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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.01.2025

Pronounced on : 17.02.2025

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THE HONOURABLE **MR.JUSTICE P.B.BALAJI**

O.A.No.843 of 2024
& Arb.Appln.No.776 of 2024

A.Chidambaram

... Applicant in both Applications

VS.

1.Dr.S.Rajagopal

2.Vasuki Rajagopal

3.S.Vengatraman

4.S.Ramesh

5.M/s.Erasma Builders and Developers Private Limited,
Rep. y its Authorised Signatory,
Mr.N.Lakshmanan & Mr.K.K.Vishwanathan,
No.1E, Jhandewalan Extension,
Naaz Cinema Complex,
New Delhi – 110 055.

6.A.Velu

... Respondents in both Applications



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Prayer in O.A.No.843 of 2024: Original Application filed under XIV Rule 8 of O.S.Rules r/w Order XXXIX Rule 1 & 2 and Section 151 of CPC, to grant an interim injunction restraining the 5th respondent and their men, agents, servants or any other persons claiming through them or authorised by them from in any manner entering into a contract, transaction or deed or in any manner from dealing, creating encumbering and from parting with the possession of the said property described in Schedule A hereunder owned by the applicant, pending hearing and disposal of the petition to be filed under Section 34 of the Arbitration and Conciliation Act.

Prayer in Arb.Appl.No.776 of 2024: Application filed under XIV Rule 8 of O.S.Rules r/w Order XXXVIII Rule 5 & Section 151 of CPC, to direct the respondents 1 and 2 to furnish security equivalent to the value of the claim filed before the Arbitral Tribunal failing which, this Court may be pleased to direct attachment of the property described in the Schedule B to H hereunder owned by the respondents 1 and 2 worth about Rs.5 crores herein pending disposal of the petition to be filed under Section 34 of the Arbitration and Conciliation Act, in continuation of the earlier order of this Court dated 26.02.2018.

(In both applications)

For Applicant : Mr.S.R.Rajagopal
Senior Counsel
for Mr.R.Sagadevan &
Mr.Aditya Sarangarajan

For Respondents



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For RR1&2 : Mr.K.Viswanathan
Senior Counsel
for Mr.K.Mayurapriyan

For R5 : Mr.Jayesh B.Dolia
Senior Counsel
for M/s.Aiyar and Dolia

For RR3&4 : Ex-parte before the Tribunal

COMMON ORDER

O.A.No.843 of 2024 has been filed seeking an interim injunction restraining the 5th respondent and their men, agents, servants or any other persons claiming through them or authorised by them, from in any manner entering into a contract, transaction or deed or in any manner from dealing, creating encumbering and from parting with possession of the said property described in Schedule A hereunder owned by the applicant, pending hearing and disposal of the petition to be filed under Section 34 of the Arbitration and Conciliation Act.

2.A.No.776 of 2024 has been filed directing respondents 1 and 2 to furnish security equivalent to the value of the claim filed before the Arbitral Tribunal, failing which, this Court may be pleased to direct attachment of



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the property described in the Schedule B to H hereunder owned by the respondents 1 and 2 worth about Rs.5 crores herein pending disposal of the petition to be filed under Section 34 of the Arbitration and Conciliation Act, in continuation of the earlier order of this Court dated 26.02.2018.

3.This Court, by an order dated 30.10.2024, passed an ex-parte order even before notice was ordered to the respondents, granting ad-interim injunction as prayed for and also ordered attachment of property as prayed for. The respondents have entered appearance and arguments are advanced before me in respect of Interlocutory Applications alone.

4.I have heard Mr.S.R.Rajagopal, learned Senior Counsel for Mr.R.Sagadevan and Mr.Aditya Sarangarajan, learned counsel for the applicant in both the applications and Mr.K.Viswanathan, learned Senior Counsel for Mr.K.Mayurapriyan, learned counsel for the respondents 1 and 2 and Mr.Jayesh B.Dolia, learned Senior Counsel for M/s.Aiyar & Dolia, for the 5th respondent.

