

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 27th DAY OF MARCH 2015

THE HON'BLE MR. JUSTICE R. MAHADEVAN

A.Nos. 1967 to 1969 of 2014

In the matter of Arbitration and
Conciliation Act, 1996

And

In the matter of Memorandum of
Agreement dated 31.05.2011
between the Applicant and
Respondent

Karismaa MEP Services Pvt. Ltd
Represented by Mr. Manoj K Sheth
340, 1st South Main Road,
Kapaleeswar Nagar,
Neelangarai,
Chennai 600 115

...Applicant/Applicant
(In All Applications)

-Versus-

M/s. KGS Constructiions Ltd
Rep. by its Managing Director
No.43, Besant Avenue Road,
Adyar, Chennai 600 020

...Respondent/Respondent
(In All Applications)

A.No.1967/2014:

Application praying that this Hon'ble Court be
pleased to direct the respondent to furnish security to
the tune of Rs.16,50,137.00 (Rupees Sixteen Lakhs Fifty
Thousand One Hundred and Thirty Seven only).

A.No.1968/2014:

Application praying that this Hon'ble Court be

pleased to direct the respondent to furnish security to the tune of Rs.10,39,527.00 (Rupees Ten Lakhs Thirty Nine Thousand Five Hundred and Twenty Seven only)

A.No.1969/2014:-

Application praying that this Hon'ble Court be pleased to direct the respondent to furnish security to the tune of Rs.44,62,396/- (Rupees Forty Four Lakhs Sixty Two Thousand Three Hundred and Ninety Six only).

These Applications coming on this day before this court for hearing the court made the following order:

Application No.1967 of 2014:-

This application has been filed to direct the respondent to furnish security to the tune of the amount pending, i.e., Rs.16,50,137.00 (Sixteen Lakh Fifty Thousand one hundred and thirty seven only).

Application No.1968 of 2014:-

2. This application has been filed to direct the respondent to furnish security to the tune of the amount pending, i.e., Rs.10,39,527.00 (Ten Lakh thirty nine thousand five hundred and twenty seven only).

Application No.1969 of 2014:-

3. This application has been filed to direct the respondent to furnish security to the tune of the amount pending, i.e., Rs.44,62,396.00 (Forty four Lakh sixty two thousand three hundred and ninety six only).

The facts leading to the filing of these applications are as under:-

4. The applicant had entered into a contract with the respondent company for carrying out plumbing & Sanitary Works in their "KGS-GREEN" residential development project at Trivandrum on 1.6.2011 for a consideration of Rs.63,18,536.00 (Inclusive of all taxes).

5. During the execution of the work, the applicant had raised periodic bills and the same have been submitted to the respondent for certification. The respondent had periodically certified the work done by the applicant and there has never been any dispute in the way or manner in which the work was done until their final bill submitted on 30.1.2012.

6. Further, the applicant had handed over the plumbing consumable materials on 8.2.2012 that were required by the respondent and specific invoice to that effect had also been raised. The amount claimed by the applicant for the 42 plumbing materials, viz., Rs.4,26,395.00 has been certified by the respondent on 8.12.2012.

7. On 30.1.2012, the applicant raised the final R.R. Bill No. 02 for Rs.12,23,742.00 but the respondent has not paid the amount due to the applicant till date. The

applicant had given a letter, dated 24.2.2012 to the respondent demanding a sum of Rs.26,89,664.00 pertaining to two contracts and a sum of Rs.16,50,137.00 is relating to the above said contract.

8. Unless and until the applicant is granted protection, the applicant will be put to irreparable loss which cannot be compensated even if the arbitral award is ultimately decreed in their favour. Hence, the above applications have been filed for the relief as afore stated.

9. In the common counter filed by the respondent, it is stated that the above applications ought to have been dismissed in limine for the following reasons:-

a. These applications have been filed after the period of two years of the alleged debt supposedly due to the applicant and in such circumstances, the applicant has failed to state as to why urgent orders are required at present.

b. The respondent is a construction company, which is in a robust financial health and as such no application for furnishing security will lie in the present case.

