

NON-REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 523 OF 2023
(Arising out of SLP(C) No. 11779 of 2020)**

DEVELOPER GROUP INDIA PVT. LTD. ...APPELLANT(S)

VERSUS

**SURINDER SINGH MARWAH AND
OTHERS ...RESPONDENT(S)**

J U D G M E N T

B.R. GAVAI, J.

1. Leave granted.
2. The present appeal arises from the judgment and order dated 16th December 2019, passed by the Division Bench of the High Court of Delhi, thereby allowing a Company Appeal, being Company Appeal No. 10 of 2019, against an order dated 21st February 2019 passed by the learned Single Judge of the High Court of Delhi, in Company Petition No. 482 of 2009, wherein

earlier interim orders of the learned Single Judge, dated 11th July 2018 and 16th August 2018, restraining the transfer, selling or alienating of 11 properties purchased by a consortium of six land-owning companies, had been vacated. In allowing the appeal, the Division Bench of the High Court, vide the impugned judgment and order, once again restrained these six companies from alienating the aforesaid properties.

3. The facts, shorn of unnecessary details, are as follows:

3.1 It is the allegation of the respondent Nos. 1 and 2 that in the year 2008, on the representation of one Dr. Rajesh Aeren, the Managing Director (MD) of respondent No.3 Company, they decided to invest in a commercial project called Festival City Mall at G.T. Road (National Highway No. 1), Ludhiana, Punjab, being launched by respondent No. 3 Company. In furtherance of the project, a term loan of Rs. 100 Crore was also availed from a consortium of banks. The interest of the respondent Nos. 1 and 2 was limited to 46% of the project, which now stands at 30%. The respondent Nos. 1 and 2 were assured of

returns with effect from 1st August 2008, failing which respondent No. 3 and its Directors were to be jointly and severally liable to pay interest @ 2.15% per annum on the amount remaining unpaid to respondent Nos. 1 and 2. Respondent Nos. 1 and 2 were collectively allocated 17 shops in the project.

3.2 The project, however, ran into trouble and the construction was stalled. Neither the possession was offered nor was the assured return or the interest thereon given to respondent Nos. 1 and 2.

3.3 The respondent Nos. 1 and 2, in the year 2009 filed a winding up petition, being Company Petition No. 482 of 2009, before the High Court of Delhi, against respondent No. 3 Company. During the course of the winding up proceedings, the learned Single Judge of the High Court, vide its order dated 19th December 2015, directed respondent No. 3 to deposit a sum of Rs. 1.5 crore with the Registrar of the High Court. However, the said direction was not complied with, and, therefore, vide order

dated 18th March 2016 of the learned Single Judge of the High Court, respondent No. 3 Company went into liquidation.

3.4 It is pertinent to note that there were several other investors who too had invested in the project. Various complaints were filed against respondent no. 3 Company and its Directors which resulted in an FIR No. 6 of 2015 being registered on 7th January 2015. Subsequently, the investigation thereon resulted in a charge sheet dated 2nd December 2016, wherein it was alleged that huge sums of money were diverted, defalcated and siphoned off from the corpus of respondent No. 3 Company, which was meant to be utilized for the construction of the project.

3.5 The appellant herein is a 100% FDI company with investors based in Singapore and Japan. In the year 2014, a development and management agreement was entered into between the appellant herein and a consortium of six land-owning companies i.e. Aeren R. Mallz Pvt. Ltd., Aeren R Township Pvt. Ltd., Yashraj Buildcon Pvt. Ltd., Yashvardhan

Infrastructure Developers Pvt. Ltd., Aeren R Buildcon Pvt. Ltd. and PMC Entertainment Pvt. Ltd. (now, Fortune R Buildco Developers Pvt. Ltd., i.e., respondent No.4 herein), for exclusive developmental rights over 11 properties extending to 115 acres of land in a real estate project launched by the consortium of six companies for a consideration of Rs. 43 crores.

3.6 Neither the appellant herein nor the consortium of six land-owning companies were originally parties to the winding up proceedings of respondent No.3 Company. Respondent Nos. 1 and 2, on the strength of the aforesaid charge-sheet filed by the police, preferred a Company Application under Sections 339, 340, 342 and 347 of the said Act, in the winding up proceedings of respondent No. 3 Company, to injunct the consortium of six companies from transferring, selling or alienating the 11 properties.

3.7 It was alleged therein that respondent No. 3 Company had, in fact, siphoned off the monies of investors to four intermediate companies, i.e. Aeren R. Enterprise, Everest

Buildwell, Global Distributors and AR Developers, who, in turn, further transferred the money to the consortium of six land owning companies. These six land-owning companies were, allegedly, related party Companies of respondent No. 3. It was further alleged that these six related party Companies had then purchased the subject land for the Project Mall. Vide interim orders dated 11th July 2018 and 16th August 2018, the Single Judge of the High Court restrained the six companies from transferring, selling or alienating the properties till further orders.

