

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

**CMA No.49 of 2017
and
CMA (SR) No.3807 of 2017**

CMA No.49 of 2017:

Between:

M/s. IndBharath Power (Madras) Limited,
Jubilee Hills, Hyderabad.
Rep. by its Authorized Signatory.

...Appellant/Respondent No.1

And

- 1) M/s.ICOMM Tele Ltd.
Srinagar Colony, Hyderabad.
Rep. by Mr. B.Rajesh. ...Respondent/Petitioner
- 2) The Lakshmi Vilas Bank Limited,
Hyderabad Main Branch,
Koti, Hyderabad.
Rep. by its Branch Manager. ... Respondent/Respondent No.2

DATE OF JUDGMENT PRONOUNCED: 07.02.2017

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE SURESH KUMAR KAIT

AND

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

- | | |
|---|----------|
| 1. Whether Reporters of Local Newspapers
may be allowed to see the judgment? | Yes / No |
| 2. Whether the copies of judgment may be
marked to Law Reporters / Journals? | Yes / No |
| 3. Whether Their Lordship wish to
see the fair copy of the Judgment? | Yes / No |

*** THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT**
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! Counsel for Appellant : Sri P.Vikram

^ Counsel for Respondent No.1 : Sri T.Bala Mohan Reddy

^ Counsel for Respondent No.2 : —

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> Head Note:

? Cases referred:

1) (2007) 6 SCC 798

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND

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CMA No.49 of 2017 and CMA (SR) No.3807 of 2017

COMMON JUDGMENT: *(Per Hon'ble Sri Justice U.Durga Prasad Rao)*

CMA No.49 of 2017 is filed by the first respondent in Arbitration O.P.No.35 of 2017 whereas the CMA (SR) No.3807 of 2017 is filed by the petitioner in the said O.P.

2) Heard respective counsel and with their consent both the CRPs are disposed of at the admission stage.

3) Hereinafter, the parties are referred as they were arrayed in the Arbitration O.P.No.35 of 2017.

4) The appellant/petitioner filed Arbitration O.P.No.35 of 2017 on the file of XI Additional Chief Judge, City Civil Court, Hyderabad under Section 9 of Arbitration and Conciliation Act, 1996 (for short "the Act") against respondents 1 and 2 with the following averments:

a) The petitioner is one of the India's largest product designing, engineering development and turnkey solution providers for Power, Telecom, Defence, Solar and Infrastructure Sectors and it was a company incorporated in the year 1989. The 1st respondent is a limited company and the 2nd respondent is the banker of the petitioner company.

b) The further case of petitioner is that the 1st respondent invited sealed bids from the eligible bidders for Construction of 400KV D/C (Quad) Moose Transmission line from switchyard of IBPML, Manapad, Tuticorin (Tamil Nadu) to PGCIL 765/400 KV pooling station at Kelaeral, Yattayapuram on Turnkey basis and the petitioner stood as the successful bidder and placed separate Purchase Orders for Supplies and Services for a total value of Rs.104.25 Crores (Supply: Rs.57.12 Crores, Services: Rs.47.13 Crores). The duration of the contract was 21 months from Contract effective date. The commencement date was 20.05.2015 and completion date was 20.02.2017.

c) The petitioner submitted the following Bank Guarantees through 2nd respondent bank as per terms of Purchase Orders:

Supply:

- *Performance BG No.0124151GADP0001, dt.4.6.2015 of Rs.5,22,31,033/- of Dena Bank*
- *Advance BG: BG No.297INGL151540002, dt.3.6.2015 of Rs.8,25,60,458/- of Laxmi Vilas Bank.*

Services:

- *Performance BG: BG No.297INGL151540001, dt.3.6.2015 for Rs.4,71,33,536/- of Laxmi Vilas Bank.*
- *Advance BG: BG No.297INGL151540003, dt.3.6.2015 for Rs.4,79,50,500/- of Laxmi Vilas Bank*

While-so, the petitioner's case is that he has undertaken the project and there was no deficiency in the quality of the work undertaken by it nor there was any delay in execution but the 1st respondent though could not find any fault with the petitioner, started

threatening to invoke the bank guarantees under false, illegal, arbitrary and fraudulent measures contrary to the terms of the general conditions of the contract entered into by the parties. The 1st respondent may take action adverse to the interest of the petitioner inspite of the valid and justified prayers of the petitioner. The petitioner intended to invoke arbitration proceedings but in the meanwhile, 1st respondent was eager to invoke the bank guarantees. Hence, the petition under Sec.9 of the Act with the prayer to grant injunction restraining the 1st respondent from invoking the petition schedule mentioned bank guarantees issued by the 2nd respondent and also a corresponding order restraining the 2nd respondent from honouring the bank guarantees.

