

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K.LAKSHMAN**

COMCA No.61 of 2019

JUDGMENT: (Per Hon'ble Sri Justice M.S.Ramachandra Rao)

This appeal is preferred by the appellant challenging the order dt.17-09-2019 of the Judge, Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad dismissing C.O.P.No.57 of 2019 filed by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act').

2. The appellant is a Company engaged in the business of construction/civil works, Real Estate activities, Development and sale of land and operation of apartments, hotels and residential mobile home sites etc.

3. The 1st respondent is also a Company engaged in the fields of design, engineering, manufacturing, supply, erection and commissioning of iron ore handling plant/Power Plants/Steel Plants/Cement Plants.

4. The 2nd respondent is Government of India Company which is a mineral producer partially owned and under the administrative control of the Ministry of Steel of the said Government and is involved in the exploration of iron ore, copper, limestone, graphite etc.

5. The appellant Company was initially carrying on business under the name and style of M/s.Prime Constructions. In 2010, M/s.Prime Constructions was merged into appellant Company by way of a merger-

cum-Dissolution deed dt.01-04-2010 and thereafter it had adopted the name M/s.Suryodaya Infra Projects (I) Pvt. Limited.

6. The 1st respondent was awarded a contract on 05-04-2011 by 2nd respondent to complete the work of engineering, design, manufacture, procurement, testing at site etc. of all equipments and accessories required for construction of downhill conveying system for the Kumara Swamy Iron Ore Project at Donimalai, Bellary, Karnataka State.

7. Prior to the award of the said contract to the 1st respondent on 05-04-2011, M/s.Prime Constructions and 1st respondent, anticipating the award of the contract in favour of 1st respondent, had discussed the structural works at the site, and basing on the same, the appellant submitted offer/revised offer for consideration of the 1st respondent, which was recorded in the minutes of meeting dt.12-04-2010 and 27-08-2010.

8. Thereafter the appellant and 1st respondent entered into a Memorandum of Understanding dt.21-01-2011 so as to govern their relationship as per the tender issued by 2nd respondent.

9. As per the said MoU, it was agreed by the appellant and the 1st respondent Company that in the event of the 1st respondent getting the contract for the site activity from the 2nd respondent, then the appellant shall be issued subcontract on back to back basis as per NIT Documents.

10. Subsequently, the appellant and the 1st respondent entered into a Letter of Award (LOA) dt.13-04-2011 for design, engineering, construction of civil package, erection of structural work on 'back to back basis' for 2nd respondent for execution of the above Kumara Swamy Iron Ore Project, Donimalai, Bellary District, Karnataka. As per the said LOA dt.13-04-2011, the contract price was Rs.99,13,60,000/- for the complete scope of civil and structural works and as per Clause-B and C of the LOA, the contract was awarded on 'back to back basis'.

11. Thereafter the 1st respondent has addressed letter to the 2nd respondent seeking its consent for engaging the appellant as sub-Contractor for civil works and the 2nd respondent, vide letter dt.12-07-2011 accepted the 1st respondent's request for engaging the appellant for civil works.

12. Thereafter, the LOA, after mutual discussion between the appellant and 1st respondent, was further amended on 19-08-2013, the scope of contract was reduced and the contract base price was also reduced to Rs.51,67,29,215/-.

Contentions of the Appellant

13. According to the appellant, the 1st respondent failed to get the approved drawing of structural works as per the schedule, due to which there was delay in completing the works, and the 1st respondent failed to release to the amounts as against the RA bills raised by the appellant. Appellant contended that it had commenced the works at Project site, but

there were several delays due to various reasons which are purely attributable to 1st respondent only and not to the appellant. It is contended that the appellant requested the 1st respondent to release outstanding payments due to it, but the 1st respondent chose to ignore the said requests and did not release the amounts as against the RA bills raised by the appellant.

14. Letters dt.11-12-2014, 17-03-2015, 14-05-2015, 18-06-2015, 10-08-2015, 11-08-2015, 25-08-2015, 23-03-2016 and 17-08-2016 have been filed by the appellant in the Court below evidencing its request to the 2nd respondent for outstanding receivables.

15. According to the appellant, it had brought to the notice to the 1st respondent regarding outstanding dues to it and the severe crunch of cash flow caused due to non-payment of the receivables from the 1st respondent.

