

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE M.GANGA RAO
CIVIL REVISION PETITION NO.5351 OF 2018

ORDER
(Per Hon'ble Sri Justice Sanjay Kumar)

C.O.S.No.28 of 2018 was filed by M/s. SEW Infrastructure Limited, Hyderabad, before the learned Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad, with the following suit prayers:

- '(i) Declaring the invocation of Arbitration by Defendant No.1 before Defendant No.4 as illegal, null and void.
- (ii) Perpetual Injunction restraining Defendant No.1 from instituting any Arbitration Proceedings or proceeding against the Plaintiff Company in pursuance of the Purchase Order dated 13.06.2011.
- (iii) Consequently, the relief of perpetual injunction restraining the Defendant No.4 from proceeding with the Arbitration Proceedings initiated against Plaintiff by the Defendant No.1.
- (iv) Costs be awarded in favour of the Plaintiff; and
- (v) Any such further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.'

M/s. RUNH Power Corporation Limited, People's Republic of China, is the first defendant in the suit. It filed I.A.No.347 of 2018 therein under Section 8 of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'The Act of 1996'), read with Section 11 of the Commercial Courts, Commercial Division and Commercial Appellate Division Act of 2015 (*for brevity*, 'the Act of 2015'), seeking dismissal of the suit and a declaration that the first suit prayer with regard to grant of a perpetual injunction against invocation of arbitration had become infructuous as the arbitration clause had already been invoked. By order dated 30.06.2018, the trial Court allowed the I.A.. Aggrieved thereby, M/s. SEW Infrastructure Limited, Hyderabad, the plaintiff company, filed this revision under Article 227 of the Constitution.

Heard Sri D.Prakash Reddy, learned senior counsel representing Sri A.Venkatesh, learned counsel for the petitioner-plaintiff company, and Sri S.Ravi, learned senior counsel representing Sri I.V.Siddhivardhana, learned counsel on caveat for the first respondent-first defendant company.

Parties shall hereinafter be referred to as arrayed in the suit.

The case of the plaintiff company before the trial Court was that it had entered into a joint venture with M/s. Nagarjuna Oil Corporation Limited, the third defendant company, on 30.09.2010, whereby M/s. Sree Venkateswara Power & Utilities Limited, the second defendant-joint venture company, was incorporated. The joint venture was for establishing a captive power generation plant at Kadaluru, Tamil Nadu, for the benefit of the third defendant company. In relation to this project, an Engineering-Procurement-Construction (EPC) contract was entered into by the second defendant-joint venture company with the plaintiff company for supply of boilers, gas turbines, plant, etc. Letter of intent dated 29.11.2010 was executed in relation thereto setting out the terms and conditions between the parties. In furtherance of this letter of intent, the plaintiff company entered into an Umbrella Agreement with the first defendant company on 13.06.2011. The plaintiff company thereafter placed purchase order and a work order, both dated 13.06.2011, on the first defendant company for supply of two 80 TPH Heat Recovery Steam Generators and two 120 TPH Auxiliary Boilers. While so, the plaintiff company claimed that its obligations under the purchase order and the umbrella agreement were assigned by it in favour of the second defendant-joint venture company, *vide* Deed of Assignment dated 16.09.2014. This assignment was stated to have been effected in exercise of the right created under Clause 17.1 of the Purchase Order dated 13.06.2011. It is on the strength of this assignment that the plaintiff company claimed

that it ceased to be under any obligation or liability to the first defendant company in relation to the Purchase Order dated 13.06.2011. However, the first defendant company issued 'Demand notice-cum-notice invoking the arbitration clause' dated 25.07.2017 to the plaintiff company, apart from the second and third defendant companies, raising various claims. Thereafter, on 07.08.2017, the first defendant company issued a formal 'Notice for Arbitration' invoking Clause 6 of the Umbrella Agreement dated 13.06.2011. The plaintiff company addressed reply notice dated 11.09.2017 denying its liability. The first defendant company reiterated its claims, *vide* letter dated 26.09.2017. On 18.10.2017, the first defendant company applied to the International Court of Arbitration attached to the International Chamber of Commerce, the fourth defendant, requesting for arbitration proceedings to be commenced under Clause 23 of the Purchase Order dated 13.06.2011. The plaintiff company sent its objections to the fourth defendant on 01.12.2017. While so, as it was the stand of the plaintiff company that it assigned its rights and liabilities arising under the purchase order to the second defendant-joint venture company on 16.09.2014, it filed the present suit seeking relief as set out *supra*.

In the affidavit filed in support of the subject I.A., the first defendant company, having adverted to the execution of the umbrella agreement, the purchase order and the work order on 13.06.2011, stated that the disputes arose due to the breach of the agreement by the other side, whereby the supplies to be made by it were suspended in August, 2011. According to the first defendant company, it had already supplied part of the equipment and had arranged for the manufacture of the balance equipment by its suppliers/vendors in China. However, the balance equipment could not be supplied due to the suspension effected by the other side and it had to suffer losses.

