

A.Nos.3052, 3053 and 3753 of 2019**PUSHPA SATHYANARAYANA, J.**

The applicant in A.No.3052 of 2019 sought for appointment of an Advocate Commissioner for the purpose of taking possession of the Schedule A and B Machineries along with its tools and accessories from the possession and custody of the respondent and handover the same to the representative of the applicant and in A.No.3053 of 2019 the applicant sought for a direction to the Station House Officer to provide adequate police protection for the said purpose.

2. On 15.04.2019, this Court had passed an elaborate order appointing an Advocate Commissioner and an Additional Advocate Commissioner for the said purpose and also directed the Station House Officer concerned to give proper police protection for the Advocate Commissioner and the Additional Advocate Commissioner to secure the machineries and mouldings in the process of execution of the warrant. Later, when the matter was listed before this Court on 29.04.2019, it was stated by the Advocate Commissioner and the Additional Advocate Commissioner that they were unable to execute the warrant as they had stiff resistance from not only the workers of the respondent, but also from their family members. The Advocate Commissioners also had

given a police complaint on 28.04.2019 stating that the workers were agitating inside the premises and they resisted the Advocate Commissioners from entering the factory. Though discussions were held with the trade unions and the representatives of the applicant company, the Commissioners could not gain entry to execute the warrant.

3. Considering these facts, this Court had passed a further order on 29.04.2019, the operative portion of the same reads as hereunder :

"5. On considering the said memo/report filed by the Advocate Commissioner and the Additional Advocate Commissioner and the copy of the complaint given to the police, this Court is inclined to pass the following order :

(i) That the Superintendent of Police, Kancheepuram District is hereby directed to give suitable instructions to the concerned police officer not below the rank of Deputy Superintendent of Police having jurisdiction over the premises of the respondent, where the Advocate Commissioner and Additional Advocate Commissioner were threatened on 28.04.2019, to investigate the matter and file a detailed report before this Court in this regard. If the investigating officer to be named by the Superintendent of Police finds any cognizable offence made out, suitable action be taken under the Code of Criminal Procedure, by the Officer concerned of the police and file a report to that effect also, before this Court.

(ii) In the meanwhile, the machineries and the mouldings lying at the premises of the respondent shall not

be meddled with or encumbered by the respondent under any mode and also the respondent shall file an affidavit before this Court during the next hearing as to the outstanding payable by the respondent as on today. Post the matter on 03.06.2019.""

4. While so, A.No.3753 of 2019 has been taken out by the applicant, who is Kanchipuram Podhu Thozhilalar Sangam, a third party, to implead itself as the second respondent in A.No.3052 of 2019.

5. It is contended by the learned counsel for the applicant in A.No.3753 of 2019 that the Advocate Commissioners had removed the machineries on 19.05.2019 with the help of the police and in the process, some of the workers, including the deponent of the affidavit, were arrested, remanded to judicial custody and later, they were released on bail on 23.05.2019. It is the contention of the learned counsel for the applicant that the removal of the machineries by the first respondent therein through the Advocate Commissioners is against the labour jurisprudence, as along with the machineries the livelihood of 500 workers have also been taken away. According to the impleading party, the applicant in A.No.3052 of 2019 could have very well attached some other properties belonging the second respondent

herein, sparing the machineries. As their livelihood has been taken away, the third party Thozhilalar Sangam is seeking to implead itself in the application in A.No.3052 of 2019 filed under Section 9 of the Arbitration and Conciliation Act (in short, 1996 Act) by the first respondent herein.

5.1. Learned counsel for the applicant in A.No.3753 of 2019 relied on the following judgments in support of his contentions :

- (i).National Textile Workers Union V. P.R.Ramakrishnan, (1983) 1 SCC 228 ; and**
- (ii).Bharat Sanchar Nigam Limited V. Siemens Financial Services Ltd., 2016 SCC OnLine Bom 5317 ;**

6. A.No.3753 of 2019 is vehemently opposed by the learned counsel for the first respondent, who is the applicant in Section 9 application in A.Nos.3052 and 3053 of 2019, contending that there has been an outstanding amount of Rs.26,51,99,881/- payable by the second respondent to the first respondent therein. As the second respondent was irregular in the payment and the outstanding amount is huge, as per the terms of the Bailment Agreement, the first respondent decided to terminate the contract. Accordingly, the agreement was terminated on 20.03.2019 and return of the machineries and mouldings under the said agreement were demanded. As the second respondent did not return the same, the application

under Section 9 of the 1996 Act in A.No.3052 of 2019 was filed for seizing the machineries and other accessories through the Court appointed Advocate Commissioners. Learned counsel relied on the decision rendered by a learned Single Judge of the Delhi High Court in **National Highways Authority of India V. China Coal Construction Group, AIR 2006 Delhi 134.**

7. Heard learned counsels on either side and perused the materials placed before this Court.

8. By virtue of the order passed on 15.04.2019 followed by the order dated 29.04.2019, the reliefs sought for by the applicant in A.Nos.3052 and 3053 of 2019 are satisfied and the applications have to be closed. But A.No.3753 of 2019 has been filed seeking impleadment of the workers in A.No.3052 of 2019, who do not have any privity of contract.

