

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.02.2017

CORAM

THE HON'BLE MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE MR. JUSTICE M.SUNDAR

O.S.A.Nos.12 to 14 of 2017
and
C.M.P.Nos.1169 to 1171 of 2017

M/s.KGS Constructions Limited,
rep. by its Managing Director,
No.43, Besant Avenue Road,
Adyar, Chennai-600 020.

... Appellant in
all three Appeals

Vs

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

.. Respondent in
all three Appeals

Appeals filed under Order XXXVI, Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 27.03.2015 made in Application Nos.1967 to 1969 of 2014 on the file of this Court.

For Appellant : Mr.Prahalad for
for M/s.R.Parthasarathy

For Respondent : Mr.Nityesh Natraj

COMMON JUDGMENT

(Judgment of the Court was delivered by The Hon'ble Chief Justice)

The respondent had entered into three agreements with the appellant - two for electrical works and one for plumbing and sanitary work dated 31.5.2011 & 01.06.2011 and 23.5.2011 respectively in relation to residential development project of the appellant at Trivandrum. The respondent claims to have raised periodic bills, which were certified for the work done

and despite there being no dispute, payments were not forthcoming even after a final bill was submitted.

2. All the three agreements contain an identical arbitration Clause being Clause No.10, and in view of the claims raised by the respondent on the appellant in contemplation of the arbitration proceedings, three separate applications were filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "the said Act") seeking furnishing of security to the extent of the final bill which had been raised. All these applications were allowed by the learned Single Judge vide the impugned common order dated 27.03.2015.

3. The impugned order is an elaborate one discussing the case laws cited by both sides. The conclusion reached by the learned Single Judge is that in a matter pertaining to Section 9 of the said Act, the provision of Code of Civil Procedure, 1908 would have no application.

4. The learned counsel for the appellant contends that the findings of the learned Single Judge on the principles of law would not be sustainable, as even if necessary averments as contemplated under Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 were not required, the analogous principles would apply. In this behalf, the learned counsel for the appellant relied upon the Division Bench judgment of this Court in M/s.A-1 Biz Solutions Chennai, rep. by its Chief Executive Officer Mr.Ujwal Rao, 106-109, NSIC STP Complex 8-24, Industrial Estate, Ekkaduthangal, Chennai-600 032 v. M/s.Cascade Building Center Incorporated, rep. by its President Mr.Dev Anderson No.1001, Cuper Point Road SW suits, 140-182 Olympia, WA 98502 U.S.A., reported in 2011 SCC OnLine Mad 924, in which reliance had been placed on the observations of the Hon'ble Supreme Court in Adhunik Steels Limited v. Orissa Manganese and Minerals Pvt Ltd, AIR 2007 SC 2563 where it was concluded that the interim measures of protection carry a common threat and thus, for an order to be passed under Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908, the intention of the parties to deprive the other party from enforcing the decree should be manifestly clear, pleaded, proved and orders of attachment cannot be granted as a matter of routine.

5. The learned counsel further refers to another Division Bench judgment of this Court in Sundaram Finance Ltd., 21, Patullos Road, Chennai-2, rep. by its Senior Manager J.Thilak v. M.K.Khunhabdulla, reported in 2014 (3) CTC 159, laying down the proposition that the relief of requiring the opposite party to furnish security for the amount in question being an extraordinary one, the same cannot be granted merely on the basis of vague or general allegations that the respondent is

about to dispose of the properties or remove it beyond the jurisdiction of the Court.

6. To the aforesaid extent, we tend to agree with what the learned Single Judge states, as there must be a real, imminent danger of removal or disposal of the properties for such an extreme measure to be taken against the party. This would naturally require necessary pleadings as to the facts.

7. In the conspectus of the aforesaid legal position, if the applications filed by the respondent are to be considered, they are not happily worded. Thus, in normal circumstance, we may have been inclined to set aside the impugned order unconditionally. But there are supervening facts and judicial orders brought to our notice, which persuade us to do otherwise.

8. The first and foremost important aspect is that the Sole Arbitrator has rendered a common Award dated 09.11.2016. The operative portion of the Award is as under:-

(a) Rs.23,83,595.33 with regard to contract No.1 together with interest 18% p.a. from 16.3.2012;

(b) Rs.2,72,658.27 with regard to contract No.2 together with interest at 18% p.a. from 08.2.2012;

(c) Rs.4,26,395/- with regard to contract No.3 with interest at 18% p.a. from 8.2.2012.

9. Thus, though both sides would have rights to file an objection in accordance with law, as they claim they would, the fact is that there is a crystallised liability as on date against the appellant, who has suffered a decree in the form of an Award.