The first defendant company stated that initially a notice had been served by it seeking to invoke the arbitration clause in the umbrella agreement but as the dispute related to breach and repudiation of the purchase order, Clause 23 thereof, being the arbitration clause, was invoked in 2017. As the said clause provided that all disputes, including disputes relating to breach, termination or invalidity thereof, were to be decided by an arbitral tribunal, the first defendant company asserted that this was a fit case for the trial Court to relegate the parties to arbitration under Section 8 of the Act of 1996 by dismissing the suit. Reference was also made to Section 11 of the Act of 2015 which provided that the Court should not take cognizance of any dispute barred by any other law. The first defendant company assailed the assignment made by the plaintiff company in favour of the second defendant-joint venture company and asserted that the same would not be binding upon it. It pointed out that this aspect had also been raised by the plaintiff company before the International Chamber of Commerce at the time of reference to arbitration and that the same would be decided by the arbitral tribunal. The first defendant company pointed out that an arbitral tribunal, comprising two former learned Judges of the Supreme Court and a senior Advocate, had been constituted and had held its first sitting on 11.06.2018, wherein the plaintiff company sought time to file a formal petition objecting to the jurisdiction of the arbitral tribunal. It further pointed out that the prayer of the plaintiff company to grant a perpetual injunction against it from instituting any arbitration proceedings had become infructuous in the light of the aforesaid developments. It is on these grounds that the first defendant company sought dismissal of the suit and allowing of its plea under Section 8 of the Act of 1996.

The plaintiff company filed a counter to the subject I.A., reiterating its stand as set out in the plaint.

Thereupon, the trial Court passed order dated 30.06.2018 holding in favour of the first defendant company. Perusal of the said order demonstrates that the trial Court, upon a conspectus of case law, held that once an arbitration clause existed in relation to the dispute, the civil Court would not have jurisdiction to entertain a /s in relation thereto. The trial Court also noted that the plaintiff company had already filed an application under Section 16 of the Act of 1996 objecting to the jurisdiction of the arbitral tribunal and concluded that it had no jurisdiction to entertain the subject suit. The I.A. was accordingly allowed, returning the plaint.

Sri D.Prakash Reddy, learned senior counsel, would point out that the Purchase Order dated 13.06.2011 specifically provided, under Clause 17.1, that the plaintiff company was free to assign or reassign any of its rights or obligations under the said purchase order but the seller, the first defendant company, was not entitled to assign any of its rights and liabilities thereunder to any third party without the prior written consent of the buyer. He would therefore assert that the assignment effected by the plaintiff company under the Deed of Assignment dated 16.09.2014 did not require either the knowledge or consent of the seller, the first defendant company, and once such an assignment was effected, even the obligations of the plaintiff company arising under the purchase order stood assigned to the second defendant-joint venture company and the plaintiff company ceased to have any responsibility or liability to the first defendant company in relation to the said purchase order. He would further contend that this was the basis for the suit and assert that the trial Court ought not to have accepted the plea of the first defendant company under Section 8 of the Act

of 1996, as the plaintiff company stood absolved of all its liabilities under the Purchase Order dated 13.06.2011, upon execution of the Deed of Assignment by it on 16.09.2014.

Per contra, Sri S.Ravi, learned senior counsel, would argue that this Court would be chary of interfering in a matter of this nature when the trial Court accepted the plea under Section 8 of the Act of 1996. He would point out that Section 37 of the Act of 1996 was amended with retrospective effect from 23.10.2015, *vide* the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016), whereby an order refusing to refer the parties to arbitration under Section 8 of the Act of 1996 has been made appealable. Learned senior counsel would point out that by implication, an order accepting a plea under Section 8 of the Act of 1996 and referring the parties to arbitration is not even appealable and therefore, judicial intervention is not called for in such a situation. He would point out that as the arbitral tribunal was already constituted in the case on hand, the question of granting an injunction restraining invocation of the arbitration clause is moot. He would further point out that the plaintiff company already filed an application under Section 16 of the Act of 1996 objecting to the jurisdiction of the arbitral tribunal and therefore, it is not open to it to maintain this revision simultaneously. He would also point out that a hearing was conducted by the arbitral tribunal on the Section 16 application filed by the plaintiff company on 11.06.2018 and the same was adjourned to 19.08.2018 and thereafter to 22.09.2018, but though the order under revision dated 30.06.2018 was received by it on 07.08.2018, the plaintiff company chose to file this revision only on 14.09.2018, after appearing before the Tribunal on 19.08.2018. He would therefore assert that this revision is only an after-thought and a belated attempt on the part of the plaintiff company to

stave off the arbitral proceedings, despite the pendency of the application filed by it under Section 16 of the Act of 1996.

In reply, Sri D.Prakash Reddy, learned senior counsel, would contend that the Constitutional power of superintendence vesting in this Court under Article 227 of the Constitution cannot be equated with the statutory appellate remedy under Section 37 of the Act of 1996. Learned senior counsel would further point out that adequate reasons are not found in the order under revision and the mere pendency of the application filed by the plaintiff company under Section 16 of the Act of 1996 would not preclude it from assailing the validity of the said order.