5) The learned XI Additional Chief Judge, City Civil Court, Hyderabad, in her order dated 04.01.2017 granted ad-interim *ex parte* injunction restraining the 1st respondent from invoking or encashing the schedule mentioned bank guarantees issued by the 2nd respondent-bank and further restrained the 2nd respondent-bank from honouring/encashing the schedule bank guarantees till 23.01.2017. The Court also ordered notice to the respondents through Court and RPAD by 23.01.2017.

Aggrieved by the aforesaid *ex parte* order, the 1st respondent filed CMA No.49 of 2017.

6) While-so, the 1st respondent filed a memo dated 01.02.2017 before the Court below for extension of interim injunction earlier granted in his favour. The trial Court while dismissing the memo passed the following order:

“Order dt.01.02.2017:

Heard both parties. The Respondents Counsel submitted that the petitioner not complied Order XXXIX Rule 3. They submitted 2007 SCC 695. The Hon’ble Apex Court clearly directed in 15th para about the compliance of the Rule 3. The Respondent also contended that no jurisdiction. Hence by following the citation, the Interim Order is not extended. Hence this memo is rejected.”

Aggrieved by the aforesaid order, the petitioner filed CMA (SR) No.3807 of 2017.

7 a) **CMA No.49 of 2017:** Heard arguments of Sri Vikram Pooserla, learned counsel for appellant and Sri T.Bala Mohan Reddy, learned counsel for respondent No.1.

b) **CMA (SR) No.3807 of 2017:** Heard arguments of Sri T.Bala Mohan Reddy, learned counsel for appellant and Sri Vikram Pooserla, learned counsel for respondent No.1.

8) Learned counsel for 1st respondent/appellant in CMA No.49 of 2017 would argue that the initial order of injunction granted by the trial Court restraining the 1st respondent from invoking the bank guarantees was devoid of jurisdiction. In expatiation, he would argue that as per the agreement between the petitioner and the 1st

respondent, all the disputes which arise between the parties shall be referred to the arbitration proceedings and the venue of the arbitration shall be at New Delhi and in that view, the Courts at Hyderabad much-less, the trial Court had no jurisdiction to entertain the petition under Sec.9 of the Act. Thus the initial order itself was illegal. Learned counsel further fairly conceded that this argument is only of academic importance because subsequently the trial Court declined to extend the interim injunction following the contention of this respondent to the effect that the petitioner, inspite of the direction of the Court to issue notice to respondents through Court and RPAD by 23.10.2017, failed to follow the said mandatory procedure laid under Order 39 Rule 3 CPC. Thus the trial Court in its order dated 01.02.2017 refused to extend the interim injunction and therefore, no injunction was in force subsequent to 01.02.2017. Learned counsel would however submit that since the petitioner has filed CMA (SR) No.3807 of 2017 challenging the order dated 01.02.2017 of the lower Court in not extending the interim injunction, it is the duty of the petitioner to submit that the order of the trial Court was perfectly valid inasmuch as, in an interim injunction passed under Sec.9 of the Act, the petitioner therein is bound to follow the mandatory procedure under Order 39 Rule 3 CPC which was grossly violated by the petitioner and therefore, the appeal—CMA(SR) No.3807 of 2017 is not maintainable on merits. He placed reliance on *Arvind*

Constructions Co. (P) Ltd. vs. Kalinga Mining Corporation and others¹.

9) Per contra, learned counsel for petitioner/appellant in CMA(SR) No.3807 of 2017 would argue that though the petitioner was scrupulously executing the work entrusted to him under the contract, the 1st respondent tried to repudiate the contract and also tried to invoke the bank guarantees issued by 2nd respondent on behalf of the petitioner. In those circumstances, the petitioner intended to invoke arbitration proceedings following the agreement between the parties but as the 1st respondent was hurriedly attempting to invoke the bank guarantees, the petitioner was constrained to file petition under Sec.9 of the Act before the XI Additional Chief Judge, City Civil Court, Hyderabad seeking interim injunction. Learned counsel further argued that the trial Court considering the *prima facie* case and balance of convenience in favour of the petitioner had, initially granted interim injunction on 04.01.2017 restraining the 1st respondent from invoking the bank guarantees and the 2nd respondent from honouring/encashing the bank guarantees and ordered notice to respondents by 23.01.2017. Learned counsel vehemently argued that interim injunction granted by the Court below was under a special enactment i.e, Arbitration and Conciliation Act, 1996 and not under the Specific Relief Act and therefore, the procedure contemplated under Order 39 Rule 3 CPC need not be followed and further,