9. Once the interim measures sought for under Section 9 of the 1996 Act are satisfied and the parties had gone before the Arbitral Tribunal, whether the applicant can be impleaded in this proceedings is the question that arises for consideration ?.

10. Any application filed under Section 9 of the 1996 Act is not a suit. Section 9 can be invoked only by the parties to an agreement. "Party" is defined under Section 2(1)(h) of the 1996 Act, according to which, "party" means a party to an arbitration agreement.

11. Admittedly, there is no agreement between the applicant in A.No.3753 of 2019 and the first respondent therein. Section 9 contemplates interim measures to protect the right under adjudication before the Arbitral Tribunal from being frustrated. As stated above, the applicant in the aforesaid application does not have any agreement either with the first respondent or the second respondent therein to be enforced by referring the same before the Arbitral Tribunal.

12. In this regard, it would be useful to refer to the judgment of the Hon'ble Supreme Court in **Firm Ashok Traders V. Gurumukh Das Saluja, (2004) 3 SCC 155**, wherein, it is held as follows :

"13. The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of the A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be

said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in clause (h) of sub-section (1) of Section 2 of the A&C Act to mean "a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court under Section 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in *Sundaram Finance Ltd. v. NEPC India Ltd.* [(1999) 2 SCC 479] the doubts stand cleared and set at rest and it is not necessary that arbitral proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court under Section 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The reliefs which the court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A&C Act, the arbitration clause is separable

from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A&C Act. The relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of the A&C Act."

13. As per the above dictum of the Hon'ble Supreme Court, only the party as defined under Section 2(1)(h) of the 1996 Act can invoke the jurisdiction of the Court seeking interim relief under Section 9 of the said Act. When the applicant is not capable of referring the matter for arbitration, it cannot seek remedy under Section 9, which is an interim measure, contemplated under the Act before or during the course of the Arbitral proceedings or after making of the Arbitral Award, but before it is enforced.

14. A Five-Judge Bench judgment of the Hon'ble Apex Court in **National Textile Workers Union V. P.R.Ramakrishnan, (1983) 1**

SCC 228 relied on by the learned counsel for the applicant in A.No.3753 of 2019 arose out of winding up proceedings under the Companies Act, 1956. Since the entire company being wound up, it was held by the Supreme Court that all the stakeholders, including the workers, be heard, in the interest of administration of justice and for property disposal of the matter. In this regard, paragraph 85 of the said judgment is usefully extracted hereafter :

85. I, however, wish to make it clear that although an employee of a company as an employee of a company cannot claim to appear and be heard in a petition for winding up of the company as a matter of right, yet in any appropriate case the court in a winding up proceeding may require or permit any employee to appear at any stage of a winding up proceeding and hear him, if the court be of the opinion that the employee or the employees should be heard in the interests of administration of justice and for proper disposal of any matter. It appears that in this very case, the court at an earlier stage of the proceeding had, in fact, heard the employees and redressed their just grievance.

15. The next judgment, upon which heavy reliance placed on by the learned counsel for the applicant in A.No.3753 of 2019, is rendered by a Division Bench of the Bombay High Court in **Bharat Sanchar Nigam Limited V. Siemens Financial Services Ltd., 2016 SCC OnLine Bom 5317**. The Bombay High Court in the said decision has held thus :

"6. The Apex Court has dealt with the rights of third person and/or objection of third person, in arbitration proceedings in *Taiyo Membrane Corporation Pty. Ltd. v. Shapoorji Pallonji and Company Ltd.* [(2016) 1 SCC 736], by following *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641. In the present matter, we have to consider the submission of Appellant accordingly. At the instance of a party, though not party to the Arbitration Agreement in *Taiyo Membrane Corporation Pty. Ltd.* (supra), based on the facts and the correspondences between the parties, the Supreme Court has maintained the invocation of the arbitration clause by the third person to appoint Arbitrator under Section 11(6) of the Arbitration Act. Therefore, depending upon the facts of the case, even the third party can be added or joined as party for appropriate reliefs and for its effective implementation, specially in Section 9 Petition. There is no total bar, but subject to the interconnected and interdependent facts and the contract conditions between the parties. In the present case also, all the transactions are interdependent and interlinked. Hence, we have to hold that the present Arbitration proceedings so initiated and the order so passed is sustainable. There is no perversity or illegality in the order."

16. A reading of the above order and the judgments of the Hon'ble Apex Court relied thereon would go to show that they were rendered on the facts and circumstances of those cases and the same cannot render any assistance to the case of the workers.

