IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 25TH DAY OF JANUARY 2022

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

Arb.Appln.No. 180 of 2021

In the matter of Section 9(1) (ii) (b) of the Arbitration and Conciliation Act, 1996
And
In the matter of dispute arising out of agreement dated 30.04.2016 between M/s.Pioneer Hydrothermal Services(P)Ltd. And M/s Techsharp Engineers Pvt. Ltd.

BETWEEN

M/s. Pioneer Hydrothermal Services Pvt. Ltd.
Pioneer House, 3-10-4/B/2,
Near St.Joseph's High School,
Ramanthapur, Hyderabad – 500 013.
Represented by its Director and Authorized Signatory,
Konghot Krishna Prasad, Aged 34 Years,
S/o Methil Gangadharan,
Residing at Flat No.E-304, 3rd Floor,
Aparna Sarovar Granda, Kanchi,
Gachibowli Nallagandla,
Lingampally, K.V.Rangareddy,
Hyderabad – 500 013. ... Applicant

-Vs-

1.M/s Techsharp Engineers Pvt. Ltd.,
Represented by its Authorized Officer,
C-39, 2nd Avenue,
Anna Nagar, Chennai – 600 040,
Presently having office at
No.10/17, 8th Street,

M-Block, Anna Nagar East,
Chennai – 600 102. ... Respondent No.1

2. M/s. Bharath Petroleum Corporation Limited (BPCL),
Kochi Refinery,
Karimughal Road,
Thrippunithura,
Ambalamugal,
Kochi, Kerala – 682 302. ... Respondent No.2

Application praying that this Hon'ble Court be pleased to Direct a prohibitory order against the 2nd Respondent prohibiting them for paying any amount to the tune of Rs.10,22,85,244/- (Rupees Ten Crores Twenty Two Lakhs Eighty five Thousand and two forty four only) there on to the 1st Respondent and consequently direct the 2nd Respondent to deposit the said amount with this Hon'ble court.

This Arbitration Application coming on this day before this court for hearing in the presence of Mr.Vipin Warrier, Advocate for the Applicant herein, and the Mr.R.V.Prabhat, for Mr.Jayesh B.Dolia, Advocate for the 1st respondent herein, and Mr.M.Vijayan for M/s King & Patridge, Advocates for the 2nd respondent herein, and upon reading the order herein dated 11.01.2022 and this Court having observed that although the applicant makes a principal claim for a sum of

Rs.6,62,17,343/- and has submitted a statement which seems to indicate that the principal receivable is about Rs.7,62,00,000/-, the contract envisages retention until measurements are taken and the completion certificate is issued, therefore, a prohibitory order for the full amount claimed is not appropriate, and in any event the learned counsel for the 2nd respondent indicated that a sum of about Rs.4,00,37,000/- may be payable by the 2nd respondent to the 1st respondent, therefore, the prohibitory order should be limited to that extent, **It is ordered as follows:-**

That the applicant herein, be and is hereby permitted to raise an inovice of current date towards the final bill and such invoice shall be issued without prejudice to the 1st respondent's contention in respect of the previously issued invoice, whether for purposes of limitation or otherwise.

2. That upon receipt of such invoice, the 2nd respondent herein, be and is hereby directed to create a fixed deposit account for a sum of Rs.4,00,37,000/- to the credit of Arbitration Application No.180 of 2021 in an interest bearing account in any nationalised bank and such fixed deposit shall be for an initial period of one year and upon establishing such fixed deposit account, the 2nd respondent herein be and is hereby directed to hand over a copy of the fixed deposit receipt to the applicant

and the 1st respondent herein.

3. That the applicant herein, shall approach the arbitral tribunal if extensions of the fixed deposit are required after the initial period of one year and the fixed deposit shall abide by the outcome of arbitral proceedings between the applicant and the 1st respondent herein.

4. That the 2nd respondent herein, be and is hereby restrained from making the final bill payment to the 1st respondent except by way of creating the fixed deposit as directed above.

5. That it is needless to say that the observations contained in this order are tentative and for interlocutory purposes only, and that the arbitral tribunal shall examine these issues without being influenced by such observations, be it in the dispute between the applicant and the 1st respondent or the dispute between the 1st respondent and the 2nd respondent herein.

