HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION No.50 OF 2017

ORDER ::

This arbitration application is filed under Section 9 of the Arbitration and Conciliation Act, 1996, (for short, 'the Act') seeking for the following relief:-

"for the reasons stated in the accompanying affidavit, it respectfully prayed that this hon'ble Court may be pleased to pass an order restraining the 1st respondent from, by itself or through any of its sister concerns/subsidiaries including respondent no.2, collaborating with or carrying on its operations/activities in India through any other party other than respondent no.4 (by way of amendment respondent no.3 is substituted with respondent no.4) in violation of clause 7 of the shareholders agreement more specifically from entering into or proceeding further with any agreement/joint venture with respondent no.5 for establishment of a multiplication centre and from entering into or proceeding further with any other form of collaboration, tie up or arrangement with respondent no.5 for import of shrimp seed into India and pass such further or other orders as this hon'ble Court deems fit and proper in the circumstances of the case."

2. Facts stated are:-the petitioner, under the name and style of Santir Aquatic Private Limited, a company engaged in the business of production of seed in shrimp industry, having stellar credentials in

the field, on being approached by the respondents, to start business in India, after discussions on the terms, offer and acceptance, the petitioner, 1st respondent-Moana Hong Kong Limited, Hong Kong and 3rd respondent-Water Base Limited, Gopalpuram, Chennai, entered into a shareholders agreement dated 31-05-2007 in relation to the affairs of the 4th respondent-Moana Technologies (India) Private Limited, Tamilnadu, to use 4th respondent company as joint venture company (JVC). The scope of business of the said JVC, mainly, among others, as per clause 3 of the memorandum of association is operation of a multiplication centre (MC) for local production and sales of high quality post-larval seed of *p.monodon* for the Indian shrimp farming sector. The 2nd respondent-Moana Technologies LLC, Kailua Kona, HI 96740, USA, was required to supply parent stock on a continual basis to the 4th respondent-company. The petitioner was instrumental for formulation of a scheme establishment of multiplication centre (MC) by the 6th respondent-National Fisheries Development Board (NFDB) with a view to let it out on lease to the 4th respondent-company. For smooth completion of the project i.e. establishment of multiplication centre (MC), as stated, for local production and supply of high-quality post-larval seeds of *p.monodon,* the production of which was to be carried out by the 4th respondent-company, the 1st respondent, 4th respondent on one side and the 6th respondent-NFDB on the other side entered into an agreement dated 20 –03–2008. Under this agreement, the 6th respondent-NFDB was to invest in setting up the multiplication centre (MC) and the 1st respondent was required to design, construct, supervise, operate and commission the multiplication centre (MC) on turnkey basis. 1st respondent charged free towards its services and received certain amounts as advance from 6th respondent-NFDB. Petitioner states that the multiplication centre (MC), could not be established solely due to the faults of the 1st respondent, as 1st respondent did not participate in the affairs of the 4th respondent-company and due to which, the managing director of the petitioner-company was to be appointed as the managing director of the 4th respondent-company and handle its day to day affairs. By reason of the defaults of the 1st respondent, which resulted in delay in commencement of the multiplication centre (MC), the estimated cost of the multiplication centre (MC) escalated due to which the 6th respondent-NFDB insisted the petitioner-company to provide consent letter for payment of lease rental on the enhanced cost of the multiplication centre (MC). As the escalated cost of the multiplication centre became commercially undesirable and impractical to carry forward the project, the managing director of the petitioner-company who is also the managing director of the 4th respondent-company did not sign the consent letter insisted by the 6th respondent-NFDB. In order to resolve internal issues among the joint venture partners, which include the petitioner-company, a meeting was held on 24-07-2009 wherein the petitioner-company opted to exit from the 4th respondent-company on condition of 1st respondent-company take over loans provided by the petitioner-company and purchase entire shares held by it in 4th respondent-company. The parties agreed for the same, and an in principle agreement to that effect was entered into by the 1st respondent and the petitioner-company on 20-08-2009. It is stated that 1st respondent reneged on its agreement and filed a suit being OS No. 376 of 2010 on the file of XXV Addl. Chief Judge, City Civil Court, Hyderabad, to declare the in principle agreement dated 20-08-2009 as null and void and for consequential reliefs. The suit filed by the 1st respondent was decreed by judgment and decree dated 19-06-2014, against which petitioner carried the matter in appeal being CCCA No.51 of 2017 and the same is pending adjudication before this Court.