3.8 Aggrieved by the same, the appellant as well as respondent No.4 herein preferred applications for vacation of the aforesaid interim orders which were allowed by the Single Judge vide order dated 21st February 2019. It may be noted that, by the same order, Ellahi Goel and Co., Chartered Accountants were appointed as 'Chartered Accountants' to carry out an audit of the books of accounts of respondent no. 3 Company to look into the allegations made in the Company Application.

3.9 Aggrieved by the vacation of the interim orders, respondent Nos. 1 and 2 herein preferred a Company Appeal against the said order. The Division Bench of the Delhi High Court, vide the impugned judgment and order, allowed the appeal, thereby restraining once again the transfer, selling or alienation of the properties purchased by the consortium of six companies.

4. We have heard Shri C.A. Sundaram, learned Senior Counsel appearing for the appellant, Shri Atmaram Nadkarni, learned Senior Counsel appearing for the respondent No.4 and Shri Vivek Kohli, learned Senior Counsel appearing for the respondent Nos. 1 and 2.

5. Shri C.A. Sundaram submitted that the judgment and order of the Division Bench of the High Court is totally unsustainable. He submits that the Company under liquidation is respondent No. 3 herein. It is submitted that neither the appellant nor respondent No.4 herein has any concern with respondent No.3. It is submitted that the finding

of the Division Bench of the High Court, that the properties, wherein the appellant had invested an amount of around Rs.66 crores through intermediate companies i.e. A.R. Developers Private Limited and A.R. Enterprises Private Limited, were purchased through the funds of respondent No.3, is totally erroneous.

6. Shri Sundaram submitted that none of the Directors of the appellant are Directors of the respondent No.3-Company. It is submitted that under Section 339 of the Companies Act, 2013, the Company Court can pass an order only in respect of a Director, Manager or Officer of the Company or any person, who were knowingly parties to the carrying on of the business in the manner set out in Section 339 of the said Act. He submits that since the liquidation proceedings are only in respect of the respondent No.3, the Company Court could have passed an order only in respect of the properties of the Director, Manager or Officer of the Company or any person, who is knowingly party to the carrying on of the business of the respondent No.3 in the manner set out in Section 339 of the

said Act. It is, therefore, submitted that the impugned judgment and order is totally unsustainable under Section 339 of the Companies Act, 2013.

7. Shri Sundaram further submitted that, the learned Single Judge of the High Court, vide order dated 21st February 2019 had vacated interim injunction/orders granted earlier, by giving cogent reasons.

8. Shri Sundaram submits that, in any case, the claim of the respondent Nos. 1 and 2, the Company Petitioners, is hardly a few crores. He submits that, for a paltry amount claimed by respondent Nos. 1 and 2, the entire project admeasuring 115 acres has been entirely stalled, thereby blocking the entire investment of the present appellant. The learned Senior Counsel submits that, *ex abundanti cautela*, the learned Single Judge of the High Court himself had protected the interest of the respondent Nos. 1 and 2 by observing that in case anything contrary is discovered in the course of the audit, the Official

Liquidator was free to file an appropriate application with regard to the properties.

9. Shri Sundaram, in the alternative, submits that the appellant is willing to give an undertaking, that it will not make any development for an area admeasuring 5 acres so as to protect the interests of the respondent Nos. 1 and 2. It is submitted that the market value of the said area admeasuring 5 acres is about Rs.25 crores and in the event the respondent Nos. 1 and 2 succeed in the proceedings, the said amount would be sufficient to meet their claims.

10. Shri Sundaram further submitted that this Court in the case of ***Usha Ananthasubramanian v. Union of India***¹ has held that the powers under Section 337 and 339 of the Companies Act, 2013 can be used only insofar as the Company regarding which the mismanagement is alleged and not to the business of another company or other persons.

¹ (2020) 4 SCC 122

11. Shri Nadkarni also supports the submissions made by Shri Sundaram. He submits that the respondent Nos. 1 and 2 are commercial investors. It is submitted that a person making an investment for commercial purposes does so with an inherent risk involved in such transactions. He submits that the affidavits filed by the respondent Nos. 1 and 2 would reveal that they have invested only an amount of Rs.4 crore approximately. It is submitted that, in any case, they had invested in the “Festival City Mall” project. It is submitted that the said “Festival City Mall” has been constructed by the respondent No.3 Company and the respondent Nos. 1 and 2, if they have any claim, it is only against the said Company. It is submitted that the respondent No. 3 Company is under liquidation and the respondent Nos. 1 and 2 can raise their claim in the liquidation proceedings.

12. Shri Vivek Kohli, on the contrary, submits that the Division Bench of the High Court, by an elaborate and reasoned order, has passed an order of injunction. He submits that the Division Bench of the High Court has rightly, after lifting the

corporate veil, found that all these transactions were entered into by Dr. Rajesh Aeren. He submits that the properties in question are all bought from the funds invested in the respondent No.3 Company in a surreptitious manner. He submits that the said Dr. Rajesh Aeren has played a fraud upon investors like respondent Nos. 1 and 2. He submits that the Division Bench of the High Court has rightly found that if an order of status quo is not passed, it may result in *fait accompli*.