10. In a rejoinder to the common counter affidavit filed by the applicant, it is stated that necessary pleadings and averments have been made in the present

<https://hcservices.ecourts.gov.in/hcservices/>

case for furnishing the security and therefore, it is not correct to state that the pleadings are insufficient.

11. When the application is filed under Section 9 of the Arbitration Act, the provisions of Order 38 Rule 5 C.P.C. do not apply.

12. With regard to two years delay in filing these applications, the applicant had expected that the respondent would repay the amount due and since even after the passing of nearly three years, as the hope had been belied by the act of the respondent, the applicant has now come forward with the above applications.

13. Heard both sides.

14. The learned counsel for the applicant has submitted that there was a contract between the applicant and the respondent for carrying out Plumbing & Sanitary Works. Though the work was completed and the final bill was certified by the respondent, yet the amount due to the applicant was not settled by the respondent and therefore, these applications have been filed under Section 9 of the Arbitration Act.

15. Further, the learned counsel has submitted that

<https://hcservices.ecourts.gov.in/hcservices/>

there is no dispute with regard to the outstanding amount to be paid by the respondent as there is no specific

denial as to the amount due and also there was no reply to the letter sent by the applicant seeking the release of the payment and therefore, when the respondent accepts the amount due, the respondent shall furnish security as an interim measure of protection.

16. The learned Counsel has contended that the provisions of Order 38, Rule 5 CPC cannot be read into Section 9 of Arbitration and Conciliation Act nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5 CPC.

17. Further, the learned counsel has contended that the power under Section 9 of Arbitration and Conciliation Act is wide and it cannot be restricted to the power conferred on the Court under Civil Procedure Code.

18. In support of his contention, the learned counsel has relied on the following decisions:-

a. a. Sundaram Finance Ltd. represented by its Senior Manager vs. M.K. Khunhabdulla (2014 (3) CTC 159) .

b. Ganesh Benzoplast Ltd. Mumbai and two others vs. Sundaram Finance Ltd., Chennai and another (2002-3-L.W.128) .

<https://hcservices.ecourts.gov.in/hcservices/>

19. On the other hand, the learned counsel for

the respondent has submitted that there is no necessary pleadings or proof for claiming the amount due and therefore, in the absence of necessary proof or pleadings, these applications are not maintainable.

20. The learned counsel has contended that the applicant has not made out any case nor was there any specific averment that there was an apprehension or danger that the amount could not be recovered by the applicant from the respondent.

21. Further, it was argued by the learned counsel that in the absence of pleadings that the attitude of the respondent is only to obstruct or delay the recovery of money or that the respondent is about to dispose of the whole or any part of the property, no relief can be granted.

22. In support of his contention, the learned counsel has relied on the following decisions:-

a. Sundaram Finance Ltd. represented by its Senior Manager vs. M.K. Khunhabdulla (2014 (3) CTC 159).

b. Omsakthi Renergies Limited represented by its Managing Director Mr. M. Jayathirth vs. Megatech Control Limited, represented by its Managing Director Mr.N. Ramkhumar (2006 (2) CTC 161).

c. C.S.S. Corp Private Limited, T.Nagar, Chennai vs. Space Matrix Design Consultants Private Limited (2012 (1) CTC 225).

d. Biz Solutions Chennai vs. Cascade Center Incorporated (MANU/TN/2871/2011).

e. Siddharam Satlingappa Mhetre vs. State of Maharashtra and others ((2011) 1 SCC 694).

23. I have considered the aforesaid submissions and perused the materials available on record.

24. The applicant had entered into a contract with the respondent company for carrying out the plumbing and sanitary works and during the execution of the work, the bills submitted by the applicant were certified by the respondent company. However, the respondent company is liable to pay amount mentioned in the above three applications. Despite several requests, since the respondent company has not paid the amount due, the applicant has filed the above applications.

