Application No.2667 of 2013

S. MANIKUMAR, J.

This application is filed by M/s.Siddhanatha Infrastructure Development Company Pvt. Ltd., Erode for an order directing the respondent, M/s.Vitaa Zeus Energy Pvt. Ltd., Chennai to furnish security for the claim in the proposed arbitration for a sum of Rs.7,38,63,663/- pending adjudication of the disputes/issues in the arbitration.

2. Facts leading to the filing of this application are that the respondent was the exclusive franchisee of a company called, M/s.India Wind Power Ltd. (IWPL), Gujarat, the manufacturer of windmills. The respondent sought to sell the windmills of IWPL to the applicant and the entire project would be managed by the respondent. By letter dated 26.05.2007, the respondent offered to supply, erect and commission two I-Wind make (Nordex) machines and also guaranteed the said commissioning within a period of 50 days from the date of receipt of the purchaser order. The applicant placed purchase order on 08.06.2007 vide Reference SIDCO/006/007 (Purchase Order No.1) for the supply of two number of IWPL

29/250/45 KW Wind Electric Generator (In short "WEG"), to be installed at S.F.No.782/2 and 783/2, Arulvoimozhi, Kanyakumari District, Tamil Nadu, the desired location of the applicant.

3. As per clause-2 of Purchase Order No.1, the applicant was required to pay Rs.2,10,00,000/- towards the entire project cost and as per clause 1(m) of Purchase Order No.1, the cost of infrastructure and development charges (In short "ISDC") payable to the Tamil Nadu Electricity Board (In short "TNEB") was also included in the total project cost. Clause-8 of Purchase Order No.1 provides for agreed payment schedule. As per clause-7, the respondent undertook for

(i) obtaining statutory clearances such as, No Objection Certificates (NOCs) and unconditional grid tie-up with TNEB; the applicant provided an authorization to the respondent in this regard in the form and manner required by the respondent by their letter dated 16.7.2007;

(ii) interfacing with TNEB grid;

(iii) supply of metering sets and meters; and

(iv) provision of vacuum circuit breaker (VCB) or any other breakers.

As per clause-7, the respondent was required to supply the equipments within a period of 12 weeks from the date of receipt of the Purchase Order No.1. The respondent being in the business of wind mill generators, was aware of the fact that specific approval was required from the Centre for Wind Energy Technology (CWET), Government of India in respect of each of the Wind Electric Generators (WEGs). The respondent has made it appear to the applicant that CWET's approval was already available in respect of the two WEGs, which were required to be supplied under the purchaser order dated 8.6.2007.

4. As per the agreed terms, the project had to be completed within twelve weeks, viz., on 8.9.2007, but the same was not done. In the meantime, the respondent required the applicant to enter into a separate Purchase Order with the respondent affiliate/associate concern viz., WEG Tech Services, Chennai in relation to the erection and commissioning of the WEGs and therefore, the applicant placed the Purchase Order (Purchase Order No.2) dated 8.7.2007 with WEG Tech Services. The applicant was required to make payment of advance to WEG Tech Service to the tune of Rs.7,00,000/-. Payments to the tune of Rs.1,99,08,606/- were made by the applicant of which

the majority sum of Rs.1,76,50,000/- was paid directly to the respondent at various stages between 11.06.2007 to 09.10.2009 as and when requested by the respondent. Though pro-forma invoices were raised on the applicant for the components/materials, the same were not supplied to the applicant in time. Vide letter dated 4.8.2007, the respondent has stated that they were in the process of obtaining No Objection Certificate, in the name of the applicant for the first WEG. In the said letter, it was also mentioned that foundation work of first WEG would be completed by the subsequent week i.e., 11th and 12th August, 2007.

5. When the bankers of the applicant from whom the applicant had sought for funding the project, requested certain information regarding WEGs, vide letter dated 27.11.2007, the applicant called for information from the respondent regarding CWET approvals. The respondent by reply dated 28.11.2007 provided a CWET approval list without specifically pointing out in any manner that the WEG in respect of which the application had placed Purchaser Orders were kept in abeyance for type certification by the CWET and the applicant was under the impression that CWET approvals were in place.

