

Pn

ITEM NO.3

COURT NO. 9

SECTION IIA

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl) No(s).9475/2011

(From the judgement and order dated 03/03/2011 in CRLOP No.9610/2010, of
The HIGH COURT OF MADRAS)

IL SUNG CONSTRUCTION P.LTD.& ORS.

Petitioner(s)

VERSUS

SIVAKUMAR

Respondent(s)

(With appln(s) for stay and office report)
(FOR FINAL DISPOSAL)

WITH

SLP (C) NO. 6073/2012

(WITH APPLN. (S) FOR PERMISSION TO TAVEL KOREA AND IMPLEADMENT AS PARTY
RESPONDENT AND EXEMPTION FROM FILING O.T. AND OFFICE REPORT)

Date: 28/02/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MRS. JUSTICE GYAN SUDHA MISRA

For Petitioner(s) Mr. R. Prabhakarana,Adv.
Mr. G.S. Mani,Adv.
Mr. M. Yuvaraja,Adv.
Mr. R. Sathish,Adv.

For Respondent(s) Mr. P. Vishwanatha Shetty,Sr.Adv.
Mr. Joseph Aristotle S.,Adv.
Mrs. Priya Aristotle,Adv.

Mr. T.A. Khan,Adv.
Mr. B. Krishna Prasad,Adv.

Ms. V. Mohana,Adv.

UPON hearing counsel the Court made the following

O R D E R

This petition arise out of an order dated 5.7.2011 passed by the High Court of Judicature at Madras whereby Writ Petition No. 976 of 2011 filed by the petitioner was dismissed and an order dated 13.09.2010 passed by a Single Bench of that Court dismissing Writ Petition No. 11051 of 2010 affirmed.

It is not in our opinion necessary to recapitulate the entire factual matrix in which the Writ Petition mentioned above as also the appeal came to be filed and disposed of by the High Court except to the extent it is absolutely essential for us to do so. Suffice it to say that the petitioner herein is the Managing Director of IL Sung Construction Pvt. Ltd. (hereinafter referred to as the "Company"). The petitioner who is a citizen of South Korea is the Managing Director of the said company, as are its other promoters. The company it appears has obtained contracts for execution of various civil works from different Korean companies who are engaged in different projects in India. For a timely execution of the said contracts, the company appears to have engaged local sub contractors and issued work orders to them under which specific items of work

have been assigned to them for execution from time to time. S.Sivakumar and Jayammal respondents No. 3 and 4 in this petition happen to be two such sub-contractors employed by the Company for execution of several items of work in connection with the contracts allotted to the company by other Korean companies. Payments due in connection with the work executed by the sub contractors were made to the sub-contractors from time to time. Alleging that the Company had not cleared all the dues payable to them, respondents No. 3 and 4 have filed complaints with the police leading to registration of criminal case against the petitioner and the company one at Kanchipuram and the other in Poondamallee Police Stations near Chennai. These cases accuse the petitioner of commission of offences punishable under Sections 406, 506, 420 and 14B of the Foreigners Act. It is not disputed that charge sheets have already been filed by the police against the petitioner in both the cases before the Jurisdictional courts concerned.

While the cases mentioned above are still pending the petitioner, Managing Director of the Company appears to have applied to the Immigration Authorities for permission to visit Korea for a period of two weeks. That permission was declined by Immigration authorities on the ground that the petitioner was involved in the aforementioned two criminal cases and a 'look out' circular had been issued against him in the case filed by Jayammal, respondent No. 4.

Aggrieved by the refusal of the permission to visit Korea, the petitioner filed Writ Petition No. 11051 of 2010 for a writ of Mandamus directing the concerned Immigration Authority to permit the petitioner to visit Korea. As noticed above the said writ petition was dismissed by a Single Judge of the High Court. An appeal filed against the dismissal also failed and was dismissed by a Division Bench of the High Court by its order dated 5.7.2011 impugned in the present petition.

When the matter came up before us initially for hearing, it was argued on behalf of respondents No. 3 and 4 that refusal of permission prayed for by the petitioner was justified and the order passed by the Immigration authority legally unexceptionable having regard to the fact that the petitioner was being prosecuted not only in the criminal cases mentioned above but also in a case under Section 138 of the Negotiable Instruments Act arising out of dishonour of two cheques issued by the company in favour of respondent No. 3. It was also pointed out by learned counsel for the respondent that while respondent No. 3 had a claim of Rs. 1,64,34,075/- against the petitioner's construction company, respondent No. 4 had a similar claim for a sum of Rs. 1,61,73,978/- to make against it. These amounts were, according to the respondents, recoverable from the petitioner's company with interest.

Permission to leave the country it was contended would mean that the amount due from the Company will never be paid for, there are very bleak chances of the petitioner who is the Managing Director of the company returning to India to Liquidate the outstanding liability.

