

Application No.1830 of 2015**S.MANIKUMAR, J.**

This application is filed by M/s.Shriram City Union Finance Ltd., Chennai for an order prohibiting the Garnishee/4th respondent from making payment to the first respondent to the extent of a sum of Rs.14,81,869/- until the dues are satisfied by the applicant from the first respondent, and to prohibit the first respondent from receiving any payment from the Garnishee and also to direct the Garnishee to deposit the sum of Rs.14,81,869/- into this Court to the credit of this application.

2. Facts leading to the filing of this application are that the applicant is a non-banking finance company registered under the provisions of the Indian Companies Act, 1956. The applicant carries on the business of extending loan facility to its customers. The first respondent is a Private Limited Company registered under the Companies Act, 1956. The first respondent, through the second respondent approached the applicant in the month of November, 2011 with a request for business working capital, which was acceded to by the applicant. The first respondent entered into a Loan Agreement No.TFHO1TF11100003, dated 10.11.2011 with the applicant. In that, the respondents 2 and 3 have joined as co-borrowers guaranteeing due performance of the obligations of the first respondent under the agreement. Thus, the respondents 2 and 3 are jointly and severally liable to pay the loan amount.

3. As per the Loan Agreement, the total loan amount of Rs.39,51,984/- (Rs.30,00,000/- being the principal amount and Rs.9,51,984/- being the interest amount) was repayable by the first respondent in 24 monthly instalments at the rate of Rs.1,64,666/- each. In case of default in the payment of instalments, an additional interest at the rate of 36% would be levied. The first instalment commenced in December, 2011 and the last instalment would end in November, 2013. The first respondent paid 18 instalments in full and the 19th instalment was paid on several dates and as per the statement of accounts, a sum of Rs.1,15,334/- was paid towards the 19th instalment and the balance of Rs.49,332/- was due. Thereafter, the respondents did not pay the remaining instalments as per the loan Agreement, despite repeated demands made by the applicant. In terms of clauses 8 and 9 of the Agreement, in the event of default made by the respondents, the applicant is entitled to claim the entire amount due under the Agreement and the clause 11 of the Agreement provides for appointment of an Arbitrator. As on 19.02.2015, a sum of Rs.14,81,869/- is due and payable by the respondents under the loan Agreement.

4. On 21.02.2015, the applicant issued a notice through its learned counsel to the respondents to pay a sum of Rs.14,83,591/- as on 21.02.2015 and in spite of the same, the respondent did not send any reply. However, the first respondent informed the applicant that it is not in a position to repay the loan amount and that the Garnishee is due to pay a sum of Rs.92,02,169/- to the first

respondent. Under Section 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act, the applicant can seek the claim before or during arbitral proceedings at any time, after making the arbitral award but before it is enforced under Section 36 of the Act and therefore, the applicant has filed this application for a direction to the Garnishee not to make payment of Rs.14,81,869/- to the first respondent and to deposit Rs.14,81,869/- into the Court to the credit of this application.

5. Though notice was served on the respondents, except the 4th respondent/Garnishee, other respondents have not chosen to enter appearance.

6. The contesting 4th respondent/Garnishee in its counter affidavit, inter alia, has raised the preliminary objections that this application is not maintainable under the provisions of Section 9(1)(ii)(b) of the Arbitration and Conciliation Act, as the 4th respondent is not a party to the arbitration agreement and the 4th respondent is not governed by any arbitration clause. The amount claimed by the applicant from the 4th respondent is not the amount in dispute in the arbitration and as such, this application is liable to be dismissed. The garnishee proceedings can be filed only after passing of a decree, as stipulated in Order 21 Rule 46-A to 46-I CPC and the present application is filed pending arbitration proceedings and hence, this application is liable to be dismissed. Further, the applicant has not satisfied the requirements of Order 38 Rule 5 CPC. The first respondent is not entitled to Rs.92,02,169/- much less

Rs.Rs.14,81,869/- from the 4th respondent and in fact, no amount is due to the 1st respondent from the 4th respondent and since the amount is under dispute between the 4th respondent and the 1st respondent, the present petition is not maintainable. No notice was issued to the 4th respondent by the applicant before initiation of this proceedings. The applicant has connived with the 1st respondent to sort out their disputes at the cost of the 4th respondent.