3. The grievance of the petitioner-company is that the 1st respondent-company cannot compete with the JVC in any manner either directly or indirectly and cannot enter into any collaboration, technical tie-up or assistance with any other company in respect of

any operations and markets in India and the action of the 1st respondent-company and 2nd respondent to negotiate and enter into a settlement with 6th respondent-NFDB and attempting to set up a multiplication centre (MC) in India through 5th respondent-Vaishnavi Aquatech is a direct breach of the shareholders agreement dated 31-05-2007. The petitioner-company has gathered proof to show that the 1st respondent-company has been carrying on activities in India through 5th respondent instead 4th respondent-company, which is in breach of clause 7 of the shareholders agreement dated 31-05-2007 committed by the 1st respondent-company and, therefore, the petitioner is seeking injunction restraining 1st respondent to do any activity either by itself or through any of its sister concern in India, other than 4th respondent-company.

4. Counter affidavit is filed by the 1st respondent-company wherein it is stated that the petitioner-company failed to show readiness to perform its part of the obligation under the shareholders agreement dated 31-05-2007, which is evident from the show cause notice dated 11-07-2011 issued by the 6th respondent-NFDB for non performance of the obligation under the contract, and the petitioner-company duly replied to the said notice vide reply notice dated 04-08-2011 making various frivolous allegations, but did not challenge

the said termination of the contract. That the petitioner-company for the last 10 years has done nothing, except making the 4th respondent-company a shell company. The role of the 1st respondent-company was only to establish a multiplication centre (MC) for the Government of India and the petitioner-company having chosen to remain quiet for a period of six years, cannot now invoke Section 9 of the Act and seek injunction. That the shareholders agreement dated 31-05-2007 has already been terminated by the 1st respondent and, therefore, the interim protection sought by the petitioner-company is in the nature of seeking specific performance of the shareholders agreement, which is barred under Section 14 (1) (c) and Section 41 of the Specific Relief Act, 1963. The petitioner-company, in a company petition filed by the 1st respondent before the National Company Law Tribunal, Chennai, having taken a ground that shareholders agreement dated 31-05-2007 is unenforceable for want of payment of proper stamp duty as per Section 35 of the Indian Stamp Act, 1899, cannot be permitted to enforce the terms of the same shareholders agreement, before this Court in the present proceedings and seek for injunction more particularly when the shareholders agreement stood terminated. The 1st respondent refunded the amounts received by it as advance to the 6th respondent-NFDB though it had performed its part of contractual obligations. That the agreement entered into by the petitioner-company and the 1st respondent as a measure to sort out disputes was called in question in a suit filed being OS No.376 of 2010 and the said suit was decreed holding that the agreement dated the 20-08-2009 as null and void by a Court of competent jurisdiction and though the petitioner-company appealed against the said judgment in this Court, no stay is granted and the appeal is pending adjudication. Additional counter affidavit is also filed wherein it is stated that the petitioner-company itself has been doing competing business through Nugen Bio Shrimp Technologies (P) Limited, for short, "Nugen" and has been selling *p.monodon* through the 4th respondent for the last 5 to 7 years and, therefore, the question of granting injunction against respondents 1 and 2 from doing business with any other party including 5th respondent in India, other than 4th respondent, when 2nd respondent and 5th respondent companies are not parties to the shareholders agreement dated 31-05-2007, the relief sought by the petitioner-company cannot be granted as it is misconceived and the arbitration application is liable to be dismissed. In the counter affidavit filed by the 2nd respondent-company it is stated that there is no relationship with the 1st respondent to it, except holding 60.57% shares of the 1st respondent company. It is stated that under Section 9 of the Act, this arbitration application is maintainable only against the parties to the arbitration agreement and against not the third party who has not derived any title or benefits from such an arbitration agreement. The other grounds raised are the same as stated by the 1st respondent in the counter affidavit filed by it.