WITNESS THE HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 25th DAY OF JANUARY 2022.

Sd./-
ASSISTANT REGISTRAR (Comm.Cases)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

ky

17.02.2022

Arb.Appln.No.180 of 2021

ORDER

DATED : 25.01.2022

THE HON'BLE MR. JUSTICE

SENTHILKUMAR RAMAMOORTHY

FOR APPROVAL: 17.02.2022

APPROVED ON : 18.02.2022

Copy to:

1. The Registrar General,
High Court, Madras-104.

2. Correspondence seat.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25.01.2022

Coram:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

Arbitration Application No.180 of 2021

M/s.Pioneer Hydrothermal Services Pvt. Ltd.
Pioneer House, 3-10-4/B/2,
Near St.Joseph's High School,
Ramanthapur, Hyderabad – 500 013
Represented by its Director and Authorised Signatory,
Konghot Krishna Prasad, Aged 34 years, S/o.Methil Gangadharan,
Residing at Flat No.E-304, 3rd Floor, Aparna Sarovar Granda, Kanchi
Gachibowli Nallagandla, Lingampally, K.V.Rangareedy,
Hyderabad – 500 013. ... Applicant

/versus/

1. M/s.Techsharp Engineers Pvt. Ltd.,
   Represented by its Authorised Officer,
   C-39, 2nd Avenue,
   Anna Nagar, Chennai – 600 040,
   presently having office at
   No.10/17, 8th Street,
   M-Block, Anna Nagar East,
   Chennai – 600 102.

2. M/s.Bharath Petroleum Corporation Limited (BPCL),
   Kochi Refinery,
   Karimughal Road, Thrippunithura,
   Ambalamugal, Kochi,
   Kerala – 682 302 ... Respondents

Prayer: This Arbitration Application is filed under order XIV Rules 8 of

Original Side Rules read with Section 9 of Arbitration and Conciliation

Act, 1996 praying this Court, pending the hearing and final adjudication of the dispute by an arbitral tribunal, should not be pleased to pass an order of Interim Directions shall be granted against the respondent and not to direct a prohibitory order against the 2nd respondent prohibiting them for praying any amount to the tune of Rs.10,22,85,244/- (Rupees Ten Crores Twenty Two lakhs Eighty Five Thousand and two forty four only) thereon to the 1st respondent and consequently direct the 2nd respondent to deposit the said amount with this Hon'ble Court.

For Applicant : Mr.Vipin Warrier

For R1 : Mr.R.V.Prabhat, for
Mr.Jayesh B.Dolia

For R2 : Mr.M.Vijayan, for
M/s.King & Partridge

O R D E R

The applicant seeks a prohibitory order restraining the 2nd respondent from making payments to the 1st respondent to the extent of Rs.10,22,85,244/- and to direct the 2nd respondent to deposit the said amount before this Court.

2. A work order dated 30.04.2016 was issued to the applicant by the 1st respondent herein in relation to the supply and application of insulation of piping system on back to back basis for the offsite of IREP project of BPCL, Kochi Refinery (the 2nd respondent herein). Pursuant thereto, the applicant undertook work. The terms and conditions annexed to the work order, include the terms of payment as clause 10. As per the terms of payment, the applicant was entitled to submit running account (RA) bills for payment on account or as advances. The payment breakup, including the 10% retention amount, is specified in the said clause 10. Upon execution of work, the applicant raised several RA bills. On receipt of such bills, it appears that some payments were made by the 1st respondent. According to the applicant, full payment was not made against these RA bills; and a statement indicating the details of bills issued and payments received in respect thereof is relied upon in this regard by the applicant. On such basis, the applicant claims that the aggregate outstanding is a sum of about Rs.10,22,85,243/-. On the contrary, the 1st respondent states that RA bills 1 to 11 were paid. As regards RA bill 11-A, it is stated that the said RA bill is the 2nd RA bill raised in the same month. Since the terms of payment do not provide for raising more than one RA bill in the same month, RA bill 11-A was rejected. As regards the bills raised subsequent thereto, it is stated that the said bills were not processed because joint measurements were not taken in spite of the 1st respondent calling upon

the applicant to come forward for measurements and reconciliation. The

1st respondent relies upon the reply notice dated 01.03.2018 in this regard.