13. A perusal of the order of the learned Single Judge of the High Court dated 21st February 2019 would reveal that while vacating the interim injunction/orders, it had directed the Official Liquidator to carry out an audit of the books of accounts of the respondent No.3 Company and look into the allegations which were the subject matter of CA No.788 of 2017. The learned Single Judge of the High Court had also observed that, in case anything contrary is discovered in the course of the audit, the Official Liquidator was free to file an

appropriate application with regard to the properties which were subject matter of Company Petition No.482 of 2009.

14. We do not find that, in the facts of the present case, it is necessary to go into the legal issues raised on behalf of the parties.

15. Though it is contended on behalf of the appellant and the respondent No.4 that the claim of the respondent Nos. 1 and 2 is hardly of a few crores, we had specifically put a query to Shri Vivek Kohli as to how much is the claim of the respondent Nos. 1 and 2. He submits that he is also appearing for the other defrauded investors apart from respondent Nos. 1 and 2 and the claim of all the claimants would run into Rs.31 crores approximately.

16. As already stated herein above, Shri Sundaram, learned Senior Counsel has made an alternative submission that the properties listed hereunder admeasuring approximately 5 acres has a present market value of approximately Rs.25 crores.

Owner Name	Mustil No./Khasra No.		Land Area	
	Mustil No.	Khasra No.	Kanal	Marla
Yashwardhan Infrastructure Developers Private Limited Village Bonkar Dogran, Tehsil & District Ludhiana- 141010, Punjab	25	17	8	0
	25	22	1	6
	25	23	7	7
	25	24	7	7
Liwpool Township Private Limited (Earlier known as Aeren R. Township Private Limited) Village Bonkar Dogran, NH-44 (1), Near Ladhawal Toll Plaza, Tehsil & District Ludhiana-141008, Punjab	25	13	8	0
	25	18	8	0
		Total	39	20
				5 Acres

17. While passing an order of injunction, the Courts are required to be guided by the principles of prima facie case, balance of convenience and irreparable injury. We find that, assuming for a moment that the respondent Nos. 1 and 2 along with the other claimants have a claim of around Rs.31 crores, the entire project in an area of 115 acres cannot be stalled. If

the Division Bench of the High Court found that, there was a prima facie case in favour of the respondent Nos. 1 and 2, they could have passed an appropriate order to protect the interests of the said respondents rather than stalling the entire project.

18. It is further to be noted that the audit report dated 16th January 2023 of Ellahi Goel & Co., Chartered Accountants would reveal that an amount of Rs.66.18 crores has been received by A.R. Developers Private Limited as sale consideration of shares of AERENS ENTERTAINMENT ZONE LIMITED from Mondon Investments Ltd. It is further to be noted that part of the amount received by A.R. Developers Private Limited has been used to pay Rs.52.76 crores to the consortium of six land-owning companies as “Advance against Future Projects”.

19. We are, therefore, of the considered view that a blanket order directing maintenance of status quo in respect of the all 11 properties admeasuring 115 acres is not justified. If such an order is allowed to continue, it will cause irreparable injury

to the appellant and the respondent No.4 inasmuch as the entire development would be stalled. Insofar as the interests of the respondent Nos. 1 and 2 are concerned, the same can be protected by directing the appellant and the respondent No.4 to file an undertaking before this Court that until further orders are passed in Company Petition No.482 of 2009, they shall not create any third party rights in respect of the properties mentioned in Paragraph 16 herein above.

20. In the result, we pass the following order:

- i. The appeal is partly allowed.
- ii. The impugned judgment and order dated 16th December 2019 passed by the Division Bench of the High Court in Company Appeal No. 10 of 2019 is set aside.
- iii. The appellant and the respondent No.4 are directed to file an undertaking before this Court within four weeks from the date of this judgment that they shall not create any third party rights in respect of

the properties mentioned in Paragraph 16 herein above.

- iv. The aforesaid undertaking will be subject to further orders to be passed by the learned Single Judge of the High Court in Company Petition No.482 of 2009.
- v. After the final Audit Report is submitted by the Auditor/Chartered Accountants appointed by the learned Single Judge, the learned Single Judge of the High Court would pass final orders with regard to the properties in respect of which the undertaking is to be given by the appellant and the respondent No.4.
- vi. We request the learned Single Judge of the High Court to decide the issue regarding final orders with regard to the said properties mentioned in para 16 as expeditiously as possible, and,

preferably, within a period of one year from the date of this order.

21. There shall be no order as to costs. Pending Applications, if any, shall stand disposed of.

.....**J.**
[B.R. GAVAI]

.....**J.**
[VIKRAM NATH]

NEW DELHI;
JANUARY 25, 2023.