On behalf of the petitioner it was on the other hand submitted that far from any liability towards any work done by respondent nos. 3 and 4, the work orders issued to them had been terminated on account of their inability to complete the same within the time stipulated as also because of poor quality of work and performance which had given rise to a counter claim by the company against each one of the two sub contractors. It was submitted that while the company has to recover a sum of Rs. 1,64,34,075/- from respondent No. 3 an amount of Rs. 1,61,73,978/- is payable by respondent No. 4 over and above interest @ 18% p.a. on the said amounts. It was submitted that in the light of the claims and counter claims made by the parties against each other there was no basis for assuming that the petitioner would not return to India or that he has no intention of paying any amount if the same is lawfully recoverable from him or the Company. Refusal of the permission prayed for by the petitioner was in that view unjustified and presumptuous on the part of the Immigration authority.

When the matters came up on a subsequent date for hearing and further argued it was submitted by learned counsel for the parties that the parties were agreeable to refer all their

outstanding disputes concerning the work orders issued to the sub contractors respondent nos. 3 and 4 as also the claims and counter claims made by them against each other for adjudication to the sole Arbitration of a Former Judge of this Court. They agreed to the suggestion made by this court that the arbitration could be entrusted to Mr. Justice R.V.Raveendran, Former Judge of this Court. They took time to place on record an arbitration agreement to that effect to enable this court to make a suitable reference.

The parties have pursuant to the said offer filed Arbitration Agreements executed by them to which we need not refer in detail for the agreements speak for themselves. Suffice it to say that the agreements unequivocally and in no uncertain terms stipulate that all outstanding disputes and differences between the parties in connection with the execution of the work orders issued to the two sub contractors mentioned above shall stand referred to the Sole Arbitration Mr. Justice R.V.Raveendran. The agreements even mention the amount of claims and counter claims that the parties have made against each other and stipulate that the same may be adjudicated upon by Mr. Justice R.V.Raveendran.

There is in our opinion no impediment in accepting the prayer made before us on the basis of the agreements and in making a suitable reference to Mr. Justice R.V.Raveendran for adjudication of all outstanding disputes between the parties. The parties who are represented before us by their counsel and who identify their respective clients further agree that the arbitration proceedings can be held at Bangalore.

In the circumstances and with the agreement of the parties we refer to the sole Arbitration of Mr. Justice R.V.Raveendran disputes between IL Sung Construction Pvt. Ltd acting through its Managing Director Cho Nam Gil petitioner herein and respondent Nos. 3 and 4 in terms of the agreements executed by them with the Company. The agreements filed before us are taken on record with a direction that a copy of the same shall be despatched to the Sole Arbitrator with a copy of this order to enable the Arbitrator to enter upon the reference for an expeditious disposal of the matter.

The parties are directed to appear before the Arbitrator either personally or through their authorised agents on 08.04.2013 or any other date convenient to the Arbitrator.

We make it clear that the Arbitrator shall be free to determine and charge his fee from the parties in such proportion as may be considered just and proper by him. Since the agreements executed between the Company and the sub contractors respondents No. 3 and 4 are different and the scope of the works covered by the same was also different, we leave it open to the Arbitrator to proceed with the adjudication of the claims and counter claims in a combined exercise or separately as may be considered appropriate in the circumstances of the case. The parties shall co-operate with the worthy Arbitrator for an early disposal of the matter.

That leaves us with the question whether the petitioner should be allowed to visit Korea for a period of one month as was the prayer made by learned counsel for the petitioner before us. With the reference of the disputes between the parties already made by us to a Sole Arbitrator the limited question that remains to be determined is whether the apprehension of the claimants respondent nos. 3 and 4 that the petitioner may not return to India can be allayed by a suitable direction regarding furnishing of security for the amount being claimed by the said respondents. The petitioner has not favourably looked at our proposal requiring him or the company to furnish a bank guarantee for the principal amount of Rs. 3,00,00,000/- (approximately) claimed by the respondent. It was submitted that instead of a bank guarantee the petitioner was willing to accept a direction from this court under which a sum of Rs. 3,00,00,000/- payable to the Company from its principals would remain withheld till such time the petitioner returns to India. It was submitted that the petitioner was ready to file a suitable certificate from the Korean company/companies under whom the company is working as to the amount due and payable to company in which event the court can pass a suitable order restraining payment of a

sum of Rs. 3,00,00,000/- out of the said amount till the petitioner returns to India.

M/s Shetty and Mohana, counsel appearing for respondent Nos. 3 and 4 had no objection to that course of action being adopted

The petitioner may therefore produce a certificate along with an affidavit of an authorised person from the Korean company concerned as to the amount if any due to the Company in connection with the work which the company has done or is engaged in doing. Needful may be done within two weeks.

Post on 20.03.2013.

| (SHASHI SAREEN)
| COURT MASTER

| | (VEENA KHERA)
| | COURT MASTER

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