3. As indicated earlier, the 2nd respondent is the employer, which awarded the main contract to the 1st respondent. The 2nd respondent states, on instructions, that all the RA bills raised by the 1st respondent on the 2nd respondent were settled. The 1st respondent produced a copy of the final bill dated 21.03.2019 in compliance with directions issued by me earlier. The said final bill of the 1st respondent is for a sum of Rs.5,15,37,000/-. As regards the final bill, the 2nd respondent states that such final bill was not received. The 2nd respondent further submits, on instructions, that a sum of Rs.4,00,37,000/- may be payable by the 2nd respondent to the 1st respondent. If a final bill of current date is raised by the 1st respondent in this regard, the 2nd respondent states that the said bill would be processed, and, subject to the aforesaid, if directed by this Court, the 2nd respondent is ready and willing to create a fixed deposit account in respect of the above mentioned sum of Rs.4,00,37,000/- subject to the outcome of arbitration proceedings.

4. A preliminary issue was raised by the 1st respondent that the arbitral proceedings initiated by the applicant earlier were rejected by the Arbitral Tribunal on the ground that such proceedings were premature. In view thereof, it is contended that the present Section 9 application is not maintainable. On merits, the 1st respondent relies upon several judgments in support of the contention that the present application is liable to be rejected. The said judgments are set out below:

(i). *M/s.A-1 Biz Solutions Chennai v. M/s.Cascade Billing Center Inc, judgment dated 27.07.2011, Madras High Court (DB)*.

(ii). *Raman Tech and Process Engineering v. Solanki Traders, judgment dated 20.11.2007 (SC)*

(iii). *Shinago Holdings v. M. Ethiraj, judgment dated 11.08.2017, Madras High Court (DB)*.

(iii). *BMW India v. Libra Automotives, order dated 09.07.2019, Delhi High Court.*

5. On the basis of the above judgments, the 1st respondent contends that an application under Section 9 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) seeking a prohibitory order should be tested against the requirements of Order 38 Rule 5 of C.P.C. Consequently, the applicant is under an obligation to establish a *prima*

facie case that the amount claimed is due and owing to the applicant from the 1st respondent. However, the establishment of a *prima facie* case is insufficient. In addition, the applicant is under an obligation to establish that the 1st respondent intends to defeat the fruits of a potential arbitral award by alienating or moving its assets outside the jurisdiction of the Court. According to the 1st respondent, in the case at hand, the applicant has failed to establish even a *prima facie* case in as much as measurements have admittedly not been taken and the bills have not been certified. As regards the 2nd requirement under Order 38 Rule 5, the 1st respondent contends that the applicant has completely failed to establish that the 1st respondent would refuse to make payment if an arbitral award is pronounced in favour of the applicant.

6. At the outset, the preliminary objection of the 1st respondent should be dealt with. As indicated above, such preliminary objection is that the arbitral proceedings initiated by the applicant earlier were rejected on the ground that such proceedings are premature and would have to await the final bill payment by the 2nd respondent to the 1st respondent since it is a back-to-back contract. An application may be filed under Section 9 of the Arbitration Act either prior to the constitution of the arbitral tribunal or, subject to establishing that the

remedy under Section 17 is not efficacious, in course of arbitral proceedings, or after the award is pronounced but before such award is enforceable. In the case at hand, the applicant approached the Arbitral Tribunal, but an application under Section 16 of the Arbitration Act was allowed. It is stated by learned counsel for the applicant that the said order has been assailed before this Court. Therefore, the facts on record disclose that the applicant has demonstrated the manifest intent to resolve the dispute through arbitration. Accordingly, the preliminary objection is overruled.

7.Turning to the merits of the application, the principal objection of the 1st respondent is that the requirements of Order 38 Rule 5 of C.P.C were not satisfied by the applicant. Therefore, this objection should be subjected to close scrutiny. In the affidavit in support of this application, the applicant has stated that a principal sum of Rs.6,62,17,343/- is due and payable to the applicant by the 1st respondent towards work done pursuant to the work order. The applicant has averred as follows in paragraph 11 of the affidavit in support of the application:

> *"The 1st Respondent had been evading and avoiding making payments to this Applicant from December, 2017 and will not release payments to this Applicant once the payments*

are received by the 1st Respondent from the 2nd Respondent. The Applicant owing to the conduct of the 1st Respondent reasonably apprehends that the 1st Respondent will not make payments to this Applicant once the payments are received by 1st Respondent from 2nd Respondent".