25. On the other hand, the respondent company has not disputed the amount due. The only contention raised by the respondent company is that the applications have been filed without necessary pleadings and proof as contemplated under Order 38 Rule 5 of C.P.C.

and therefore, they have to be dismissed.

26. Now the question is whether the applicant is entitled for the interim measure of protection as envisaged under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter be referred to as "Act") and the passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5 CPC.

27. Section 9 of the Act reads as under:-

"9. Interim measures, etc. 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,--

(i)....

(ii) for an interim measure of protection in respect of any of the following matters, namely,--

(a)....

(b) securing the amount in dispute in the arbitration;

(c).....

(d)...

(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 in relation to, any proceedings before it."

27a. A perusal of Section 9 would make it clear that it is neither similar to Order 38 Rule 5 nor Section 18 of the Arbitration Act, 1940.

28. At this juncture, it will be very useful to refer to the provisions of Order 38 Rule 5 of C.P.C., which reads as under:-

5. Where defendant may be called upon to furnish security for production of property.- (1) Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void.

29. The above provision under Section 9 of the Arbitration and Conciliation Act, 1996 does not specifically require averment in any particular form as contemplated under Order XXXVIII, Rule 5 C.P.C., whereas the Provisions of Code of Civil Procedure are applicable only in respect of the proceedings for attachment before judgment and therefore, the requirements of Order 38 Rule 5 are not strictly applicable to the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, as there is no restriction imposed under Section 9 of the Arbitration and Conciliation Act for exercising jurisdiction by this Court.

30. When the Division Bench of this Court had an occasion to deal with the similar matter **in Sundaram Finance Ltd. represented by its Senior Manager vs. M.K. Khunhabdulla (2014 (3) CTC 159)**, it has observed as under:-

"19. The Learned Counsel for the Appellant/Applicant places heavy reliance on the decision of this Court in *Ganesh Benzoplast Limited, Mumbai 2 and 2 others V. Sundaram Finance Limited, Chennai 2 and another, 2002 (2) CTC 238*, wherein it is observed that Section 9 of the Arbitration and Conciliation Act, 1996 does not specifically require averment in any particular form as contemplated under Order XXXVIII, Rule 5 C.P.C. Further, it is held that the Provisions of Code of Civil Procedure applicable in respect of

proceeding application for attachment if before judgment need not confirm to requirements of Order 38 Rule 5 are not strictly applicable to the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, as there is no restriction imposed under Section 9 of the Arbitration and Conciliation Act for exercising jurisdiction by this Court.

20. At this stage, in the decision of the Hon'ble Supreme Court in *Arvind Constructions Co. (P) Ltd. Vs. Kalinga Mining Corporation and others*, (2007) 6 SCC 798, wherein it is, inter alia, observed as follows:

".... No doubt, a view that exercise of power under Section 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power under Section 9 of the Act is not controlled by Order XVIII Rule 5 of the Code of Civil Procedure is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power under Section 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver."

21. Also, in the decision of the Hon'ble Supreme Court in *Adhunik Steels Ltd., Vs. Orissa Manganese and Minerals Pvt. Ltd.*, AIR 2007 SC 2563, wherein it is, among other things, observed as follows:

"10. ... 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 measure under Section 9 of the Act."

22. At the outset, this Court pertinently points out that to invoke the ingredients of Section 9 of the Arbitration and Conciliation Act, 1996, there ought to be a dispute which had arisen with respect to the subject matter of the agreement and referable to an arbitration. There must be a manifest intention on the part of applicant to take recourse to the arbitral proceedings at the time of filing of an application under Section 9 of the Act. It cannot be brushed aside that in the instant case as per Article 22 of the Loan Agreement, the Appellant/Applicant is empowered to initiate arbitral proceedings by having a sole arbitrator upon its Managing Director and further, it is specifically averred by the Appellant/Applicant in the Application that it undertakes to initiate arbitration proceedings within a reasonable time. In reality, the issuance of a notice in a particular case would suffice to establish a manifest intention to have the dispute referred to an Arbitration. An Application under Section 9 can be entertained before a Court of Law only if in a given case, the subject matter of arbitration comes within its ambit of original civil jurisdiction both in terms of pecuniary and territorial ones.

