Sundaram Finance Ltd vs Nepc India Ltd on 13 January, 1999

Equivalent citations: AIR 1999 SUPREME COURT 565, 1999 AIR SCW 225, (1999) 3 PUN LR 685, 1999 (3) COM LJ 205 SC, 1999 (1) ARBI LR 305, 1999 (1) SCALE 40, 1999 (1) LRI 69, 1999 (1) ADSC 51, 1999 (2) SCC 479, 1999 (123) PUN LR 685, 1999 (2) SRJ 71, 1999 (1) UJ (SC) 613, (1999) 1 JT 49 (SC), (1999) 2 MAD LJ 53, (1999) 1 SCJ 289, (1999) 1 ARBILR 305, (1999) 1 SUPREME 126, (1999) 1 RECCIVR 580, (1999) 1 ICC 4, (1999) 1 SCALE 40, (1999) 1 CURCC 32, (1999) 32 CORLA 321, (1999) 3 CIVLJ 851, (1999) 3 MAD LW 335, (1999) 1 BANKCLR 1

Bench: Sujata V. Manohar, B.N. Kirpal

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           CASE NO.:
Appeal (civil)  141-143 of 1999

PETITIONER:
SUNDARAM FINANCE LTD.

RESPONDENT:
NEPC INDIA LTD.

DATE OF JUDGMENT: 13/01/1999

BENCH:
SUJATA V. MANOHAR & B.N. KIRPAL

JUDGMENT:
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JUDGMENT 1999 (1) SCR 89 The Judgment of the Court was delivered by KIRPAL, J. Leave granted.

An important question which arises for consideration in these cases is whether under Section 9 of The Arbitration and Conciliation Act, 1996 (hereinafter referored to as `the 19% Act') the Court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an 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 payments being made in instalments by the respondent, the first instalment was payable on 29th September, 1995 and the last was due by 25th 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 La spite of several demands being made by the appellant. The hire-purchase 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 a person 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 7th April, 1998 and the Trial Court passed an interim order appointing a Commis-sioner 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 arbitration proceedings were pending and even the arbitrator had not been appointed, an 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 was uncalled for. While supporting the order of the Trial Court the appellant herein had submitted before the High Court that interim order could be passed even before the commencement of the arbitral proceedings.

By it's judgment dated 22nd June 1998, the High Court allowed the respondent's petition. In it's judgment, after referring to the provisions of Section 41 of the Arbitration Act, 1940 and the relevant provisions of the 1996 Act, the High Court observed as follows :

> "Second 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 proceedings 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 2nd Schedule to the Arbitration Act, 1940. Mr. Gopal Subramaniam,0 learned senior counsel appearing for the respondent, placed reliance on Sant Ram & Co. v. State of Rajasthan and Others, [1997] 1SCC 147 wherein at page 150 it was observed that "The initiation of pendency of any proceed-ings in the Court in relation to the arbitration proceedings would, therefore, be a precondition for the exercise of the power by the civil court under the Second Schedule 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 Ar-bitration 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 appended to the BUI 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 a model for legislation on domestic arbitration and conciliation. The present Bill seeks to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral 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 provisions of 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 19% 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 Sections 2(d), 9, 17 and Section 21. Section 2(d) defines an Arbitral Tribunal to mean a sole arbitrator or a panel of arbitrators. 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 proceedings 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 :
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> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
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> (ii) for an interim measure of protection in respect of any of the following matters, namely :
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> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
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> (b) securing the amount in dispute in the arbitration;
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> (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 any 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;
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> (d) interim injunction or the appointment of a receiver;
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> (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 order as it has for the purpose of, and in relation 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 respon-dent."

The Arbitral Tribunal has also been given jurisdiction to pass interim orders by Section 17 of the said Act which reads as follows :

> "17. Interim measures ordered by arbitral tribunal :
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> (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 tribunal may consider neces-sary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide ap-propriate security in connection with a measure ordered under sub-section (1)."

The reading of Section 21 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 or during arbitral proceed-ings" 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 Section 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 9 or Section 17 similar to Section 41(b) and the Second Schedule to the 1940 Act. Section 8 of the new Act is not in pari materia 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 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 orders under 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 proceedings". 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 is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect it's 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 proceedings or after the making of the arbitral award but before it is enforced 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 proceedings, from a court an interim measure of protection and for a court to grant such measure."

This article recognises, 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 proceedings can commence and continue notwithstanding a party to the arbitration agreement having approached the Court for an order for 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 UN-CITRAL 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.
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> 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 proceedings". The expression used in this sub-section "party or proposed party to the arbitral proceedings" shows that where arbitral proceedings have commenced then the application 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 ap-proach the Court. A proposed party to the arbitral proceedings would, therefore, be one who is party to an

arbitration agreement and where disputes have arisen but the arbitral proceedings have not commenced. While 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 (21st 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 appoint-ment 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 to the granting of a Mareva injunction in appropriate cases. It may also include granting an interim mandatory injunc-tion, although the court will be slow 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. v. Balfour Betty Construction Ltd. and Others, [1992] 2 Lloyd's Law Reports) dealing with question of the juris-diction 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. The Court of Appeal referred to Section 12 (6) of the 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 Staughton LJ observed as under :

"In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course. Whatever the meaning of "reference" to s.12(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 a case would be exercised for the purpose of and in relation to a reference."

We are in respect 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 unequivocably relies on the arbitration agreement and makes an averment that it would invoke the arbitration clause; (b) At the time when the Court passes an interim order under Section 9, an express undertaking is given by the party before the Court that it would invoke the arbitration clause forthwith and within 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, there-fore, 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 manifest intention to have the dispute referred to arbitral tribunal, 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 a 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 Courts have not so far made rules. Whereas the Section 84 gives the Central Government power to make rules to carry out the provisions 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 the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the Courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases.

In view of the aforesaid discussions it follows that the High Court erred in coming to the conclusion that the trial court had no jurisdiction in entertaining the application under Section 9 because arbitration proceedings 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.