5.At the outset, Mr.K.Viswanathan, learned Senior Counsel appearing



for the respondents 1 and 2 as well as Mr.Jayesh B.Dolia, learned Senior Counsel appearing for the 5th respondent would submit that both the applications are not maintainable under Section 9 and they ought to be dismissed *in limine*.

6.Mr.S.R.Rajagopal, learned Senior Counsel appearing for the applicant would submit that the primary question that falls for consideration is as to whether the applications under Section 9 are maintainable in the facts and circumstances of the case, where the petitioner has no award in his favour and has challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996. The learned Senior Counsel would submit that the Hon'ble Supreme Court is considering this issue as to whether only a successful party in the arbitration proceedings is entitled to seek interim relief from the Court and not an unsuccessful party, under Section 9 of the Act.

7.Firstly, the learned Senior Counsel for the applicants would take me through the language employed under Section 9. The same is extracted hereunder for easy reference.

“9.Interim measures, etc., by Court.- (1) A party may, before or during arbitral proceedings or at any time



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after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court:-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon and land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the 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.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under Section



17 efficacious.”

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8.He would therefore rely on the said phraseology employed in the said Section and contend that any party can seek interim relief from the Court, invoking Section 9 at three stages, namely before the commencement of the arbitration proceedings; during the arbitration proceedings and after the arbitral award is made, but before enforcement.

9.The learned Senior Counsel for the applicants would also take me through the definition of term 'party' as defined under Section 2(1)(h) which means 'a party to an arbitration agreement'. He would therefore submit that giving a literal interpretation to the definition of 'party' available under Section 2(1)(h), the words 'any party' appearing in Section 9 would certainly enable the person challenging the award also to invoke Section 9 and seek interim relief or interim protection. Further, the learned Senior Counsel would take me through the chronological events that has led to the filing of the present Original Petition.

10.Admittedly, in a Criminal Original Petition before this Court, an



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Arbitrator came to be appointed with the consent of the parties and the parties went before the Tribunal. However, the Tribunal, on its own accord, found that the issues cannot be arbitrated and the parties would have to only resort to regular civil and criminal proceedings to resolve the disputes and consequently dismissed the claim of the petitioner herein. The learned Senior Counsel would therefore submit that it is not a case where the petitioner can be even said to be unsuccessful before the Tribunal as the Tribunal has only relegated the parties to regular legal proceedings, holding that arbitration is not be possible. Further, when the parties themselves accepted for reference of the disputes to arbitration and went before the Arbitrator and when the respondent also did not take any contention that the arbitral proceedings would not be maintainable, the Arbitrator clearly fell in error, in refusing to go into the merits of the issues in arbitration. He would therefore submit that if ultimately the petitioner is going to succeed in the Section 34 petition, then the matter will either be remitted to the Arbitrator for fresh consideration on the merits of the claims and statement of defence or even be relegated to a different Arbitrator for such purpose and therefore the claim of the petitioner is not extinguished as on date. In such view of the matter, according to the learned Senior Counsel for the applicant, the Section



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was not even raised by the respondents, this Court can certainly come to the rescue of the petitioner and protect the interest of the petitioner, pending the Section 34 petition.

12. The learned Senior Counsel for the applicant would further submit that under Section 36 of the Act, the Court is entitled to grant stay of enforcement of the arbitral award pending a Section 34 petition, which implies that an unsuccessful party is also entitled to interim relief. Therefore, applying the same analogy, the learned Senior Counsel would submit that the unsuccessful party cannot be deprived of the benefits of Section 9. The learned Senior Counsel would therefore submit that the power of this Court to grant interim measures under Section 9 should be extended to the petitioner in the present case as well and on the facts of the case, he would submit that the petitioner having a very good chance of succeeding in the Section 34 proceedings and the arbitration proceedings are also likely to be revived in view of the glaring errors committed by the Tribunal, the rights of the petitioner have to be protected pending the Section 34 petition, at least. He would further submit that rightly this Court has granted ex-parte interim orders in both the applications and he would therefore pray for the same



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being made absolute by allowing the applications. He would also place reliance on the following decisions:

1.Lennar Homes of Texas Land and Construction, Ltd. and Lennar Homes of Texas Sales and Marketing, Ltd. in No.21-0783 dated 12th May 2023.

