IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 29TH DAY OF JULY 2015

THE HON'BLE MRS. JUSTICE S.VIMALA

A. No.4445 of 2013

In the matter of Arbitration & Conciliation Act, 1996

And

In the matter of Memorandum of Understanding dated 29/11/2012

and

In the matter of disputes between Mr.Rakesh P.Seth and another Vs.K.G.S.Developers Ltd. And anr.

1.Rakesh P.Sheth,
S/o.Premkumar K.Sheth,
No.340, 1st South Main Road,
Kapaleeshwar Nagar,
Neelankarai,
Chennai-600 041.

2.Roshini R.Sheth,
W/o.Rakesh P.Sheth,
No.340, 1st South Main Road,
Kapaleeshwar Nagar,
Neelankarai,
Chennai 600 041. : Applicants

Vs.

1.M/s.K.G.S.Developers Limited,
No.63, Kamaraj Avenue, 1st Street,
Adyar, Chennai 600 041.

2.M/s.K.G.S.Constructions Limited
(formerly known as K.G.S.Milestone Construcitons Limted)
No.63, Kamaraj Avenue, 1st Street,
Adyar, Chennai 600 020. : Respondents

Application praying that this Hon'ble Court be pleased to direct the Respondents to furnish security to an extent of Rs.15,00,00,000/- (Rupees Fifteen Crores Only) within a period of four weeks and on their failure, direct attachment of the property is mentioned in the schedule to this Judge's Summons.

Schedule-A

All that piece and parcel of land situated at Pallikaranai Village, Tambaram Taluk, Kanchipuram District bearing Survey No.321/2, 321/3, 321/4, 321/5, 321/6, 322/2, 325/1A

situate within the Registration District of Kanchipuram, Sub-Registration District of Tambaram belonging to KGS. Developers Ltd.

Schedule-B

All that piece and parcel of land situated at Egatthur Village, Chengalpet Taluk, Kanchipuram District bearing Survey No.77/5C, 5D, 5E, 5F, 5G, 5H, 5I, 6A3, 7, 82/3B1B, 4A1B, and 82/4A1E

situate within the Registration District of Kanchipuram, Sub-Registration District of Chengalpet, belonging to KGS. Developers Ltd.

Schedule-C

All that piece and parcel of land situated at Thalumbur Village, Chengalpet Taluk, Kanchipuram District bearing Survey No.147/3, 148/3A, 148/3B, 148/3C, 148/3D.

situate within the Registration District of

Kanchipuram, Sub-Registration District of Chengalpet, belonging to KGS. Developers Ltd.

Schedule-D

All that piece and parcel of land situated at Karasangal Village, Chengalpet, Taluk Kanchipuram District bearing Survey No.180/6, 180/2A, 186/1, 186/2, 196, 197/2, 197/3, 198/2A1A, 2A1B, 2A1C1, A1C2, 2A2, 2B, 199/1A, 1A, 1B, 2, 3, 210/1, 2, 202/1A, 1B, 2, 3A1, 3A2, 3A3, 3B1, 3B2, 203/1A, 1B, 204/2, 208/2 & 209/1.

situate within the Registration District of Kanchipuram, Sub-Registration District of Chengalpet, belonging to KGS. Developers Ltd.

This application coming on this day before this court for hearing the court made the following order:

This Application has been filed by the Applicants, seeking direction to the respondents to furnish security to an extent of Rs.15,00,00,000/- and on their failure, to direct attachment of property.

2. There is an Arbitration Award, dated 03.01.2015, in favour of the claimants / Applicants, under which the Arbitral Tribunal has awarded a sum of Rs.3,62,50,000/- in favour of the first Applicant and a sum of Rs.43,49,305/- in favour of both the Applicants. This amount is payable with 12% interest from 08.08.2013 until realization. The second respondent has been directed to pay this amount.

3. Pending Arbitral Proceedings, the Applicants have filed an Application under Section 9 (ii) (b) of The Arbitration and Conciliation Act, 1996, seeking directions to the respondents to furnish security and also to order attachment of the property, in the event of failure to furnish security.

4. It is the claim of the Applicants that they are entitled to the amount of Rs.15,00,00,000/-, as per the details furnished in paragraph 6 of the affidavit are as follows:-

(i) The amounts covered under the two cheques - Rs.3,25,00,000/-;

(ii) The amount due, on account of, not closing the vehicle loans (transferring the vehicles alone to the applicants) - Rs.43,49,305/-

(iii) The amount waived earlier by the applicants, provided all the amounts due to them were paid before 31.03.2013 - Rs.37,50,000/-; and

(iv) The amount towards loss of profit suffered on account of non-payment of amounts by the respondents in time - Rs.11,25,00,000/-.

5. It is submitted by the learned counsel for the Applicants that the respondents are highly indebted and they are not in a position to honour their commitment. It

is alleged that the respondents are conducting hectic parlays to dispose of the properties with an intent to cheat and defraud the Applicants. Alleging that there are encumbrances over the property and if the security is not furnished, the Applicants would not be able to realize the award amount, this Application has been filed.

5.1. No counter is filed in this case, but an Application challenging the Award has been filed under Section 34 of the Act, which is yet to be numbered.

6. The learned counsel for the respondents submitted that there is no jurisdiction to this Court to pass any interim order when the award is under challenge under Section 34 of the Arbitration Act. In support of the contention, the decision reported in **(2004) 1 SCC 540 (National Aluminium Co. Ltd., v. Pressteel & Fabrications (P) Ltd.,)** is relied upon, where-under it has been held as follows:-

> "10. ... from the mandatory language of section 34 of the 1996 Act, that an award, when challenged under section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible....."