5. In the counter affidavit filed by the 5th respondent-company *inter alia,* it is stated that in the light of the fact that the shareholders agreement dated 31-05-2007 has not been stamped, the petitioner-company cannot enforce its rights under the agreement muchless under clause 7 thereof. In the absence of payment of stamp duty as required under Section 34 of the Indian Stamp Act, the agreement cannot be looked into. The 5th respondent stated that the petitioner-company is doing business with Nugen and the address of the 4th respondent-company is mentioned as the marketing address of the said Nugen which is in clear violation of clause 7 of the shareholders agreement, which the petitioner is now relying upon in this arbitration application. That Nugen was selling the stock of shrimp seed which was supplied by the 2nd respondent-company to the 4th respondent-JVC, which itself is a clear proof that the stock supplied by the 2nd respondent was misappropriated by the petitioner- company and, therefore, by its own actions by doing business with Nugen, the

petitioner violated the non-compete clause 7 of the shareholders agreement

dated 31-07-2007 and because of its activities with Nugen, the 4th respondent- company could not generate any revenue. The 5th respondent-company was not provided with a copy of the shareholders agreement

dated 31-05-2007 until the present arbitration application was filed by the petitioner-company before this Court and the non-compete clause 7 of the said agreement was not within the knowledge of the 5th respondent. That the petitioner-company approached this Court with unclean hands by suppressing material facts and the action of the petitioner in filing the present arbitration application is an abuse of process of law and abuse of process of the Court. The relief sought in this arbitration application cannot also be granted for non-compliance with the requirement of Rule 6 of the Andhra Pradesh Arbitration Rules, 2000, which enunciates that the petitioner should specifically refer to the steps, if any already taken, to seek arbitration or that the petitioner is willing and prepared to take necessary steps with utmost expedition to seek reference to arbitration in terms of the arbitration clause in the agreement. In this case the petitioner-company miserably failed to undertake to take any steps to refer the alleged dispute to arbitration and in view of the failure on the part of the petitioner-company to comply Rule 6 of the Rules, the arbitration application is liable to be rejected on count also under Rule 7 of the Rules.

6. Reply affidavit to the counter affidavits filed by the 1st and 5th respondents is filed by the petitioner mostly denying the counter allegations made by them in their counters.

7. Having heard the arguments of the learned counsel for the contesting parties, the matter was reserved for orders on 22-01-2018. Thereafter, learned counsel for the 5th respondent filed two applications being IA nos.1 and 2 of 2018 for re-opening and to receive the copy of the order passed by the National Company Law Tribunal Bench at Chennai in TCP No.77 of 2016. For that purpose, the matter was posted on 22-01-2018 and both the applications are allowed and the matter was heard again. Transfer Company Petition (TCP) No.77 of 2016 was filed by the 1st respondent herein under Sections 235, 237, 397, 398, 402, 403 and 405 of the Companies Act, 1956 r/w. Schedule 11 of the Companies Act, challenging the mismanagement of the 4th respondent-company by the petitioner-company and eight others. A perusal of the order dated 19-12- 2017 passed in TCP No. 77 of 2016, the National Company Law Tribunal having considered the rival contentions ordered for winding up of the