6. The respondent had not taken any prompt action from 8.6.2007 to implement the project and therefore, vide letter dated 3.5.2008, the applicant requested the respondent to do the needful. On 31.5.2008, the respondent informed the applicant that certain materials would reach the site shortly. However, on 6.6.2008, the applicant intimated the respondent that they had already paid Rs.1,61,00,000/- to them at that stage and also a further sum of Rs.7,00,000/- to WEG Tech Services. In the said letter, the applicant has stated that despite payments, there was no response from the respondent for obtaining the No Objection Certificates from TNEB for installation of WEGs. Further, the applicant requested for the completion of the project as required under the Purchase Order at least before June, 2008 or alternatively to refund the money paid by the applicant together with interest. At last, on 19.6.2009 the respondent was able to obtain NOC in respect of 1st WEG, however, the respondent has not obtained the NOC in respect of 2nd WEG till date. The repeated attempts made by the applicant for the completion of the project evoked no response, even though the respondent was able to get certain payments in the name of M/s.IWPL. The applicant requested the respondent to complete the

project within the revised, agreed and final deadline viz., 31.3.2010, but the respondent failed and neglected even to dispatch the materials to the site. TNEB, by letter dated 5.3.2010, revised the Infrastructure and Development Charges and the applicant also paid Rs.14,37,500/- to the TNEB.

7. The applicant also took up the issue with IWPL. There was a joint meeting held in between the applicant, the respondent and the representatives of M/s. IWPL and the respondent and M/s.IWPL convinced and induced the applicant to place a Purchase Order (P.O.3) for procurement of a third machine. A Memorandum of Understanding (Memorandum of Understanding) was entered into between them on 24.6.2010 as per which the deadline was extended to 30.10.2010. However, the respondent failed to comply with the terms of Memorandum of Understanding, but unilaterally extended the time-line for the completion of the project. The defaults on the part of the respondent have critically affected the crux of Purchase Order No.1.

8. In view of the gross negligence of the respondent, the applicant caused a legal notice dated 5.4.2013. But, the respondent by reply dated 3.6.2013, attempted to raise false and moonshine

defences in a mala fide manner. The applicant is therefore inclined to invoke the arbitration clause contained in the Purchase Order. As can be seen from the balance sheet of the respondent as on 31.3.2011, the respondent has no assets to secure the entire claims of the applicant and the applicant apprehends that in the event of an award being passed as against the respondent, there will be nothing left for the applicant to satisfy its interest and hence, the applicant has filed this application.

9. The respondent in its counter affidavit, inter alia, has raised the preliminary objections that the applicant initiated the arbitration proceedings pursuant to the arbitration clause contained in the Purchase Order No.1 dated 8.6.2007, but the claims made before the Arbitral Tribunal proceed on the basis of Memorandum of Understanding dated 24.6.2010, which does not contain an arbitration clause. The applicant has not raised any dispute under the Purchase Order No.1 which contains the arbitration clause. Even assuming without admitting that a part of the claim made arises from the Purchase Order No.1, the invocation of arbitration proceedings and this application are not maintainable as such claims are clearly

inextricably linked with other claims that are not arbitrable as they involve third parties and different agreements. The applicant also filed C.S.No.476 of 2013 before this Court which is substantially based on the same cause of action and hence, the present application is not maintainable. The Purchase Order No.1 dated 8.6.2007 and Memorandum of Understanding dated 24.6.2010 are not stamped and as such, cannot be looked into and the present application is liable to be dismissed on account of the mandatory provisions of the Indian Stamps Act, 1899 and Section 7 of the Arbitration and Conciliation Act.

10. The respondent has also stated that at no point of time, the respondent accepted any responsibility for procuring encumbrance free land and the Purchase Order specifically states that the obligation for procuring encumbrance free land will be the responsibility of the applicant. The respondent was always ready and willing to perform its obligations but the project was delayed due to the failure of the applicant to procure the requisite land. The respondent caused the supply of the materials for WEGs which were stored at the site of the applicant. The applicant managed to acquire some land during the end of 2008 and as desired by the applicant, the respondent shifted the turbines including the foundation materials to the applicant's site and the applicant installed the first turbine for

which NOC was available. However, the applicant informed that it would commission both the turbines together and delayed the commission of the installed first turbine.