2.O.Mohamed Yusuf Levai Saheb Vs. S.Hanee Mohammed Hussain Rowther (Died) and Others, in A.A.O.A.No.133 of 1958.

3.The National Highways Authority, Trichy Vs. N.M.Ravi and Another in C.M.A(MD).No.432 of 2023 dated 01.08.2024.

4.ONGC Vs. Discovery Enterprises Private Limited and Another ((2022) 8 SCC 42).

5.Gayatri Balasamy Vs. ISG Novasoft Technologies Limited (2024 SCC Online SC 1681).

6.Project Director, NHAI Vs. M.Hakeem and Another ((2021) 9 SCC 1).

13.Per contra, Mr.K.Viswanathan, learned Senior Counsel appearing for the respondents 1 and 2 would submit that admittedly the petitioner challenges the claims disallowed by the Arbitrator and therefore, the petitioner can only be termed as an unsuccessful party. Placing reliance on the following decisions of the Delhi, Bombay and Karnataka High Courts, namely *Nussli Switzerland Limited Vs. Organizing Committee Commonwealth Games*, reported in 2014 SCC Online Del 4834; *Dirk India Private Limited Vs. Maharashtra State Electricity Generation Company Limited*, reported in 2013 SCC Online Bom 481 and *Smt.Padma Mahadev*



and Others Vs. Sierra Constructions Private Limited, reported in *AIR Online*

2021 Kar 248, learned Senior Counsel for the respondents 1 and 2 would submit that an unsuccessful party cannot maintain an application under Section 9.

14. The learned Senior Counsel for the respondents 1 and 2 would take me through the relevant passages in the above three decisions and would persuade me to adopt a similar view taken by the three High Courts holding that an unsuccessful party before the arbitration proceedings is not entitled to invoke Section 9 of the Act.

15. Mr. Jayesh B. Dolia, learned Senior Counsel appearing for the 5th respondent, apart from reiterating the submissions of Mr. K. Viswanathan, learned Senior Counsel, would submit that even on the facts, the cancellation of power was not valid and the sale also came to be challenged very belatedly and in such circumstances, no equity can be exercised or shown in favour of the petitioner. He would also place reliance on the decision of this Court in *A.M.K. Shahul Hameed Vs. D. Sharine and Others* in *A.S.No.409 of 2014* dated 25.02.2022, where this Court referring to the



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decision of this Court in *T.Sivaperumal Vs. S.Viswanathan and Others*, reported in 2014 (1) CTC 447, held that even though the Power of Attorney did not state that it was coupled with interest, when possession was given and original title deeds had also been parted with, then the power would have to be presumed to be one coupled with interest and consequently not revoked.

16.I have carefully considered the submissions advanced by the learned Senior Counsel appearing for the parties. I have also gone through the various decisions on which reliance is placed on by the Senior Counsel on either side.

17.The short but interesting point that arises for consideration in these applications is as to whether the petitioner having not succeeded before the Arbitrator, is whether entitled to seek interim relief under Section 9 of the Act. Section 9 of the Arbitration and Conciliation Act, 1996 has already been extracted hereinabove. No doubt, the language of Section 9 indicates that any party can seek interim measures invoking Section 9, either before the commencement of the arbitration proceedings or during the pendency of



the arbitration proceedings or even after the award being passed, but before its enforcement.

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18. In view of the arguments advanced by the learned Senior Counsel on either side, I now need to examine whether 'a party' appearing in Section 9 would extend to even a person who challenges the award under Section 34 of the Act. The Division Bench of the Bombay High Court has specifically dealt with the maintainability of a petition under Section 9 at the instance of a person challenging the award being unsuccessful before the Tribunal. The Delhi High Court in *Nussli Switzerland Limited's case*, held that a party whose claims are rejected even if it succeeds in the challenge to the award would at best have the award set aside and thereafter, the aggrieved party can only commence proceedings (including arbitration) and consequently held that the Section 9 application filed seeking interim measure post award was not maintainable. The Bombay High Court held that the party which has failed in its claim before the arbitral proceedings and has challenged the award under Section 34 of the Act, cannot maintain the petition under Section 9 as it would result in perversion of the very object and purpose underline Section 9 of the Act.



