



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8/9/2020

C O R A M

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.M.A.NO.1114 OF 2018

TATA Coffee Limited
rep. By its Authorised Signatory
Polibetta 571 215
Kodagu District
Karnataka.

... Appellant/1st Respondent

Vs

1. VNS Enviro Biotechq Pvt Ltd
rep. By its Managing Director
Plot No.69 B Subiksha Flats
Daniel Street, Puzhuthivakkam
Chennai 600091.

... 1st Respondent/Petitioner

2. M/s. Canara Bank
rep. By its Branch Manager
4th Main Road, Nanganallur Branch
Chennai 600 061.

... 2nd Respondents/2nd Respondent

Appeal filed under Section 37 (1) (a) of the Arbitration and Conciliation Act, 1996 against the order and decreetal order of the Court of the Principal District Judge of Kancheepuram District at Chengalpattu, dated 11th day of August 2017 in Arbitration Original Petition No.1 of 2016.

For appellant ... Mr.Abraham Markos

For respondents ... No appearance

J U D G M E N T

This Civil Miscellaneous Appeal has been filed against the order, dated 11/8/2017, passed by the learned Principal District Judge, Kancheepuram District at Chengalpattu.

2. The brief facts leading to the filing of an Arbitration Original Petition No.1 of 2016 is as follows:-



VNS Enviro Biotechq Pvt Ltd/first respondent herein is a private Company duly registered under Companies Act. TATA Coffee Limited/appellant sent e-mail to the first respondent, on 13/4/2013, for the supply of equipments and proposed to have a permanent solution and system for treating effluent eco-friendly at their factory at Karnataka. It appears that a bank guarantee, dated 27/9/2013, was issued in favour of the appellant by the second respondent Bank, on behalf of the first respondent, for a sum of Rs.15,72,000/-, and the parties entered into an agreement. As the dispute arose between the parties in respect of the transaction entered into between them, an application in Arbitration O.P.No.1 of 2016 has been filed, under Section 9 of the Arbitration and Conciliation Act, 1996.

3. The learned Principal District Judge of Kancheepuram District, Chengalpattu, by an order, dated 11/8/2017, granted a mandatory injunction directing the appellant herein to return the money to the tune of Rs.15,72,000/-, received by the appellant herein, by invoking the Bank Guarantee No.4 of 2013 issued on 27/9/2013 from the second respondent Bank, on 24/3/2016, till an arbitrator is appointed, as per the terms and conditions of purchase order, dated 19/9/2013. Being aggrieved, instant Civil Miscellaneous Appeal has been filed.

4. Heard Mr.Abraham Markos, learned counsel appearing for the appellant and perused the materials available on record.

5. Learned counsel for the appellant contended that having filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, for interim measure, in the nature of mandatory injunction that too refund of money already realised by invoking the bank guarantee, there was no proceeding initiated by the first respondent to arbitrate the dispute. Hence, interim order obtained by them cannot be continued for ever.

6. Learned counsel appearing for the appellant would further submit that bank guarantee is an independent contract between the bank and beneficiary. In case of an unconditional and irrevocable bank guarantee, Court would not normally interfere with its invocation irrespective of any dispute between the beneficiary and the party, at whose instance the guarantee was given, except in case of fraud or irretrievable injustice likely to be caused. But in the instant case, there was no averment whatsoever that the invocation of the bank guarantee by the appellant is fraudulent. Therefore, the learned Principal District Judge, passing a mandatory injunction



directing refund of the amount is against law is not maintainable. At any event, it is his contention that as long as the arbitration has not been initiated, interim order cannot be continued for ever.

WEB COPY

7. Further, the learned counsel for the appellant would submit that the Principal District Judge has no jurisdiction to entertain this application. Arbitration Clause clearly provides that the seat of Arbitration is at Bangalore and the appellant is also situated in Bangalore.

8. Even in the last hearing also, there was no representation on behalf of the respondents. Despite the matter is posted today for argument, there was no representation on the side of the respondents.

9. The Principal District Judge has entertained the application filed under Section 9 of the Arbitration and Conciliation Act, 1996, for mandatory injunction directing the appellant to return the money to the tune of Rs.15,72,000/-, received by the appellant by invoking the Bank Guarantee No.4 of 2013, for Rs.15,72,000/-, issued on 27/9/2013, from the second respondent Bank, on 24/3/2016, till an arbitrator is appointed, as per the terms and conditions of purchase order, dated 19/9/2013.

10. A perusal of the record clearly indicates that there is no dispute with regard to the execution of the bank guarantee in favour of the appellant by the first respondent. Having executed such contract, first respondent herein had filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, before the Principal District Court, Chengalpattu.

11. It is well settled that the contract of Bank Guarantee is independent in nature. It has to be enforced independent to the other disputes also. Admittedly, in this case, bank guarantee has already been invoked. In such a view of the matter, when the dispute itself is with regard to the payment of the money in a transaction entered into between the parties, passing such an order will amount to decide the entire dispute between the parties itself. The learned Principal District Judge has gone beyond the scope of Section 9 of the Arbitration and Conciliation Act. In fact, the decision of the learned Principal District Judge is having a serious impact on the entire dispute between the parties itself. Whereas no scope left to be decided by the Arbitrator by seeking the refund of entire amount which was secured on bank guarantee. Such an order in my view is against the well settled principle of law and opposite to the fundamental policy of India. It is also relevant to note that having filed an application under Section 9 and obtained



interim order, it is the contention of the learned counsel for the appellant that no arbitration or any proceedings are initiated for all these years.

12. In Firm Ashok Traders and Another etc., v. Gurumukh Das Saluja and others [(2004) 3 SCC 155], the Hon'ble Supreme Court has 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 : AIR 1999 SC 565] 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



WEB COPY

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.

14.
15.
16.

17. There are two other factors which are weighing heavily with us and which we proceed to record. 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



WEB COPY

said: (SCC p. 488, para 19) "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. 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. 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



WEB COPY

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."

13. The above judgment makes it clear 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. Sub-Clause (2) of Section 9 of the said Act, which came into force on and from 23/10/2015, makes it clear that whenever interim order was passed under Section 9 (1) of the Act, arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time, as the Court may determine. Admittedly, in this case, having obtained an interim order, so far, no arbitration proceeding has been initiated. Therefore, it is also makes it very clear that manifest intention to arbitrate the matter is totally lacking on the part of the respondent. Such a view of the matter, this Court is of the view that interim order granted by the Principal District Judge, Chengalpattu is also not sustainable and cannot be continued when the party failed to demonstrate manifest intention to arbitrate the matter.

14. Be that as it may. At any event, the Court passed an interim order, do not have a jurisdiction to entertain this



application. As far as the bank guarantee is concerned, bank guarantee has already been invoked. Therefore, instead of referring the matter for dispute, granting the final relief under Section 9 application itself is against the very object of the Act. Having regard to the above facts, this Court holds that the order passed by the learned Principal District Judge is not sustainable in law.

15. In the result, instant Civil Miscellaneous Appeal is allowed and the order, dated 11/8/2017, made in O.P.No.1 of 2016, passed by the learned Principal District Judge is set aside. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mvs

To

The Principal District Judge of Kancheepuram District,
Chengalpattu.

C.M.A.No.1114 of 2018

PM(CO)
CS/26/08/2021