No doubt, the legislative intent in not making an order accepting a plea under Section 8 of the Act of 1996 appealable under Section 37 of the Act of 1996 clearly demonstrates that appellate intervention with such an order is not contemplated. However, the Constitutional power of judicial superintendence vesting in this Court under Article 227 of the Constitution cannot be trammelled or restricted by statutory provisions. In a deserving case, exercise of such Constitutional power would be justified, if warranted on facts and in law. The question, however, is whether the case on hand qualifies for such exercise.

It would be relevant at this stage to take note of the arbitration clause in the Purchase Order dated 13.06.2011. This clause reads as under:

'23) ARBITRATION

23.1 Any dispute, controversy or claim arising out of or relating to this PURCHASE ORDER or CHANGE ORDER thereto, or the breach, termination or invalidity thereof, shall, if it cannot be settled amicably, be referred to the decision of the Arbitration Tribunal consisting of three arbitrators. Buyer/USER and Seller shall nominate one arbitrator each and these two arbitrators shall nominate the third arbitrator as a Chairman/Empire. The decision of the Arbitration

Tribunal shall be final and binding on the parties hereto. The arbitration proceedings shall be conducted in accordance with the provisions of the International Chamber of Commerce (ICC) arbitration rules. The place of arbitration shall be Hyderabad, India. The arbitration proceedings shall be conducted in English language only.

23.2'

It is clear from a bare perusal of the aforestated arbitration clause that any dispute, controversy or claim arising not only out of the purchase order itself but any change order thereto is to be resolved amicably in the first instance and in the event of failure, it has to be referred to an arbitral tribunal for decision. The term 'Change Order' is defined in Clause 1 titled 'DEFINITIONS' in the purchase order to mean any written change to the purchase order, set down in the buyer's change order form and fully signed by the buyer and acknowledged by the seller. 'Buyer' is defined in the said clause to mean SEW Infrastructure Ltd. and where the context so admits, include its workmen, employees, agents and/or representatives, successors and permitted assignees. 'Seller' is defined in the said clause to mean the person or company identified in the purchase order as the seller of the goods. The term 'User' is also defined in the clause and it means the second defendant-joint venture company and where the context so admits, include its workmen, employees, agents and/or representatives, successors and permitted assignees.

It is no doubt true that Clause 17.1 of the purchase order, which is titled 'Assignment, Subcontracting', permits the buyer, viz., the plaintiff company, to assign or reassign any of its rights or obligations under the purchase order. However, as is clear from the definition itself, the buyer is essentially intended to mean the plaintiff company and by extension, this 'includes' its assignees also. To a query as to whether the claims raised by

the first defendant company before the arbitral tribunal relate only to post-assignment developments or whether it also pertained to the pre-assignment supplies and developments, Sri D.Prakash Reddy, learned senior counsel, fairly conceded that pre-assignment issues were also under consideration before the said tribunal. Further, as rightly pointed out by Sri S.Ravi, learned senior counsel, though the plaintiff company claims that it had no role to play in the context of the purchase order after it executed the Deed of Assignment dated 16.09.2014 in favour of the second defendant-joint venture company, e-mail correspondence indicates its participation even after such assignment. The e-mail exchanges between the first defendant company and the third defendant company demonstrate that the plaintiff company was always kept informed by marking copies thereof to it. More significantly, the plaintiff company itself addressed an e-mail to the first defendant company on 29.10.2015 in relation to these transactions. It cannot therefore be said that the plaintiff company exited from the picture altogether after execution of the Deed of Assignment on 16.09.2014.

Lastly, this Court finds merit in the submission that this revision is a desperate attempt on the part of the plaintiff company to exit from the arbitration proceedings at this stage. The order under revision was available with the plaintiff company by the time it appeared before the arbitral tribunal on 19.08.2018. Despite the same and notwithstanding the pendency of its application filed under Section 16 of the Act of 1996 before the said arbitral tribunal, the plaintiff company chose to file this revision on 14.09.2018. The revision is therefore utterly lacking in *bonafides*.

It is no doubt true that the trial Court's order leaves a lot to be desired as it lacks cogent reasoning based on a proper analysis on facts. Except for copiously reproducing head notes of case law, the trial Court did

not expend any effort in dealing with the individual facts of the case before it. However, that by itself is not sufficient to discard the ultimate conclusion drawn by the trial Court. In the light of what we have stated hereinbefore, it is clear that even if the plaintiff company claims immunity from liability by taking recourse to the Deed of Assignment dated 16.09.2014, it would still be a proper and necessary party to the arbitral proceedings, as it is the 'buyer' under the purchase order. Further, as noted above, the arbitral proceedings are not restricted to post-assignment issues only but also include alleged pre-assignment supplies and issues relating thereto. In such a situation, the plaintiff company cannot blithely claim that it has nothing whatsoever to do with the dispute and choose to walk out at this stage. As this was the only issue put forth by it in the suit and as the trial Court rightly held against it on this count, this Court finds that the order under revision does not warrant interference, but for the reasons recorded *supra*.

The civil revision petition is accordingly dismissed. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

M.GANGA RAO, J

27th SEPTEMBER, 2018

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