T.D. Srinivasan and S. Kannappan and Others Vs M/s. AMR Malind Infra Private Limited.

Civil Miscellaneous Appeal No. 334 of 2011

Court: Andhra Pradesh High Court

Date of Decision: Sept. 20, 2011

Acts Referred:
Arbitration and Conciliation Act, 1996 â€" Section 34(2), 37, 9, 9(1)#Civil Procedure Code, 1908 (CPC) â€" Order 18 Rule 5#English Arbitration Act, 1950 â€" Section 15#English Arbitration Act, 1996 â€" Section 48(5)#Income Tax Act, 1961 â€" Section 2(47)#Specific Relief Act, 1963 â€" Section 14, 14(1), 16, 41#Transfer of Property Act, 1882 â€" Section 53A

Citation: (2011) 09 AP CK 0067

Hon'ble Judges: K.S. Appa Rao, J; A. Gopal Reddy, J

Bench: Division Bench

Advocate: D. Prakash Reddy, representing Sri. S. Sri Ram, for the Appellant; N. Subba Reddy, representing Sri. P. Vinayaka Swamy, for the Respondent

Final Decision: Allowed

Judgement

Honourable Sri Justice A. Gopal Reddy

1. This Civil Miscellaneous Appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (for short ""the Act"") is directed against the order dated

31-12-2010 of the I Additional District Judge, Rangareddy District in allowing O.P. No. 51 of 2010 filed u/s 9 of the Act directing the

appellants/respondents not to alienate the petition schedule property or otherwise create third party interest or change its nature, pending initiation

and conclusion of Arbitral Proceedings.

2. Respondent/petitioner--Private Limited Company having expertise in undertaking development of residential and commercial complex entered

into registered Development Agreement-cum-General Power of Attorney (GPA) dated 24-08-2006 with the appellants/respondents agreeing to

construct residential/commercial complex in an extent of Ac. 2.20 gts and Ac. 0.35 gts of agricultural land, forming part of Sy. No. 538 of

Gundlapochampally village owned and possessed by the appellants/respondents, having purchased under a registered sale deeds dated 22-05-

2006 and 15-07-2006 respectively.

3. In the said Development Agreement the appellants/respondents (hereinafter referred to as "owners") agreed to transfer 75% undivided share of

land in the schedule property proportionate to the super built up area falling to the share of the respondent/petitioner (herein after referred to as

''developer") to be constructed over the schedule property by the developer, the developer undertakes to construct and deliver 96,000 square feet

of the super built up area to the owners from all encumbrances as per Condition No. 5 of the Development Agreement. The cost of construction of

such owners constructed area shall be borne by the developer. The selection of the constructed area of the owner shall be decided with the

consent of owners and the developer shall execute supplementary agreement sharing the constructed area and land. The owners shall be given first

preference for the selection of the constructed area and also execute supplementary agreement showing the demarcation and allocation of the area

with floor plans. The developer should not proceed with the construction without executing supplementary agreement for demarcation and

allocation of areas. The final allocation of undivided share to the owners shall be computed after sanction and release of plans by the civic

authorities. In the event that construction is not started within nine months after receiving plan sanction from civic authorities, this joint Development

Agreement-cum-GPA stands cancelled. The owners have equal access to common facilities, electricity, water, gas, parks, road and other common

amenities at no cost to owners. The common facilities shall stretch to the abutting lands also. It is the responsibility of the developer to get the land

use of the petition schedule property converted and submit the plans of the complex within 15 days from the concerned departments. Under

Condition No. 9.3 of the Development Agreement, the developer is at liberty to take the development of abutting lands also and in such an event

the allocation of the built up area to the owners will be in the first block/phase in that particular slot as the entire building complex is being

constructed in block/phase wise manner.

