

**(2010) 09 AHC CK 0054**

**In the Allahabad High Court**

**Case No :** First Appeal From Order No. 2384 of 2010

Union of India (UOI) and Others

APPELLANT

Vs

Awadh Transformers Pvt. Ltd. and Another

RESPONDENT

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**Date of Decision :** 16-09-2010

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 9

**Citation :** (2011) 1 ADJ 163

**Hon'ble Judges :** Sunil Ambwani, J;Kashi Nath Pandey, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## **Judgement**

1. Heard Shri O.P. Lohia appearing for the Union of India. Shri Shambhavi Nandan appears for the Respondent-contractor.

2. In this First Appeal From Order, the Union of India is aggrieved by the order of the District Judge, Allahabad dated 6.7.2010 in Misc. Arbitration Case No. 254/2010, Awadh Transformers Pvt. Ltd v. Union of India and Ors. Misc. Arbitration Case No. 254/2010, by which while issuing notices to the opposite party on the date fixed, the District Judge has by an ex-parte order restrained the opposite party from terminating the impugned agreement and also invoking Bank Guarantees No. 63/41 and 63/53 issued by Central Bank of India, Sultanpur

3. Shri O.P Lohia appearing for the Union of India submits that electrification of Barabanki-Gorakhpur-Barauni route of Railway track of North Eastern Railway and East Central Railway was sanctioned by Government of India in 2007-08 for increasing the fine capacity of the section. To materialise the proposed project, tenders were invited for design, supply, erection, testing and commissioning of 132/25 KV traction sub-station feeding post and shunt capacitor banks. An agreement was executed between the Appellant Railway Electrification and the Respondent contractor on 5.12.2008. The work was to be finished in nine months from the date of issue of letter of acceptance dated 10.7.2008. It was found that

there was delay in completing the works, and that the Respondent firm had stopped the work for last ten months on which a notice was given to the contractor terminating the contract. Para 12.54 of the conditions of Contract provides for applicability of Clause-64 of the General Conditions of Contract, for a detailed procedure regarding arbitration. The contractor has an opportunity to raise all the claims within 120 days of the day of receipt of the claims.

4. The contractor had furnished bank guarantees for due performances of the work. The Misc. Arbitration Case No. 254 of 2010, was filed by the contractor u/s 9 of the Arbitration and Conciliation Act, praying for reliefs namely that the opposite party be restrained from terminating the agreement dated 4.12.2008 and also from invoking bank guarantees No. 63/44 and 63/53 issued by the Central Bank of India, Sultanpur.

5. The District Judge, while issuing notices, has restrained the opposite party from terminating the agreement and also from invoking the bank guarantee.

6. It is submitted by Shri O.P. Lohia that in the entire pleading there is no averment made by the Respondent contractor that arbitration clause has been invoked or that the Respondent contractor has an intention to take recourse to the arbitral proceedings. He would submit that Section 9, for interim reliefs, under the Arbitration and Conciliation Act can be invoked before the commencement of the arbitration proceedings, but that there should be manifest intention on the part of the Respondent to take recourse of such proceedings.

7. In Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., the Supreme Court, relying upon its earlier judgment in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., has explained the legal position as follows:

17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in M/s. Sundaram Finance Ltd. an application u/s 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In M/s. Sundaram Finance Ltd., itself the Court has said - "It is true that when an application u/s 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." Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word "before" means, inter alia, ahead of; in presence or sight of; under the consideration or cognizance of." The two events sought to be interconnected by use of the term "before" must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or "within sight" certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended (as M/s. Sundaram Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is

a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection." The order passed by the Court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all-time or permanent protection.

8. On the last date of hearing we enquired from the counsel appearing from the Respondent whether any notice has been given to demonstrate that the Respondent has expressed his intention to invoke the arbitration clause. We are informed by Shri Shambhavi Nandan appearing for the Respondent that till date no notice has been given for invoking the arbitration clause.

9. The notice terminating the agreement was sent to the Respondent on 20.6.2010. He filed an application u/s 9 of the Arbitration and Conciliation Act in which the interim orders were passed on 6.7.2010. More than two months have expired but that the Respondent contractor has not invoked the arbitration clause.

10. There is no averment in the pleading in the application u/s 9, the stay application, nor any material has been placed before us which may satisfy us that the Respondent contractor wants to invoke the arbitration clause. He appears to be aggrieved by the termination of the contract, but that no effort has been made nor any intention can be gathered from the pleading or his conduct that there is any intention on the part of the Respondent contractor to invoke the arbitration clause.

11. In the aforesaid circumstances, relying upon Firm Ashok Traders's case (supra) we are of the opinion that the District Judge, Allahabad did not have jurisdiction to entertain and pass any orders on the application u/s 9 of the Arbitration and Conciliation Act.

12. The First Appeal From Order is allowed. The order of the learned District Judge dated 6.7.2010 is set aside.