IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 10 OF 2023
WITH
INTERIM APPLICATION NO. 770 OF 2023
IN
ARBITRATION APPEAL NO. 10 OF 2023

Kumar Urban Development
Private Limited & Anr. ...Applicants/Appellants

Versus

Atul Ashok Chordia & Ors. ...Respondents

* * *

- Dr. Veerendra Tulzapurkar, Senior Advocate a/w Mr. Aditya Shiralkar, Mr. Gaurav Gopal and Mr. Kanu Upadhyay i/by Wadia Ghandy & Co., for Applicants/Appellants.
- Mr. Mayur Khandeparkar, Mr. Akshay Doctor and Mr. Parag Sawant i/by P.S. Chambers, for the Respondents.

* * *

CORAM : MANISH PITALE, J

DATE : 08th MARCH, 2023

P. C. :

1. Heard finally with the consent of the learned Counsel for the parties.

2. The Appellants are aggrieved by judgment and order dated 06th January, 2023, passed by the Court of Additional Sessions Judge, Pune (hereinafter referred to as the "District Court") in an application filed by the Appellants under Section 9 of the Arbitration and Conciliation Act, 1996, for grant of interim measures. By the impugned judgment and order, the District Court rejected the said application.

3. The appellants and Respondents entered into a Share Purchase Agreement dated 21st March, 2018, whereby the Appellants agreed to sell and transfer to the Respondent Nos. 1 and 2 and the said Respondents agreed to purchase and acquire 100% equity shares of Respondent No. 3. At that time, Respondent No. 3 Company was known as KUL Developers Private Limited. The consideration for execution of the said agreement included an amount of Rs. 1,39,93,90,460/- subject to the lien of the Appellants over the shares and consideration reserved for an access road, to be paid by Respondent Nos. 1 and 2 to the Appellants in the mode and manner and on terms and conditions set out in the said agreement. At the relevant time, the Respondent No. 3 was the owner of land admeasuring 40 Hectares and 95.35 Ares at village Manjari, District Pune and it was undertaking phase-wise development of a project called KUL Nation Township Project.

4. The dispute between the parties in the present case concerns the aspect of consideration payable in respect of access road and clause 9 of the said agreement pertaining to the same. The said clause from 9.1 to 9.9 provides in detail as to the rights and obligations of the parties with reference to the access road and the consideration reserved for the same, payable by the Respondent Nos. 1 and 2 to the Appellants herein. It is relevant that the Appellant No.

1 is a company of which Appellant No. 2 is the promoter and the Respondent No. 1 is the promoter of the Respondent No. 2. As noted hereinabove Respondent No. 3, at the relevant time, was a company known as KUL Developers Private Limited and it is now Ashdan Developers Private Limited.

5. The material on record demonstrates that disputes arose between the parties on the question as to the respective obligations of the parties for construction of the access road, as also the mode and manner in which consideration was to be paid to the appellants, in the light of the fact that the Appellants on the one hand and the Respondent Nos. 1 and 2 on the other, made conflicting claims as to the exact status of construction of the access road and its completion.

6. The parties exchanged number of communications with each other, beginning from 08th January, 2020 till 05th September, 2022, wherein allegations and counter allegations were made in the backdrop of the disputes pertaining to the access road and interpretation of clauses 9.1 to 9.9 of the said agreement. While the Appellants claimed that Respondent Nos. 1 and 2 had specifically told them not to interfere with construction of the access road, although the Appellants as sellers were to facilitate construction of the road, the Respondent Nos. 1 and 2 alleged that the Appellants had failed to perform their obligations under the said clauses of the agreement. At

one point in time, the Appellants claimed in their communications that as per the information available with them, the access road was indeed constructed and available at the behest of the Respondent Nos. 1 and 2 and that therefore, under the agreement the said Respondents were obliged to inform the Appellants regarding the same, so that payment of consideration could be facilitated.

7. The Appellants stated in their communications repeatedly that since the construction of access road was complete, they were entitled to payment of monetary consideration of Rs.25 Crores. On the other hand, the Respondent Nos. 1 and 2 claimed that the construction of the road was not as per schedule 8 specified in clause 9.1 of the agreement and therefore, the question of payment of consideration did not arise. Towards the end of the series of communications exchanged between the parties, the Appellants sought to exercise option available to them under clause 9.2 of the agreement to claim consideration by allotment of flats in the concerned project by Respondent Nos. 1 and 2, while the Appellants denied that such option could be exercised, for the reason that the construction of the access road itself was not completed.