11. The fact that the Memorandum of Understanding was entered into by the applicant with the respondent itself is a proof that the respondent did not default in the performance of its obligations. The applicant wished to commission a third WEG along with initial two WEGS and directly procure the third WEG from IWPL and after execution of the Memorandum of Understanding, the applicant was in direct contact with IWPL. The respondent duly provided the applicant with NOC for commissioning of 2nd and 3rd turbines, but due to the failure of the applicant to pay necessary charges to TNEB, the project was not completed. Further, the applicant failed to discharge its financial obligations as contained in the Memorandum of Understanding resulting in the non-supply of components by IWPL to the applicant and the respondent cannot be held responsible for the same. By the execution of the Memorandum of Understanding, dated 24.6.2010, the respondent was discharged of any responsibility or liability for the supply of the remaining WEG under the purchase order dated 8.6.2007 if at all there was any liability or obligation of the

respondent under the said P.O. in respect of the supply or erection of WEGs and the purchase order stood novated under the Memorandum of Understanding, dated 24.6.2010. As the rights and liabilities of the parties in respect of the agreement dated 8.6.2007 stood novated by the Memorandum of Understanding, there can be no claim on the basis of any transactions prior to the said Memorandum of Understanding. The dispute sought to be raised by the applicant is not arbitrable on account of it being inextricably linked to disputes with third parties which cannot be resolved through arbitration. Since the respondent has been discharged from all obligations under the purchase order dated 8.6.2007 and the said purchase order stands novated as on date, the applicant is not entitled to any relief, much less the relief as prayed for. Even assuming without admitting that the respondent is liable to compensate the applicant, such amount is an unascertained claim as on date and the applicant is not entitled to call upon the respondent, being a financially sound company to furnish security for such unascertained claim.

12. In the reply, while denying the averments made in the counter affidavit, the applicant has stated that the applicant had approved all three locations in between 8.6.2007 and April/May,2008.

However, as per clause-7 of PO, the respondent ought to have delivered the entire equipments within 12 weeks from approving the Location No.4 which period expired as early as in July, 2008. As far as 1st WEG is concerned, the applicant was not able to commission the windmill for want of the required CWET approval. As regards the 2nd WEG, the respondent did not supply any material other than the stub which is the foundation part of the tower material. The respondent had miserably failed to honour the commitments under the purchase order. The respondent continued to default with its obligations till the year 2013. The applicant has stated that the balance of convenience is entirely in favour of the applicant and the applicant will be put to serious and irreparable injury, if the respondent does not furnish the security sought for.

Heard the learned counsel for the applicant and the respondent and perused the documents filed.

13. It is not in dispute that the respondent being the franchisee of IWPL, offered to supply, erect and commission two I-Wind make windmills. The applicant and the respondent have entered into a Purchase Order on 8.6.2007. According to the applicant, they

were required to pay a sum of Rs.2,10,00,000/- towards the entire project cost and the location for the installation of windmills was also identified. As per clause-7 of the Purchase Order, the respondent was required to supply equipments within a period of 12 weeks. According to the applicant, though the PO was received on 8.6.2007 and the project had to be completed within 12 weeks period i.e. on 8.9.2007, the same was not done. It is the case of the applicant that payments to the tune of Rs.1,99,08,606/- was made to the respondent, but the respondent did not take any prompt action in implementing the project. In the meantime, the applicant entered into another Purchase Order for procurement of a third machine and also a Memorandum of Understanding on 24.6.2010 as per which the time-line was extended but the respondent failed to comply with the terms and commitments.

14. On the other hand, case of the respondent is that it is the applicant which delayed the project by not procuring the encumbrance free land for the commissioning of the windmills and the applicant identified the land only during the end of 2008, but the respondent caused the supply of materials much earlier. According to the respondent, the claims were made before the Arbitral Tribunal on

the basis of Memorandum of Understanding dated 24.6.2010 which does not contain any arbitration clause and the applicant has not raised any dispute as per the purchase order (Purchase Order No.1) which only contains an arbitration clause. According to the respondent, since the rights and liabilities under Purchase Order No.1 which stands novated by the Memorandum of Understanding, there cannot be any claim against the transactions prior to the Memorandum of Understanding and the applicant is not entitled to any relief.

