

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Arbitration Appeal No. 65 of 2011**

M/s Jalwa Stone Crushing Industries, a Partnership firm registered office at Village Pandariya, District Kabirdham (C.G.), through its Partner Shri Khushal Chand Jain, son of Shri P.C. Jain, aged about 56 years, resident of village Pandariya, District Kabirdham (C.G.)

---- Appellant**Versus**

1. State of Chhattisgarh, through the Secretary, Public Works Department, D.K.S. Bhawan, Mantralaya, Raipur (C.G.)
2. The Executive Engineer, Public Works Department, Bridge Construction Division, PWD, Rajnandgaon (C.G.)

---- Respondents

For Appellant: Mr. A.K. Mishra, Advocate.
 For Respondents/State: Mr. U.N.S. Deo, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****15/05/2017**

(1) This appeal has been filed under Section 34(1)(a) of the Arbitration and Conciliation Act, 1996 (henceforth "Act, 1996") against the judgment and decree dated 23.04.2011 passed by District Judge, Rajnandgaon in M.J.C. No.23/2010 whereby appellant's application under Section 9 of the Act, 1996 has been rejected.

(2) The appellant had filed an application under Section 9 of the Act, 1996 stating inter alia that the appellant is a duly registered partnership firm; there is arbitral dispute exists

between the parties as one of the partner namely Shri Gautam Chand Jain has expired so the appellant-firm has sent the letter about on 19.12.2007 but the respondents did not heed to the said letter and have made a demand for recovery of Rs.7,80,600 from the appellant-firm; it has further been stated as per Clause 37 of the agreement, no proceeding for recovery can be made against the appellant for the amount in question.

(3) Learned District Judge, by its impugned order, rejected the application holding principally that no proceedings for arbitration has been initiated by the petitioner and, therefore, no interim measure protection can be granted in favour of the petitioner.

(4) Learned counsel for the petitioner submits that in order to grant application under Section 9 of the Act, 1996, pendency of any arbitral proceedings is not a pre-condition for exercise of power by Court and, therefore, the learned District Judge has grossly erred in rejecting the application under Section 9 of the Act, 1996 principally on the ground that no arbitral proceedings is pending on the date of making an application for interim measures and, thus, the impugned order is liable to be set aside.

(5) Per contra, counsel for the respondents submits that as the proceedings for arbitration has not been initiated by the appellant to resolve the dispute exists between the parties, no interim measure of protection can be granted in favour of the petitioner and, therefore, the application under Section 9 of the Act, 1996 has rightly been rejected by the learned District Judge, which does not call for any interference by this Court.

(6) I have heard learned counsel appearing for the parties and also considered their rival submissions made hereinabove; also gone through the record with utmost circumspection.

(7) In order to decide the dispute, it would be appropriate to notice Section 9 of the Act, 1996 which states as under:-

“9.Interim measures, etc. by Court.- [(1)] A party may, before or during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
 - (b) securing the amount in dispute in the arbitration;
 - (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) interim injunction or the appointment of a receiver ;
 - (e) such other interim measure of protection as may appear to the court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

(8) A careful perusal of the aforesaid provisions would show that a party may 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, apply to a court for an interim measure of protection, as such, pendency of any arbitral proceedings is not a condition precedent for exercising power by the Court under Section 9 of the Act, 1996.

(9) In the matter of **Firm Ashok Traders and another Vs. Gurumukh Das Saluja and others**¹, their Lordships of the Supreme Court has held as under;

“13. The A & C Act, 1996 is a long lead in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of the A & C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract ? “Party” is defined in clause (h) of sub-section (1) of Section 2 of the A&C Act to mean “a party to an arbitration agreement”. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court under Section 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the

1 (2004) 3 SCC 155

arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this court in **Sundaram Finance Ltd. v. NEPC India Ltd**² the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed.”

(10) Division Bench of the Karnataka High Court in the matter of **Globe Cogeneration Power Ltd. Vs. Sri Hiranyakeshi Sahakari Sakkere Karkhane Niyamit, Sankeshwar, Karnataka**³ has laid down the similar proposition by holding that in order to invoke the provision under Section 9 of the Act, 1996, pendency of any arbitral proceedings not a pre-condition for exercise of power by Court. Paragraph 9 of the report states as under:-

“9.This Section is a substitute for the Second Schedule of the Arbitration Act, 1940. Under Section 41(b) of the Arbitration Act, 1940, the Court had power to grant interim reliefs, for the purpose of, and in relation to arbitration proceedings. Section 41(b) was interpreted to mean that the Court could grant interim relief if the arbitration proceedings were pending before the arbitrator or before the Court. Pendency of any proceedings in the Court in relation to the arbitration was a pre-condition for the exercise of power by the Court to grant interim relief under Section 41(b) of the Arbitration Act, 1940. Under section 9 of the new Act, the Court may, on application by a party, grant interim relief “before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced”. Thus, under Section 9 of the Act, a party can make application for grant of interim reliefs of protection as provided therein not only during the arbitral proceedings but

2 (1999) 2 SCC 479

3 AIR 2005 Karnataka 94

even before commencement of arbitral proceedings and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

(11) Applying the principle of law laid down by the Supreme Court in the matter of **Sundaram Finance Ltd. (supra)** & Division Bench of the Karnataka High Court in the matter of **Globe Cogeneration Power Ltd. (supra)** to the facts of the case, this Court is of the opinion that the order of learned District Judge holding that in absence of initiation of arbitral proceedings, the application under Section 9 of the Act, 1996 for interim measure is not maintainable, cannot sustain and the same is liable to be and is hereby set aside. The aforesaid application under Section 9 of the Act, 1996 is restored to the file of Principal District Judge, Rajnandgaon for hearing and disposal in accordance with law after affording due opportunity of hearing to both the parties expeditiously preferably within a period of three months from the date of production/receipt of copy of this order.

(12) No order as to cost (s).

Sd/-

(Sanjay K. Agrawal)
Judge

D/-