THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.3999 of 2015

ORDER: (per the Hon'ble Dr. Justice B.Siva Sankara Rao)

This revision is filed aggrieved by the order dated 21.08.2016 passed in Arb.O.P.No.1611 of 2015 by the learned III Additional Chief Judge, City Civil Court, Hyderabad. The petition in Arb.O.P.No.1611 of 2015 was filed by the petitioners, who are respondents herein for interim measures, under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') seeking to attach the petition schedule properties pending disposal of the arbitration proceedings between the petitioners and the respondents and to grant injunction in favour of the petitioners restraining the respondents from alienating or encumbering or otherwise altering or deal with the schedule properties in any way either mortgage, sale or development. After hearing the petitioners therein, the learned III Additional Chief Judge, City Civil Court, Hyderabad directed the respondents, petitioners herein, to maintain status quo.

2. It is the contention of the revision petitioners that before passing exparte order, the trial Court should have examined the pleadings as to maintainability of the petition on the ground of territorial jurisdiction, apart from the petition for interim measures, did not file any payment receipts for the alleged claim under the agreement of sale. It is also contended that no arbitrator has been appointed and no arbitration proceedings were pending in respect of the properties of the respondents by that date to maintain the application under Section 9 of the Act but for if at all before Arbitrator on such appointment. It is contended further that the trial Court has exceeded its discretionary powers, apart from failed to provide an opportunity to the revision petitioners before passing the exparte interim orders against the whole of the property, when the claim if any

of the Respondent/petitioners is only with respect to their respective flats and prayed to allow the revision by setting aside the order under revision.

3. On the other hand, learned counsel for the revision respondents contends that when both the parties entered into an agreement of sale for construction of flats by the revision petitioners in their plot of land and even the revision respondents paid the entire sale consideration, the revision petitioners are procrastinating the issue of delivery of flats, having appropriated the amounts transferred without bothering to return or refund the same or deliver the flats as promised under the agreements and further they are trying to alienate and encumber the schedule properties and thus the status quo order passed is just to subserve the ends of justice. Learned counsel for revision respondents further contended that the order under revision is on right perspective and no interference need be necessary and prayed to dismiss the revision.

4. Heard and perused the material on record. The parties are being referred to as they are arrayed before the lower Court for the sake of convenience.

5. A perusal of the application for interim measures under Section 9 of the Act for the reliefs referred supra shows that it was maintained by the eight petitioners against the two respondents (revision petitioners) of whom 2nd respondent is the Managing Partner of the 1st respondent partnership firm by representing the same. The 1st respondent firm floated a venture, with name and style M/s.Gharonda Builders and Developers Private Limited, at Pocharam Village of Ghatkesar Mandal and among the eight petitioners, petitioners 1 and 2 initially entered sale agreement dated 18.05.2005 for sale of flat No.127 (G.C) in Gharonda Chamundeswari apartmenrs at R.T.C cross Road for valuable consideration (including by obtaining loan from ICICI Bank) promising to make ready and deliver possession of the flat with 23 months of the agreement date supra