4. Condition No. 17.1 of the said Agreement provides that in the event of breach of the terms and conditions of the Agreement by either party, the

aggrieved party shall be entitled to specific performance and also to recover all the losses and expenses incurred as consequences of such breach

from the party committing the breach. Condition No. 18.1 of the Agreement provides for the resolution of the disputes between the parties with

regard to the said agreement or under the agreement or relating to interpretation of any of the terms and conditions of the said agreement by

referring to a sole arbitrator to be appointed by the parties under the provisions of the Act. The seat of such Arbitral Tribunal shall be Hyderabad.

The developer purchased an extent of Ac. 2.00 of agricultural land situated in Sy. No. 173 of Dhoolapally village, Qutubullapur Mandal under a

registered sale deed dated 16-11-2006 abutting to the property agreed to be developed. The said property has no access to the main road except

the developed property.

5. The developer filed the impugned O.P. stating that it approached Hyderabad Urban Development Authority (HUDA) in December, 2007 for

conversion of the property belonging to the owners into residential houses, as the same was earmarked for agricultural use in the master plan. The

HUDA required No Objection Certificate (NOC) from Andhra Pradesh Industrial Infrastructure Corporation (APIIC) as the said property was

reserved to be given to the proposed works of the Volks Wagon. The APIIC issued NOC in January, 2008. Meanwhile, HUDA prepared master

plan showing the said property as affected by water body based on satellite images. For which both the developer and the owners filed objections

in November, 2007. The developer paid a sum of Rs. 38 lakhs and Rs. 50 lakhs to the owners towards refundable advance, which were handed

over to N. Srinivas Rao. The HUDA converted the land use of the said property into residential and in the month of August, 2008 released a

master plan earmarking the said property for residential use. According to the developer--Company their Managing Director discussed the matter

with the vendor of the second respondent and explained the reasons for delay in commencing the construction in September and December, 2008

and revised plans were sent to the owners through Srinivas Rao. While so, the first respondent (owner) addressed an e-mail to the Managing

Director of the developer--Company stating that it is three years since the joint Development Agreement has been signed and original completion

date of the project is approaching in the month of August, 2009 and requesting the developer to provide formal written progress report covering

activities completed to the date and approximate major milestones for future activities which will help the owners what lies ahead of them and assist

them in completing planning activities on their side. On receipt of e-mail, the Managing Director of the developer--Company and the first

respondent (owner) discussed the matter at length on 17-07-2009 and pursuant to the same, the first respondent (owner) sent an e-mail dated 21-

07-2009 to the Managing Director of the developer--Company confirming that the requested schedule with all milestone will be available within

two weeks by 01-08-2009 and that he would get back if further discussions are needed. While the e-mails are exchanged between the parties, the

owners filed caveats in all the Courts in the month of December, 2009 and got the Development Agreement-cum-GPA cancelled by executing

Cancellation Deed dated 06-12-2009 at Millburn, New Jersey and presented the same for registration through their attorney in the office of the

Sub-Registrar, Medchal. While so, when some activity was reported on 31-12-2009 in the property agreed to develop, the authorised

representative of the developer--Company visited the spot and asked the workers to vacate the same. As they failed to vacate the premises, a

complaint was lodged in Pet Basheerbad Police station complaining that the owners committed breach of contract. The developer is initiating

arbitral proceedings by issuing a notice for appointment of sole Arbitrator. Pending initiation and finalization of arbitral proceedings, if the said

property is not protected by appropriate orders, the owners may alienate the said property or create third party interest moved the Court u/s 9 of

the Act directing the owners not to alienate the said property or otherwise create third party interest or change its nature pending initiation and

conclusion of Arbitral Proceedings and other reliefs.

6. The claim of the developer has been contested by the owners by filing written statement inter alia contending that petition as such is not

maintainable and the Court will not have jurisdiction to entertain the petition and the developer is also guilty of suppression vari and suggestion falsi.

It was contended that in view of cancellation of Development Agreement, no rights have been accrued to the developer as it has abandoned the

Development Agreement-cum-GPA. Therefore, the owners reserve their right to seek damages against the developer due to its failure to perform

their part of obligation under the Agreement. The land at present is in the same position as it was at the time of entering Development Agreement.