19. In fact, the Delhi High Court has elaborately discussed the definition of 'a party' under Section 2(1)(h) and the intent of the legislature in employing the word 'party' under Section 9. The Division Bench of the Bombay High Court discussed the scope of Section 9 and ultimately held that it is only a measure as a step to aid to the fruition of the arbitral proceedings. In other words, it is a measure of protection for aiding enforcement of the award when the Section 9 petition is filed post the award.

20. In a later judgment, the Division Bench of the Karnataka High Court, again dealing with this specific issue as to whether an application under Section 9 by an unsuccessful claimant, pending an application under Section 34 of the Act challenging the arbitral award would be entitled to protection under Section 9, held that the object of providing the interim measure after passing of the award was only to secure the property for the benefit of the party seeking enforcement and cannot be taken advantage of by an unsuccessful party before the arbitration proceedings.

21. The learned Senior Counsel for the applicant would attempt to differentiate the above three decisions of Delhi, Bombay and Karnataka



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High Courts on the merits of the fact situation arising under different circumstances and that therefore the same cannot be applied to the facts of the present case. The learned Senior Counsel for the applicant would also contend that since the issue as to whether the power of the Court to provide interim measure invoking Section 9 to an unsuccessful party is pending final decision before the Hon'ble Supreme Court in *Home Care Retails Marts Private Limited Vs. Haresh N.Sanghavi*, reported in 2016 SCC Online Bom 5027, he would submit that there is no legal embargo or impediment by way of stay granted by the Hon'ble Supreme Court to the effect that an unsuccessful party cannot maintain an application for interim relief, pending the Section 34 petition under Section 9 of the Act.

22. Even with regard to power of modification, the learned Senior Counsel would submit that the issue is now being taken up by the Larger Bench to decide whether the Section 34 Court has power to modify the award. He would further submit that there has been several instances where the Hon'ble Supreme Court as well as this Court had modified and altered the awards and therefore, it cannot be put against the petitioner at the stage of deciding the Interlocutory Applications.



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23.I am only hearing the Section 9 petitions and deciding as to whether they are maintainable and whether the petitioner is entitled to interim relief sought for or rather continuance of the interim orders already granted at the time of moving the applications. Therefore, I am not presently going into the merits of the challenge under Section 34 of the Act as I am not deciding the Section 34 petition now.

24.It is only the applications that have been argued before me, though the learned Senior Counsel for the applicant has touched upon various aspects of the merits of the challenge to the award in support of his contentions in the Section 9 applications. Firstly, I find that even though the decisions of the Delhi, Bombay and Karnataka High Courts, may have been rendered in different fact situations and circumstances, all the Courts, in fact, the three respective Division Benches of this Court have specifically addressed the very same issue of whether an unsuccessful party can maintain an application under Section 9.

25.I have already extracted the definition of party under Section



2(1)(h) and also Section 9 in its entirety. No doubt, Section 9 opens with 'a party may'. However, the reference to 'a party' shall have to be applied in the context of the three scenarios under which the application under Section 9 can be maintained seeking interim measures from this Court. The first and second scenarios, namely filing of a Section 9 petition related to before the arbitral proceedings or pending the arbitral proceedings and cannot be applied to the facts of the present case.

26. Admittedly, it is post award that the present Section 9 applications have been filed by the unsuccessful claimant who has challenged the award under Section 34 of the Act. There is no difficulty that the party being defined under Section 2(1)(h) to be a party to even an arbitration agreement, the petitioner also qualifies to be a party under Section 9 of the Act. However, it is to be carefully seen as to whether a party can apply across the three scenarios contemplated under Section 9 or it has to be read according to the particular stage at which the Section 9 petition is made. Section 9(c) provides for appointment of a guardian for a minor and a person on unsound mind for the purposes of arbitral proceedings. This provision can be invoked by either of the parties to the arbitration proceedings, needless to state that it



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may be pressed into service before the commencement of the arbitration proceedings. Section 9(2) provides various instances of interim measures or protection in respect of five different circumstances. Section 9(2)(a) contemplates for interim measure or protection for preservation, interim custody or sale of goods which are subject matter of the arbitration agreement. Section 9(2)(b) provides for securing the amount in dispute in the arbitration. Section 9(2)(c) provides for detention, preservation or inspection of any property which is subject matter in arbitration. Section 9(2)(d) is to provide an interim injunction or appointment of a Receiver and Section 9(2)(e) contemplates such other interim measures of protection as that may appear to this Court to be just and convenient.