23. It is to be noted that even if a party projects an Application under Section 9 coupled with Order XXXVIII Rule 5 C.P.C. for necessary directions in requiring the opposite party to furnish security for the due amount in question and for a simultaneous order of conditional attachment of property, we opine that the

ingredients of Section 9 enjoins a Court of Law to pass an order of interim measure without seeking the aid of the ingredients of Order XXXVIII Rule 5 C.P.C. The exercise of general power to award interim relief including the specific injunction relief under Order 39 C.P.C. and the Specific Relief Act are certainly applicable to the exercise of power under Section 9 of the Act, 1996.

24. Further, under Section 9 of the Arbitration and Conciliation Act, 1996, the Court entertaining an Application shall have the same power for passing orders as it has for the purpose of, and in relation to, any proceedings before it.

31. In the above decision a similar view had been taken that the provision under Section 9 of the Arbitration and Conciliation Act, 1996 does not specifically require averment in any particular form as contemplated under Order XXXVIII, Rule 5 C.P.C., whereas the Provisions of Code of Civil Procedure are applicable only in respect of the proceedings for attachment before judgment and therefore, the requirements of Order 38 Rule 5 are not strictly applicable to the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, as there is no restriction imposed under Section 9 of the Arbitration and Conciliation Act for exercising jurisdiction by this Court.

32. Further, in the above decision, to invoke the ingredients of Section 9 of the Act, the Division Bench of this Court has laid down the following requirements:-

a. There ought to be a dispute which had arisen with respect to the subject matter of the agreement and referable to an arbitration.

b. There must be a manifest intention on the part of applicant to take recourse to the arbitral proceedings at the time of filing of an application under Section 9 of the Act.

33. At this juncture, it is pertinent to refer the intention of the applicant, which is manifested from the averments of the affidavit filed in support of the application, which reads as under:-

"It is submitted that on 30.1.2012 we raised the final R.A. Bill for Rs.12,23,742.00 but the respondents have not paid the amount due to us till date. I submit that the applicants have sent in their letter, dated 24.2.2012 by hand delivery demanding a sum of Rs.26,89,664.00 pertaining to two contracts of which this contract claim is Rs.16,50,137.00. As all our attempts to resolve the issue with the respondent has failed, we are constrained to resort to Clause 10 of the Contract, dated 1.6.2011 which provides for arbitration."

34. The above averments would clearly show that there is a dispute with regard to the amount due to the applicant by the respondent and inspite of several requests and demand, since the respondent has not paid the amount due, invoking the arbitration clause in the agreement, dated 1.6.2011, the applicant has filed the above application under Section 9 of the Act for a direction to furnish security by the respondent company.

35. Therefore, the above averments of the affidavit would satisfy the ingredients of Section 9 of the Act as has been laid down by the Division Bench of this Court in the above said decision and as such the contention of the learned counsel for the respondent cannot be countenanced.

36. To the contention of the learned counsel for the respondent that the applicant had not made out any case nor was there any specific averment that there was an apprehension or danger that the amount could not be recovered by the applicant from the respondent, the answer lies in the decision in ***Ganesh Benzoplast Ltd. Mumbai and two others vs. Sundaram Finance Ltd., Chennai and another (2002-3-L.W.128)***, wherein, the ***Division Bench of this Court has observed as under:-***

"10.Coming to the obligation of the applicant/first respondent herein to satisfy the requirement as contemplated

under Order 38, Rule 5 C.P.C is concerned, at the outset, we have to point out that all the judgments cited by the learned senior counsel deals with the application filed either under Order 38 Rule 5 C.P.C or under Section 18 of the Arbitration Act, 1940. If we look at the provision of Section 18 of the Arbitration Act, 1940, it is analogous to Order 38, Rule 5 C.P.C. Further Section 41 of the Arbitration Act, 1940 provides the applicability of C.P.C in respect of the proceedings under the Arbitration Act.