The question of invoking the jurisdiction of arbitration does not arise as the owners abandoned the Development Agreement. It was denied that the

developer purchased an extent of Ac. 2.00 of land abutting the subject property pursuant to Development Agreement. It is contended that the

abutting property purchased by the developer was never part of the Development Agreement-cum-GPA and cannot be part of any claim. In fact,

after the owners purchased the subject property in the year 2006, the developer has purchased an extent of Ac. 2.00 abutting the subject lands

after the Development Agreement was entered, with which the owners are not at all concerned nor they gave consent for purchase of two acres or

land. It is denied that HUDA required NOC from APIIC, as the subject property was reserved to be given to the proposed works of Volks

Wagon. There is no notification issued by the Government to that effect with regard to the above proposal for acquisition by APIIC and also

denied about sending of plans for approval of owners on 25-01-2007.

7. Sri N. Srinivas Rao though he is the own brother of the first respondent (owner), is also the business associate of the Managing Director of the

developer--Company and for that purpose he was made as the joint authorised signatory in the Development Agreement-cum-GPA. Further, N.

Srinivas Rao and the developer--Company have other business dealings with respect to other properties and in the month of June, 2007 the

developer informed the owners that the subject property was affected by water body and the owners filed their objections before the HUDA. For

proving that the developer resolving the dispute of water body, no proof is placed to show that there exists any real water body issue with regard

to the subject property except informing by phone and e-mail. It is specifically denied that in the month of November, 2007 developer paid Rs. 38

lakhs to the owners as refundable advance which was handed over to N. Srinivas Rao and further denied in the month of March, 2008 developer

paid a sum of Rs. 50 lakhs towards refundable advance and between November, 2007 and March, 2008 the developer paid another sum of Rs.

5.5 lakhs towards refundable advance to the owners through N. Srinivas Rao.

8. It is categorically asserted that no amounts were paid or given to the owners and if at all any payments are made to Srinivas Rao that might be in

connection with the other transaction and has nothing to do with the Development Agreement-cum-GPA. As the developer failed to perform its

part of obligation arising under the Development Agreement, it was informed on different occasions between 2008 and 2009 that non-performance

would result in cancellation of Development Agreement-cum-GPA. In spite owners provided adequate time to demonstrate the progress, as there

was no progress, they left with no other option but to cancel the Development Agreement-cum-GPA. Further, possession of the land was never

handed over to the Developer--Company, which is evident from Condition No. 1.1 of the Development Agreement-cum-GPA. The details of the

owners asking the developer to demonstrate progress etc. have been explained in the counter, which are not necessary for the purpose of deciding

the issue involved in the appeal and subsequent events. Suffice it to say on cancellation of the Agreement the above OP has been filed.

9. The learned I Additional District Judge through the impugned award was of the view that if Condition No. 5 and Condition No. 9.3 are to be

read conjointly, it would envisage and forcing the developer--Company to develop the abutting lands, they are at liberty to take the advantage of

abutting land also and the common facilities including the roads shall be stretched from the petition schedule property to the abutting lands also. In

view of arbitration under Condition No. 18 of the Agreement, which shall bind both the parties to approach Arbitral Tribunal for settlement of their

claims including the controversy, whether two acres of land purchased by the developer--Company have any access through the petition schedule

property, is a matter once again to be decided by the Arbitral Tribunal. If no interim arrangement is made, that too where Arbitral Tribunal has no

powers to grant the relief of injunction, there is every possibility of alienating the schedule property or creating rights to third parties or change the

nature of the schedule property in the event of that developer--Company would be put to immense loss, as such developer--Company is entitled

to have the relief of interim injunction the relief cannot be for indefinite period. If there is any delay on the part of the developer--Company in

getting appointment of Arbitral Tribunal to take up the present matter or upon taking cognizance by the Arbitral Tribunal, if the lapses are on the

part of the developer--Company, then interim injunction is liable to be vacated on moving petition by the owners. Holding so allowed the OP

granting injunction as aforementioned. Questioning the said order the present appeal has been filed.