15. It is true that the arbitration proceedings have been initiated invoking the arbitration clause found in Purchase Order No.1. Pending finalisation and disposal of the arbitration proceedings, the applicant seeks for a direction to the respondent to furnish security for a sum of Rs.7,38,63,663/-. In the affidavit, the applicant has made various averments relating to the purchase orders, Memorandum of Understanding and the default committed by the respondent and in paragraph 56, the applicant has stated that,

> "... from a perusal of the records of the respondent with the Registrar of Companies, that the respondent has not filed its Balance Sheet and Profit and Loss accounts after 31.03.2011. It is submitted that as can be seen from the Balance sheet of the respondent as

on 31.03.2011, the respondent has no assets to secure the entire claim of the applicant. The applicant therefore apprehends that the in the event of an award being passed as against the respondent there will be nothing left for the applicant to satisfy its interest and the applicant is therefore forced to make the present application before this Hon'ble Court".

16. The averments and the counter averments raised by the parties are matters to be deliberated and decided only by the arbitrator. It is stated that the applicant has already taken steps for the appointment of arbitrator invoking the arbitration clause found in the Purchase Order No.1. The issue before this Court is whether the applicant is entitled to invoke the provisions of Section 9 of the Arbitration and Conciliation Act for a direction to the respondent to furnish security for the outstanding amount.

17. As rightly pointed out by the learned counsel for the respondent, the respondent is not an individual, but a company incorporated under the Companies Act. It is not the case of the applicant that the respondent is going to completely wind up their operations or close down the company. It is seen from the averments made in the affidavit as well as the counter affidavit, that the

respondent has taken steps to perform its obligations and even according to the applicant, there is delay on the part of the respondent in commissioning the windmills, which has to be gone into in the arbitration proceedings. Further, it is not the case of the applicant that the respondent is trying to dispose of its properties. The mere fact that the respondent has denied the contents of the applicant's notice will not entail the applicant to invoke the provisions of Section 9 of the Arbitration and Conciliation Act. Except the bald allegation that the respondent has no assets to secure the claim of the applicant, the applicant has not produced any document to show that the assets of the respondent company will be lost.

18. To grant the relief under Section 9 of the Arbitration and Conciliation Act, what has to be seen is whether there is a prima facie case, whether the balance of convenience lies in favour of the applicant and whether there will be irreparable loss and injury if interim orders are not granted. In this case, the applicant has not come forward with a clear pleading to seek for a direction to the respondent to furnish security. In the absence of any pleading that the respondent is about to dispose of the whole or any part of the property, the appellant is not entitled to the relief sought for. In this

case, it is stated that the arbitrator has been appointed and the arbitral proceedings has been commenced and it is open to the applicant to approach the arbitral tribunal under Section 17 of the Arbitration and Conciliation Act for interim orders. It is well settled that security can be ordered only in cases where the other party is likely to abscond or there is positive evidence to show that the other party is taking steps to dispose of the property with the intention to deceive or defeat the award to be passed by the Tribunal. Here, the respondent is a company and it is not possible for them to abscond so easily or dispose of their assets immediately.

19. The power under Section 9 is wide and interim order passed under Section 9 of the Act is a drastic order. While dealing with the application under Section 9 of the Act, the accepted principles that governed the grant of an interim injunction should be kept in mind and the normal rules that govern the Court in the grant of interim orders are not sought to be jettisoned by the provision of Section 9. In this regard, it is worth to refer to the decision of the Hon'ble Supreme Court in **Adhunik Steels Ltd. vs. Orissa Manganese & Minerals Pvt. Ltd. (CDJ 2007 SC 781)** wherein it is held as under:

"10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the Court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the Court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that Court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

21. Therefore, this Court would not be justified in granting interim orders and relief merely for the asking of it and the Court must act cautiously. The applicant has not only to make out a clear case on merits of the claim, but also the applicant should establish that the denial of order would result in grave injustice to the applicant. Here, the applicant has not made out any case or produced any material to show that there is an apprehension or danger that the amount could not be recovered by them from the respondent. In these circumstances, I am of the considered view that the application filed under Section 9 of the Act has been filed only with an intention to mount pressure on the respondent to settle the amount. I, therefore hold that the applicant has not made out a case for an order directing the respondent to furnish security. This application is dismissed. No costs.

30.09.2019

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S. MANIKUMAR, J.

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