8. There is no dispute that the agreement consists of an Arbitration clause and therefore, the Appellants filed an application under Section 9 of the aforesaid Act, before the District Court for

grant of interim measures. The Appellants claimed that pending the disputes they were entitled to the interim measures as claimed, because Respondent Nos. 1 and 2 were obliged to keep state of affairs in such a manner that pending the disputes between the parties, the option available to the Appellants under clause 9.2 of the agreement to insist upon allotment and sale of flats to them towards consideration, was not foreclosed. The Appellants claimed that they apprehended that Respondent Nos. 1and 2 had already disposed of or they were in the process of disposing of the flats in the project and if urgent interim measures were not granted, there was every likelihood of the Appellants being deprived of exercising the option available to them under Clause 9.2 of the aforesaid agreement. It is in this factual background that the Appellants prayed for the following interim measures pending Arbitral proceedings between the parties:

> "(a) this Hon'ble be pleased to pass an order restraining the Respondents and/or their transferees and/or assignees either by themselves or their servants, attorneys, assigns, agents, representatives and/or any other person claiming through or under them from in any manner selling, alienating, transferring, parting with the possession of, encumbering, dealing with, disposing of, creating tenancies or otherwise creating any third party right or interest of whatsoever nature, whether directly or indirectly, in the Project Flats (a list whereof is

provided in Schedule-15 of the Share Purchase Agreement, Exhibit-A) or any part thereof in any manner whatsoever.

(b) this Hon'ble Court be pleased to appoint the Court Receiver of the Project Flats (a list whereof is provided in Schedule-15 of the Share Purchase Agreement, Exhibit-A), with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908 for taking possession of the Project Flats and managing, preserving and protecting the Project Flats and collecting the rents and profits thereof and to deposit the same with this Hon'ble Court.

(c) this Hon'ble Court be pleased to pass an order restraining the Respondents in any manner selling, alienating, transferring, encumbering, dealing with, disposing of, or otherwise creating any third party right or interest of whatsoever nature, whether directly or indirectly, in the said Sales Shares (the details whereof are set-out in Schedule 5 of the Share Purchase Agreement). Copy of relevant extract of Schedule 5 of the Share Purchase Agreement is marked hereto and annexed as Exhibit-T hereto being 11,120 (Eleven Thousand One Hundred and Twenty) equity shares constituting 1005 of the share capital of the Respondent No. 3, or any accruals thereof to any third party till such time the Consideration Reserved for the Access Road is paid by the Respondents to the Petitioners."

9. The Respondent Nos. 1 and 2 opposed the said application, *inter alia* contending that a perusal of communications exchanged between the parties would show that the Appellants had clearly exercised the option available to them under clause 9.2 of the said agreement, by repeatedly insisting upon payment of amount of Rs. 25 Crores, as according to the Appellants, construction of the access road was already completed. It was submitted that since the Appellants had exercised their option, they could not revert back and raise a claim towards allotment of flats as consideration for construction of the access road. The Respondent Nos. 1 and 2 further claimed that as per the terms of the agreement in clauses 9.1 to 9.9 of the agreement, a cheque of Rs. 25 Crores was lying in the custody of Escrow Agent and therefore, the interests of the Appellants were sufficiently secured.

10. By the impugned judgment and order, the District Court accepted the contentions raised on behalf of Respondent Nos. 1 and 2 and rejected the application for interim measures filed by the Appellants. The District Court analyzed clauses 9.1 to 9.9 of the agreement and found that the Appellants had failed to make out a *prima facie* case in their favour and that, in any case, the interest of the Appellants was sufficiently secured by the cheque for an amount of Rs. 25 Crores kept by Respondent Nos. 1 and 2 in the custody of the

Escrow Agent.

11. Aggrieved by the impugned judgment and order, the Appellants filed the present Appeal, wherein the Respondents appeared through Counsel and the appeal was taken up for final disposal.

12. Dr. Veerendra Tulzapurkar, learned Senior Counsel appearing for the Appellants referred to the contents of the said agreement dated 21st March, 2018, and particularly clauses 9.1 to 9.9 thereof, to contend that a proper interpretation of the said clauses would show that the impugned judgment and order of the District Court deserves to be set aside. The learned Senior Counsel invited attention of this Court to clauses 9.1 to 9.9 of the agreement and submitted that since the construction or completion of the access road had not taken place even as on today, as per the stated stand of the Respondent Nos. 1 and 2, the event was yet to occur upon which the Appellants were required to exercise the option provided in clause 9.2 of the agreement, to choose between the consideration in the form of sale and transfer of specific project flats in their favour or payment of amount of Rs. 25 Crores by Respondent Nos. 1 and 2. It was emphasized that clause 9.3 of the agreement specifically stipulated that there was no time limit for completion of the access road and therefore, when the access road itself was not completed, pending

disputes between the parties, it was necessary as an interim measure to ensure that project flats are available for the Appellants to exercise the option as regards consideration available under Clause 9.2(i) of the said Agreement.

13. It was vehemently submitted that the communications exchanged between the parties were wrongly interpreted by the District Court to reach the conclusion that the Appellants had failed to make out a *prima facie* case in their favour and that interests of the Appellants were sufficiently secured with the cheque of Rs. 25 Crores lying in the custody of the Escrow Agent. It was submitted that even the said security was now rendered doubtful in the light of the fact that Respondent No. 2 had merged with Respondent No. 3 and therefore, the cheque lying in the custody of Escrow Agent towards security issued by Respondent Nos. 1 and 2, was worthless. It was submitted that since the Respondents had started creating third party rights in the project flats, details of which were placed before the District Court, there was urgent need of interim measures to ensure that pending disputes between the parties the state of affairs was maintained in such a manner that the option available to the Appellants under clause 9.2 of the agreement would remain alive and preserved.