8. In support of the application, the applicant has filed all the bills raised by the applicant on the 1st respondent. In addition, a statement setting out the details of bills, amounts received in respect thereof and amounts outstanding has been filed.

9. The contention of the 1st respondent that a *prima facie* case should be made out is unexceptionable. The work order provides for the processing of RA bills subject to retention. All the RA bills are on record. There is no communication on record from the 1st respondent setting out reasons for rejecting these bills. The main objection is that the outstanding bills were not certified and that measurements were not taken. Nevertheless, in the absence of an express communication stating that the work was not done or that the amounts claimed in these bills are not payable, the applicant has made out a *prima facie* case. This leads to the next issue, whether the requirement under Order 38 Rule 5 that the 1st respondent would remove the assets from the jurisdiction of the Court and thereby defeat the fruits of the potential arbitral award has been satisfied by the applicant. On this issue, it should be noticed that the applicant is not seeking to attach a movable or immovable property of the 1st respondent. Instead, the asset is in the form of a receivable from the 2nd respondent to the 1st respondent. The said receivable is money. Given the nature of the asset, the test of removal of assets from the jurisdiction of the Court cannot be applied without tweaking such test to suit the nature of the asset. In response to the submission of the 2nd respondent that it is ready and willing to place Rs.4,00,00,037 in a fixed deposit account, the contention of the 1st respondent is that this money would be put to use by the 1st respondent. Moreover, as stated above, in the affidavit in support of the application, the applicant has stated that the 1st respondent has evaded and avoided payments from December 2017. The admitted position, as on date, is that no payments were made pursuant to any bills subsequent to RA bill 11. About 4 years have elapsed in the meantime. In these facts and circumstances, in my view, the requirements of Order 38 Rule 5 of C.P.C., as applicable to a garnishee application in respect of a receivable, stand satisfied.

10. Although the applicant makes a principal claim for a sum

of Rs.6,62,17,343/- and has submitted a statement which seems to indicate that the principal receivable is about Rs.7,62,00,000/-, the contract envisages retention until measurements are taken and the completion certificate is issued. Therefore, a prohibitory order for the full amount claimed is not appropriate. In any event, learned counsel for the 2nd respondent indicated that a sum of about Rs.4,00,37,000/- may be payable by the 2nd respondent to the 1st respondent. Therefore, the prohibitory order should be limited to that extent. Accordingly, Arbitration Application No.180 of 2021 is disposed of with the following directions:

(i). The applicant is permitted to raise an invoice of current date towards the final bill. Such invoice may be issued without prejudice to the 1st respondent's contention in respect of the previously issued invoice, whether for purposes of limitation or otherwise.

(ii). Upon receipt of such invoice, the 2nd respondent is directed to create a fixed deposit account for a sum of Rs.4,00,37,000/- to the credit of Arbitration Application No.180 of 2021 in an interest bearing account in any nationalised bank. Such fixed deposit shall be for an initial period of one year. Upon establishing such fixed deposit account, the 2nd respondent is directed to hand over a copy of the fixed deposit receipt to the applicant and the 1st respondent herein.

(iii). The applicant may approach the arbitral tribunal if extensions of the fixed deposit are required after the initial period of one year. The fixed deposit shall abide by the outcome of arbitral proceedings between the applicant and the 1st respondent.

(iv) The 2nd respondent is restrained from making the final bill payment to the 1st respondent except by way of creating the fixed deposit as directed above.

(v) It is needless to say that the observations contained in this order are tentative and for interlocutory purposes only, and that the arbitral tribunal may examine these issues without being influenced by such observations, be it in the dispute between the applicant and the 1st respondent or the dispute between the 1st respondent and the 2nd respondent.

Sd./-S.K.R.J
25.01.2022

//Certified to be true copy//
Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.