IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.02.2025

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THE HONOURABLE MR JUSTICE ABDUL QUDDHOSE

O.A.No.758 of 2024

G.Sasidhara Karanavar .. Applicant

vs

BGR Energy Systems Limited and another .. Respondents

ORDER

This application has been filed under Section 9 of the Arbitration and Conciliation Act seeking for an order of interim injunction to restrain the first respondent from invoking the Bank Guarantee dated 09.01.2020 issued by the second respondent for a sum of Rs.19,74,658/- pending disposal of the MSME proceedings.

2.The first respondent had issued Service Orders dated 31.10.2019 and 27.11.2019 in favour of the applicant. As per the said Service Orders, the applicant will have to carry fabrication and erection work in the first respondent's premises. An advance Bank Guarantee of a sum of Rs.19,74,658/- was given by the applicant as per the terms and conditions of the Service Orders. The applicant claims that they have completed their work as per the Service Orders.

3.Admittedly, the first respondent was a contractor employed by the

Hindustan Petroleum Corporation Limited (hereinafter referred to as 'HPCL'). Admittedly, their contract has been terminated on account of breach of contract. The applicant has pleaded that a sum in excess of the Bank Guarantee of Rs.19,74,658/- is due and payable to him by the first respondent. According to the applicant, as seen from the averments contained in the affidavit filed in support of this application, the first respondent is now attempting to invoke Advance Bank Guarantee of Rs.19,74,658/-, which is the subject matter of this application.

4.A categorical averment has been made in the affidavit filed in support of this application that fraudulent documents have been made by the first respondent to invoke the Bank Guarantee. According to the applicant, if the Bank Guarantee is invoked, it will cause irretrievable injustice to him since already a sum in excess of the Bank Guarantee amount is due and payable to him by the first respondent. There exists an arbitration clause in the Service Orders dated 31.10.2019 and 27.11.2019.

5.The applicant has referred the dispute for recovery of the said amount from the first respondent to the MSME Council under the provisions of Section 18 of the MSME Act. According to the applicant, the MSME Council has also issued notice to the applicant as well as the first respondent calling for conciliation.

According to the applicant, the MSME Council has also directed the first respondent to file their statement of defence pertaining to the claim made by the applicant. To protect the interest of the applicant, pending disposal of the MSME proceedings, this application has been filed seeking for an interim injunction to restrain the first respondent from invoking the Bank Guarantee for a sum of Rs.19,74,658/-, which has been issued by the second respondent Bank.

6.A counter has been filed by the first respondent, who is the contesting respondent. They have contended as follows:

a)Arbitration is yet to commence. The MSME Council is presently attempting to conciliate the dispute between the parties. Only if the conciliation fails, arbitration will commence and only then, the present application is maintainable;

b)No fraud has been established by the applicant against the first respondent;

c)The question of seeking injunction from invocation of Bank Guarantee does not arise.

d)Since the applicant is only acting on the instructions of HPCL on account of the termination of the contract of the first respondent by them, as on date there is no privity of contract between the applicant and the first respondent

7.Admittedly, the contract of the first respondent earlier issued in their favour by HPCL stands terminated on account of the alleged breach of contract committed by the first respondent. The applicant was appointed as a Sub Contractor under the Service Orders dated 31.10.2019 and 27.11.2019 by the first respondent. The applicant claims that he has completed the work as per the Service Orders issued by the first respondent and subsequent to the termination of the contract of the first respondent by HPCL, he has completed the work and submitted his invoices to the first respondent and also sought for certification to enable him to receive payment from HPCL. According to the applicant, despite completing the work and despite making a request to the first respondent to certify his invoices, the first respondent failed to do so. The applicant also claims that a sum of Rs.28,92,895/- is due and payable to him by the first respondent in respect of the services rendered under the Service Orders issued by the first respondent. The sum of Rs.28,00,000/- is in excess of the Bank Guarantee amount, which is only for a sum of Rs.19,74,658/-. Admittedly, when the contract of the first respondent with the HPCL stands terminated and the basis of the issuance of the Service Orders in favour of the applicant is only on account of the said contract with HCPL, the question of invocation of the Bank Guarantee by the first respondent does not arise. Any attempt made by the first respondent to invoke the Bank Guarantee, which is the subject matter of the dispute may amount to unjust enrichment and would cause irretrievable injustice to the applicant. Admittedly, the invoices raised by the applicant towards the services rendered by him, have not been paid till date. The value of the invoices also exceeds the Bank Guarantee amount, which is the subject matter of this application.