14. According to the learned Senior Counsel for the Appellant,

the effect of the negative covenant in the aforesaid clause was completely misunderstood by the District Court while rejecting the application. On this basis, it was submitted that the present appeal deserved to be allowed and interim measures as prayed deserved to be granted in favour of the Appellants.

15. On the other hand, Mr. Mayur Khandeparkar, learned Counsel appearing for the Respondents submitted that since this Court in the present appeal is exercising power under Section 37(1)(b) of the aforesaid Act, the jurisdiction is akin to the jurisdiction exercised by an Appellate Court in an Appeal from Order. It was submitted that applying the principles laid down by the Supreme Court in the case of *Wander Ltd. Vs. Antox India (P) Ltd.*[1], this Court in a recent case in *Swan Energy Limited Vs. Peninsula Land Limited* (judgment and order dated 06th February, 2023, passed in Commercial Arbitration Petition (L) No. 40252 of 2022), held that since the view adopted by the District Court in the impugned judgment and order was certainly a possible view and it was based on proper exercise of discretion, this Court ought not to interfere with the same. It was submitted that in the limited jurisdiction available in such cases, the Appellants are required to make out an exceptional case for interference with the impugned judgment and order.

1 1990 Supp SCC 727

16. It was further submitted that the District Court adopted a correct approach and refused to exercise discretion in favour of the Appellants, in the facts and circumstances of the present case. The learned Counsel appearing for the Respondents also extensively referred to clauses 9.1 to 9.9 of the said agreement and submitted that in the light of the aforementioned communications exchanged between the parties, it was evident that the Appellants had exercised their option and having done so, they were estopped from claiming the nature of interim measures as sought before the District Court. It was submitted that the Appellants ought not to be permitted to approbate and reprobate and having taken a specific stand in repeated communications that they wanted the payment of consideration in the form of Rs. 25 Crores from Respondent Nos. 1 and 2, they cannot be heard to say that the option of accepting consideration in the form of project flats was still available to them under Clause 9.2 of the said agreement. Much emphasis was placed on communications in which the Appellants themselves insisted upon payment of Rs. 25 Crores as consideration for the access road, on the basis that it was completed.

16. The learned Counsel for the Respondents relied upon judgments of the Supreme Court in the case of *Gujarat Bottling Co., Ltd. & ors. Vs. Coca Cola Co. & Ors.*[2] and *Mumbai International*

2 (1995) 5 SCC 545

Airport Private Limited Vs. Golden Chariot Airport & Anr.[3] and submitted that the present appeal deserved to be dismissed.

17. Having heard learned Counsel for the rival parties, this Court is required to consider the question as to whether interference is warranted in the impugned order passed by the District Court, keeping in mind the Appellate jurisdiction to be exercised in the present Appeal filed under Section 37(1)(b) of the said Act. This jurisdiction is akin to Appellate jurisdiction exercised by the Court in an Appeal against Order. The limitations in exercise of such jurisdiction are by now well settled and the position has been clarified by the Supreme Court in its judgment in the case of *Wander Ltd. Va. Antox India (P) Ltd.* (supra), wherein it was laid down that merely because the Appellate Court finds that another view is possible, interference in the impugned order is not warranted. The Appellate Court would not replace its discretion with that of the Court below, so long as the discretion exercised by such Court is reasonable and can be a possible view in the matter. It is on this touchstone that the impugned order in the present case needs to be tested.

18. In order to do so, it is necessary to refer to clause 9 of the said Agreement pertaining to the access road, the interpretation of which is necessary for deciding the issue as to whether interference

3 (2010) 10 SCC 422

in the impugned order is warranted, in the facts and circumstances of the present case. The said clause reads as follows.

> "9 ACCESS ROAD
>
> 9.1 The Sellers hereby agree and undertake that they shall, cause and procure the availability of the motorable access road for connecting the KUL Nation Township Project to Kharadi ("Access Road") at the costs of the Purchasers and the Purchasers shall undertake construction and development of the Access Road, as more particularly represented and marked in the map and plan attached hereto as Schedule 8.
>
> 9.2 The Purchasers shall, as stated in Clause 2.2.9 hereinabove, pay consideration to the Sellers upon the occurrence of the completion of the motorable Access Road in the following manner, at the sole option of the Sellers ("Consideration Reserved for Access Road")
>
> (i) The Purchasers shall sell and transfer Project Flats being flats/units admeasuring 55,000 square feet saleable area in the Buildings T-4 and T-7, the details where are set-out in Schedule 15 ("Project Flat Consideration") hereto to the Sellers and/or their nominees without any consideration of any nature whatsoever. The Sellers and the Purchasers and/or the Company shall not deal with and/or create third party rights and/or Encumbrance in

respect of the Project Flats in any manner whatsoever; OR

(ii) The Purchasers shall pay monetary amount of Rs. 25,00,00,000/- (Rupees Twenty Five Crore) to the Sellers ("Monetary Consideration")

9.3 If the completion of the Access Road does not occur, then the Purchasers shall have no obligation and shall not be liable to pay the Consideration Reserved for Access Road. However, it is agreed that there is no time limit for causing the availability of the motorable Access Road and as and when the motorable Access Road is completed, the Consideration Reserved for Access Road will become due and payable by the Purchasers to the Sellers.