11. The present application was filed under sub-clause (ii) (b) (e) of Section 9 of the Arbitration Act, 1996. This section do not contain such words as that of Section 18 of the Arbitration Act, 1940. Further there is no provision in the 1996 Act similar to Section 41 of 1940 Act. When that be so, it is for us to consider how far Order 38, Rule 5 C.P.C can be enforced in this proceedings. It is better to have a look at the relevant provision i.e., Order 38 Rule 5 C.P.C which is as follows:-

"5. Where defendant may be called upon to furnish security for production of property.--(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,--

(a) is about the dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule, such attachment shall be void."

This provision specifically; mentions that the court is to satisfy by affidavit or otherwise that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of court with an intention to obstruct or delay the execution of any decree that may be passed.

12. Section 18 of the Arbitration Act, 1940 is the provision governing the interim orders, which reads as follows:

"18. Power of Court to pass interim orders.--(1) Notwithstanding anything contained in Section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary, and just."

13. Here again what the above provision contemplates is that the court has to satisfy by affidavit or otherwise that a party has taken or is about to take steps

to defeat, delay or obstruct the execution of any decree that may be passed upon the award or that speedy execution of the award is just and necessary. Both the provisions Order 38, Rule 5 C.P.C as well as Section 18 of the Arbitration Act, 1940 contemplates the satisfaction of the court by the affidavit or otherwise.

14. When those provisions have been considered by this court and various other courts as well as the Apex Court, the courts have held that the mandatory requirements of the provision have to be strictly complied with. In order to satisfy the said requirement, it is for the party who claims interim order of attachment or any garnishee order to aver in the affidavit filed in support of such application that the debtor is aiming to delay or defraud the creditor. The non compliance would disentitle the party who seeks prohibitory order against the garnishee or attachment order from seeking such relief.

15. When Section 9 of the Arbitration and Conciliation Act, 1996, is applicable for the case on hand for the grant of the interim relief, it is for this court to consider what is the requirement of the said provision. The relevant provision is as follows:

"9. Interim measures, etc. 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,--

(i)....

(ii) for an interim measure of protection in respect of any of the following matters, namely,--

(a)....

(b) securing the amount in dispute in the arbitration;

(c).....

(d)...

(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 in relation to, any proceedings before it."

16.A perusal of Section 9 would make it clear that it is neither similar to Order 38 Rule 5 nor Section 18 of the Arbitration Act, 1940. When that be so, the bulk of the judgments relied upon by the learned senior counsel for the appellants is of no assistance to decide the issue in this appeal.

17.It may be worth to mention the Apex Court judgment by three Judges Bench with regard to the plea of readiness and willingness, in SYED DASTAGIR V. T.R. GOPALAKRISHNA SETTY wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed, "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract." So the compliance of "readiness and willingness" has to be in spirit and substance and not

in letter and form."

18. From the above ratio decidendi of the Apex Court, it is clear that if only the statute requires a plea should be in a particular form, then such requirement is strictly to be complied with. If we have a look at Section 9 of the Arbitration and Conciliation Act, 1996 to find out whether it requires any averment in the affidavit filed by the party, seeking the interim relief, as contemplated under either Order 38 Rule 5 C.P.C or under Section 18 of the Arbitration Act, 1940, in our view, it is not so. When Section 9 of the Arbitration and Conciliation Act, 1996 do not specifically require any averment in any particular form, as contemplated either under Order 38 Rule 5 C.P.C or under Section 18 of the Arbitration Act, 1940 there is no need for the first respondent herein to make such averment in the affidavit filed in support of the application seeking a prohibitory order.