10. Sri D. Prakash Reddy, learned senior counsel for the appellants/owners contends that under the Development Agreement-cum-GPA executed

in favour of the respondent/developer the owners never parted with the possession, and possession remains with the owners. The finding recorded

by the trial court in paragraph-13 that the plea of the owners running contra to the terms and conditions of the Development Agreement-cum-GPA

and the interpretation put forth by the lower court that Condition No. 5 and Condition No. No. 9.3 have to be read conjointly is erroneous; in

spite of specific plea taken by the owners in the counter at para-5 that N. Srinivas Rao is business associate of the developer--Company and

denied payment of amount of Rs. 38 lakhs, Rs. 50 lakhs and Rs. 5.5 lakhs through Srinivasa Rao and the same might have been in connection with

other transaction; the developer failed to substantiate the said payment of Rs. 93.5 lakhs. Admittedly, the cheques were not issued in the name of

owners nor there is any condition in the Agreement that the developer should give security deposit. Therefore, once the developer took a false plea

of payment of Rs. 93.5 lakhs and failed to substantiate the same not entitled to equitable relief of injunction. In the counter filed by the developer in

CMA it is stated about payment of cheques through Srinivasa Rao towards refundable advance, but the same is contrary to the averments made in

para-7 of the counter wherein it is stated as the owners could not come up with the required expenditure needed to clear, as requested by the

owners they have extended financial support of Rs. 93.5 lakhs under the expenditure of owners head to Srinivasa Rao to complete the process.

The said plea is contrary to Condition No. 2.1 of the Development Agreement. Therefore, it is absurd to contend that the amounts were deposited

to clear the land for development purpose.

11. It is specifically pleaded in the counter filed by the owners in OP that Srinivasa Rao who made as Chief General Manager/Managing Director

of the developer--Company, and the same has not rebutted by filing any reply. The developer failed to satisfy the three cardinal principles viz.

prima facie case, balance of convenience and irreparable injury for grant of injunction. The conduct of parties is an important factor, which has to

be taken into consideration for granting equitable relief of injunction. In view of Section 41(e) of Specific Relief Act, 1963 where a false plea has

taken by the developer about payment of Rs. 93.5 lakhs, they are not entitled to injunction.

12. Sri N. Subba Reddy, learned senior counsel for the respondent/developer contends that in view of explicit Condition No. 17 of the

Development Agreement-cum-GPA that the aggrieved party shall be entitled to specific performance of the agreement, which has not been

referred to by the trial court. Therefore, it is not open to contend that the developer is not entitled for specific performance of the Agreement. The

arbitrator has to decide the merits and demerits of the case including whether the developer is entitled to specific performance or not. Therefore,

this Court cannot make any observation with regard to the merits of the case nor can record a finding that specific performance cannot be granted

u/s 14(1) of the Specific Relief Act, 1963 which has to be necessarily decided by the arbitrator. In support of the same, reliance is placed on the

judgment of the Supreme Court in Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, and M.P. Housing Board Vs.

Progressive Writers and Publishers, The developer in para-7 of the application categorically stated the delays, which were caused for undertaking

the development and the payment of amount by the developer to the owner of Rs. 38 and 50 lakhs by way of cheques towards refundable

advance. Between November, 2007 and March, 2008 another sum of Rs. 5.5 lakhs was paid to Srinivas Rao. Once the developer is entitled to

specific performance of the agreement as per Condition No. 17 of the Development Agreement, property, which is the subject matter of

Development Agreement, has to be preserved and if the owners are allowed to create third party rights, same will cause prejudice and multiplicity

of proceedings. In view of the same, it is incumbent on the court to preserve the property and for the said purpose reliance is placed on the

judgment of the Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., He lastly contended that if this Court feels

no finding has been recorded about encashment of cheques paid to the owners, matter could be remitted to the court below for fresh disposal.