9.4 Upon the occurrence of the availability of the motorable Access Road, the Sellers shall, notify the Purchasers in writing of such occurrence "Completion Notice") along with a certificate by Architect Jagdish Deshpande certifying the completion of the motorable Access Road ("Architect Certificate"). The Sellers shall also in the Completion Notice specify (i) its preferred mode of Consideration Reserved for Access Road i.e. either Project Flats or Monetary Consideration, and (ii) the details of the designated account of the Sellers where the Purchasers will be required to deposit the Monetary Consideration in case the Sellers opts for Monetary Consideration. The

parties agree that Architect Jagdish Deshpande has been mutually agreed between them and neither of them shall dispute the Architect Certificate. In the event the motorable Access Road is completed by the Purchasers on its own accord, costs and expense, prior to the receipt by the Purchasers of the Completion Notice and the Architect Certificate, then the Purchasers shall pay the Consideration Reserved for Access Road to the Sellers and/or their heirs and/or nominees by informing them voluntarily the fact of completion of the motorable Access Road and the Consideration Reserved for Access Road to be paid in respect of the same.

9.5 upon receiving the Completion Notice and the Architect Certificate from the Sellers and the Certificate by as stated in Clause 9.4 above, the Purchasers shall within 15 (fifteen) Business Days at the sole option of the Sellers either:

9.5.1 give instructions to its bankers to remit Monetary Consideration to the designated bank accounts of the Sellers; or

9.5.2 execute and register agreements for sale or transfer deeds/ documents for the sale and transfer of the Project Flats in favour of the Sellers and/or their nominee as requested by the Sellers.

9.6 It is hereby clarified and agreed between the Parties that in the event the Sellers select Project Flats as preferred mode of Consideration Reserved for Access Road, then;

9.6.1 It is agreed that save and except the statutory costs including without limitation stamp duty, registration, maintenance costs to the society or developer (as applicable), and goods and services tax in relation to Project Flats that will be society borne by the Sellers, no other costs and/or consideration shall be payable by the Sellers and/or their nominees; and

9.6.2 as and when the Sellers and/or their nominee sell and transfer the Project Flats to a third party, the Purchasers shall not levy any transfer charges on such transactions. It is clarified that in the event if the purchasers of units/premises in the building in which the Project Flats are situated, have formed an association/ society of flats/units purchasers, the charges payable to such an association/ society shall be paid and borne solely by the Sellers or the Sellers' nominees.

9.6.3 Save and except as stated in Clauses 9.6.1 and 9.6.2, there shall be no costs of any nature whatsoever to be borne and payable by the Sellers to the Purchasers.

9.7 The Sellers shall use their best endavour to ensure that the availability of the motorable Access Road Completion is fulfilled as soon as possible after the Closing Date. The Company and the Purchasers

covenant and undertake to provide necessary costs, support and cooperation to achieve the availability of the motorable Access Road, including (i) by making timely payments towards the acquisition of additional lands for the Access Road in accordance with a valuation acceptable to the Purchasers and execution and registration of deeds, documents and writing in relation to the same; (ii) by executing necessary contracts with the contractors and service providers for construction of the Access Road and making timely; payments to them; and (iii) to sign and execute necessary forms, applications and writings and authorizing the Sellers to enable them to cause and procure the completion of the motorable Access Road.

9.8. The parties undertake to disclose to the other Party anything of which a Party becomes aware which will or may prevent the completion of the Access Road from being satisfied, promptly upon it coming to its notice and in any event no later than 5 (five) Business Days of it becoming aware of such information.

9.9 As a security for the payment of the Monetary Consideration, the Purchasers have agreed to deposit an undated cheque of Rs. 25,00,00,000/- (Rupees Twenty-Five Crores Only) ("Consideration for Road Security Cheque") with the Escrow Agent on the Closing Date in accordance with the Escrow Letter. In case if the Sellers opt for the Monetary Consideration from the Purchasers in the manner