and the ICICI Bank however did not disburse the sanctioned loan saying as per the development agreement with owner of the premises flat No.GC-127 was to be allotted to the land owner and therefrom, when the respondents were questioned by the petitioners, they promised by entering into agreements with petitioners to allot flat Nos.220 and 229 in the Gharonda Brahma apartments, Pocharam for consideration of Rs.17,15,000/- and Rs.12,76,250/- agreeing to set off the amounts already paid for Gharonda Chamundeswari apartments at R.T.C cross roads for flat No.127 and as they paid entire consideration for the flats, they promised to complete the construction and deliver within 30 months therefrom, however, they did not start construction. The petitioners 1 and 2 thereby filed Arbitration Application Nos.140 and 141 of 2014 before the Court where Sri B.Nalin Kumar Advocate was appointed as arbitrator on 10.04.2015. They did not even choose to file counter before the Arbitrator whereby their right to file counter was forfeited after several adjournments and the arbitration proceedings are under trial/enquiry. Apart from the above, the petitioners 3 and 4 entered another agreement of sale dated 23.07.2013 for flat No.233 of second floor in Gharonda Brahma apartments with 1st respondent firm and paid entire sale consideration of Rs.20,10,000/- and they also filed Arbitration Application No.75 of 2015 for appointment of an arbitrator. Apart from the above, the 5th petitioner paid U.S $45,000/- equal to Rs.17,81,901/- to the 1st respondent firm for allotment of flat No.605 in Gharonda Brahma apartments vide agreement dated 05.10.2007 to him also the respondents were delaying and 5th petitioner filed Arbitration Application No.67 of 2015 for appointment of arbitrator by representing through his father-cum-G.P.A holder. Apart from the above, 6th petitioner entered sale agreement with 1st respondent firm dated 18.01.2013 for sale of flat No.504/404 in Gharonda Brahma supra having paid Rs.42,45,943/- and they also filed application for appointment of arbitrator in A.A. No.68 of 2015. Further, petitioners 7 and 8 who entered agreement dated 29.06.2013 with 1st respondent firm for allotment of flat in Gharonda Brahma from the failure pursuant to the agreement clause filed application No.87 of 2015 for appointment of arbitrator. The interim measures petitioners 1 to 8 together thereby maintained the petition with averments that the respondent firm-1st respondent represented by the 2nd respondent sternly lured them to pay entire sale consideration for the respective flats under the agreements, for about Rs.1.30 crores and seemingly investing the same in other projects and not started construction in make believing as if the project would be completed and flats being delivered and even for the demands to refund the amounts with interest, they were dilly-dallying. While so, it is reliably learnt that the respondents are trying to avoid payments and foreclose their partnership firm business and to decamp with the petitioners' amounts supra. The interim measure application enclosed with schedule of properties as 'A' and 'B' of which part-A consists of two items of 8228 Sq. yards and 3811 Sq. yards respectively in S.No.27 part of Pocharam village within the boundaries mentioned and Schedule-B consists of three parts of semi-finished built up area undivided 750 Sq. yards, 1250 sq. yards and 1000 sq. yards respectively with 38,647 sq. ft built up area respectively consisting of the three items with premises M.C.H No.1-8-678/20 and 21 which is Gharond Chamundeswari apartments.

6. The interim measures petitioners claim that the respondents 1 and 2 are making hectic efforts to alienate at any time and if they are allowed to do so, even the arbitration proceedings decide in their favour they remain paper awards and purpose of the claim be defeated unless the respondents are restrained from alienation and attachment of their properties be ordered to realize the fruits of the awards to be passed. It is averred further that through Eenadu and Deccan Chronicle paper publications of 2/9.08.2015, it came to light also of the intention of the respondents to create third party interest by transferring third party development rights over Schedule-A property supra to avoid legitimate claims of the petitioners to be satisfied. It further came to light that the respondents are involved in

several criminal cases of cheating the general public. In the interim measure application, it is mentioned that cause of action arisen from the agreements entered for construction and from the non-compliance and on the jurisdiction aspect also it is mentioned that as the agreements contain the arbitration clause, they are entitled to the interim measures and the cause of action since arising within the jurisdiction of the Chief Judge, City Civil Court, Hyderabad. The learned III Additional Chief Judge, City Civil Court, Hyderabad from above facts and averments having satisfied with the prima facie case and was only passed the exparte interim orders of status-quo pending notice vide order dated 21.08.2015 by posted the matter till 10.09.2015 to maintain the status-quo order meantime in respect of the schedule properties.

7. Though in the grounds of revision, it is mentioned that as the property is situated at Pocharam village of Ghatkesar Mandal of Ranga Reddy District, the District Court i.e. City Civil Court, Hyderabad has no jurisdiction, it is not the case of the revision petitioners (respondents to the interim measure application) that the agreements entered even at Pocharam Village of Ghatkesar Mandal. In fact, prima facie when the petition averments as detailed supra, clearly speaks that the original agreement entered by the respondents (revision petitioners) was for the property at R.T.C cross-roads and it is out of that, from the amounts paid by the petitioners 1 and 2, there was an arrangement by entering fresh agreements for that consideration and from the cause of action arises within City Civil Court, Hyderabad where entered the agreements to construct flats and convey of the land at Pocharam village. Merely because the property is situated in Pocharam village of Ranga Reddy District, it cannot be said, no part of cause of action taken place within the jurisdiction of the Chief Judge, City Civil Court, Hyderabad and there is nothing to say there is no case made out to entertain the interim measures application and to pass the interim ex parte order. A Division Bench of this Court in ***Bharat Sanchar Nigam Limited V.***

