

Case No. 64

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**Civil Appellate Nos. 141-143 of 1999**

[Arising out of SLP @ Nos.11643-11645/98]

M/s Sundaram Finance Ltd.

Appellant

Vs

M/s NEPC India Ltd.

Respondent

**Application under section 9 of arbitration act for interim relief - whether can be filed even before commencement of arbitral proceedings and appointment of arbitrator - Held -Yes.**

**JUDGMENT**

**KIRPAL J.**

Leave granted.

An important question which for consideration in the cases is whether under Section 9 of The Arbitration and Conciliation Act, 1996 ['hereinafter referred to as the 1996 Act'] the Court has jurisdiction to pass interim orders even before arbitral proceedings commence and before arbitrator is appointed.

The relevant facts which are necessary for the consideration of the point in issue are that the respondent had entered into a hire-purchase agreement with the appellant herein in respect of supply of two wind turbine generators along with all accessories. The terms of the agreement contemplated payment being made in instalments by the respondent the first instalment was payable on 29<sup>th</sup> September, 1995 and the last was due by 25<sup>th</sup> August, 1998. In all the payment was to be made by 36 instalments.

According to the appellant the respondent paid the first fifteen instalments and thereafter committed default and payment was not made in spite of several demands being made by the appellant. The hirepurchase agreement contained an arbitration clause which reads as follows:

"All disputes, differences and/or claims, arising out of this hire purchase agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provision of Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of an arbitrator nominated by the Managing Director of the owner. The award given by such an arbitrator shall be final and binding on all the parties to this agreement.

It is a term of this agreement that in the event of such an arbitrator to whom the matter has been originally referred doing or being unable to act for any reason, the Managing director of the owner at the time of such death of the arbitrator or his inability to act as arbitrator shall appoint another person to sit as arbitrator. Such apperson shall be entitled to proceed with the reference from the stage at which it was left by his predecessor."

When the appellant came to know that other litigation was pending against the respondent it filed an application under Section 9 of the 1996 Act before the City Trial Court, Chennai praying for the appointment of an Advocate Commissioner to take custody of the hire-purchase machinery/equipment and restore the same to the interim custody of the appellant herein. This application was taken up for hearing on 7<sup>th</sup> April, 1998 and the Trial Court passed an interim order appointing a Commissioner to take possession of the turbines with the help of the police.

The aforesaid order of the Trial Court was challenged with the respondent filing a petition under Article 227 of the Constitution before the High Court at Madras. One of the main contentions urged on behalf of the respondent was that as no arbitrator proceeding were pending and even the arbitrator had not been appointed and application under Section 9 of the 1996 Act for getting interim relief alone was not maintainable. On merits it was contended that the ex parte order which was passed by the Trial Court the appellant herein had submitted before the High Court that interim orders could be passed the commencement of the arbitral proceedings.

By its judgment dated 22<sup>th</sup> June, 1998, the High Court allowed the respondents petition. In its judgment after referring to the provisions of Section 41 of the Arbitration Act 1940 and relevant provisions of the 1996 Act, the High Court observed as follows:

"section schedule to the 1940 Act is the powers of the Court and item No.4 is "interim injunction or the appointment of a receiver". Therefore there is no virtual

difference between Section 41 read with Schedule 2 and present Section 9 of the Arbitration Act. Moreover if an interpretation such as the one contended by the Learned Counsel for the appellant is to be given to Section 9 the very object of the Act would be defeated. Any party who has an agreement for arbitration with another can rush to civil Court and straight away get an order under Section 9 and thereafter keep quiet without referring the matter to Arbitration. That will have a very serious consequence on the provisions of the Act. It could not have been the intention of the legislature in enacting the present Arbitration Act. Further the very fact that Section 9 comes after Section 8 which deals with the reference of disputes to Arbitration the only interpretation that could be given to Section 9 is that it could be availed of when an arbitration proceeding is pending before the Arbitral Tribunal or is at the reference stage before the Court or after the Arbitral award has been made."

While coming to the conclusion that the application under Section 9 of the 1996 Act before the Trial Court was misconceived as no effort had at the time of filing of such an application being made by the appellant to have an arbitrator appointed the High Court chose not to consider the merits of the Trial Court's order as in its opinion the Trial Court had no jurisdiction to entertain such an application. Hence these appeals by special leave.

Under the provisions of the Arbitration Act, 1940 the powers of the Court to pass interim orders were derived from Section 41(b) read with 2<sup>nd</sup> Schedule to the Arbitration Act, 1940. Mr. Gopal Subramaniam learned senior counsel appearing for the respondent placed reliance on *Sant Ram & Co. Vs. State of Rajasthan and Other* [(1997) 1 SCC147] wherein at page 150 it was observed that "The initiation of pendency of any proceedings in the Court in relation to the exercise of the power by the Civil Court under the Second of the Act. Even if this be the position under the 1940 Act we still have to examine whether there has been any change in the law with the promulgation of The Arbitration and Conciliation Act, 1996.