as stated in clause 9.2 hereinabove and the Purchasers fails to pay the same, then the Sellers shall without any further reference or recourse to the Purchasers can intimate in writing to the Escrow Agent along with a copy of the Completion Notice and the Architect Certificate issued to the Purchasers under Clause 9.4 and send a copy of the same to the Purchasers, to release the Consideration for Road Security Cheque to the Sellers whereupon the Sellers shall be entitled to duly date the same and present it to the respective bank foe encashment. The Purchasers undertake to honour the Consideration for Road Security Cheque. In the event, the Purchasers fail to make the payment of the Consideration Reserved for Road in the manner provided in Clause 9.5 above for any reason whatsoever and/or the Sellers are not able to encash the Consideration for Road Security Cheque due to actions/omissions solely attributable to the Sellers shall have an unpaid vendors lien on the Sale Shares and in addition (a) the Purchasers shall also pay interest at the rate of 3% per month on the Monetary Consideration to be computed from the date when the same is due and payable till the time the same is duly paid by the Purchasers to the Sellers, it is hereby clarified that (i) in the event the Sellers preferred mode of Consideration Reserved for Access Road is Project Flat Consideration or (ii) upon timely payment of the Monetary Consideration, by the Purchasers so the Sellers in

> accordance with Clause 9.5, then the Escrow Agent shall promptly upon receipt of intimation in writing from the Purchasers release the Consideration for Road Security Cheque to the Purchasers in the manner stated in the Escrow Letter."

19. This Court cannot be oblivious of the conduct of the parties manifested by the communications exchanged between them in the context of the access road. A close look at the above quoted clause shows that reference is made to clause 2.2.9 of the Agreement, which mandates that Respondent Nos. 1 and 2 shall pay to the Appellants the consideration reserved for the access road in the manner set out in clause 9. Thus, the Respondent Nos. 1 and 2 are necessarily required to pay consideration for the access road to the Appellants. Clause 9.1 stipulates that the Appellants shall procure the availability of the motorable access road at the cost of Respondent Nos. 1 and 2 and that the said Respondents shall undertake construction and development of the access road, as particularly represented in the map and plan attached to the agreement at schedule 8.

20. Clause 9.2 of the agreement stipulates that upon the event of completion of the motorable access road occurring, Respondent Nos. 1 and 2 shall pay consideration to the Appellants either by sale and transfer of project flats without any consideration or by payment

of monetary consideration of Rs. 25 Crores to the Appellants. Thus, clause 9.2 does provide an option to be exercised by the Appellants for the manner in which the consideration would be paid to them for the motorable access road. The two options are specified in 9.2(i) and 9.2(ii). Clause 9.2(i) further contains a negative covenant to the effect that the Appellants and Respondent Nos. 1 and 2 shall not deal with or create third party rights in respect of the project flats in any manner whatsoever. It is this negative covenant on which the Appellants place much reliance to claim that the District Court in the present case committed grave error in rejecting their application filed under Section 9 of the said Act for grant of interim measures.

21. Clause 9.3 specifies that there is no time limit for making the motorable access road available and when such road is completed the consideration reserved for the same will become due and payable by Respondent Nos. 1 and 2 to the Appellants. Clause 9.4 specifies that upon the completion of the motorable access road the Appellants shall notify Respondent Nos. 1 and 2 in writing along with a certificate by a named Architect regarding completion of the road and thereupon, the Appellants shall specify their preferred mode of consideration i.e. either the project flats or the monetary consideration. This clause also significantly states that if Respondent Nos. 1 and 2 complete the motorable access road on their own accord,

prior to the receipt of completion notice and architect's certificate from the Appellants, then the Respondent Nos. 1 and 2 shall pay consideration received for the access road to the Appellants.

22. Clause 9.5 gives the details as to the manner in which the consideration would be paid. Clause 9.6 pertains to stamp duty registration etc. which is not relevant for the present controversy. Clause 9.7 refers to mutual obligations on the parties to make an endeavor to complete the motorable access road as soon as possible. Clause 9.8 also places obligations on the parties to inform each other about any factor, which may prevent completion of the access road.

23. Clause 9.9 stipulates that as security for payment of monetary consideration, Respondent Nos. 1 and 2 agree to deposit an undated cheque of Rs. 25 Crores with an Escrow Agent. It is further stipulated that if the Appellants opt for monetary consideration and Respondent Nos. 1 and 2 fail to pay the same then the Appellants would intimate the Escrow Agent to release the consideration for access road through the said cheque deposited by way of security by Respondent Nos. 1 and 2. This clause also stipulates further consequences in the event the Appellants are unable to encash the aforesaid cheque deposited by way of security with the Escrow Agent.

24. The aforementioned clauses 9.1 to 9.9 lay down the

manner in which consideration would be paid to the Appellants for the access road. It is upon completion of the access road that the necessity of payment of consideration would arise. There is an option provided to the Appellants to either accept consideration through project flats or monetary consideration. There is no dispute about the fact that Respondent Nos. 1 and 2 have kept in deposit with the Escrow Agent an undated cheque of Rs. 25 Crores.

