IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 19TH DAY OF APRIL 2018

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

OA.No.1063 of 2017

In the matter of Arbitration and Conciliation Act, 1996
And
In the matter of disputes between M/s.Sai Tripura Techno Projects (P) Ltd., And M/s.T.V.R.Constructions Pvt.Ltd., In respect of Agreement Dated 09.04.2012.

M/s.SAI TRIPURA TECHNO PROJECTS (P) LTD.,
Rep.by its Managing Director
Sri A.S.Ranganayakulu
At D.No.3-16B-119/1:
Near Rama Krishna Public School
Plot No.31, Shanthi Nagar,
Kakinada 533005
(East Godavari District)
Andrapradesh ..Petitioner

Vs.

1.M/s.T.V.R.Constructions Pvt.Ltd.,
Rohini Apartment, 7-1-32/A, G1
Leela Nagar,
Ameerpet,
Hyderabad-16 .. Respondent

2.The Executive Director, (Southern Region)
Engineering Projects (India) Ltd.,
(A Government of India Enterprise)
No.3-D, EC Chambers,
No.92, G.N.Chetty Road,
T.Nagar,
Chennai 600 017

3.The Executive Director,
Engineering India Limited EIL Bhavan,
No.1, Bhikaji Cama Place,
R.K.Puram,
New Delhi 110 066

4.The General Manager,
M/s.Engineering Projects (India) Ltd.,
Plot No.50, 1st Floor, Phase-III,
Kamalapuri Colony,
Hyderabad-73 ..Respondents/Garnishee

Original Application praying that this Hon'ble Court be pleased to grant an interim injunction to restrain the garnishee respondents 2 to 4 herein from entertaining, receiving, accepting any claim or payment request or processing or paying the amount due towards the General Civil Work containing laying of 508mm dia MS Pipeline and related works, C.P.System etc. Raw Water Pipeline & Associated works for onshore Gas Terminal at Mallavaram, Andhra Pradesh of Deendayal Field Development project of M/s.Gujarat State Petroleum Corporation Ltd., executed by the 2nd respondent herein pending adjudication of Arbitration Proceeding.

This Original Application coming on this day before this court for hearing the court made the following order:

The applicant has taken out the present application seeking for interim injunction to restrain the respondents 2 to 4, as Garnishees, from entertaining, receiving, accepting any claim or payment request or processing or paying the amount due towards the General Civil Work containing laying of 508 mm dia MS pipeline and related works, C.P. System etc. Raw Water Pipeline and Associated Works for onshore Gas Terminal at Mallavaram, Andhra Pradesh of Deendayal Field Development Project of M/s.Gujarat State Petroleum Corporation Limited, executed by the second respondent herein pending adjudication of arbitration proceedings.

2. The applicant company, which is represented by its

Managing Director Mr.A.S.Ranganayakulu, is dealing in civil engineering work with specialised skill for different kinds of rigging, digging and construction. The first respondent company secured a tender from the second respondent for General Civil Work containing "Laying of 508 MM diameter MS pipeline and related works, C.P. System etc. including arranging approval for drawing 15 MLD of Water from Godavari River at Rajahmundry from the concerned Government Departments, Arranging Right of Way (ROW) including Canal/Water Body ROW, Acquisition of Right of Use (ROU) from the concerned authorities/ Irrigation Department/private land owners.

2.1. The first respondent had invited the applicant company to participate as the back-to-back contract for the said project, with an Agreement for Joint Venture. The applicant company had agreed for the back-to-back contract accepting the terms and conditions imposed by the second respondent and thus, entered into an agreement on 21.10.2011, with the first respondent.

2.2. The second respondent is the Southern Region office of the third respondent, which was entrusted to carry out the project floated by the M/s.Gujarat State Petroleum Corporation Limited (in short, "GSPCL"), for "Raw Water Pipeline and Associated Works for Onshore Gas Terminal at Mallavaram, Andhra Pradesh of Deendayal Field Development Project". The second respondent called for a tender in terms of the conditions imposed by the GSPCL and the same was allotted to the first respondent. In turn, the first respondent, who secured the job, could not cope up with the said work and decided to entrust the entire work to the applicant company. Accordingly, a resolution was passed on 26.12.2011 to give effect to the terms and conditions of the Joint Venture Agreement dated 21.10.2011, referred supra. Basing on the Joint Venture Agreement, a

Construction Agreement was also entered into on 09.04.2012 enlisting the back-to-back terms of the second respondent, Letter of Indent (LOI) with clear responsibilities and liabilities of the parties to this agreement to proceed with the work entrusted by the second respondent. The first respondent had agreed to induct the applicant's representative Mr.A.K.Ranganayakulu as one of the Directors on the irrevocable basis and to allow him to handle the entire project without any interference of the first respondent company. Thus, the Agreement dated 09.04.2012 was signed, which contained Clause 12 directing the parties to proceed for arbitration in the event of any dispute or difference between them.