S.Satya Durga Prasad[1] observed that proceedings instituted under the Act, 1996 since treated as a suit, principles underlying Section 16 to 20 C.P.C becomes relevant in determining proper Court for institution of proceedings and once place of residence of the defendant or where cause of action in whole or part arisen also becomes relevant in deciding jurisdiction. It was observed at para No.6 of the expression that the place where the agreement, in question entered also gives part of cause of action for jurisdiction. The Apex Court in its larger Bench expression in ***S.B.P & Co. V. Patel Engineering Limited***[2] held that writ jurisdiction invoking Article 227 of the Constitution of India cannot be exercised once there is an appeal remedy. Even earlier to it in **ITC Limited Vs. Seimons Public Communication Net Work Limited**[3] it was observed that the power of appeal is conferred by Section 37(2) of the Arbitration Act, against an order of the Arbitration Tribunal accepting the plea of Section 16(2) or (3) or granting or refusing to grant interim measure under Section 17 of the Act, no revision lies in such cases, though against the appeal order under Section 37of the Act, revision lies including under Section 115CPC, for application of CPC not expressly taken away and what Section 19 of the Act merely states is Arbitral Tribunal shall not be bound by CPC which has no application to proceedings before Civil Court in exercise of powers of appeal or revision under Section 37 of the Act. In fact, as per Section 37(1) of the Act, against the order of the Court granting or refusing to grant any interim measure under Section 9 of the Act appeal lies.

8. So far as the interim measure under Section 9 of the Act concerned, any party before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36 of the Act, may apply for the interim measure which includes interim measure of protection for custody, sale, securing amount, detention, inspection or preservation of property or interim injunction or appointment of a receiver or such other interim measure of protection as may appear to the Court to be

just and convenient. What Section 9(3) of the Act, speaks is once the arbitral Tribunal has been constituted, the Court shall not entertain application under sub-section (1) supra, unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. The difference between the two sections are well laid down in the expression of the Apex Court in ***M.D. Army Welfare Housing Organization Vs Sumangal Services Pvt Ltd[4] & Firm Ashok Traders V. Gurumukh Das Saluja[5].*** A combined reading of Sections 9 and 17 of the Act, and from the above expressions indicate that application for interim measures under Section 9 of the Act is maintainable even before commencement of arbitral proceedings. In fact as per the amended Act 3 of 2016, w.e.f. 23.10.2015, in such an event, where interim measure of protection granted by an order by a Court before commencement of arbitral proceedings, arbitral proceedings shall be commenced within 90 days from the date of such order or within such further time, the Court may determine. Section 21 of the Act speaks that date of receipt of the request to refer the dispute to arbitration is the date of commencement of arbitral proceedings. Even in Section 37(1) of the amended Act, right of appeal against interim measure under Section 9 is there but for deletion of appeal against order refusing to refer the parties to arbitration under Section 8 of the Act. However, as per the saving clause incorporated by Section 26 of the Amended Act, the Amended Act shall not apply to the arbitral proceedings already commenced by the time, the amended Act came into force, unless the parties otherwise agree, Section 17 of the Act is the interim measure as an interim award which tantamounts to award as per Section 2© of the Act, that can be passed by the arbitral Tribunal and same can be subjected to challenge under Section 34 but not the interim measure under Section 9, but for by appeal under Section 37 of the Act. The effect of pending application under said section on enforceability, under Section 37 of the Act in this regard was well considered by the Apex Court in **NBCC Ltd. Vs. LII Limited[6].**

Once that is the difference between Section 9 and 17 of the Act and Section 9 of the Act, enables the party to apply even during arbitral proceedings or even after making of the arbitral award before it is enforced under Section 36 of the Act, but for subject to the rider under Section 9(3) of the Act to show circumstances exist which may not render remedy under Section 17 efficacious.

9. In this regard, as can be seen from the pleadings, Arbitrator was appointed on the application of the petitioners 1 and 2 and commenced the proceedings. However, so far as other applicants concerned, the applications were stated filed pending and no arbitrators are appointed and or no arbitral proceedings are commenced. What Section 17 of the Act, speaks is the power of the arbitral Tribunal, after commencement of the arbitral proceedings. As such, the facts of the case on hand come within the circumstances enumerated under Section 9(1) r/w(3) of the Act. Thereby, the contention that so far as the petitioners 1 and 2 concerned arbitral proceedings already commenced is not even a bar and so far as other petitions concerned, no arbitral proceedings by then even commenced.