6.1. The legal proposition enunciated in the said decision cannot be disputed, but this decision is not applicable to the facts of this case. As already pointed out, even though it is claimed that the award is under challenge as per Section 34 of the Act, the respondents are not in a position to furnish even the details of the Application. Therefore, the contention that the Award is under challenge cannot be accepted.

7. Relying upon the decision reported in **(2010) 3 Comp L.J. 749 (Delhi) (Bharat Sanchar Nigam Ltd. v. Haryana Telecom Ltd.,)** it is contended by the learned counsel for the respondents that the Arbitral Tribunal is duty bound to ensure that the award is actually delivered directly to the party concerned; it is also contended that the award was not directly delivered to the respondents and therefore, still there is time left for the Applicants to challenge the award. The relevant paragraph, in the said judgment, reads thus:-

> "5. It also seems to us that it is imperative that delivery / receipt of the Arbitral Award should be at the instance, responsibility and authority of the Arbitral Tribunal. In the case in hand, the Arbitral Award appears to have been dispatched under "Certificate of Posting" and not recorded delivery, and that too to the Advocate of the Appellants. "UPC" merely evidences the posting of

> a letter/envelope and not its service. In matters of moment, such as delivery/receipt of an Arbitral Award, the Arbitral Tribunal is duty-bound to ensure that the Award is actually delivered directly to the party concerned. It is our fervent hope that the Arbitrators and Arbitral Tribunals shall henceforward consider their judicial contract to have culminated only upon their being satisfied that each of the parties before it has actually been served with the Arbitral Award. If the recorded delivery is returned undelivered, the Arbitral Tribunal must dispatch it once again until it is served or there is sufficient reason to assume that it stands served."

7.1. This decision is the most appropriate one for being placed before the Court which would hear the Application under Section 34 of the Act, to convince the court that there is no delay in filing and this decision is not relevant for the purpose of deciding this Application.

8. The next contention of the learned counsel for the respondents is that merely because there is an admission on the part of the respondents to pay certain amount to the Applicants, which was allegedly due, that itself will not entitle the Applicants to invoke the provisions of Section 9 of the Act, for a direction to the respondents to furnish security for the outstanding amount. In support of this contention, the decision reported in **MANU/TN/2871/2011 (A-1 Biz Solutions Chennai v. Cascade Billing Center**

Incorporated) is relied upon, whereunder it has been held as follows:-

> "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. In this case, ***the appellant has not come forward with a clear pleading*** to seek for a direction to the respondent to furnish security. ***In the absence of any pleading that the attitude of the respondent is only to obstruct or delay the recovery of money or the respondent is about to dispose of the whole or any part of the property, the appellant is not entitled to the relief of direction*****....."**

8.1. This decision has been rendered in a situation where there was lack of pleading: (a) that the respondent was trying to obstruct or delay the recovery of money; (b) that the respondent is about to dispose of the property. But, in so far as this case is concerned, the pleadings are in abundance and therefore this decision is not applicable to the facts of this case.

9. The last contention of the learned counsel for the

respondents is that, in the absence of the Applicants satisfying that they have a prima facie case, the Applicants are not entitled to get the orders of attachment before judgment. In support of this proposition, the following observation in the decision reported in **(2008) 2 SCC 302 (Raman Tech. & Process Engg. Co. and another v. Solanki Traders)** is relied upon. The relevant observation reads thus:-

> "4. .... The Scheme of Order 38 and the use of the words 'to obstruct or delay the execution of any decree that may be passed against him' in Rule 5 make it clear that before exercising the power under the said Rule, the ***court should be satisfied that there is a reasonable chance of a decree being passed in the suit against the defendant***. This would mean that the court should be satisfied the plaintiff has a prima facie case. If the averments in the plaint and the documents produced in support of it, do not satisfy the court about the existence of a prima facie case, the court will not go to the next stage of examining whether the interest of the plaintiff should be protected by exercising power under Order 38 Rule 5 CPC. It is well-settled that merely having a just or valid claim or a prima facie case, will not entitle the plaintiff to an order of attachment before judgment, unless he also establishes that the defendant is attempting to remove or dispose of his assets with the intention of defeating the decree that may be passed. Equally well settled is the position that even where the defendant is removing or disposing

his assets, ***an attachment before judgment will not be issued, if the plaintiff is not able to satisfy that he has a prima facie case.***

5. The power under Order 38 Rule 5 CPC is drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It Should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff ***to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged.*** Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out of court settlement, under threat of attachment."

9.1. In the above decision, it has been cautioned that the provisions of Order 38 Rule 5 cannot be utilized as a leverage for coercing the defendant to settle the suit claim. The reported decision is with reference to bloated and doubtful claims. This is not the situation here. It is not as if the entire claim is pending adjudication. Already there had been an Arbitral Award to the extent of Rs.3,62,50,000/- and Rs.43,49,305/-.

10. It is settled law that powers under Section 9 of the Act is far and wide and the nature of order passed can also be diverse to the extent of securing the interest of justice. The attempt of the respondents in resorting to

technicalities to derail the admitted claim cannot be encouraged. Therefore, the objections on the part of the respondents are ill-founded and the same is rejected.

11. Having regard to the: (a) pleadings; (b) details furnished with regard to the amount payable by the respondents to the Applicants; (c) amount decreed under the Arbitral Award; (d) alleged attempt made on the part of the respondents to defeat and delay the execution of the decree, the respondents are directed to furnish security to the extent of the claim made in the Application within a period of three weeks from the date of receipt of a copy of this order, failing which, the properties are ordered to be attached.

11.1. In the event of the properties being attached, the order of attachment shall be communicated to the Office of the Sub-Registrar/s concerned.

11.2.This Application stands disposed of accordingly.

sd/.S.V.J

29.07.2015

//Certified to be a true copy//

Dated this the day of 2016

R.s/11.04.2016 COURT OFFICER

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