2.3. It is the specific case of the applicant that as agreed the applicant had invested huge amounts to comply with the conditions of the respondents 2 to 4 for mobilising the men and material to work. It is also stated further that the applicant had to face rough weather, when the project was in progress. Thus, at the instance of the applicant, the project became viable and operative to the benefit of the public. Letter of Appreciation was also issued by the GSPCL on 02.09.2014 and an Appreciation Certificate dated 12.04.2014 was also issued to the applicant.

2.4. While so, the first respondent, who had all along been staying outside the project, upon seeing the successful completion of the project, alleged to have issued a letter dated 14.08.2014 to the respondents 2 to 4 stating that the authority given to the applicant company by them was revoked and sought permission to continue the work. It is the contention of the applicant company that the first respondent was attempting to receive the outstanding dues to the applicant in the process of settling the final bill, return of redemption money, Earnest Money and that of cancelling the Bank Guarantee provided for the work. The said attitude of the first respondent had plagued the entire project, which was taken ahead smoothly by the applicant company.

2.5. As the first respondent, who had entrusted the project and came out of the same directly to the applicant instead of settling it with the applicant company, had raised the issue through the respondents 2 to 4, the applicant was compelled to take up the issue in the arbitration proceedings questioning the conduct of the first respondent and causing the delay in making the payment to the applicant company unnecessarily. Though as per the agreement dated 09.04.2012, only an arbitration is contemplated, the first respondent was coercing the respondents 2 to 4 to disburse the entire outstanding amount and to release the Bank Guarantee also. Hence, the present application is filed seeking to prohibit the respondents 2 to 4 from entertaining, receiving, accepting any claim or payment request or processing or paying the amount due towards the project executed by the second respondent herein pending adjudication of arbitration proceedings.

3. The application is resisted by the first respondent raising preliminary objection about the maintainability of the application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") before this Court.

3.1. According to the first respondent, its main objection is that the application as such before this Court is not maintainable, as the jurisdiction vests only with the Court at Hyderabad, as (i) the agreement was entered by the second respondent at Hyderabad ; (ii) the workplace is also at East Godavari District in Andhra Pradesh; and (iii) the Joint Venture Agreement dated 21.10.2011 was also entered into between the applicant and the first respondent at Hyderabad. As this Court did not have jurisdiction, it was prayed for dismissal of the application.

3.2. It is admitted by the first respondent that the subject work was entrusted to them by the fourth respondent and the Joint Venture Agreement was entered into on 21.10.2011, in which, the applicant is also a party. As there was a breach of the terms of the said agreement, the first respondent had cancalled the resolution dated 26.12.2011 authorising Mr.A.S.Ranganayakulu, Managing Director of the applicant company, to deal with the project, which was communicated to the second respondent through e-mail on 07.01.2012. It is stated that subsequent to the same, on 24.03.2012, the second respondent had issued Work Order only to the first respondent. Hence, it is contended that the applicant company was not a party to the Work Order. As there was no privity of contract between the applicant and the second respondent, the relief sought for cannot be granted and thus, the instant application is not maintainable.

4. The respondents 2 to 4 have been served and they have chosen not to appear in Court either in person or through a Counsel, though their names have been printed in the cause list.

5. Heard the learned counsel for the applicant and the learned counsel for the first respondent and also perused the materials on record.

6. Admittedly, the parties have agreed for arbitration as per Clause 12 of the Agreement of contract dated 09.04.2012. The preliminary objection raised by the first respondent is that first of all, the authorised signatory

Mr.A.S.Ranganayakulu, as the Managing Director of the applicant company, is not competent to represent the applicant company, as the applicant has not produced any resolution passed by the Board of Directors authorising him to institute the instant proceedings. It is also not stated that the Articles of Association of the applicant company authorised the Managing Director as the competent person to litigate on behalf of the company. Hence, it was prayed that the application has to be rejected as not maintainable. Learned counsel for the first respondent also placed reliance on **Swadharma Swarajya Sangha represented by its Director Mrs.Lalitha Rathunam V. Indian Commerce and Industries Company (P) Limited, 1998-1-L.W. 203** in support of his contention.