¹ (2007) 6 SCC 798

knowing about the interim injunction, the 1st respondent has already filed CMA No.49 of 2017. Hence the trial Court was not right in refusing to extend the interim order.

a) Nextly, on the aspect of jurisdiction he would argue that the petitioner and both the respondents are residents of Hyderabad having their offices and the work contract has to be executed in Tamil Nadu and except the seat of arbitration, no part of cause of action has arisen at New Delhi. Probably, the 1st respondent might have issued tenders on behalf of the Power Grid Corporation of India, New Delhi, and therefore, the seat of arbitration was selected at New Delhi. Except that no fraction of cause of action had arisen in New Delhi. On the other hand, since the 2nd respondent issued bank guarantees on behalf of petitioner at Hyderabad, it can be said that the part of cause of action has arisen at Hyderabad and therefore, the petitioner was right in invoking the jurisdiction in City Civil Court at Hyderabad. He thus prayed to allow his appeal and dismiss the appeal filed by 1st respondent.

10) In the light of above rival arguments, the points that arise for determination are:

(i) Whether there are merits in the respective appeals filed by the petitioner and 1st respondent?

(ii) To what relief?

11) **POINT No.1:** The brief admitted facts which are necessary for disposal of these two appeals are that the 1st respondent floated the tenders and the petitioner became the successful bidder for construction of 400KV D/C (Quad) Moose Transmission line from switchyard of IBPML, Manapad, Tuticorin (Tamil Nadu) to PGCIL 765/400 KV pooling station at Kelaeral, Yattayapuram on Turnkey basis. It is also an admitted fact that the petitioner submitted bank guarantees through the 2nd respondent, who is his banker. Due to some disputes that have arisen in due course of execution, the petitioner under the apprehension that the 1st respondent might invoke the bank guarantees, wanted to invoke arbitration and even before that he filed Arbitration O.P.No.35 of 2017 before the XI Additional Chief Judge, City Civil Court, Hyderabad, under Sec.9 of the Act seeking interim injunction restraining the respondents from invoking the bank guarantees. It is also an admitted fact that initially the Court granted interim injunction on 04.01.2017 till 23.01.2017 and ordered notice to the respondents and subsequently on the memo filed by the petitioner, on 01.02.2017, the trial Court refused to extend the interim order on the ground that he failed to comply with the mandatory procedure under Order 39 Rule 3 CPC. Thus the interim order is not in force as of now. Be that as it may, since both parties filed rival appeals on different contentions, one of which is the jurisdiction of the trial Court, it necessitated this Court to answer the contentions.

12) Regarding the jurisdiction, the General Conditions of Contract (for short “G.C.C”) entered into by the petitioner and the 1st respondent contains various terms and conditions, one of which is with regard to the settlement of disputes and arbitration. Clause 38 speaks of settlement of disputes. It is mentioned therein that if any dispute of any action whatsoever arise between the “employer” and the “contractor” (both the terms are defined in the definition chapter of the G.C.C), the party shall seek to resolve such dispute or difference to the extent possibly, amicably by mutual consultation and if they failed to do so, then the dispute shall be referred by the Contractor to the Project Manager, who within a period of 30 days, shall give written notice of his decision. The decision of the Project Manager shall be deemed to be accepted by the Contractor, unless the Contractor notifies the intention to refer the matter to the arbitration within 30 days of such decision. Then coming to the arbitration scheme, it is mentioned that all disputes or differences in respect of which the decision of Project Manager or the head of the implementing authority has not become final or binding as aforesaid, shall be settled by the arbitration of three arbitrators, one each is to be nominated by the Employer and the Contractor and the third arbitrator to be appointed by both the arbitrators.

13) Then with regard to the venue of arbitration, in Clause 39.3, it is mentioned as under:

“Clause 39.3: The language of the arbitration proceedings and that of the documents and communications between the parties shall be English. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New Delhi.”