Prior to the promulgation of the 1996 Act the law on arbitration in India was substantially contained in three enactments namely. The Arbitration Act, 1940 the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. In the Statement of Objects and Reasons to the Bill it was stated that the 1940 Act, Which contained the general law of arbitration had become outdated. The said objects and reasons noticed that the United Nations Commission on International Trade Law [UNCITRAL] adopted in 1985 the Model Law on International Commercial Arbitration. The General Assembly had recommended

that all countries give due consideration to the said Model Law which along with the rules was stated to have harmonised concepts on arbitration and conciliation of different legal systems of the world and thus contained provisions which were designed for universal application. The above said Statement of Objects and Reasons in para 3 states that " Though the said UNCITRAL Model Law and Rules are intended to deal with international commercial arbitration and conciliation, they could with appropriate modifications serve as model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to foreign arbitration international commercial arbitration enforcement of foreign arbitration awards and to define the law relating to conciliation taking into account the said UNCITRAL Model Law and Rules."

The 1996 Act is very different from the Arbitration Act, 1940. The provision so this Act have therefore to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to misconstruction. In other words the provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.

Some of the provisions of the 1996 Act which are relevant in the present case are Section 2(d), 9, 17 and Section 21. Section 2 (d) defines an Arbitral Tribunal to mean a sole arbitration or a panel of arbitration. Section 9 of the 1996 Act, which gives power to the Court to pass interim orders and with the interpretation of which we are concerned in the present case reads thus:

"9. Interim measures by Court-A party may before or during arbitral proceeding or at any time 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 any arise therein and authorising for any of the aforesaid purposes may persons any person to enter upon any land or building in the possession of any party of authorizing 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 imrelation to any proceedings before it."

As this section refers to "Arbitral Tribunal" the same has to be read along with section 21 which relates to the commencement of the arbitral proceedings and reads as follows;

"21. Commencement of arbitral proceedings - Unless otherwise agreed by the parties the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

The Arbitral Tribunal has also been given jurisdiction to pass interim orders by Section17 of the said Act which reads as follows:

"17. Interim measures ordered by arbitral tribunal -

(1) Unless otherwise agreed by the parties the arbitral tribunal may at the request of a party order a party to take any interim measure of protection as the arbitral may consider necessary in respect of the subject-matter of the dispute

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section(1)."

The reading of section 121 clearly shows that the arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent. It is in this context that we have to examine and interpret the

expression “ before of during arbitral proceedings” occurring in Section 9 of the 1996 Act. We may here observe that though Section 17 gives the arbitral tribunal the power to pass orders the same cannot be enforced as orders of a Court. It is for this reason that Section 9 admittedly gives the Court power to pass interim orders during the arbitration proceedings.

The position under the Arbitration Act, 1940 was that a party could commence proceedings in Court by moving an application under Section 20 for appointment of an arbitrator and simultaneously it could move an application for interim relief under the Second Schedule read with Section 41(b) of the 1940 Act. The 1996 Act does not contain a provision similar to Section 20 of the 1940 Act. Nor is Section 17 similar to Section 41(c) and the Second Schedule to the 1940 Act. Section 8 of the new Act is not in pari material with Section 20 of the 1940 Act. It is only if in an action which is pending before the Court that a party applies that the matter is the subject of an arbitration agreement does the Court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party applying to a Court for appointing an arbitrator when no matter is pending before the Court. Under the 1996 Act appointment of arbitrator/s is made as per the provision of section 11 which thus does not require the court to pass a judicial order appointing arbitrator/s. The High Court was therefore wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act.

Under the 1996 Act the Court can pass interim order Section-9. Arbitral proceedings as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are “*before or during the arbitral proceeding*”. This clearly contemplates two stages when the Court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word “before” occurring in the said section. The only interpretation that can be given is that the Court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation like the one given by the High Court will have the effect of rendering the word “before” in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision no party would have a right to apply for interim measure before notice under Section 21 is received by the respondent. It was therefore necessary that provision was made in the Act which could enable a party to get interim relief ur-

gently in order to protect its interest. Reading the section as a whole it appears to us that the Court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceeding in accordance with Section 36 of the Act.

Section 9 of the said Act corresponds to Article 9 of the UNCITRAL Model Law which is as follows:

“It is not incompatible with an arbitration agreement for a party to request before or during arbitral proceeding from a Court an interim measure of protection and for a Court to grant such measure.”

This article recognizes just like Section 9 of the 1996 Act a request being made before a Court for an interim measure of protection before arbitral proceedings. It is possible that in some countries if a party went to the Court seeking interim measure of protection that might be construed under the local law as meaning that the said party had waived its right to take recourse to arbitration. Article 9 of the UNCITRAL Model Law seeks to clarify that merely because a party to an arbitration agreement requests the Court for an interim measure “before or during arbitral proceedings” such recourse would not be regarded as being incompatible with an arbitration agreement. To put it differently the arbitration can commence and continue notwithstanding a party to the arbitration agreement having approached the Court for an order interim protection. The language of Section 9 of the 1996 Act is not identical to Article 9 of the UNCITRAL Model Law but the expression “before or during arbitral proceedings” used in Section 9 of the 1996 Act seems to have been inserted with a view to give it the same meaning as those words have in Article 9 of the UNCITRAL Model Law. It is clear therefore that a party to an arbitration agreement can approach the Court for interim relief not only during the arbitral proceedings but even before the arbitral proceedings. To that extent Section 9 of the 1996 Act is similar to Article 9 of the UNCITRAL Model Law.