27.No doubt, as rightly pointed out by the learned Senior Counsel for the applicant, under Section 36 of the Act, an arbitral award can be enforced in the same manner as if it is for a decree of the Court and this Court has the power to grant stay of enforcement of the award as well. However, the said analogy cannot be applied in the scenario of invoking Section 9(2) by an unsuccessful claimant who has suffered before the Tribunal. Though the argument of the learned Senior Counsel for the applicant that in strict sense



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the petitioner cannot be said to be an unsuccessful party because the Arbitrator has not tested and decided the claim on merits, appears to be very attractive on the face of the submission, ultimately it cannot be denied that the arbitration proceedings have ended against the petitioner, necessitating the filing of the Section 34 petition. Therefore, despite the fact that the claims have not been tested and decided on merits or there being no adjudication on the merits of the case of the petitioner, still with the arbitration proceedings being dismissed the petitioner being the claimant can only be categorized under the head 'unsuccessful party'.

28. The scheme of Section 9 providing for interim protection clearly postulates certain measures being granted to preserve or secure the subject matter of the arbitration agreement or the dispute in arbitration. In other words, they are intended to only ensure that the subject matter of the dispute is not lost but preserved before or during the arbitral proceedings. It is in this context that 'a party' has to be viewed and interpreted. However, when it comes to a post award scenario, Section 9 can be invoked before the enforcement of the award only as a measure of safeguarding the subject matter of the proceedings till the enforcement of the award.



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29. Admittedly, the petitioner's claim has been rejected by the Arbitrator and therefore an option is not available for the petitioner to enforce the said award by resorting to Section 36 of the Act. The letter and spirit of Section 9 providing for interim measure insofar as post award is concerned, can only mean to secure the property or subject matter for the benefit of the successful party before the Arbitrator who has approached the Court for enforcement of the award in his favour.

30. In fact, the Division Bench of the Delhi High Court has dissected the language of Section 9 and held that the textual setting in which the word but 'finds itself in Section 9' can be given an interpretation that it is not used as a noun or as an adverb and went on to hold that it should be rightly read as a conjunction or a proposition. Thus, it indicates that a literal reading of Section 2(1)(h) defining a party to mean a party to the arbitration agreement cannot be incorporated into Section 9, that too in an application presented before this Court post award, that too by a person challenging the award and having been unsuccessful before the Tribunal. The Division Bench of the Karnataka High Court has also taken a similar view.



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31. In view of the above discussions made herein above, I am also inclined to respectfully follow the well reasoned views of the three decisions of the Division Benches of the three High Courts, namely Delhi, Bombay and Karnataka High Courts. I find no justifiable reasons to take any different view and hold that an application by an unsuccessful party, post award in a pending Section 34 petition can be maintained under Section 9 of the Act. The argument of the learned Senior Counsel Mr.S.R.Rajagopal also do not persuade me to take any different view.

32. Further, even with regard to the issue of whether an unsuccessful party can move an application under Section 9, the issue is large before the Hon'ble Supreme Court equally, the power of modification of the award is also being addressed by a Larger Bench of the Hon'ble Supreme Court. As on date, the law laid down by the Hon'ble Supreme Court in *National Highways Authority of India Vs. M.Hakeem and Another's case*, prevails and is binding on this Court. Even otherwise, having held that the applications at the instance of the petitioner who is challenging the award passed only because he has been unsuccessful before the Arbitrator, certainly cannot be



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maintained, I do not see any requirement to go into the merits of the averments in the said applications as to the entitlement of the applicant to interim reliefs/measures of protection.

33.In fine, O.A.No.843 of 2024 and Arb.Appln.No.776 of 2024 are dismissed as not maintainable.

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Internet : Yes / No

P.B.BALAJI, J.,
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