10. The aforesaid fact is also not to be seen in isolation, but the importance of the conduct of the appellant before us in different legal proceedings. In respect of these proceedings, judicial orders have been placed before us, where the nephew of the Managing Director of the respondent was in litigation with the same appellant. These litigations consist of Company Petition, Interim Application and Contempt Petition etc. being C.P.No.377 of 2016, O.P.No.436 of 2016 and Cont. P.No.2824 of 2016 and Sub Application Nos.628 and 643 of 2016. In all these applications, on 01.12.2016, a settlement agreement dated 29.11.2016 was taken on record, which quantified the compensation payable by the appellant, apart from the registration of the properties through its sister concern and an undertaking was given to abide by the compromise, where the

Managing Director of the appellant was present. It is on this undertaking, even the Contempt Petition was closed against the appellant. However, cheques had bounced and despite notice dated 24.1.2017 issued on behalf of the creditor, the sister concern of the appellant has failed to honour the same as on date.

11. In our view, the aforesaid proceedings are important because it belied the plea of the learned counsel for the appellant that the appellant is in robust financial health and there is no apprehension of frittering away the assets.

12. We may note that we had given an opportunity after some hearing on the last date of hearing on 31.1.2017 to the learned counsel for the appellant to see whether the appellant would be willing to give security to the extent of the awarded amount and thus, watering down the amount as set out in the impugned order. The learned counsel for the appellant on instruction states that the appellant is unwilling to do so and would thus invite the orders of this Court. It is in pursuance thereto, we have penned down our order.

13. We are of the view that there is just an apprehension on part of the respondent that the appellant is not in good health and may fritter away its assets. Though the averments in detail are lacking, the conduct of the appellant in the proceedings arising from the settlement recorded dated 01.12.2016 leaves us with no matter of doubt. Thus in the given facts of the case, we can safely say that it is one of res ipsa loquitur and even though the application may not be happily worded, the respondent would be entitled to an order where security should be called upon to be given by the appellant, but reduced to the amount to the total quantum of the Award along with interest and costs as on 31.01.2017. A period of two weeks' time is granted for the same.

14. The appeals are, accordingly, disposed of, leaving the parties to bear their own costs. Consequently, C.M.P.Nos.1169 to 1171 of 2017 are closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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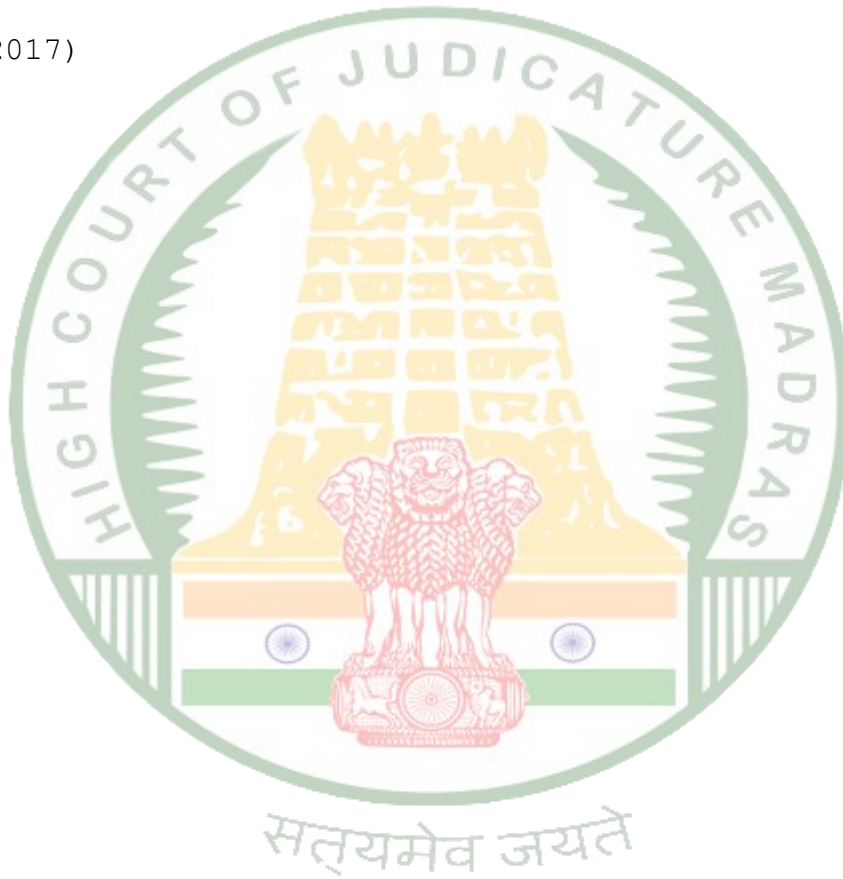
To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

+1cc to M/s.Satish Parasaran, Advocate, S.R.No.7702

O.S.A.Nos.12 to 14 of 2017

AK(CO)
CA(13/02/2017)



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