IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT BHUBANESWAR.

Present :

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 3rd Sept.'14.

Arb. (P) No. 143 of 2014.

(Under Section 9 of the Arbitration and Conciliation Act, 1996)

M/s. NEM Engineering Projects Pvt. Ltd., represented through its Managing Director, Mr. M. Murugan, Office At - 39-A, 1st Floor, In front of BDA Park, BJB Nagar, Bhubaneswar,Odisha.

... **Petitioner.**

-V e r s u s-

M/s. Brahmani River Pellets Ltd., represented through its Managing Director Mr. Dharma Rao Namaballa, Brahmani River Pellets Ltd., 5th and 6th Floor, IPICOL Annex Building, IPICOL House, Janpath, Bhubaneswar - 751 022, Odisha.

... **Opp. Party.**

Counsel :

For petitioner -- Shri G. Padhi & Associates.
For opposite party -- Shri G. Rath & Associates.

Date of conclusion of argument : 12.08.2014.

Date of judgment : 03.09.2014.

J U D G M E N T

This is an application under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") to restrain the opposite party from transferring the shares of the company, selling or disposing of the pellet plant or creating any third party interest in respect of the said pellet plant, until the matter is adjudicated between the parties by way of arbitration and further to preserve and protect the pellet plant by attaching the same till final adjudication between the parties by way of arbitration.

FACTS :

2. The factual matrix leading to the case of the petitioner is that the petitioner is a registered Private Limited Company having its registered office at Visakhapatnam and at Bhubaneswar. The opposite party is the registered Private Limited Company duly registered under the Companies Act and they are key ventures of one of the British firm, namely, Stemcor. Said Stemcor has invested money in three key ventures, namely, Aryan Mining and Trading Corporation, Brahmani River Pellets Limited and Mideast Integrated Steel Limited. The present opposite party, namely, Brahmani River

Pellets Limited ("BRPL", for short) has got the pellet plant at Jajpur and this is their only property. It is alleged, inter alia, that on 03.10.2007, the petitioner was awarded work order by the opposite party for fabrication and erection contract for pellet plants at Jajpur and Barbil at a value of Rs.32.56 crores with a completion period of eighteen months w.e.f. 03.11.2007. The effective date of start was amended to 01.01.2008, specifying that the retention money shall be refunded to the petitioner on successful completion of defect liability period of six months. There was further amendment on 04.09.2008 by restricting the scope of work to the pellet plant at Jajpur road and award value was restricted to Rs.21.22 crores with extension of the contract upto 31.03.2010. Again, by third amendment on 08.06.2010, the value of the contract was revised by adding Rs.2.46 crores and extending the completion of date of the contract to 30.06.2010. Again on 22.06.2011, there was amendment to the contract due to addition of items of sand blasting and painting and roof sheeting works with the revised value of the contract at Rs.26.21 crores. The date of completion of the work was extended to 30.06.2011. So, the aforesaid work order dated 03.10.2007 along with these amendments to the work order were completed and defect liability period was successfully completed on 30.06.2012.

After completion of the work, the petitioner handed over the pellet plant along with some miscellaneous contract with regard to piping work at pellet plant and erection work of ESP at pellet to BRPL. After the defect liability period was over on 30.06.2012, the petitioner requested BRPL in writing for release of their outstanding payment of Rs.50,840,184/- on account of retention money, pending miscellaneous bills, extra items, and other pending payments as per their contract. Since the amount was not paid, the interest was accrued and the total money became Rs.6,95,37,330/-. There were several meeting for settlement of accounts between the petitioner and the opposite party office bearers. Only Rs.50,00,000/- against the retention amount was released on 31.01.2014. But, the balance outstanding dues of Rs.6,25,37,330/- remained outstanding. The interest accrued @ 14% per annum for default period of January, 2012 to March, 2014. It is further alleged that the petitioner-Company (in short, "NEM") is under tremendous pressure due to financial constraint arising out of non-payment of outstanding dues by the opposite party. In spite of best efforts by the petitioner, when the outstanding dues were not paid, the petitioner issued a notice to the opposite party for adjudication of the matter by way of arbitration as per Cl.9.10 of their contract. It is further

averred that the opposite party has no property either in Orissa or in any plant in India, except the pellet plant, and it was learnt that they were going to dispose of the pellet plant and transfer the shares with an ulterior motive to deprive the petitioner of their legitimate dues. Hence, the petitioner has filed the present petition to restrain the opposite party from transferring the shares or disposing of the pellet plant as an interim measure under section 9 of the Act and also to preserve and protect by attaching the pellet plant till final adjudication by arbitration. Hence the petition.