19. As pointed out by the learned Judge, the first respondent did not seek for the repossession of the mortgaged machineries, giving out the reasons. They are very reasonable when they said that by resorting to such mode, not only the value of the machinery will be deteriorated but also the first appellant has to close down the business and they are not interested in closing down the business. When such is the attitude of the first respondent who seeks the security to recover the amount from the appellants, the court must also be reasonable. When the appellant has stated in their counter filed to the application that they are worth much more than the money claimed by the first respondent and their business profit is on the higher side, at least in the interest of justice and to satisfy the court, the appellants ought to have come forward to offer some security to show their bonafide. What all stated on behalf of the appellants is that they will give an undertaking that they will not alienate the machineries. When the machineries are working day in and day out, there cannot be any doubt or second opinion that there will be depreciation in the

value of the machineries, however properly it may be maintained. The learned Judge also referred this attitude of the appellant in paragraph 27 of the order which was repeated before us also. When the appellant do not come forward with any offer to satisfy the claim of the first respondent, except stating that they are willing to furnish an undertaking not to alienate the machineries, we are of the view that the intention of the appellant is only to prolong and protract the proceedings.

20. Apart from the above reason, as already pointed out, Section 41 of the Arbitration Act, 1940 which contemplates the applicability of the provisions of C.P.C for the arbitral proceeding has been deleted in the New Act i.e., The Arbitration and Conciliation Act, 1996. In such circumstance, we are unable to appreciate the contentions raised by the learned senior counsel for the appellant and consequently no interference is called for in the orders of the learned Judge.

37. From the above decision, it is clear that if only the statute requires a plea should be in a particular form, then such requirement is strictly to be complied with. If we have a look at Section 9 of the Arbitration and Conciliation Act, 1996 to find out whether it requires any averment in the affidavit filed by the party, seeking the interim relief, as contemplated under either Order 38 Rule 5 C.P.C or under Section 18 of the Arbitration Act, 1940, in my view, it is not so. When Section 9 of the Arbitration and Conciliation Act, 1996

do not specifically require any averment in any particular form, as contemplated either under Order 38

Rule 5 C.P.C or under Section 18 of the Arbitration Act, 1940 there is no need for the applicant herein to make such averment in the affidavit filed in support of the application.

38. Further, the learned counsel for the respondent has submitted that there is no necessary pleadings or proof for claiming the amount due and therefore, in the absence of necessary proof or pleadings, these applications are not maintainable.

39. Even in the decision relied on by the learned counsel for the respondent in **C.S.S. Corp Private Limited, T.Nagar, Chennai vs. Space Matrix Design Consultants Private Limited (2012 (1) CTC 225)**, wherein, when the another Division Bench of this Court had dealt with the similar issue, it had referred to the decision of the Bombay High Court in **National Shipping Company of Saudi Arabia vs. Sentrans Industries Limited (AIR 2004 Bombay 136)**, wherein, the Division Bench of the Bombay High Court has held as under:-

"10. Section 9 in the Act of 1996 is a substantive provision which empowers the Court to pass an interim order before or during Arbitral proceedings or any time after the making of the Arbitral Award but before it is executed under Section 36. Since we are concerned with Section 9(ii) (b), it may be noticed that it provides for an interim measure of protection for securing the amount in dispute in the Arbitration. Sort of clarification it also provides that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it. Such provision as enacted in Section 9 is a provision that enables a party to apply for interim protection if action of the other party to the agreement providing for Arbitration is either in breach of the terms of the agreement or is unequitable, unfair or in breach of natural justice. The order under Section 9(ii)(b) is in the nature of interim protection order. In a special provisions of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of order 38, Rule 5 of the Civil Procedure Code as it is. It is true and as has been held by the Supreme Court in ITI Ltd, 2002 (5) SCC 510, that for want of specific exclusion of the Code of Civil Procedure in the Act of 1996, it cannot be inferred that the Code was not applicable but that would not mean that provisions of Code have to be read into as it is when the Court exercises its powers as prescribed in the Act of 1996. The procedural aspects provided in the Code about which the Act of 1996 is silent, needless to say, when the Court exercises its substantive power under the Act of 1996 shall be applicable but the guiding factor for exercise of power by the Court under Section 9(ii)(b) has to be whether such order deserves to be passed for justice to the cause. The provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of order 38, Rule 5. The power of the Court in passing the protection order to secure