13. In view of rival submissions, as referred to above, the point that arises for consideration in this appeal is:

Whether the developer is entitled to seek injunction restraining the owners from alienating the property covered by Development Agreement or

otherwise create third party rights pending initiation of arbitral proceedings u/s 9(1)(b) of the Act.

14. In OLYMPUS SUPERSTRUCTURES PRIVATE LIMITED (1 supra) the Supreme Court considered the issue whether Section 34(2)(b)(i)

of the Arbitration and Conciliation Act, 1996 prohibits reference of a dispute with regard to specific performance of contract to Arbitration, the

ratio laid down by the Punjab, Bombay and Calcutta High Courts, where the above three Courts have taken a view that arbitrator can grant

specific performance relating to immovable property under an award; whereas the Delhi High Court taken a view that the arbitrator cannot grant

specific performance. The Supreme Court approved the ratio laid down by the Punjab, Bombay and Calcutta High Courts is the correct one and

the view taken by the Delhi High Court is incorrect. It was further held that the right to specific performance of an agreement of sale deals with

contractual rights and it is certainly open to the parties to agree with a view to shorten litigation in regular Courts to refer the issues relating to

specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract

relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act,

1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained

a prohibition relating to specific performance of contracts concerning immoveable property.

15. In the case of m.p. housing board (2 supra) the issue, which fell for consideration before the Supreme Court, was whether referring of the

dispute and of the award passed by the arbitrator for enforcing the agreement with certain conditions is justified or not as confirmed by the trial

Court and High Court. Rejecting the contention the Supreme Court held that when there has been quantification of the costs of the construction of

the building and incorporation of the same in the third agreement the same could not be re-determined by the arbitrator by rewriting the terms of

the agreement entered into between the parties. It was also held that there is no dispute with the proposition that the intention of the parties is to be

gathered from the words used in the agreement. If the words are clear, there is very little that the Court can do about it. The same was decided on

different sets of facts.

16. In adhunik steels ltd. (3 supra) while considering the scope of Section 9 of the Act for grant of injunction the Supreme Court held it would not

be correct to say that the power u/s 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that

generally govern the courts in that connection and to see whether the High Court was justified in refusing the interim injunction on the facts and in

the circumstances of the case.

17. In Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, the Supreme Court while considering the scope of Section

9 of the Act for grant of interim order held the power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in that

behalf. It is also clarified that the Court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for the

purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the

grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act. There is also the principle that

when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition

for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the

provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power u/s 9 of the Act is not controlled by the Specific

Relief Act has been taken by the Madhya Pradesh High Court. The power u/s 9 of the Act is not controlled by Order XVIII Rule 5 of the CPC is

a view taken by the High Court of Bombay. But, how far these decisions are correct requires to be considered in an appropriate case. Suffice it to

say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are

prima facie inclined to the view that exercise of power u/s 9 of the Act must be based on well recognized principles governing the grant of interim

injunctions and other orders of interim protection or the appointment of a receiver.

18. this Court in Wockhard Hospitals Limited v. Kamineni Hospitals Limited 2011 (3) ALD 228 (DB) while upholding the orders of the civil court

in dismissing the O.Ps. filed by the appellant seeking various relief in the form of injunction, appointment of advocate commissioner to preserve the

properties and considering the facts of the case held that the petitioner is not in management of the cardiac unit and it has already taken over all its

movable and immovable items and therefore u/s 14 of the Specific Relief Act, the contract for non performance of which a compensation of money

is an adequate relief, such contract cannot be enforced under the Specific Relief Act and when it is not the case of the petitioner who moved

application u/s 9 that it will not be in a position to recover the money sustained by it by reason of the alleged illegal determination of the contract of

the respondent and if the petitioner succeeds before the arbitrator with regard to the subject matter of the dispute in arbitration, it cannot be said

that the petitioner will not be in a position to execute the said arbitral award affirmed the order of trial court refusing to grant injunction.