16. Appellant alleged that the 1st respondent was however raising invoices and receiving money from the 2nd respondent as against the works completed by the appellant at the work site and in a meeting held between the appellant and 1st respondent on 17-02-2016 and 07-05-2016, the 1st respondent had also had also acknowledged that large amounts was outstanding and had not been released to the appellant.

17. It is stated that the 1st respondent again altered the scope of contract by virtue of another amendment made to the LOA dt.13-04-2011 and the contract price was enhanced to Rs.59, 94, 32,825/- ; that the 2nd

respondent had issued a letter on 11-08-2017 under caption 'To whomsoever it concerns' mentioning that appellant had done major share of work at project site; that the appellant also addressed letters dt.28-09-2016, 15-11-2016 and 15-12-2016 to the 1st respondent requesting to resolve the issue by releasing the funds against to the works completed by the appellant, but the 1st respondent did not release the same.

18. According to the appellant, supplementary work orders dt.03-02-2017 and 09-09-2017 were also placed by 1st respondent on the 1st respondent; and in a meeting held on 09-12-2017, officials of 1st respondent acknowledged and admitted the payments due to be made to the appellant; and though the project was commissioned subsequently, no payments were released to the appellant. According to the appellant, the 1st respondent did not release even 5% amount retained from the running bills as well as outstanding receivables raising untenable objections.

19. According to the appellant, the 1st respondent has to pay Rs.11,91,01,514/- to the appellant as against the works done by the appellant for the project though the 1st respondent had received most of the payments due from the 2nd respondent.

20. The appellant contends that the 1st respondent, however, made a demand to the appellant to return Rs.3,20,26,142/- on 08-04-2019 alleging that the appellant had not completed the project as per schedule. The appellant, therefore, contends that 1st respondent is avoiding

payment of Rs.11,91,0,514/- and is also making efforts to get amounts equal to 10% of the value of the works order in the form of performance bank guarantee and also trying to receive 5% of the value of the work order towards the final acceptance certificate from the 2nd respondent; and that if the 1st respondent receives the said amount from the 2nd respondent, appellant would have no other means to receive the outstanding amounts.

21. Appellant contended that as per the work order dt.05-04-2011, there was an arbitration clause (clause 14) which mentioned that venue of the arbitration would be Hyderabad; the 1st respondent is in grave financial distress and would not be in a position to honour any payments due to the appellant if it receives any amounts from the 2nd respondent; and therefore, the 2nd respondent should make payments directly to the appellant against the works completed by it as a 'garnishee'.

22. Therefore, in the C.O.P.No.57 of 2019, the appellant impleaded both the respondents, and sought the following reliefs:

“(a) By directing the NMDC i.e. respondent No.2 by Garnishee order to pay the amounts due to the petitioner by the 1st respondent,

Or

In the alternative restrain the respondent No.2 from releasing any amounts to the respondent No.1 or its representatives, agents, assignees in any manner or form,

(b) direct the respondent No.2 to deposit the amounts that are to be released to respondent No.1 to the credit of this O.P. pending disposal of arbitration proceedings and until realization of any arbitral award that may be passed in the said proceedings.

(c) pass such orders/s as this Hon'ble Court deems fit and proper,

(d) to award to the costs of the present petition."

The interim order of the Court below

23. Initially, an *ad interim* injunction was granted against the 2nd respondent directing the 2nd respondent to withhold the money payable by it to the 1st respondent.

The stand of the 1st respondent in it's counter affidavit

24. Counter-affidavit was filed by 1st respondent opposing the appellant's contentions.

25. A preliminary objection was raised by the 1st respondent that under Section 9 of the Act, the order in the nature of 'garnishee' covered by Order XXI Rule 46 C.P.C. could not be passed by the Court below. It is contended that no notice was issued under Order XXI Rule 46 C.P.C., which is mandatory before passing any garnishee order.

26. It is also contended that Subject-Contract Agreement dt.06-08-2013 between the appellant and the 1st respondent was suppressed by the appellant, and that as per the said sub-contract agreement, only Courts at Anand, Gujarat State have exclusive jurisdiction to try and entertain any dispute between the appellant and the 1st respondent.