25. There is also no doubt about the fact that disputes have arisen between the parties, which have now gone to arbitration and the question really is, as to whether the interim measures sought by the Appellants deserve to be granted. A perusal of the prayer clauses of the application filed by the Appellants under Section 9 of the said Act, quoted above, show that the Appellants are seeking an order for restraining the Respondents from transferring or assigning project flats, a list whereof is provided in Schedule 15 of the Agreement; a direction for appointment of Court Receiver on the project flats for taking possession of the same and a further direction restraining the Respondents from selling, alienating or transferring shares, details of which are set out in schedule 5 of the agreement. The thrust of the Appellants is on their subsisting right to exercise option available under Clause 9.2 of the said agreement. It is the specific case of the Appellants that since, even according to Respondent Nos. 1 and 2, the

access road is still not completed, the event for exercising the option specified in clause 9.2 of the agreement, has not occurred and that therefore, such interim measures are necessary. The Appellants claim that pending resolution of disputes, unless such interim measures are granted, they will be deprived of exercising the option available to them.

26. As noted above, Respondent Nos. 1 and 2 claim that the Appellants in numerous communications specifically demanded amount of Rs. 25 Crores from Respondent Nos. 1 and 2 and therefore, having already exercised the option, the Appellants cannot be permitted to claim such interim measures, particularly in the light of the fact that cheque towards security amount of Rs. 25 Crores is still lying in deposit with the Escrow Agent.

27. In order to appreciate the rival stands and to examine as to whether the impugned order deserves interference, it would be necessary to analyze the true purport of the communications exchanged between the parties, which reflects their conduct. On 08th January, 2020, the Respondent Nos. 1 and 2 sent a communication to the Appellants in respect of the said project and amongst other things, sought information and clarifications about procuring availability of motorable access road as per clause 9.1 of the agreement. It is significant that on 03rd February, 2020, the

Appellants responded to the same and claimed that Respondent Nos. 1 and 2 had themselves insisted that they would undertake completion of the access road with one Mr. Ranka and that the said Respondents had asked the Appellants not to interfere in the process, further assuring that the access road would be completed on or before 31st December, 2019. Thereupon, the Appellants specifically requested for payment of Rs. 25 Crores. The relevant portion of the said communication sent by the Appellants reads as follows:

> "With regard to the availability of the Access Road, please note that post execution of the Share Purchase Agreement, you had insisted that the same shall be undertaken by you and your Mr. Pramod Ranka and you had asked us not to interfere on this process and that you shall complete the road on or before 31st December. Accordingly, we have not made any interference in the process being run by you. Hence, we request you to make payment of Rs. 25 Crores."

28. On 28th July, 2020, Respondent Nos. 1 and 2 refuted the demand of Rs. 25 Crores made by the Appellants and claimed that the question of payment of such amount did not arise, because as per clause 9.3 of the agreement the access road was yet to be completed. On 30th July, 2020, the Appellants sent a detailed e-mail communication to Respondent Nos. 1 and 2 and stated that when they visited the site, they found that the Respondents had already made the access road. They also enclosed photographs of the access

road and stated that they had been reminding the Respondent Nos. 1 and 2 for releasing the payment. This obviously referred to payment of monetary consideration of Rs. 25 Crores. The Appellants further stated that they might have to take legal course to claim damages for the inordinate delay caused by Respondent Nos. 1 and 2, leading to financial losses, particularly due to delay in payment towards the access road. This statement also indicates the state of mind of the Appellants, demanding payment of monetary consideration on the assertion that the access road was already complete.

29. Thereafter, on 01st August, 2021, the Appellants addressed an e-mail to the Respondents, contents of which are relevant for deciding the issues that arise in the present Appeal. The tone and tenor of the said communication is such that according to the Appellants, on the basis of information received, the construction of the access road was already complete. In this communication the Appellants specifically demanded monetary consideration of Rs. 25 Crores from the Respondents. The relevant portion of the said communication is as follows:

> "1. We refer to the Share Purchase Agreement dated 21st March 2018. All capitalized terms used herein but not defined shall have the meaning ascribed to them under the Share Purchase Agreement.
>
> 2. We also refer to the earlier emails sent by us date 03rd February 2020 and 30th July 2020 with regard

to the Access Road for connecting the Project to Kharadi.

3. On 29th July 2021 we were informed that the construction of the Access Road has been completed. Under Clause 9.4 of the Share Purchase Agreement, you were duty bound to inform us about completion of the Access Road in case the same was completed by the Purchasers on their own accord, however, you did not inform us about the same.

4. On 30th July 2021 when our representative Mr. Sudhir Kadam along with Architect Ashok from the office of Architect Jagdish Deshpande reached at the site for verification of the completion of the Access Road, they were not allowed to do the same by your security guards and bouncers present at the site.

5. It is clear that the motorable Access Road has been completed and is already being used for access to the project. Copies of the photographs and videos of the said Access Road taken on 29th July 2021 are attached herewith. Therefore, as per the terms of the Share Purchase Agreement, the Consideration Reserved for Access Road has become due and payable.