3. The opposite party has filed counter affidavit through its General Manager admitting about the work order given to the petitioner and from time to time amendment thereof. It is the case of the opposite party that they have paid all the sums due and payable as per the terms of the contract during various stages of execution of the work. But, in July, 2012, the petitioner informed about further sum of Rs.5,08,40,184/- outstanding against the opposite party. But, the opposite party was shocked to see such inflated amount. According to the opposite party, the claim of the petitioner comprised of certain sums, which are highly inflated and various other amounts which have never been agreed upon between the parties. After discussion with the petitioner, again

the opposite party sent a revised details of the alleged amount from Rs.508.402 lacs to Rs.373.76 lacs and due to such surprise demonstration, the opposite party is not liable to pay any amount. It is the further case of the opposite party that the petitioner had engaged sub-contractors without settling the dues of the workmen for which one of the claimants preferred a writ vide W.P.(C) No.12129 of 2009 before the Hon'ble High Court of Orissa. The opposite party has not paid the retention money to the petitioner, awaiting the result of the writ petition filed by the sub-contractor of the petitioner. The opposite party has also challenged the notice for arbitration. It is further averred by the opposite party that the arbitration clause present in the contract is not the real arbitration clause, as this is a money claim made by the opposite party. So, the petitioner has no prima facie case in his favour to invoke section 9 of the Act. Further, balance of convenience lies in favour of the opposite party because in the event injunction order is issued, the opposite party would be more sufferer. So, there is no balance of convenience in favour of the petitioner, since the money claimed cannot be irreparable injury to the petitioner. On the other hand, the petitioner has not made out any case for an interim injunction under section 9 of the Act. It is further averred in the counter

affidavit that granting of interim relief of injunction, as prayed for, will amount to granting of final relief, for which the interim relief cannot be granted. Apart from this, the claim of the petitioner is delayed one, which cannot be granted. The opposite party has further averred that the petitioner's letter dated April 5, 2014 shows that the pellet plant at Jajpur is the only property of the opposite party. Since the pellet plant is located outside the jurisdiction of this Court, the relief claimed by the petitioner cannot be granted, as the subject matter is outside the jurisdiction of this Court. The opposite party has denied about selling of any shares or plant and the allegation of the petitioner is frivolous and imaginary. Since the agreement between the petitioner and the opposite party is contractual in nature, the transfer of the pellet plant or shares of the share-holders cannot be granted in this case. Hence, it is prayed to dismiss the petition.

CONTENTIONS :

4. Learned counsel appearing for the petitioner submitted that there is contract between the petitioner and the opposite party by virtue of the work order issued by the opposite party. According to Cls.9.10 of that contract, there is arbitration clause. Not only this, but also every amendment made to the contract refer to the original clause of arbitration.

Section 9 of the Act can be pressed into service before arbitral proceeding, since the opposite party has not cleared the outstanding dues, the petitioner has already issued notice and, at the same time, has moved the Hon'ble High Court in Arbitration Case vide No. ARBP 14 of 2014 under section 11(6) of the Act for the appointment of Arbitrator. Learned counsel for the petitioner further submitted that the opposite party is the key venture of one of the British firms, namely, Stencor and they will, at any time, foreclose the Company by transferring the plant and shares to the share-holders. Since the petitioner is entitled to get their contractual dues and the legal right emanates from the contractual obligation, there is a prima facie case in their favour to invoke the power under section 9 of the Act. Since the opposite party has not settled the account of the petitioner as per their contractual agreement and is about to dispose of the plant and transfer their shares, the balance of convenience lies in favour of the petitioner. He further argued that under section 9 of the Act, there can be attachment of the plant under Order 38, Rule 5 of the C.P.C. Apart from this, it is submitted by learned counsel for the petitioner that if the pellet plant is disposed of and shares are sold away, there is nothing remained to clear the dues and, as such, there will be irretrievable injury or loss to