It will also be useful to refer to a somewhat similar provision in the Arbitration Act, 1996 of England. Section 44 of this Act gives the Court powers which are exercisable in support of the arbitral proceedings. Sub-section (3) of Section 44 Permits in the case of urgency, the Court to make an order contemplated by sub-section (2) even on an application by a “proposed party to the arbitral proceeding”. The expression used in this sub-section “party or proposed party to the arbitral proceedings” shows that where arbitral proceedings have commenced then the appli-

cation will obviously be of a party to the said proceedings but where the arbitral proceedings have not commenced a "proposed party" has been given the right to approach the Court. A proposed party to the arbitral proceedings would therefore be one who is party to an arbitration proceedings agreement and where disputes have arisen but the arbitral proceedings have not commenced. When referring to Section 44 of the English Act in dealing with the question of grant of interim injunctions in support of arbitral proceedings Russell on Arbitration 21<sup>st</sup> Edition] at page 386 has stated as under:

"The Court may exercise its power to grant an interim injunction before there has been any request for arbitration or the appointment of arbitrators provided that the applicant intends to refer the dispute to arbitration in due course.

The power to grant an interim injunction under Section 44 of the Act extends of the granting of a Mareva injunction in appropriate cases. It may also include granting an interim mandatory injunction although the Court will be shown to grant an injunction which provides a remedy of essentially the same kind as is ultimately being sought from the arbitral tribunal.

In our opinion this view correctly represents the position in law. Namely that even before the commencement of arbitral proceedings the Court can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.

Our attention was also drawn to the case of *The Channel Tunnel Group Ltd. and France Manche S.A. Vs. Balfour Beatty Construction Ltd. and Others* [1992 (2) Lloyd's Law Reports dealing with the question of the jurisdiction of the England Court to grant an interim injunction in a case where the parties have agreed that the disputes shall be settled by arbitration Act, 1950 which provided as follows:

"The High Court shall have for the purpose of and in relation to a reference the same power of making orders in respect of - (h) interim injunctions or the appointment of a receiver as it has for the purpose of and in relation to an action or matter in the High Court....

Construing this Stoughton LJ observed as under:

"In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitration provided that the applicant intends to



take the dispute to arbitration in due course. Whatever the meaning of “reference” to s.J.2 (6)(h) (and it is not always easy to determine the precise meaning of the word in arbitration statutes) I would hold that the power of the Court in such in such a case would be exercised for the purpose of and in relation to a reference.”

We are in respectful agreement with the aforesaid observations which are in conformity with the view which we have taken in construing Section 9 of the 1996 Act.

It was submitted by Mr.Subramaniam that even if the Court can exercise jurisdiction under Section 9 before the arbitral proceedings have commenced the party seeking to invoke Section 9 must express a manifest intention to arbitrate. The learned counsel submitted that this intention can take the following forms: [a] In an application under section 9 the party would have to state that it unequivocally relies on the arbitration clause; [b] At the time when the Court passes an interim order Section 9 an express undertaking is given by the party before the Court that it would invoke the arbitration clause forthwith and with in a fixed period; and [c] a notice invoking arbitration clause should have been issued to the opposite party. It was contended that mere filing of an application under Section 9 was not sufficient to establish manifest intention to this extent.

When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is therefore right in submitting 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 if at the time when the application under Section 9 is filed the proceedings have not commenced under Section 21 of the 1996 Act. In order to give full effect to the words “*before or during arbitral Proceedings*” occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may in a given case be sufficient to establish the manners manures to have the dispute referred to but a situation may so demand that a party may choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there exists valid arbitration agreement and

the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings the Court while exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent however is that the Court is not debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.

There is another aspect which calls for our attention. Section 82 of the 1996 Act gives the High Court power to make rules consistent with the Act. We were informed that all the High Court have not so far made rules. Whereas the Section 84 gives the Central Government power to make rules to carry out the provision of the Act the High Court should also wherever necessary make rules. It would be helpful if such rules deal with the procedure to be followed by the Courts while exercising jurisdiction under Section 9 of the Act. The rules may provide for the manner in which has application should be filed the documents which should accompanist the same and the manner in which such applications will be dealt with by the Court. The High Court are therefore requested to there appropriate rules as expedition as possible so as to facilitate quick and disfactory of arbitration cases.

In view of the aforesaid discussions is follows that the High Court erred in coming to the conclusion that Trial Court had no jurisdiction in entertaining the application under Section 9 because arbitration proceeding had not been initiated by the appellant.

We accordingly set aside the judgment of the High Court but as the High Court has not considered the merits of the case, it is directed that the petition filed by the respondent challenging the order of the Trial Court be decided on merits. The appeals are disposed of accordingly. There will be no order as to costs.