4th respondent-company and an official liquidator to conduct the proceedings for winding up of the 4th respondent-company in accordance with the provisions of the Companies Act, 2013, was appointed. It was also observed by NCLT that from the date of the order of winding up of the 4th respondent- company and the appointment of the official liquidator, no suit or other legal proceeding shall be commenced or if pending, at the date of the winding up order, shall be proceeded with, by or against the 4th respondent-company except with the leave of the Tribunal. The NCLT having noted the pleadings of both the parties, wherein the 1st respondent herein is petitioner and the petitioner herein is 5th respondent therein and 4th respondent herein is 1st respondent therein, that the 2nd respondent-company which is a subsidiary of the 1st respondent-company was required to supply parent stock on a continual basis to 4th respondent to operate multiplication centre (MC) for which an agreement dated 20-03-2008 was signed between the 1st respondent, 4th respondent on one side and 6th respondent-NFDB on the other side it was also observed that in pursuance of this agreement, the 6th respondent-NFDB gave a sum of USD $ 540,000 as advance to the 1st respondent towards fees and it provided drawings and designs and also shifted PPL's from Hawaii to India on different occasions under the supervision of the 1st respondent's technicians, but due to the mismanagement of the 4th respondent-company by the petitioner-company, the establishment of multiplication centre (MC) could not see the light of the day, due to which the 1st respondent vide its letter dated 13 – 03 – 2017 offered to refund the sum of USD $ 540,000, which was advanced to it by the 6th respondent-NFDB with 12% interest with effect from March 2008 till April 15, 2017 on condition to terminate the agreement dated 20-03-2008 and return the drawings and designs to the 5th respondent-Vaishnavi Aquatech. It was further observed that the said proposal has worked out as advance amount has been refunded by the 1st respondent company to the 6th respondent-NFDB, the 6th respondent–NFDB has terminated the agreement, dated 20-03-2008. It is also observed that the shareholders agreement dated 31-05-2007 is also in shambles. The petitioner-company himself in his reply filed in the company petition before the NCLT stated that the shareholders agreement dated 31-05-2007 had not been stamped in accordance with the provisions of Indian Stamp Act, 1899, and the 1st respondent cannot be permitted to rely on such an un-stamped document, in other words, the petitioner-company itself did not recognize the binding effect of the agreement and that indicates that both the petitioner and the respondents did not want to honour the shareholders agreement in letter and spirit.

8. Heard learned counsel for the petitioner-company and the learned counsel for contesting respondents. Perused the material placed on record.

9. It is seen that in this case we are concerned, in the facts and circumstances of the case, whether to grant or refuse the relief of injunction, pending reference for arbitration. In ***FIRM ASHOK TRADERS vs. GURUMUKH DAS SALUJA,*** (2004) 3 SCC 155), the Supreme Court hearing an application, under Section 9 of the Act observed that Court would use its discretion of granting an interim relief, if it is just and convenient to do so. The Supreme Court had also held that the time for invoking the jurisdiction of the Court, under Section 9 of the Act, could be before, or during the 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. It had also been held that the Court under Section 9 of the Act, only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated and that the right conferred by Section 9 of the Act cannot be said to be one arising out of the contract. The qualification for invoking the jurisdiction of the Court, under Section 9 of the Act, is that the person or the entity should be a party to an arbitration for invoking such

powers of the Court. The relief prayed for in an application, under Section 9 of the Act, is neither a relief prayed for in a suit, nor a right arising out of a contract. It was further observed that Section 9 of the Act is wide in scope and it would extend even to third parties in whom the properties or goods are vested, even though such parties may not be a party to the arbitration clause in an agreement and even though Section 9 of the Act, could be invoked only by a party to the arbitration agreement, the interim relief could be granted by the Court even against the third parties and unless such a power is reserved, the parties to the arbitral agreement could be frustrated even if they succeed in the arbitral proceedings before the arbitration Tribunal concerned.

10. With this background in mind and having understood the facts of the case, whether the petitioner-company is entitled for grant of interim injunction is the question that arises from consideration in this arbitration application.