the petitioner. At the same time, he cited decisions reported in **AIR 2007 SC 2563** ***(Adhunik Steels Ltd.*** Vs. ***Orissa Manganese and Minerals Pvt. Ltd.)*** and **AIR 2007 SC 2144** ***(M/s. Arvind Constructions Co. Pvt. Ltd.*** Vs. ***M/s. Kalinga Mining Corporation & Ors.)*** to explain that the power under section 9 of the Act is well recognized basing on the principles of interim injunction, as required under Order 39, Rules 1 & 2 of the C.P.C. He also cited decision of our Hon'ble High Court in the case of ***GRID Corporation of Orissa Limited*** Vs. ***The AES Corporation & others*** **[2005 (Supp.) OLR - 500]**, where the shares can be taken as property and they can also be restrained from alienation under section 9 of the Act. Also citing the decision reported in **AIR 2004 SC 143*3 (Firm Ashok Traders and another etc.*** Vs. ***Gurumukh Das Saluja and others, etc.)***, he submitted that the commencement of arbitral proceeding cannot be dependent on the interim relief being allowed or denied under section 9 of the Act or vise versa. He further submitted that in the decision reported in **AIR 1999 SC 565** ***(M/s. Sundaram Finance Ltd.*** Vs. ***M/s. NEPC India Ltd.),*** Their Lordships have been pleased to observe that interim orders under section 9 of the Act can be passed before commencement of arbitral proceeding. He ambitiously submitted that the petition should be allowed and the opposite

party should be restrained from alienating the pellet plant and shares of the share-holders till commencement of arbitral proceeding.

5. Learned counsel appearing for the opposite party submitted that the petition under section 9 of the Act is not maintainable because it is a monetary claim with no right or interest in the goods of the opposite party. Apart from this, learned counsel also submitted that there is no arbitration clause in the contract, for which the question of application under section 9 of the Act does not arise. He further submitted that the work order dated 03.10.2007 being not stamped as per the Stamp Act cannot be accepted as a valid document and Cl.9.10 in that work order about arbitration is equally not to be pressed and binding on the parties. He relied on the decisions reported in **(2011) 14 SCC 66** ***(SMS Tea Estates Private Limited*** Vs. ***Chandmari Tea Company Private Limited)***. Even if the work order is acceptable, yet the said Cl.9.10 cannot be said to be binding in view of the decision reported in **AIR 1999 SC 565** ***(M/s. Sundaram Finance Ltd.*** Vs. ***M/s. NEPC India Ltd.)***. Learned counsel for the opposite party further submitted that mere word "arbitration" cannot be construed as arbitration clause. He further submitted that under section 14 of the Specific Relief Act, 1963, contracts for

non-performance of which compensation is an adequate relief cannot be specifically enforced. According to him, the petitioner has no prima facie case, as the claim is disputed by the opposite party. The balance of convenience lies in favour of the opposite party since interim injunction, if granted, will affect the restructuring process of the whole Stemcor Group under whose the present opposite party is coming. Further, he stated that there will be no irreparable injury if interim injunction is not granted. On the other hand, in the event of injunction being granted, there will be irreparable injury to the opposite party. In support of his submission, he cited the decision of the Hon'ble Apex Court reported in **AIR 2007 SC 2563** ***(Adhunik Steels Ltd.*** Vs. ***Orissa Manganese and Minerals Pvt. Ltd.).*** He also cited the decision of the Hon'ble Delhi High Court in the case of ***Modi Rubber Ltd.*** Vs. ***Guardian International Corp.*** **[2007(2) ARBLR 133 (Delhi)]** to show that protection under section 9 of the Act can be granted if prima facie case, balance of convenience and irreparable injury are made out by the petitioner. Learned counsel for the opposite party also submitted that after expiry of two years, the petitioner has filed this petition and thus the equity relief of injunction has to be defeated for the reason that the delay defeats equity. According to him, the present interim

injunction cannot be granted, as it will dispose of the final relief, which is not permissible under law. The share-holders being not added as a party, this case is also bad for non-joinder of necessary parties. Finally, he submitted to reject the petition.

DISCUSSIONS :

6. Basing on the pleadings and contentions of both parties, the following points emerge for discussion :

(i) Whether there is valid arbitration clause in the contract between the parties ?

(ii) Whether there is prima facie case in favour of the petitioner ?

(iii) Whether there is balance of convenience in favour of the petitioner ?

(iv) Whether there is irreparable injury to the petitioner in the event of refusal of interim measure of protection ?

(v) Whether the petitioner can be granted the relief, as prayed for under section 9 of the Act.