27. According to the 1st respondent, the appellant failed to provide the required documents for compliance under the Karnataka VAT Act, GST Act and also copies of returns and payment challans required as proof to the 1st respondent, and that the appellant did not comply with other statutory compliances.

28. According to the 1st respondent, the concerned authorities issued notices to the 1st respondent for recovery of tax liability with interest because of which the 1st respondent had to discharge obligations of the appellant by paying to the statutory authorities on behalf of the appellant.

29. It is contended that the appellant had also defaulted in payment of statutory liabilities like ESI, PF and is trying to evade and escape from such liabilities and that it was the 1st respondent who paid Rs.24,16,052/- and debited to the appellant account on 25-05-2018.

30. It is also contended that the Karnataka Government Commercial Tax Department issued notices to the 1st respondent on 05-02-2019 on the issue of non-payment of VAT by the appellant as the appellant did not value the sub-contract in its turnover, and VAT liability of Rs.3.60 crores for the year 2013-14 and an amount of Rs.0.75 crores for the year 2014-15 has been fastened on the 1st respondent, which was the responsibility of the appellant. It is also contended that the appellant did not submit invoices in its GST returns and because of appellant's non-compliances, there is a possibility of GST and 100% penalty with 18% interest being imposed by the competent authority.

31. It is further contended that a certificate dt.09-11-2018 on 1st respondent's letter head was created and forged by the appellant and was used by the appellant for obtaining some other contracts from the PSUs for its benefit.

32. While admitting that the contract was awarded to the appellant on back-to-back basis, it is contended that the appellant was reluctant to complete the scope of work as per the agreed schedule and the 1st respondent had to chase the appellant to get the work completed.

33. It is contended that the minutes of the meeting dated 6th and 7th May, 2016 were fabricated by the appellant ; that by December, 2016, the appellant was paid Rs.52.26 crores against the payable amount of Rs.48.48 crores and the appellant had received excess payment of Rs.3.78 crores; that the contract, being on back to back basis, the release of retention amount of appellant is subject to release of retention of 1st respondent from the 2nd respondent and is also subject to adjustment of Liquidated Damages imposed.

34. According to the 1st respondent, appellant had admitted in its letter dt.22-04-2019 about the receipt of payment of 7.5% retention against 15% retention, and in fact it is the appellant which has to pay Rs.3.20 crores to the 1st respondent. It also relied on a memorandum of minutes dt.21-09-2018 signed by both parties and annexed a reconciled account statement, stating that Rs.3,20,26,142/- is payable by the appellant to the 1st respondent and this was concealed and suppressed by the appellant.

35. According to the 1st respondent, even after completion of commissioning and Performance Guarantee tests, the appellant was required to complete balance various major civil works relating to Performance Guarantee test, FAC and defect liability due to which day to day operations at project site were effected and due to which Final Acceptance Certificate issuance by 2nd respondent was delayed.

36. According to the 1st respondent, the legal notice dt.25-03-2019 issued by the appellant was not received by it and the 2nd respondent sent a copy of it to the 1st respondent. It disputed that the amount of Rs.11,91,01,514/- was payable by it to the appellant, and it is stated that such demand of the appellant is not supported by any document.

37. It is contended that as per the contract terms and conditions, all payments due and payable were paid long back and nothing is pending due and payable to the appellant. The only amount lying with the 1st respondent is retention amount of Rs.6.55 crores which is subject to adjustment of applicable Liquidated Damages, tax liabilities and penalties paid or to be paid on behalf of the appellant to the statutory authorities.

38. It is contended that the appellant cannot take undue advantage of clause 14 of LOA dt.13-04-2011 between respondent Nos.1 and 2 and suppress the sub-contract between appellant and 1st respondent. According to 1st respondent, it is the appellant who has to pay Rs.4,36,40,934/- to the 1st respondent. It blamed the appellant for the delay in completion of the contract.

39. It is also denied that there is privity of contract between the appellant and 2nd respondent and the appellant cannot initiate any action against 2nd respondent, with whom it has no contractual relationship. It therefore prayed that the application be dismissed.