40. From the above decision, it is clear that the order under Section 9(ii)(b) is in the nature of interim protection order. In a special provisions of the nature like Section 9(ii)(b), the exercise of power cannot be restricted by importing the provisions of order 38, Rule 5 of the Civil Procedure Code as it is. It is true and as has been held by the Supreme Court in *ITI Ltd, 2002 (5) SCC 510*, that for want of specific exclusion of the Code of Civil Procedure in the Act of 1996, it cannot be inferred that the Code was not applicable but that would not mean that provisions of Code have to be read into as it is when the Court exercises its powers as prescribed in the Act of 1996.

41. It is also made clear that the provisions of Order 38, Rule 5, CPC cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the Arbitration before or during Arbitral proceedings or at any time of making of the Arbitral amount but before or during Arbitral proceedings or at any time of making of the Arbitral amount but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C.

but has to be exercised ex debito justitiae and in the interest of justice.

42. Further, It is the case of the applicant that it has a prima facie case in their favour and unless and until the applicant is granted protection, they would be put to irreparable loss which cannot be compensated even if the arbitral award is ultimately decreed in their favour.

43. While considering this aspect, the Division Bench of Bombay High Court, has observed as under:-

"The interim protection order contemplated under Section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. Though the power given to the Court under Section 9(ii)(b) is very wide and is not in any way controlled by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the application for direction to the other party to deposit the security of the amount in dispute in the Arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order in as much as in the absence of such order, the applicant

party succeeding before the Arbitral Tribunal may not be able to execute the Award.

44. Therefore, since it is the case of the applicant, if the relief sought for is denied, it would result in grave injustice and in the absence of any security, the applicant would not be in a position to execute the award and hence, I am of the view that the applicant is entitled to get the relief as prayed for.

45. Further, for granting an interim order under Section 9 of the Act, the Division Bench of this Court has laid down three golden principles in ***Biz Solutions Chennai vs. Cascade Center Incorporated (MANU/TN/2871/2011)***, which are as under:-

"9. Section 9 of the Act contemplates interim measure to protect and secure the amount in dispute in arbitration. But that does not mean even without any pleadings in respect of the fact that the asset of the respondent company will be lost, the appellant is entitled to file the application under Section 9 of the Act. In fact, in granting injunction or passing any order under Section 9, three golden principles under law have to be taken note of by the Courts and they are (i) prima facie case (ii) balance of convenience and (iii) irreparable loss and injury."

46. As far as the prima facie case is concerned, the applicant would clearly state that in view of the contract work done by them, the respondent

is liable to pay the amount mentioned in the above three applications and after several requests, the respondent did not pay the amount due and even after sending the letter, 24.2.2012 demanding repayment, as there was no response from the respondent company, the applicant has come forward with the above applications for the relief as afore stated.

47. Even in the common counter, there is no specific denial about the amount due to the applicant and it is not the case of the respondents that no amount is due or there was no contract between the applicant and the respondent and in these circumstances, this Court is of view that the applicant has made out a prima facie case in their favour and therefore, the balance of conveninece is also in their favour.

48. Further, as discussed above, unless and until the applicant is granted protection, they would be put to irreparable loss which cannot be compensated even if the arbitral award is ultimately decreed in their favour, whereas it is not the case of the respondent that even in the event of non-granting of interim order under Section 9 of the Act, no loss or injury would be caused to the applicant and therefore, this Court is of view that, if no relief is granted as sought for by the applicant, then the applicant would be put to irreparable loss and injury.

