings initiated by one existing partner of the firm against the another existing partner, in respect of the dispute between them. As rightly noticed by the Commercial Court below, it is on the four main grounds that the prayer for joining said Falguni Naik and Balwantrai Naik is rested. Firstly that the retiring partner Sandip Naik did not publish public notice regarding his retirement from the firm, therefore he is liable to the third parties. The second consideration urged was that the said Falguni Naik was given unsecured loan by the firm Blue Feathers Infracon in the year 2013 and since the amount is not fully paid by said Falguni Naik, she is required to be joined as party in the proceedings of interim measures under Section 9 initiated by one of the partner. The third was also that the amount was also recoverable from said Sandip Naik by the firm which would require his presence as party in Section 9 proceedings. The fourth ground alleged was that since the Umang Jatin Gandhi and Sandip Balwantrai Naik committed fraud and cheating with the investors, said Sandip Naik has to be made party.

6.5 All the above factual aspects hardly justify the case for joining the proposed parties. In addition that Section 9

proceedings are and have to be basically between the parties to the arbitration, the above four grounds put forth by the petitioner create a separate cause of action. The aggrieved party would have a separate cause of action against another before appropriate legal forum.

6.6 In the facts of the case the aspects to be highlighted are that the dispute exists between the applicant respondent of Section 9 proceedings who are the partners and party to the arbitration agreement. Out of the two proposed parties sought to be joined in the proceedings of Section 9, Falguni Naik was never associated in any way with the partnership firm, whereas Sandip Naik was a partner already retired. The dispute between them and the partnership firm, even if viewed to be existing, such cannot be said to be dispute within the arbitration clause which was to operate between the parties. Such dispute could be said to be outside the purview of the arbitration. Merely because the partnership firm may have to recover money or have some disputes with the proposed parties, such aspect would not made out a case for joining them in the proceedings of Section 9 of the Act. The Commercial Court was justified in dismissing the petition.

7. In view of the reasons supplied by the Commercial Court below and for the supplemented additionally as above, the challenge to the impugned order fails. The Special Civil Application is dismissed. Notice is discharged. Interim orders are vacated.

(N.V.ANJARIA, J)

(SAMIR J. DAVE, J)

Manshi