The stand of the 2nd respondent

40. The 2nd respondent filed a counter stating that application under Section 9 of the Act is not maintainable as there is no contract between the appellant and 2nd respondent, that appellant is only a sub-contractor, and there is no clause relating to arbitration between the appellant and the 2nd respondent in the MoU between the appellant and the 1st respondent. It also reiterated that there is no territorial jurisdiction vested in this Court to entertain any claim against the 1st respondent and only that only the Courts at Anand, Gujarat State would have such jurisdiction.

The rejoinder of the appellant

41. The appellant filed a rejoinder stating that it had also issued a notice to refer the dispute to arbitration; that 1st respondent cannot impose any liquidated damages on it since it is the 1st respondent who is responsible for delay of execution of the contract.

Rejoinder of 2nd respondent

42. Separate rejoinder was filed by 2nd respondent enclosing document dt.23-03-2018, under which time extension upto 22-07-2017 was granted

by the 2nd respondent with the condition of imposition of liquidated damages for the delay in completion of the project.

The points framed by the Court below:

43. The Court below framed the following points:

- “1. Whether the petition is maintainable against R1 and R2 in view of absence of the agreement between the petitioner and the respondent No.2?*
- 2. Whether Court can pass any order directing respondent No.2 not to release the money to the 1st respondent or deposit the money in the Court?*
- 3. To what relief?”*

The decision of the Court below

44. By order dt.17-09-2019, the Court below dismissed C.O.P.No.57 of 2019 filed by the appellant under Section 9.

The reasons given by the Court below

45. On point No.1, the Court below rejected the contentions of the respondents about maintainability of the OP against both respondents in view of absence of agreement between the appellant and 2nd respondent. It took note of the fact that MoU between the appellant and 1st respondent shows that the work awarded to the appellant shall be executed by it on same terms and conditions as between 1st respondent and 2nd respondent and that the MoU specifically stated that it was on ‘back to back’ basis. It took note of the fact that the agreements and negotiations between the parties had commenced even before awarding

of contract by 2nd respondent to the 1st respondent, and thus, the agreement between the appellant and the 1st respondent and the agreement between the 1st respondent and 2nd respondent were *intrinsically connected* and they cannot be viewed separately. It placed reliance on the judgment of the Supreme Court in **Elite Engineering and Construction (Hyderabad) Private Limited, represented by its Managing Director and Techtrans Construction India Private Limited, represented by its Managing Director**¹ while coming to the said conclusion as well as judgment of the Supreme Court in **Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc**². It observed that the arbitration clause in the contract between the appellant and 2nd respondent can also be inferred if the agreement between 1st respondent and 2nd respondent is considered as mother agreement/Principal agreement and the agreement between the appellant and 1st respondent is considered as ancillary/incidental agreement. It held that the appellant can invoke the arbitration clause against respondent Nos.1 and 2 though there is no separate agreement between the appellant and 2nd respondent.

46. It also rejected the contention of the 1st respondent that the Court below had no jurisdiction in view of clause 14.3 of the contract fixing the venue of arbitration at Hyderabad.

47. On the 2nd point the Court below referred to the judgment of the Supreme Court in **Adhunik Steels Ltd. Vs. Orissa Manganese and**

¹ (2018) 4 SCC 281

² (2013) 1 SCC 641

Minerals Pvt. Ltd.³ and judgment of the Bombay High Court in **Nimbus Communications Limited Vs. Board of Control for Cricket in India and others⁴**.

48. It observed that even though the appellant had stated that 1st respondent had financial distress, no material is placed before the Court to convince the Court that the financial position of the 1st respondent is grim; that since the 1st respondent was disputing the quantum of the amount to be paid in the letter dt.08-04-2019, and had also filed letter dt.23-03-2018 addressed to it by the 2nd respondent under which it was intimated that liquidated damages to the tune of 10% of the total contract value of Rs.190.86 crores might be recovered from the appellant, it held that the appellant did not establish *prima facie* case for grant of interim relief.

The consideration by this Court

49. Though learned counsel for 1st respondent tried to contend that the finding on point (i) by the Court below on this aspect is also not correct, we disagree with the said contention since we are of the opinion that the contract between appellant and 1st respondent is intrinsically connected with the transaction between 1st respondent and 2nd respondent since it was the case of the award of contract on 'back to back' basis. We agree with the reasoning given by the Court below that the O.P. was maintainable in the facts and circumstances of the case against both the

³ AIR 2007 SC 2563

⁴ MANU/MH/0247/2012

respondents even if there was no separate contract between the appellant and 2nd respondent.