6. Accordingly, we hereby call upon you to pay the Monetary Consideration of Rs. 25,00,00,000/- (Rupees Twenty-Five Crore). In any case we will request Architect Jagdish Deshpande to visit the site on Tuesday 3rd August at 11 a m along with our representatives Mr. Sandeep Dombale and Mr. Sudhir Kadam. Please inform your security

accordingly to permit Architect Jagdish Deshpande along with our representatives to verify the completion of the Access Road."

30. On 02nd August, 2021, the Respondents sent e-mail communication to the Appellants, stating that construction of the access road was still incomplete, further claiming that it was not as per the plan annexed at Schedule 8 to the agreement and thereupon, the Respondents gave an update on the status of construction of the access road. The Respondents then stated that since the access road was not constructed as per Schedule 8 to the agreement and it was not 30 meters wide as required, the question of payment of consideration of Rs. 25 Crores did not arise. This stand was reiterated by the Respondents in their further e-mail communication dated 04th August, 2021.

31. It is significant that till this date the repeated communications sent on behalf of the Appellants clearly manifested their exercise of option for monetary consideration on the basis that the access road stood completed. At this stage, on 14th October, 2021, the Appellants addressed a letter to the Respondents and for the first time in paragraph no. 8 thereof, referred to the option available to them under the agreement for payment of consideration, either by way of sale and transfer of project flats or monetary consideration. But, in the same letter, the Appellants themselves, in the first

paragraph, referred to the earlier e-mail of 01st August, 2021, whereby they had called upon Respondents to pay monetary consideration of Rs. 25 Crores and in paragraph no. 5 of the said letter, the Appellants themselves alleged that the Respondents had tried to delay the payment.

32. In response, on 27th October, 2021, the Respondents sent a letter to the Appellants and again asserted that the motorable access road was not completed and therefore, there was no question of payment of Rs. 25 Crores to the Appellants.

33. On 11th July, 2022, the Appellants sent another letter to the Respondents reiterating the option available to them for payment of consideration and called upon the Respondents to provide true and correct disclosures in respect of project flats in writing and to fix up date and time for inspection of the project flats. On 18th July, 2022, the Respondents sent a detailed letter to the Appellants raising various disputes pertaining to the other aspects of the agreement, including pending tax liabilities, unpaid creditors and alleged misrepresentation of sales data. On 19th August, 2022, the Appellants sent a letter to the Respondents, again calling upon them to give inspection of project flats. Such a demand was reiterated in another letter dated 05th September, 2022, sent by the Appellants to the Respondents.

34. This is the backdrop in which disputes arose between the parties and the Appellants filed the application under Section 9 of the said Act for grant of interim measures. As noted above, the District Court rejected the application, *inter alia,* holding that since the Respondents had indeed kept cheque for security of Rs. 25 Crores deposited with the Escrow Agent, the interests of the Appellants were sufficiently secured, pending resolution of disputes through arbitration.

35. The nature of communications exchanged between the parties, to which detailed reference has been made hereinabove, does indicate that the Appellants in their communications to the Respondents asserted that the access road was complete and repeatedly demanded monetary consideration of Rs. 25 Crores. It was only in October, 2021, that for the first time the Appellants referred to the option available to them to either accept consideration by sale and transfer of the project flats or by accepting monetary consideration. The matter is complicated for the reason that the Respondents herein, during exchange of communications between the parties, took the stand that although the access road was constructed, it was not constructed and completed as per Schedule 8 to the agreement. On this basis, the Respondents repeatedly refuted their liability to pay monetary compensation.

36. It is for this reason that the Appellants have taken a stand before this Court that when the access road itself was not completed, even according to the Respondents, as per aforementioned clauses of the agreement, the stage for exercising option for accepting consideration had not yet arisen. On this basis, it is claimed that if interim measures as sought are not granted, it would be in the teeth of the terms of the agreement and the Appellants would be left without the option of seeking consideration by sale and transfer of project flats. Much emphasis is placed on the negative covenant contained in clause 9.2 (i) of said agreement.

37. The disputes between the parties have now gone to arbitration and this would include the rival stands of the parties, as regards completion of the motorable access road. Strictly speaking, exercise of option on the part of the Appellants has to happen upon completion of the access road. The aforementioned clauses also specify that there is no time limit for completion of the access road. Whether the access road is completed or not is also part of the dispute between the parties. But, what is crucial is the stand of the Appellants and their assertions in their communications sent from February, 2020 onwards, parts of which have been quoted hereinabove, wherein they repeatedly exercised their option of receiving monetary consideration on a positive assertion that the

access road was completed. The question is, whether the Appellants could now be heard to say that the option of receiving consideration through sale and transfer of project flats is available to them. It is here that the aspect of approbate and reprobate comes up for consideration, particularly in the light of the emphasis placed by the Appellants on the negative covenant in the aforementioned clause.