19. In Vidya Securities Ltd. Vs. Comfort Living Hotels Pvt. Ltd., when the party, who entered into agreement to run restaurant was illegally

terminated, moved the Delhi High Court u/s 9 of the Arbitration and Conciliation Act, 1996 for restraining the party, who terminated the

agreement, from giving or parting with the possession of ground floor, which is the subject matter of agreement or from entering or arrangement

relating to restaurant pending arbitral proceedings, as the agreement provides resolution of dispute through arbitration. Pending reference to the

arbitrator the Delhi High Court held the question as to whether the contract between the parties was validly determined or not would be

determined by the Arbitrator only to be appointed in terms of the agreement between the parties but this Court on prima facie basis, holds that the

contract stood determined and as such, the petitioner is not entitled to interim relief as prayed for and dismissed the petition.

20. What is culled out from the judgments, referred to above is that underlying principles applicable for grant of temporary injunction by the Courts

are equally applies for grant of injunction u/s 9 of the Act. The cardinal principles viz. prima facie case, balance of convenience and irreparable

injury as held by a Division Bench of this Court in Nawab Mir Barkat Ali Khan Vs. Nawab Zulfiquar Jah Bahadur and Others, have to be kept in

mind while granting injunction. While prima facie case sin quo non the party seeking injunction must satisfy atleast two conditions.

21. Keeping the same in mind, it is proper for this Court to consider whether the lower court is justified in granting injunction or not. There is no

dispute with regard to entering into Development Agreement-cum-GPA between the developer and owners. Condition No. 1.1 of the Agreement

deals with permission for development where it is stated owners who are in possession and enjoyment in the schedule property authorizes the

developer for the purpose of development to enter upon the schedule property and develop the same, however, the authority so granted does not

in any manner be construed as amounting to delivery of possession by the owners in part performance of the agreement u/s 53-A of the Transfer of

Property Act, 1882 or u/s 2(47)(iv) of the Income Tax Act, 1961. Under Condition No. 2.1 the developer agrees to carry out the construction as

per the agreed plains/drawings/designs for the construction of multi storied apartment building. The responsibility and expenses for preparing the

plan, obtaining renewal of plan sanctions and all the other permissions required to be taken up and complete the said construction and development

on the schedule property shall be that of the developer including conversion of land use. Condition No. 5.1 of the Agreement owners agreed to

transfer 75% undivided share of land in the schedule property proportionate to the super built up area falling to the share of the developer to be

constructed over the schedule property by the developer, the developer undertake to construct and deliver 96,000 sq. ft. of the super built up area

to the owners free from all encumbrances which area shall be in all floors for the absolute use and /or benefit and ownership of the owners. The

entire cost of construction of owners constructed area shall be borne by the developer. To the said effect supplemental agreement with regard to

sharing of constructed area and land will be entered between the parties. Preference is given for the selection of constructed area to the owners.

The developer was prevented from proceeding with the construction without executing supplemental agreement for demarcation and allocation of

area. The final allocation of undivided share to the owners shall be computed after sanction and release of plan by the civil authority. The owners

will have equal access to common facilities, electricity, water, gas parks, roads and other common amenities at no cost to owners. The common

facilities shall stretch to the abutting lands also. The developer agreed to complete the construction in all respects; the apartments building and the

owners constructed area before 01-08-2009 as per Condition No. 6 of the agreement. Under Condition No. 9.3 it was agreed between the

parties that the promoter/developer is at liberty to take development of abutting lands also and in such an event the allocation of the built up area to

the owners will be in the first block/phase in that particular slot as the entire building complex is being constructed in block/phase wise.