Point No.(i) :

7. On going through the pleadings accompanied by affidavits filed by both parties and the documents filed by the petitioner, it reveals that there was work order issued on 03.10.2007 by the opposite party in favour of the petitioner. The copy of the said work order shows that with reference to quotation dated 24.09.2007 of the petitioner and after various

discussions held at Bhubaneswar, the opposite party awarded the contract in favour of the petitioner under different terms and conditions. There are altogether nine clauses. In fact, the work order issued by the Sr. Project Manager and Project Director of the opposite party-Company has been accepted by the petitioner-Company. According to section 2(e) of the Indian Contract Act, 1872, every promise and every set of promises, forming the consideration for each other, is an agreement. Section 2(h) of the said Act also defines that an agreement enforceable by law is a contract. In the present case, when after discussion, proposal containing the terms and conditions of the contract is given to the petitioner and the same has been accepted by them, notwithstanding having nomenclature of the same as work order, the same has become a contract between the petitioner and the opposite party. The character of the work order has been converted to a contract between the petitioner and the opposite party. Learned counsel for the opposite party submitted that such work order requires a compulsory registration and hence, according to section 35 of the Stamp Act, it should be stamped. When it is a contract between the petitioner and the opposite party, it does not require any compulsory registration under the Registration Act. Since it is not coming under compulsory

registration, the contents of the contract are said to be binding on the respective parties.

8. On going through the said contract, it appears that there is a clause i.e. Cl.9.10, which speaks as follows :

"ARBITRATION : Any claim, dispute or controversy arising out of in relative to this CONTRACT, the activities performed hereunder, or the breach hereof, which within a period of 30 days time from receipt of first notice of the existence of such claim, dispute or controversy cannot be satisfactorily settled by mutual understating between the parties, shall, whether or not both parties agree that such claim, dispute or controversy exists, be finally settled by arbitration at the request of either of the parties hereto".

Not only this, but also, special terms and conditions of the contract, as available at page-30 of the petition, show that there is another clause i.e. Cl.24, which reads as under :

"ARBITRATION : In the event of any dispute arising during course of execution of the Contract, the same shall be resolved as per the provisions of Indian Arbitration & Conciliation Act, 1996 and amendments thereto. The place of arbitration shall be Bhubaneswar and the language of the arbitration shall be English. The remuneration of the arbitrators shall be borne equally by the parties to the agreement".

9. After going through both the clauses of the contract, it appears that any dispute, claim or controversy in

relation to the contract shall be settled finally by arbitration on the request of either of the parties. The submission of learned counsel for the opposite party is that in view of the disputes and the decision in the case of ***M/s. Sundaram Finance Ltd.*** Vs. ***M/s. NEPC India Ltd.***(supra), the work order cannot be said to have contained such arbitration clause in true sense. I have already explained this arbitration clause in the contract and special contract, which amounts to arbitration under the Act, for which the facts and circumstances of the aforesaid decision do not have relevancy in the present context. On the other hand, I am of the view that the work order dated 03.10.2007 is a contract between the parties and also it is supplemented by another special contract agreement and they have got arbitration clause for settlement of the claims and disputes arising between the parties. So, the arbitration clause, as revealed from the documents of the parties, is binding upon both parties. This point is answered accordingly.

Point No.(ii) :

10. It is admitted fact of both parties that the petitioner was awarded the contract by the opposite party. It is further admitted fact that there was fabrication and erection contract for the pellet plant at Jajpur and Barbil. It is also revealed from different amendments to the agreement dated

03.10.2007 held on 01.01.2008, 04.09.2008, 03.06.2010 & 22.06.2011 that the work order has been amended and in every such amendment, the amount for the work order has been increased. There is defect liability period agreed upon between the parties. Such amendments have also been admitted by the opposite party in their counter affidavit. The amendments show that besides some escalation of the amount and extension of defect liability period, all other terms and conditions of the existing work order remained unaltered. The petition of the petitioner accompanied by affidavit shows that on 22.10.2012, the petitioner submitted bills towards extra items. According to the petitioner, there was outstanding of Rs.5,08,40,184/- on account of retention money, pending miscellaneous bills, extra items, pending items, etc. On the other hand, the opposite party has admitted the outstanding dues; but in para-9 of the counter affidavit, it has been claimed that such dues are exaggerated. In spite of several meetings, the opposite party did not clear the outstanding dues. On the other hand, at para-11 of the counter affidavit, the opposite party has admitted that the outstanding dues of Rs.508.402 lacs has been reduced to Rs.373.76 lacs. So, it is proved by the petitioner that there is outstanding amount of Rs.373.76 lacs with the opposite party. It is only claimed by the opposite

party that the petitioner is liable and responsible for complying with the provisions of Employees Provident Funds and Miscellaneous Provisions Act, 1952, for which the opposite party is reluctant to pay the rest of the money. When there is outstanding dues lying with the opposite party and the same is flowing from the original contract and the defect liability period is over, the opposite party has to pay back the money to the petitioner. So, the petitioner has proved a prima facie case against the opposite party to get the relief under section 9 of the Act. Point No.(ii) is answered accordingly.