38. The judgment upon which the learned Counsel appearing for the Respondents has placed reliance i.e. *Mumbai International Airport Private Limited Vs. Golden Chariot Airport & Anr.* (supra) refers to the doctrine prohibiting approbation and reprobation as a facet of the law of estoppel. In the said judgment of the Supreme Court, reference is made to the English judgments on the said aspect of the matter and also earlier judgment of the Supreme Court in the case of *C. Beepathuma Vs. Velasari Shankaranarayana Kadambolithaya.*[4] The relevant portion of the judgment of the Supreme Court in the case of *Mumbai International Airport Private Limited Vs. Golden Chariot Airport & Anr.* (supra), reads as follows:

> "52. This Court has also applied the doctrine of election in C. Beepathuma V. Velasari Shankaranarayana Kadambolithaya wherein this Court at AIR p. 246, para 17 relied on Maitland as saying :
>
> > "That he who accepts a benefit under a deed or will or other instrument must

4 AIR 1965 SC 241

> adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it." (Maitland's Lectures on Equity, Lecture 18.)

53. This Court in C. Beepathuma case at AIR p. 246, para 17 also took note of the principle stated in White & Tudor's Leading Case in Equity, Vol. 18th Edn. At p. 444, wherein it is stated :

> "Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both ... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

39. In other words, it is indicated that a party cannot blow hot and cold at the same time, in order to take benefit of an agreement executed between the parties. The judgment of the Supreme Court in the case of *Gujarat Bottling Co., Ltd. & ors. Vs. Coca Cola Co. & Ors.* (supra), is more on the point that a Court is not bound to grant injunction in every case to enforce a negative covenant, particularly when the party claiming such a relief is itself found to have acted in violation of the terms of the agreement.

40. In the present case, the Respondents claim that the Appellants committed breach of the agreement in failing to complete the access road and providing certificate from the named Architect regarding such completion. But, it is necessary to appreciate that the above quoted clauses of the agreement do indicate that the Respondents could also undertake construction and completion of the access road. This is evident from clause 9.4 of the said agreement. Hence, it may not be appropriate to reach a finding at this stage that the Appellants committed breach of the above quoted clauses of the agreement. But, a *prima facie* view needs to be taken as to whether the conduct of the Appellants, manifested through their written communications sent to the Respondents, demonstrated that they were approbating and reprobating. If on a *prima facie* consideration, it is found that such was the case that the Appellants were blowing hot and cold at the same time, it cannot be said that the District Court committed an error in rejecting the application.

41. On a *prima facie* consideration, this Court finds that the Appellants proceeded on a positive assertion that the access road was completed and it was their state of mind that since the access road was completed, the stage had arrived for exercising option provided in clause 9.2 of the said agreement and thereupon, they consciously exercised the option of demanding monetary consideration of Rs. 25

Crores. The contents of the communications sent by the Appellants to the Respondents dated 03rd February, 2020, 30th July, 2020 and 01st August, 2021, *prima facie* indicate that the Appellants exercised the option of seeking monetary compensation from the Respondents. Thereafter, for the first time in the letter dated 14th October, 2021, the Appellants referred to the option available for seeking consideration by sale and transfer of the project flats. These actions of the Appellants indicate a strong *prima facie* case against them of approbating and reprobating, thereby indicating that the interim measures sought on their behalf were correctly rejected by the District Court. In fact, the District Court found, on an appreciation of the material on record that the Appellants had failed to make out a *prima facie* case in their favour, for the nature of interim measures sought on their behalf, particularly when the aforesaid cheque towards security for an amount of Rs. 25 Crores is still lying with the Escrow Agent. It cannot be said that the discretion exercised by the District Court and the view adopted in the facts and circumstances of the present case was not even a possible view. Applying the ratio of the judgment of the Supreme Court in the case of *Wander Ltd. V. Antox India (P) Ltd.* (supra), this Court is of the opinion that no case is made out by the Appellants for interference with the impugned order.

42. This Court is of the view that the Appellants indeed failed to make out a *prima facie* case in their favour and therefore, as per the settled position of law, it is not necessary to go into the aspects of grave and irreparable loss that the Appellants may suffer in the absence of the interim measures and the balance of convenience between the parties.

43. This Court is of the opinion that the cheque by way of security of an amount of Rs. 25 Crores, lying with the Escrow Agent sufficiently secures the interests of the Appellants, during pendency of the disputes to be resolved by arbitration. The apprehension expressed on behalf of the Appellants that since Respondent No. 2 has now merged with Respondent No. 3, the cheque lying in deposit may be rendered worthless, can be addressed by giving an appropriate direction in the matter. In fact, the learned Counsel for the Respondents, on instructions, submitted that a fresh undated cheque for the amount of Rs. 25 Crores shall be deposited with the Escrow Agent to address the apprehension expressed on behalf of the Appellants.

44. In view of the above, this Court finds no merit in the present Appeal. Accordingly, the Appeal is dismissed. The Respondents are directed to deposit a fresh undated cheque for the amount of Rs. 25 Crores with the Escrow Agent by way of security,

within four weeks, during pendency of the disputes to be resolved through arbitration. There shall no order as to costs.

45. Pending applications, if any, stand disposed of accordingly.

(MANISH PITALE, J.)