49. Since the applicant, as discussed above, has satisfied the afore said three golden principles, this Court is of firm view that the above applications are deserved to be allowed.

50. The decision relied on by the learned counsel for the respondent in **Siddharam Satlingappa Mhetre vs. State of Maharashtra and others ((2011) 1 SCC 694)** is not relevant to the case on hand and the decision in **Omsakthi Renergies Limited represented by its Managing Director Mr. M. Jayathirth vs. Megatech Control Limited, represented by its Managing Director Mr.N. ramkhumar (2006 (2) CTC 161)** is also not applicable to the case on hand.

51. Further, the decision in **Sundaram Finance Ltd. represented by its Senior Manager vs. M.K. Khunhabdulla (2014 (3) CTC 159)** relied on by the learned counsel for the respondent, as discussed above, would only lend support to the case of the applicant and not the respondent.

In the light of the above discussion, this Court is of view that the above applications are deserved to be allowed and accordingly, they are allowed and the respondent company is hereby directed to furnish security to the amount mentioned in the above three

applications within a period of two weeks from the date of receipt of a copy of this order.

sd/.R.M.D.J

27.03.2015

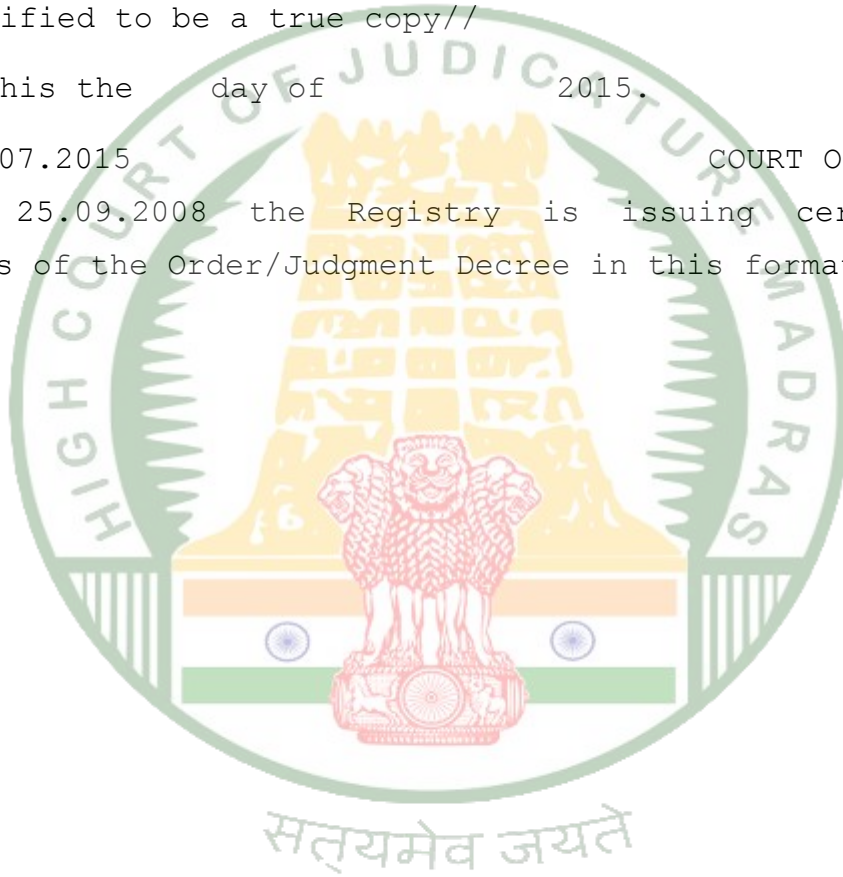
//Certified to be a true copy//

Dated this the day of 2015.

R.s/27.07.2015

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



WEB COPY