Point No.(iii) :

11. When the work has already been executed and the pellet plant has been handed over to the opposite party by the petitioner, as revealed from the affidavit, and the said fact is not seriously disputed by the opposite party in their counter affidavit, I am of the view that the balance of convenience lies in favour of the petitioner, but not in favour of the opposite party. It is only averred by the opposite party that the damage caused to the petitioner is merely monetary in nature. When a huge amount is outstanding and the work has been completed by the petitioner without any sort of hesitation, it can be safely said that the balance of convenience lies in favour of the petitioner in the event of granting interim measure of

protection. It is revealed from the counter affidavit of the opposite party that bills are pending with extra claims, which are also the subject matter of the contract being excessive; but the same can be disposed of only after commencement of arbitral proceeding. Before arbitral proceeding, the balance of convenience lies in favour of the petitioner in the event the plants in question are sold away by the opposite party to anyone else. On the other hand, the balance of convenience tilts in favour of the petitioner to invoke interim injunction against the opposite party. This point is answered accordingly.

Point No.(iv) :

12. It is the contention of the opposite party that there is no irreparable injury caused to the petitioner, as the basis for interim injunction is disbelieved. But, in the event injunction is not issued, there will be irreparable injury to the petitioner, as submitted by their learned counsel. In the instant case, when there is huge amount outstanding against the opposite party and the petitioner has submitted affidavit, stating about opposite party's dillydallying process and they are trying to wind up because of the fact that the opposite party is a branch office of Stemcor, a Group of British Company, there will be irreparable injury or loss to the petitioner in the event of refusal of injunction. In addition, it is

amply proved by the petitioner that there will be irreparable injury to them if no interim measure is extended to preserve and protect the property. This point is answered accordingly.

Point No.(v) :

13. In the foregoing paragraphs, it has already been discussed that the petitioner has got a prima facie case, balance of convenience and irreparable injury to get an order of interim measure of protection under section 9 of the Act. Their Lordships in the case of ***Adhunik Steels Ltd.*** Vs. ***Orissa Manganese and Minerals Pvt. Ltd.***(supra) have been pleased to observe at para-10 that :

"xx xx xx xx

The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary

rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act".

14. With due respect to the above decision, I find in the instant case, as held earlier, that prima facie case, balance of convenience and irreparable injury being the concept of just and convenient under section 9 of the Act have been fulfilled by the petitioner to warrant the order required to be passed for interim measures. It is only contended by learned counsel for the opposite party that since this is a monetary claim, as revealed from section 9(ii)(b) of the Act, to secure the amount in dispute in the arbitration, no order for interim injunction or the appointment of a Receiver as per section 9(ii)(d) can be passed. I went through the said provisions and it is found that the amount in dispute flowing from the contractual obligation is binding on both parties under the agreement dated 03.10.2007 and for subsequent amendment for securing such money claim, the interim measure, as required under section 9(ii)(d) of the Act is required to be passed. It is only contended by learned counsel for the opposite party that the opposite party has got some other properties other than the pellet plant at Jajpur, but never disclosed where it is. Now, it is available

from the petitioner's affidavit, along with the notice attached to it, that the petitioner has already given notice to the opposite party for deciding the dispute of monetary claim by way of arbitration. When there is already notice for arbitration and the claim is to be decided in the arbitration, it is necessary to take the interim measure under section 9 of the Act so that the claim can be disposed of by way of arbitration between the parties. It is only contended by learned counsel for the opposite party that since shares are not properties, third party interest is created thereby. Even if shares not properties as per the submission of learned counsel for the opposite party, the pellet plant being the property of the opposite party should not be disposed of till final adjudication of the claim or the dispute between the parties by way of arbitration. Therefore, for the preservation of the property in dispute i.e. pellet plant, the opposite party should be restrained from selling or disposing of the pellet plant and from creating any third party interest in respect of the said pellet plant until the matter is adjudicated between the parties by way of arbitration. This point is answered accordingly. Hence ordered :

O R D E R

The Arb.(P) under section 9 of the Arbitration and Conciliation Act, 1996 is allowed. The opposite party is hereby

restrained from selling / disposing of the pellet plant and from creating any third party interest in respect of the said pellet plant till the matter is adjudicated between the parties by way of Arbitration. No cost.

District Judge, Khurda
at Bhubaneswar.
03.09.2014.

Dictated, corrected by me and pronounced in the open Court this day the 03rd September, 2014.

District Judge, Khurda
at Bhubaneswar.
03.09.2014.