7. Secondly, on the question of jurisdiction, it was contended that no part of cause of action arises in Chennai and hence, the application cannot be maintained before this Court. In support of his contention, learned counsel relied on Section 2(e) of the Act, which defines "Court". Sections 2(e) reads as follows :

> *"**2. Definitions** – In this part, unless the context otherwise requires -*
>
> *.... (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 ;"

7.1. There is no reference in the aforesaid Section to the place, where, the parties reside or carry on business. The jurisdiction of the Court is made not to depend on any of these factors, but solely on the subject matter. Therefore, learned counsel for the first respondent argued that the subject matter is in East Godavari District of Andhra Pradesh and hence, the application filed before this Court is not maintainable, as the office of the second respondent alone is in Chennai and the respondents 3 and 4 are also situate in New Delhi and Hyderabad respectively, and the applicant is from Kakinada, Andhra Pradesh.

7.2. However, learned counsel for the applicant company argued that the second respondent from whom, the moneys have to be paid, is situate in Chennai, and hence, this Court has jurisdiction, as the second respondent, being the Garnishee having its address in Chennai, part of cause of action is deemed to have arisen in Chennai and it is contended that the application filed is maintainable.

8. *De hors* the preliminary objection on the merits of the case, it is to be seen whether the applicant has made out a case for prohibitory order ?

8.1. It is the consistent case of the applicant company that it had completed the entire project without interference from the first respondent and only it is entitled to receive the amounts from the second respondent. Even if the first respondent, who had assigned the work to the applicant company, had any dispute, the first respondent could not have taken it up with the third and fourth respondents. Therefore, pending resolution before the Arbitral Tribunal, the applicant company is seeking for the prohibitory order restraining the respondents 2 to 4 from entertaining any claim by the first respondent.

9. Though the application is filed on 25.10.2017, when a specific question was put as to whether arbitration proceedings is initiated, learned counsel for the applicant company was unable to answer to the same. After the application was adjourned on 03.04.2018 to 04.04.2018, a notice for arbitration is said to have been issued on 04.04.2018. The applicant, who is interested in getting the prohibitory order from this Court, ought to have been prudent in initiating the arbitration proceedings within a reasonable time. Though the matter had been adjourned time and again from the date of filing, only when the matter was taken up for final hearing on 04.04.2018, the notice of arbitration was issued to the first respondent. However, the learned counsel for the first respondent submitted that till the arguments were over on 09.04.2018, no notice was served on the first respondent. It is now useful to refer to the decision of the Apex Court in **Firm Ashoka Traders V. Gurumukh Das Saluja, 2004 (2) CTC 208**, wherein, it has been held as follows :

> *"17. ..... As per the law laid down by this Court in Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] itself the Court has said - "It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings". Section 9 permits application being filed in the court*

before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word "before" means, inter alia, "ahead of; in presence or sight of; under the consideration or cognizance of". The two events sought to be interconnected by use of the term "before" must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or "within-sight" certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended (as Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] puts it) and are positively going to commence within a reasonable time. ***<u>What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses.</u>*** *The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection". The order passed by the court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all-time or permanent protection.*

18. Under the A&C Act, 1996, unlike the *predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court.* ***The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the "proximately contemplated" or "manifestly intended" arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before" i.e. in contemplation of arbitral proceedings.*** *The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so.* ***The court may***

also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms."

(emphasis is mine)

9.1. In view of the above decision, though Section 9(2) of the Act says that the arbitration proceedings shall be commenced within a period of ninety days from the date of passing the interim order or within such further time as the Court may determine, it would be incumbent on the part of the applicant to take steps for the issuance of the notice invoking the arbitration clause within a reasonable time. When the applicant is specifically invoking the jurisdiction of this Court for prohibitory order, as an interim measure to protect its right pending adjudication before the Arbitral Tribunal, the applicant has not invoked the arbitration clause, till the date of hearing of the instant application finally that too after almost six months time. Though Section 9 of the Act permits the applicant for seeking interim measure even before the commencement of the arbitral proceedings, and no specific time limit has been provided for in the Section, having delayed for considerably a longer time for seeking the relief that is sought for in the application, it is open to the applicant to move for the same relief under Section 17 of the Act before the Arbitral Tribunal.

9.2. The time lapse on the part of the applicant for not invoking the arbitral clause would disentitle it from seeking the interim measure before this Court. As stated earlier, it is always open to the applicant company to seek for the same relief before the Arbitral Tribunal under Section 17 of the Act.

10. In view of the aforesaid reasons, this Court is not inclined to entertain the instant application and the same is, accordingly, dismissed.

Sd/.P.S.N.J.
19.04.2018

//Certified to be a true copy//

Dated this the day of 2018.

TR/09.05.2018 COURT OFFICER(OS)