11. The shareholders agreement dated 31-05-2017 is said to have been entered into between the petitioner-company, 1st and 3rd respondents to manage the affairs of the 4th respondent. Clause 7 thereof speaks of non-compete clause which states that business of the parties in shrimp *p.monodon* in India should be done only through

JVC i.e. the 4th respondent-company. The scope of business of the JVC, as seen from memorandum of articles of association of the 4th respondent- company is to establish multiplication centre in collaboration with 6th respondent-NFDB for local production of high-quality post-larval seeds of *p.monodon*. The 2nd respondent was required to supply parent stock on continual basis to the 4th respondent to operate the multiplication centre (MC) . There are allegations and counter allegations made by the petitioner-company and 1st respondent for not catching up with the establishment of multiplication centre (MC). While it is the allegation of the petitioner-company that the 1st respondent did not participate in the affairs of the 4th respondent-company, the counter allegation of the 1st respondent is that the petitioner failed to show readiness and willingness to perform its part of contract under the shareholders agreement dated 31-05-2007. The case of 1st respondent is stated that even otherwise, it is concerned with the multiplication centre (MC) project to the extent providing drawings and designs. It is also the case of the 1st respondent-company that it has returned the fees received by it for drawings and designs, in relation to the multiplication centre (MC) to the 6th respondent-NFDB with 12% interest with effect from March 2008 till April 15, 2017 on condition to terminate the agreement dated 20-03-2008 and transfer the entire drawings and designs furnished by it to the 5th respondent-Vaishnavi Aquatech. The 6th respondent-NFDB accepted the proposal and terminated the agreement dated 20-03-2008. It is to be seen that even the agreement dated 20 –08–2009 wherein the petitioner-company mooted a proposal to exit from the 4th respondent-company and the 1st respondent agreed to take over the loans provided by the petitioner-company and purchase the entire share held by the petitioner-company in the 4th respondent-company besides other conditions to pay salary to the managing director of the petitioner-company etc. which was subject matter of dispute between the parties in suit OS No.376 of 2010 was decreed against the petitioner-company and the agreement dated 20–08-2009 declared as null and void and in-operative. Though the petitioner-company seems to have appealed against the said judgment and decree before this Court in CCCA No.51 of 2017 the same is pending adjudication. It is also to be noticed that the 1st respondent filed company petition before the NCLT at Chennai, being TCP No.77 of 2016 under Sections 235, 237, 397, 398, 402, 403 and 405 of the Companies Act, 1956, r/w. Schedule Section 11 of the Companies Act. The NCLT after considering the pleadings and rival contentions of the parties, at para 37 held thus:- -

"37. From the perusal of the pleadings and the record placed on the file, it is quite clear that the 1st respondent company (4th respondent herein) was incorporated to carry on the business of hatchery and grow out penaeid shrimps through farming, etc. But the scope of business under clause 2 of the shareholders agreement dated 31-05-2007 was that the 1st respondent company was to operate the required, "multiplication centre" contemplated under the project with NFDB for the local production of high-quality post-larval seeds of p.monodon (SPF and improved breeds). The petitioner's subsidiary viz., M/s. Moana Technologies, LLC, Hawaii, was required to supply parent stock on a continual basis to the 1st respondent company to operate the "multiplication centre," for which an agreement dated 20th March, 2008 was signed between the petitioner and the 1st respondent company on one side and NFDB on the other side. As per this agreement, the NFDB has given a sum of USD $ 540,000 as an advance to the petitioner (1st respondent herein). The petitioner has provided the drawings and designs and also shipped PPL's from Hawaii to India on eight different occasions (350,333 animals) under the supervision of the petitioner's technicians and the same was executed by several high skilled technicians, but due to the mismanagement of 1st respondent company by 5th respondent, (the petitioner herein) the setting up of the "multiplication centre" could not see the light of the day, due to which, the petitioner viz., M/s. Moana Hong Kong Ltd, vide its letter dated 13th March, 2017 has offered to refund the sum of USD $ 540, 000, which was advanced to the petitioner by NFDB, with 12% interest with effect from March 2008 till April 15th, 2017 on the condition to terminate the agreement dated