14) Therefore, as rightly pointed out by the 1st respondent, the seat of arbitration is at New Delhi, as agreed by both the parties and therefore, the term “Court” for the purpose of Sec.9 and 34 of the Act as defined in Sec.2(1)(e) of the Act shall also be deemed to be the Court at New Delhi. Sec.2(1)(e) of the Act defines the Court as under:

2(1)(e) "Court" means—

(i) *in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;*

(ii) *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;*

From the clause “having jurisdiction to decide the questions forming subject matter of the arbitration if the same had been the subject matter of a suit”, it is evident that the principal Civil Court of

original jurisdiction at New Delhi would have had the jurisdiction to entertain a petition under Sec.9 of the Act but not the Court at Hyderabad.

15) We are unable to accept the contention of the petitioner that since the parties are residents of Hyderabad and the bank guarantees were offered by the 2nd respondent on behalf of the petitioner to the 1st respondent also at Hyderabad, part of cause of action had arisen at Hyderabad and therefore, the Court at Hyderabad would be vested with the jurisdiction, for the reason, such an interpretation would militate against the agreement of parties to have the seat of arbitration at New Delhi. This aspect has been cleared by the Division Bench of this Court in *Jyothi Turbopower Services Pvt. Ltd. vs. Shenzhen Shandong Nuclear Power Construction Company Ltd.*². In that case, this Court was engaged with the question whether the II Additional Chief Judge, City Civil Court, Hyderabad had jurisdiction to entertain the application filed by the appellant under Sec.9 of the Act to pass the interim order restraining the 1st respondent therein from invoking bank guarantee issued by 2nd respondent-bank, when the parties have designated the State of Orissa as the place of arbitration. In that case also, the appellant had taken a plea that a fraction of cause of action had indeed arisen at Hyderabad because the registered office of the appellant company was at Hyderabad; the tender documents were submitted from Hyderabad; agreement works were monitored from Hyderabad and the bank guarantees have been drawn at the banks at

² AIR 2011 AP 111

Hyderabad and as such, in view of the provisions under Sec.20 of the C.P.C, the Court below had jurisdiction. Referring various decisions, this Court observed thus:

“Para 25: As already noticed supra, the parties, in the instant case, in Article 10 of the agreement, have agreed to the place of arbitration as State of Orissa, and considering the definition of “Court” as defined in Sec.2(1)(e) of the Act, the Courts in the State of Orissa, alone will have the jurisdiction to decide the questions forming the subject-matter of arbitration, but not the Courts in Andhra Pradesh, much less the Court below, irrespective of whether cause of action has arisen wholly or part.”

Needless to emphasize that the above decision applies to the present case with all its force. Therefore, we have no demur to hold that the XI Additional Chief Judge, City Civil Court, Hyderabad had no jurisdiction to pass the initial order dated 04.01.2017 even.

16) The next contention of the petitioner/appellant is that since the order passed was under special enactment and not under the Specific Relief Act, there was no need for the petitioner to follow the mandatory procedure under Order 39 Rule 3 CPC and further, the 1st respondent having come to know about the interim order, already filed CMA No.49 of 2017 and hence there was no occasion for him to follow Order 39 Rule 3 CPC. This argument, it must be said has no much conviction in view of the decision of the Apex Court in **Arvind Constructions Co. (P) Ltd.**’s case (1 supra) wherein it was held thus:

“Para 15: *The argument that the power under Section 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power under Section 9 of the Act cannot prima facie be accepted. The reliance placed on **Firm Ashok Traders vs. Gurumukh Das Saluja [(2004) 3 SCC 155]** in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court under Section 9 of the Act. The power under Section 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the court entertaining an application under Section 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application under Section 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply.(Emphasis supplied) The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order 18 Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer*

that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well-recognised principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a Receiver.”

Thus the Apex Court *prima facie* opined that the exercise of power under Sec.9 of the Act must be based on well-recognised principles governing the grant of interim injunction and other orders of interim protection or the appointment of a Receiver. Therefore, it cannot be contended that since the order was passed under a special legislation, the general procedure prescribed under Order 39 Rule 3 CPC has not application. Accordingly, this point is answered.

17) **POINT No.2:** In view of the findings in point No.1, the CMA (SR) No.3807 of 2017 filed by the petitioner/appellant is liable to be dismissed and accordingly dismissed. CMA No.49 of 2017 is concerned, it merits allowing but since the Court below did not extend the interim order beyond 23.01.2017, the same is in our view has become infructuous and therefore, dismissed.

As a sequel, miscellaneous petitions, if any pending, shall stand closed.

SURESH KUMAR KAIT, J

U.DURGA PRASAD RAO, J

Dt: 07.02.2017

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