10. It is the submission across the Bar that in some of the matters and in particular so far as the petitioners 1 and 2 even the arbitral awards were passed. However, it is not even the case that the arbitral awards are under enforcement under Section 36 of the Act, to close the proceedings by left open the remedy to invoke under Section 36 of the Act in enforcing the award before the Court to take protective measures therein. Undisputedly an appeal lies against granting or refusing any measures under Section 9 of the Act, or any interim measures under Section 17 of the Act, from reading of Section 37(1) and (2) of the Act as detailed supra. Once such is the case and once CPC applies to such appeal or even to revision proceedings and it is also provided by Order XLIII CPC of appeal remedy even against granting ad-interim exparte injunction, it cannot be contended to maintain the revision saying there is no appeal

remedy against exparte order of ad-interim status quo which tantamounts to prohibitory injunction to mean maintenance of existing status quo. Even para-10 of the Division Bench expression of this Court in **ICICI Bank Limited Vs. IVRCL Limited**[7] is clear on this aspect of appeal maintainability under Section 37(1) of the Act, against an exparte interim order under Section 9 of the Act, though on merits the appeal was allowed setting aside the exparte interim order. Further, a Division Bench expression of this Court in **S.Laxmi Vs. Reliance Builders, Hyderabad**[8], laid down that in an application under Section 9 of the Act, the respondent can raise by filing counter any defence like lack of cause of action or jurisdiction or bar of any law on maintainability against the claim. Once, when there is an appeal remedy, there is a bar to maintain the revision also as discussed supra.

11. A Full Bench of this Court in ***East India Udyog Limited V. Maytas Infra Limited***[9], in answering the reference as to pending disposal of the interim measure application under Section 9 of the Act, whether the Court is entitled to grant any interim order or whether such Court entitled to dispose of the interim measure application before initiation of arbitral proceedings, exparte without giving notice to respondents if the facts and circumstances so warrant and whether further application pending disposal of interim measure under Section 9 of the Act is maintainable, held in paras 18 to 20 that when application under Section 9 of the Act, is made to a Court which gives rise to a original proceeding in nature within the meaning of Section 141 C.P.C, which is not dependant upon the pendency of any other proceeding such as any suit or appeal. Such application under Section 9 of the Act, can be made even before any arbitral proceedings are commenced. There is no special procedure for it and thereby the general rules that covers the civil Court while considering grant of interim measure or order at the threshold are attracted. When application under Section 9 of the Act, is made and pending such application an exparte ad-interim order when becomes

imperative, it is open to the Court to pass such ad-interim exparte order based on the principles contemplated by Order XXXIX Rules 1 and 2 C.P.C governing grant of ad-interim injunction and/or orders of interim protection of the appointment of a receiver or or the like and such a power to pass exparte order is derived to ensure that the application made before it does not become infructuous, for no specific provision to meet the emergent situation of necessity to pass exparte order, the Court cannot be stated helpless in the matter of ad-interim order or measure and otherwise the entire purpose of the application under Section 9 of the Act would stand defeated. In short, when any power is expressly granted by statute, there is impliedly included in the grant, even without special mention of every power and every control, the denial of which would render the grant itself ineffective. On the question whether Court can dispose of the application under Section 9 of the Act, even before initiation of arbitral proceedings is settled by the expressions of the Apex Court in ***Sundaram Finance*** and ***Firm Ashok Traders*** that Court is undoubtedly entitled to dispose of the application under Section 9 of the Act even before initiation of the arbitral proceedings. The Court cannot, however, dispose of such application exparte without giving notice to respondents, but can pass exparte ad-interim order pending notice on the application filed under Section 9 of the Act.

12. In view of the same, in the petition under Section 9 of the Act, which is for interim measures pending service of notice an ad interim order can be passed therein and in the case on hand ad-interim order of status quo granted pending service of notice and hearing to pass final orders is perfectly legal and valid and within the power of the Court and also on consideration of material as discussed above. Thus, it cannot be said the order is not appealable and revision is the only remedy. No doubt on the application deemed for all purposes as pending, even ad-interim exparte order passed, it is left open to the respondents therein(revision petitioners) to file counter and participate in enquiry to decide the interim measures

application finally on merits including on jurisdiction or maintainability and locus of party and existence or not of arbitrary clause in the agreement etc., or to maintain an appeal against the exparte interim order and not to maintain the revision.

13. Accordingly and in the result, the revision is dismissed with no costs. Pending miscellaneous petitions, if any, shall stand dismissed.

SANJAY KUMAR, J

Dr.B.SIVA SANKARA RAO, J

11-08-2016
Ksh/vvr

[1] 2014(1) ALD 734
[2] (2005)8 SCC 618
[3] AIR (2002) SC 2308
[4] AIR 2004 SC 1344
[5] AIR 2004 SC 1433
[6] (2005) 2 SCC 367.
[7] (2015) 6 ALD 486
[8] (2015) 5 ALD 402
[9] 2015(4) ALT 797=2015(5) ALD 446