50. We shall next consider the question: “ *whether a relief in the nature of a garnishee order as was sought by the appellant could be granted in a proceeding under Sec.9 of the Act?*”.

51. Section 9(1)(ii)(b) of the Act enables the Court to grant as an interim measure *protection of securing the amount in dispute in the arbitration* and Section 9(1)(ii)(e) of the Act, enables the Court to grant *such interim measure of protection as may appear to the Court to be just and convenient*. We are of the opinion that nothing prevents the Court below from granting an interim protection order in the nature of a garnishee order in exercise of its power under Order XXI Rule 46 C.P.C.

52. Similar view was also been taken by the Madras High Court in **Radhakrishnan Raghavan Nair Vs. Consul Consolidated (P) Ltd**⁵. The Madras High Court had also reiterated that while hearing the application under Section 9 of the Act, the Courts are empowered to grant prohibitory orders against the garnishee even though it is a third party against whom relief is sought for; and though such third party is not a party to the arbitration agreement between the parties, as the relief is in the nature of securing the claim of the applicants, if the requirement under the Code of Civil Procedure for grant of interim orders are satisfied.

⁵ 2015 SCC Online Madras 8871 = (2015) 3 Law Weekly 882 (Madras)

53. Next we shall consider the question:

“Whether the Court below was correct in dismissing the application under Sec.9 of the Act filed by the appellant ?”

54. In **Nimbus Communications Limited** (5 supra), the Mumbai High Court had held that a party which has a claim adjudicated in its favour ultimately by the arbitrator should be in a position to obtain the fruits of the arbitration while executing the award, and that the power being of a drastic nature, a direction to secure the amount claimed in the arbitration petition should not be issued merely on the merits of the claim, unless a denial of the order would result in grave injustice to the party seeking a protective order, and the obstructive conduct of the party against whom such a direction is sought was regarded as being a material consideration.

55. The Court below accepted this principle also to be correct and also accepted that in an arbitration application under Section 9 of the Act, the Court can grant relief under Section 9(1)(ii)(b) of the Act.

56. It even conceded that appellant could make out case in these circumstances for grant of such relief as laid down **Nimbus Communications Limited** (5 supra).

57. The Delhi High Court in **Huawei Technologies Co. Ltd. Vs. Sterlite Technologies Limited**⁶ has accepted the plea of a petitioner in a Sec.9 (1) (ii) (b) application that though in a normal case, the

⁶ MANU/DE/0242/2016

requirement of all conditions of Order XXXVIII Rule 5 CPC are to be satisfied before Court *while considering the prayer of securing the amount* and the Court should exercise its discretion very carefully in order to secure the amount, but if the petitioner has been able to make out a *strong case* against the respondent, particularly, *when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising the flimsy reasons*, and when it appears to the Court to be just and convenient, the Court has ample power to exercise its discretion to secure the amount **even when the condition of the company is solvent**, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996. It held that the amount, under these circumstances, should be secured, once the dispute is of commercial in nature and that case of the petitioner in that case falls within the range of exceptional ones where the amount is liable to be protected.

58. The Court below relied on the following passage in **Everest Industries Ltd., UP Vs. MW High Tech Projects India Pvt. Ltd., Hyderabad**⁷ rendered by a Division Bench of this Court:

“Where allowing the encashment of the unconditional bank guarantee would result in irretrievable injury, harm or injustice to the other party. In most cases, payment of money under such a bank guarantee would adversely affect the bank and its customer, at whose instance the guarantee is given. Therefore, the injury, harm or injustice contemplated under this head must be of an exceptional and irretrievable nature. It has. to be such a circumstance

⁷ 2019(4) ALT 355 (DB) (TS)

which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This would have to be decisively established and it must be proved to the satisfaction of the Court that there would be no possibility whatsoever of recovery of the amount from the beneficiary by way of restitution. Mere apprehension that the other party would not be able to pay is not enough....

....