8.Therefore, on a prima facie consideration, the averments contained in the affidavit filed in support of this application by the applicant that a fraudulent attempt has been made by the first respondent to invoke Bank Guarantee has to be believed by this Court.

9.Insofar as the contention raised by the first respondent that since the arbitration has not commenced before the MSME Council and the MSME proceedings are only in the conciliation stage, this application is not maintainable is concerned, the same has to be rejected for the following reasons:

a)Admittedly, reference has been made by the applicant to the MSME

Council as per provisions of Section 18 of the MSME Act. The first stage before the MSME is for the MSME Council to conciliate the dispute between the parties;

b)A notice has already been issued by the MSME Council to both the parties, namely, the applicant and the first respondent calling for conciliation;

c)Only after the conciliation fails, the MSME Council will refer the dispute to arbitration;

d)Under Section 9 of the Arbitration and Conciliation Act, a party is entitled to seek for an interim relief from this Court either before, during or after the arbitration. Even if the arbitration between the parties to the dispute is yet to commence, this Court is having the power to grant an order of interim injunction prior to arbitration under Section 9 of the Arbitration and Conciliation Act.

10.Learned counsel for the applicant also drew the attention of this Court to a judgment of the Calcutta High Court in the case of **Indian Oil Corporation Limited and another vs. Union of India and others rendered in W.P.O. No.1624 of 2023 dated 17.11.2023**. In the said judgment, a similar issue was under consideration. The learned Single Judge of the Calcutta High Court held that the application filed under Section 9 of the Arbitration and Conciliation Act seeking for interim protection is maintainable, once a reference has been made to the MSME Council as per the provisions of Section 18 of the MSME Act.

11.Admittedly, the contract granted in favour of the first respondent by

HPCL stands terminated on account of the alleged breach of contract by the first respondent. The applicant also claims that he has completed the work as per the Service Orders issued by the first respondent and he has also requested the first respondent to certify those invoices to enable him to receive payment from HPCL. Despite those requests, admittedly, the first respondent has not certified the invoices raised by the applicant. Though the first respondent may say that they were unable to certify the invoices since their contract has been terminated by HPCL, the applicant cannot be left high and dry on account of the said termination.

12.Having rendered the services based on the Service Orders issued by the first respondent, whether the applicant has to receive payments for the quantum of payment claimed by him, can only be decided in the arbitration, but when a prima facie case has been made out that a sum in excess of the Bank Guarantee amount is payable to the applicant, the applicant has to be protected, pending disposal of the MSME proceedings by granting the relief as prayed for in this application.

13.This Court, after giving due consideration to the contentions of the applicant, which are supported by documents and in view of the fact that the applicant is ready and willing to complete the arbitration process before the

MSME Council in accordance with the MSME Act, this Court will have to necessarily protect the interest of the applicant by granting an order of interim injunction as prayed for in this application. If the Bank Guarantee is allowed to be invoked by the first respondent, irretrievable injustice will be caused to the applicant, pending disposal of the MSME proceedings. Since the Bank Guarantee was furnished by the applicant and it is an Advance Bank Guarantee as per terms and conditions of the Service Orders issued by the first respondent, necessarily the said Bank Guarantee will have to be kept alive till the disposal of the MSME proceedings.

14.Since a prima facie case has been made out by the applicant for the grant of an order of interim injunction as prayed for in this application and balance of convenience and irreparable hardship have been established, this Court is inclined to grant an order of interim injunction as prayed for in this application, subject to the condition that the applicant keeps the Bank Guarantee alive till the disposal of MSME proceedings.

15.Accordingly, this application is allowed as prayed for and there shall be an order of interim injunction restraining the first respondent from invoking Bank Guarantee till the disposal of the MSME proceedings. It is made clear that the applicant shall renew the Bank Guarantee within one week prior to the expiry date periodically till the disposal of the MSME proceedings and failure to do so, the first respondent is granted liberty to invoke the Bank Guarantee.

18.02.2025

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ABDUL QUDDHOSE,J.

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