17. In **National Highways Authority of India V. China Coal Construction Group, AIR 2006 Delhi 134**, relied on by the learned counsel for the applicant in A.Nos.3052 and 3053 of 2019, a learned Single Judge of the Delhi High Court held as follows :

"15.5. In view of the discussion with regard to questions 1 and 2 above, it becomes clear that the Intervenor has no privity of contract with NHAI. It is also clear that the Intervenor is not a party to the arbitration proceedings. Section 9 of the Act is with reference to arbitral proceedings just as the Intervenor cannot be a party in the arbitral proceedings pending between NHAI and China Coal, it has no locus standi in the present proceedings. The interim orders that may be passed under Section 9 or Section 17 are with respect to the parties to the arbitration and in connection with the subject matter thereof. As such, the Intervenor's application under Order 1 Rule 10 cannot be allowed and nor can its application for modification of the order dated 25.01.2005, which order, in any event, stands merged in the order being passed herein."

18. From the foregoing discussion, it is clear that in the absence of any privity of contract, much less an agreement with the first respondent in A.No.3753 of 2019, the applicant therein cannot ask for impleadment. Accordingly, A.No.3753 of 2019 is liable to be dismissed.

19. As stated earlier, already the reliefs sought for by the applicant in A.Nos.3052 and 3053 of 2019 under Section 9 of the Act were granted by this Court and they were complied with.

20. Under such circumstances, nothing further survives for adjudication in A.Nos.3052 and 3053 of 2019 and they are closed. A.No.3753 of 2019 is dismissed.

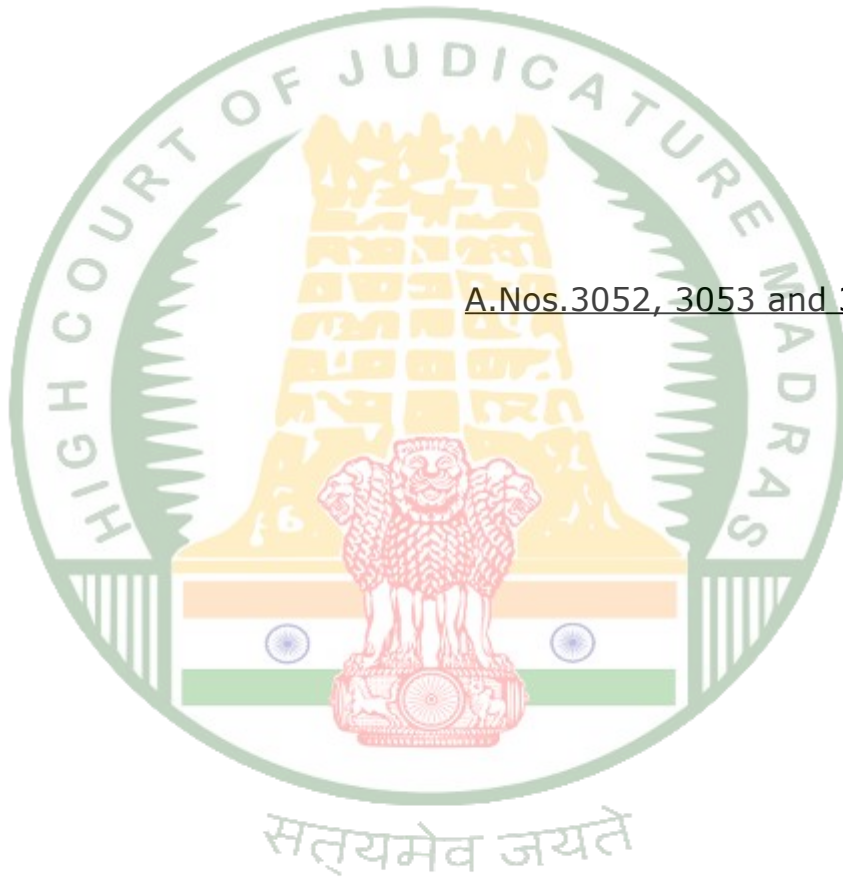
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PUSHPA SATHYANARAYANA, J.

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A.Nos.3052, 3053 and 3753 2019

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13.06.2019

A.Nos.3052, 3053 and 3753 of 2019

PUSHPA SATHYANARAYANA, J.

After pronouncing the orders, the learned Advocate Commissioner and the learned Additional Advocate Commissioner submitted that they have filed memos seeking additional remuneration of a sum of Rs.3,00,000/- each for the services rendered by them.

2. This Court is of the view that a sum of Rs.Rs.1,00,000/- (Rupees one lakh only) each could be awarded to the learned Advocate Commissioner and the learned Additional Advocate Commissioner, for which, the learned counsel for the applicant in A.Nos.3052 and 3053 of 2019 has no objection.

3. Accordingly, the learned Advocate Commissioner and the learned Additional Advocate Commissioner shall be paid an additional remuneration of Rs.Rs.1,00,000/- (Rupees one lakh only) each by the applicant in A.Nos.3052 and 3053 of 2019 within a period of four weeks from the date of receipt of a copy of this order.

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PUSHPA SATHYANARAYANA, J.

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A.Nos.3052, 3053 and 3753 of 2019

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