59. In para 25 of the said judgment it was further observed that:

“25. Coming to the second issue, given its own finding that there could be no inference that the first respondent had become insolvent and would not be in a position to pay, we are perplexed as to why the Commercial Court thought it fit to direct the first respondent to furnish third party security. As per the settled legal norm, more than a mere apprehension is required in this regard and allusion by the appellant to some news reports in support of its contention that the first respondent was facing financial difficulties was wholly insufficient to sustain such a direction. The reasoning that if the first respondent encashed the Bank Guarantee and if the appellant thereafter succeeded in the arbitration proceedings it would have to recover the amount, to justify imposition of this condition, is without logic or basis as a similar situation would arise in every case of encashment of a Bank Guarantee. When the Commercial Court found no evidence of the first respondent facing any financial crisis, there was no cause made out to impose such a condition.”

60. In that case the appellant had also sought for an injunction restraining encashment of bank guarantee and was found to be disentitled to such relief. Maybe that factor influenced the Bench to take the above view.

61. We are of the view that mere fact that the 1st respondent is solvent by itself cannot be a ground to deny to the appellant the relief under Sec. 9(1) (ii) (b) of the Act and the said decision in Everest Industries Ltd. (4 supra) has to be confined to it's facts.

62. The court below also referred to **Raman Tech. & Process Engg. Co. v. Solanki Traders**⁸ and to the following passage therein to deny relief to the appellant. The passage reads:

“The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment.”

63. While these considerations are also to be kept in mind as held in **Huawei Technologies Co. Ltd** (6 Supra), the refinement thereof is also to be followed, i.e if the petitioner has been able to make out a *strong case* against the respondent, particularly, *when the respondent has received the amount from the employer and it is avoiding to clear the due amount and is raising the flimsy reasons, and when it appears to the*

⁸ (2008) 2 SCC 302

Court to be just and convenient, the Court has ample power to exercise its discretion *to secure the amount* even when the condition of the company is solvent, under Sections 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996.

64. According to the appellant, in the minutes of the meeting dt.09-12-2017, the 1st respondent had admitted that Rs.16,96,125/- was withheld on back to back basis by 2nd respondent and mere denial in the counter by 1st respondent or in its letter dt. 08-04-2019 would not suffice.

65. Coming to the statement dt.21-09-2018 pleaded by 1st respondent, there is a statement recorded in the very minutes of the meeting dt.21-09-2018 that *the appellant would have the same checked by their Accounts Department and would be revert back*. So this does not amount to be an unconditional acceptance by the appellant of what was discussed and recorded in the said minutes of meeting.

66. Merely because the 2nd respondent had granted extension up to 22-07-2017 to the 1st respondent on condition of levying liquidated damages because of delay in completion of the project, since the question as to who is responsible for the delay in completion is not adjudicated, and can only be decided in the arbitration, the same cannot be a fact to be taken into consideration while deciding whether or not the amount claimed by the appellant is to be secured. We are of the view that on the basis of the said letter issued by the 2nd respondent, the Court

below was not correct in coming to the conclusion that the appellant did not establish *prima facie* case for grant of interim relief.

67. In our opinion, in a situation like in the instant case, where (i) the contract of the appellant with 1st respondent is on a 'back to back' basis,

(ii) when the appellant is the one which actually executed the work for the 2nd respondent and no work was at all done by the 1st respondent,

(iii) when the appellant is alleging that not even 5% has been paid to it by the 1st respondent out of the amounts, the 1st respondent had received from the 2nd respondent, and the appellant is claiming Rs.11,91,01,514/- from the 1st respondent,

(iv) the issue of delay in execution of work is to be decided in the proposed arbitration,

(v) and the refusal of the 1st respondent to pay any amount to the appellant does not appear to be bonafide,

it is a fit case to exercise power under Sec.9(1) (ii) (b) and direct the 2nd respondent not to make any further payments to the 1st respondent pending adjudication of disputes between the parties.

68. The fact that the financial position of the respondent is sound is not a ground to deny the said relief since the intention is only to secure the amount and not to order release of any amount to the applicant.

69. Accordingly this appeal is allowed; the order dt.17-09-2019 in C.O.P.No.57 of 2019 passed by the Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad is set aside; and C.O.P.No.57 of 2019 is allowed as prayed for. No costs.

70. Pending miscellaneous petitions, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date : 08-01-2020.
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