20th March 2008 and return the entire drawings and designs to "Vaishnavi Aquatech" (5th respondent herein) . The said proposal has gone through, as the payment has been made by the petitioner to NFDB and the agreement with NFDB has been terminated. The shareholders agreement dated 31-05-2007 is also in shambles as the answering respondents have stated in para no.18 of their reply that the agreement had not been stamped in accordance with the Indian Stamp Act, 1899 and the petitioner cannot rely on such un-stamped document. In other words, the respondents do not recognize the binding effect of the agreement. The petitioner also admits in para 19 (b) of its rejoinder that clause 3.4 clearly demonstrates that it was desirable that shareholding pattern should not be changed for a period of three years, but there was no absolute prohibition. This indicates that both the petitioner and the respondents did not honour the shareholders agreement in letter and spirit."

12. It is seen that the petitioner-company himself before the NCLT, in company petition filed by the 1st respondent-company taken a plea that the shareholders agreement dated 31-05-2007 cannot be considered and relied on as it had not been stamped in accordance with the Indian Stamp Act, 1899. Having taken such a stand, as contesting 5th respondent in the said company petition, the petitioner cannot seek relief for violation of the terms of the same shareholders agreement dated 31-05-2007 in this proceedings, which is nothing

short of approbate and reprobate. The petitioner-company has to stand or fall on its strength, but cannot be permitted to take dual stands to suit its purpose. It is also not open to the petitioner-company to contend that the 1st respondent cannot take a defense that the shareholders agreement is not properly stamped after the shareholders agreement has been acted upon, as it applied to the petitioner as well and it is a legal plea. The relief sought in these proceedings has nexus to the proceedings concluded by the NCLT, wherein the 4th respondent-company is under liquidation. There is a finding recorded by the NCLT that the shareholders agreement has been abandoned by both the petitioner and the 1st respondent. In the light of the order passed by the National Company Law Tribunal, Chennai, in TCP No.77 of 2016 (CP No.71 of 2011 old number) and also the judgment and decree obtained by the 1st respondent in suit OS No.376 of 2010-company against the petitioner and also having regard to the fact that the 6th respondent-NFDB terminated the agreement dated 20 – 03 – 2008 and the 1st respondent-company refunding the fees paid to it, the 6th respondent-NFDB transferred the drawings and designs to the 5th respondent-Vaishnavi Aquatech, the relief of interim injunction cannot be granted to the petitioner-company, on the given facts and circumstances of the case as the petitioner has not made out a *prima facie* case. When prima facie case itself is not made out, the other limbs i.e balance of convenience and irreparable loss if injunction is refused, need not be examined. In the light of the discussion made hereinabove, the petitioner is also not entitled for grant of injunction since it can claim compensation in money by virtue of Section 14 (a) of the Specific Relief Act which speaks of award of compensation for the non performance of a contract. Section 41 (h) of the Specific Relief Act, which lays down that an injunction, which is discretionary equitable relief, cannot be granted when an equally efficacious relief is obtainable in any other usual mode or proceeding except in cases of breach of trust. The petitioner has recourse to obtain efficacious relief, if so advised, by way raising arbitration, and no compelling reasons to grant injunction pending reference for arbitration directing respondents 1 and 2 to do business through the JVC of 4th respondent, particularly, which it is under liquidation. In the circumstances, no relief can be granted to the petitioner in this arbitration application filed under Section 9 of the Act.

13. In the result, the arbitration application is accordingly dismissed. It is needless to mention that the observation made herein above are only for the purpose of this proceedings and may not be construed as conclusions on the claims of the petitioner-company in

case of reference of the dispute to arbitration. Miscellaneous petitions, if any pending in this case shall also stand dismissed. There shall be no order as to costs.

A. RAJASHEKER REDDY, J

Dated: 16-02-2018
NRG

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION No.50 OF 2017

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Dated: 16-02-2018

NRG