22. Under Condition No. 17, in the event of breach of the terms of the agreement by either party, the aggrieved party shall be entitled to specific

performance and also be entitled to recover all the losses and expenses incurred as consequences of such breach from the party committing the

breach. Condition No. 18 provides resolution of dispute through arbitration of a sole arbitrator appointed by the parties as per the provisions of

the Act and sittings for such arbitration shall be at Hyderabad.

23. There was no agreement between the parties that the developer has to deposit amount towards security deposit under the terms of the

Agreement. The entire cost of construction including architects fee and charges if any to be paid for obtaining license for the temporary connection

of water and electricity during construction and development of the schedule property including the area falling to the share of the owners shall be

borne by developer.

24. In pursuance of the Development Agreement and based upon the liberty to take development of abutting land in Condition No. 9.3, the

developer purchased an extent of Ac. 2.00 of agricultural land situated in Sy. No. 173 of Dhoolapally village, Qutubullapur Mandal, Rangareddy

District under a registered sale deed dated 16-11-2006. The property purchased is abutting to the property agreed to develop and has no access

to the main road, which is situated on the Eastern side of the said property. After purchase of the said land and entering into Development

Agreement, the developer approached HUDA in December, 2007 for conversion of property into residential use as stated by it in para-7. When

the developer alleges that he paid a sum of Rs. 93.50 lakhs to N. Srinivasa Rao on various dates, it is incumbent on the developer to establish that

the cheques were encashed by the owners and acknowledged the receipt of the same. Whereas in the counter filed by the owners it is specifically

denied about payment of the said amount and no such amounts were paid to the owners and if at all any amount is paid to Srinivasa Rao, the same

must be in connection with other transaction and nothing to do with the present transaction which has not been controverted by filing any reply.

Even in the counter filed in CMA in para-5 it is reiterated about payment of the amount of Rs. 38 lakhs and Rs. 50 lakhs by way of cheques

towards refundable advance and handed over to Srinivasa Rao. Between November, 2007 and March, 2008 another sum of Rs. 5.5 lakhs was

paid to owners through Srinivasa Rao. It is nowhere stated that cheques in the name of owners were handed over to Srinivasa Rao and in turn

cheques were encashed by the owners; whereas in para-7 it is averred that the Managing Director of the developer--Company sent an e-mail 29-

08-2009 to the first appellant/owner which reads as under:

We have moved an application for converting your agricultural land to residential status in December, 2006. HUDA authorities have held up the

file for clearance of land ceiling as your land attracted the provision of ceiling. While we were still pursuing the ceiling issue and the application

made considerable progress HUDA announced a revision to the master plan in year June, 2007 and proposed to change your land use from

agriculture to water body, throwing the future of land into dilemma. After large scale representations at all levels HUDA classified the land use to

residential in April, 2008. That"s when the whole controversy about the water body was laid to rest. As you could not come up with the required

expenditure needed to clear thus, as requested by you, we have extended the financial support of Rs. 92.5 lakhs under your head of expenditure to

Mr. Sreenivasa Rao to complete this process. This amount is to be treated by you as refundable deposit and to be returned to us at the time of

delivery of possession of the built space. The receipt of acknowledgement for this amount is still pending from you.

25. Once it is the responsibility of the developer to develop the project with its own expenditure as agreed in Condition No. 2.1 of the Agreement,

taking a plea by the developer that as the owners could not come up with the required expenditure needed to clear the land for development

purpose and as requested by them developer extended financial support of Rs. 93.5 lakhs under the owners head of expenditure to Srinivasa Rao

to complete the process is contrary to the terms and conditions of the Agreement. In such an event whether the developer is entitled to specific

performance of Development Agreement-cum-GPA in view of Section 16(c) of the Specific Relief Act, 1963 is a matter, which has to be gone

into by the arbitrator. Since any finding recorded by this Court into the said aspect will prejudice the claim of the developer before the arbitrator as

rightly contended by Sri N. Subba Reddy, but the same can be taken into consideration in judging the terms and conditions for grant of injunction

in favour of developer. But in the counter filed in the OP it is categorically asserted by the owners that they have asked the developer to

demonstrate the progress of the project with regard to:

1. Deploying resources to the project by starting with a project manager.

2. Allocation of funds for the project.

3. Preparation of detailed project plans identifying major milestones.

4. Appointment of an architect for preparing plans.

5. Obtaining no objection certificate from various authorities.

6. Schedule of specifications.

7. Bore well and water testing.

8. Study landscape details.

26. The developer has not done any of the above and fabricated the statements that they have provided plans to Srinivasa Rao which is an after

thought based on the cancellation of the Development Agreement-cum-GPA and the said Srinivasa Rao is no way concerned to take a decision on

behalf of land owners with regard to any aspect on the subject land except joint authorized signatory along with M.D. and the E-mail sent by the

developer-Company dated 29-08-2009 violated the requirements for high and luxury township with appropriate amenities promised by the

developer-Company prior to signing the Development Agreement-cum-GPA. The developer unilaterally decided to change the nature of town ship

to budget apartments, which resulted in loss approximately Rs. 5 crores in revenue that would have been realized by sale of apartments, in case the

said apartments were completed and handed over in time. Hence, they have cancelled the Development Agreement-cum-GPA as the developer

abandoned the project.

27. It is admitted that Development Agreement-cum-GPA was cancelled by the owners by executing a registered Cancellation Deed dated 06-

12-2009.

28. In spite of cancellation of Development Agreement whether the developer is entitled to enforce the agreement by way of specific performance

or not is a matter, which has to be decided by the arbitrator. Mere permitting the developer to undertake developments in the abutting land also

and in such an event the allocation of built up area to the owners should be in the first block/phase in that particular slot under Condition No. 9.3 of

the terms and conditions do not prima facie indicate the owners agreeing to provide necessary passage to the land purchased by the developer on

the back side land agreed to be developed. What all the agreement provides is in case of such development the allocation of built up area to the

owners would be in the first block/phase in that particular slot as the entire building complex is being constructed in block/phase wise manner and

the owners will have an access to the common areas in the developed areas belonging to the developer also. It is nowhere stated that the

developer had already obtained necessary permission or proceed with the construction and construction is in the half way and at that stage the

Agreement was cancelled.

29. Whether the plea taken by the developer--Company that payment of Rs. 93.5 lakhs to N. Srinivasa Rao towards refundable advance is in

tune with the Agreement or not have to be decided by the arbitrator for grant of equitable relief of specific performance. But, we are of the prima

facie view that Agreement does not provide for giving such security deposit by the developer for enabling the owner to meet the expenses, as

contended in the counter, when the owners could not come up with the required expenditure needed to clear the site for construction, they have

extended the financial support. Obviously, by taking the said plea the developer made the owners responsible to clear the property and bear the

expenses; is contrary to the terms and conditions of the Agreement. The entire responsibility to clear the site to undertake construction and

obtaining necessary permissions is on the developer. Further, all the amounts, which were said to be paid by way of cheques, are not alleged to be

issued in the name of the owners. Though the developer took a plea that an amount of Rs. 93.5 lakhs was paid to the owners through Srinivasa

Rao, failed to establish the same. When the developer--Company approached the Court with false and untenable pleas contrary to the agreed

terms they are not entitled to equitable relief of injunction in view of Section 41(i) of the Specific Relief Act, 1963. The lower court without

considering the above aspect erred in granting injunction restraining the owners, which cannot be sustainable.

30. We also make it clear that the discussion and observations made by us are confirmed in the context of granting equitable relief of injunction

pending initiation of arbitral proceedings, and cannot be understood the said observation/findings with regard to enforceability of agreement by way

of specific performance which is left open to be decided by the arbitrator.

31. The impugned order is set aside and appeal is accordingly allowed and O.P. is dismissed. In the circumstances of the case, there shall be no

order as to costs.