7. The 4th respondent has also stated that it is engaged in the business of manufacture and sale of weigh bridges, weighing machines, scales, etc. It has entered into a contract with MARG Limited, Karaikal for supply and commissioning of automated truck loading system for their project at Karaikal Port, Puducherry. In order to execute a part of the contract with MARG Limited, the 4th respondent has engaged the 1st respondent for supply of silo structure. The 4th respondent has so far paid Rs.5,81,91,501/- to the 1st respondent during the period from July, 2011 to May, 2013 and since the 1st respondent did not make supply and carry out a portion of the work assigned, a sum of Rs.92,02,169/- was retained by the 4th respondent. There is a dispute between the 1st respondent and the 4th respondent with regard to Rs.92,02,169/- retained by the 4th respondent against the pending work to be completed by the 1st respondent. Since this amount represents the works that are yet to be completed by the 1st respondent and there is a dispute between the 1st respondent and the 4th respondent with regard to the amount, the 4th respondent is not liable to pay

Rs.92,02,169/- much less Rs.14,82,869/- to the 1st respondent and this application is therefore liable to be dismissed.

8. Heard the learned counsel for the applicant and the 4th respondent and perused the documents filed.

9. In this application the short point to be decided is whether a prohibitory order is required to be issued against the 4th respondent/Garnishee restraining it from making the payment to the 1st respondent upto a limit of Rs.14,81,869/- and to direct the Garnishee to deposit the said amount into the Court.

10. The question whether the first respondent is liable to pay Rs.14,81,869/- to the applicant herein will be decided in the arbitration proceedings. This is a petition filed under Section 9(1)(ii)(b) and (e) of the Arbitration and Conciliation Act,1996 (in short, "the Act") for securing the amount in dispute in the arbitration by means of a prohibitory order against the 4th respondent/garnishee restraining it from making payment to the first respondent to the tune of Rs.14,81,869/- and also to deposit the same into the Court.

11. It is submitted on behalf of the 4th respondent that the present application is in the nature of a garnishee proceedings and can be filed only after

passing of a decree as stipulated in Order 21 Rule 46A to 46I CPC. He submitted that the present application has been filed pending arbitration proceedings and as such, the present application for prohibitory order is not maintainable. In this connection, the attention of this Court was also drawn to the decision of this Court in **M/s.L & T Finance Limited rep. by its Asst.Manager C.Balasubramanian vs. C.T.Ramanathan Infrastructure Pvt. Ltd. Chennai [CDJ 2013 MHC 2490]** wherein this Court held that only in rarest of rare cases the provisions of Order 21 Rule 46A to 46C, CPC can be invoked pending arbitral proceedings and this Court held as under:

“5. Reading of provisions of C.P.C. shows that the order of Garnishee can be passed in case of recovery from the judgment debtor meaning thereby that the provisions of Order 21 Rule 46A to 46C are applicable only after passing of decree. Furnishing of security pending arbitral proceedings therefore will be governed by underlying principle of Order 38 Rule 5 of Code of Civil Procedure. It is only in rarest of rare cases that provisions of Order 21 Rule 46A to 46C can be invoked pending arbitration proceedings and not in a routine manner. The reason being that the relationship of Garnishee with the debtor or creditor is not governed by arbitration clause between the parties to the dispute. In case of any dispute with regard to claim, the Garnishee cannot approach the Arbitrator for want of arbitration agreement. Though under Section 9 of the Arbitration and Conciliation Act, it is open to the Court to pass interim order against a party who is not a party to arbitration agreement or arbitration proceedings, but it can be with regard to subject matter of arbitration and not otherwise. The Court can pass

order against third party in exceptional cases in the interest of justice to protect the property from being transferred or becoming vested with third party illegally.

6. The Hon'ble Supreme Court in *Firm Ashok Traders vs. Gurumukh Das Saluja* (AIR 2004 SC 1433) was pleased to lay down that since remedy under Section 9 flows from arbitration agreement, a third party who is not a party to the arbitration agreement or arbitration proceedings, cannot seek any relief in this section, nor he can be pleaded as party in any application under Section 9 of the Arbitration and Conciliation Act, 1996. Therefore, it is in the rarest of rare case, that the relief against Garnishee would be competent under Sec.9 of the Arbitration and Conciliation Act and not otherwise. It is also well settled law that unsecured loan cannot be converted into a secured loan, by invoking Order 38 Rule 5 CPC.”

12. In the instant case, the 4th respondent is not a party to the arbitration agreement or arbitration proceedings and the 4th respondent cannot seek any relief under Section 9 of the Act and this Court should be so cautious in considering the plea of the applicant herein. As held by this Court in the case cited supra, the provisions of Order 21 Rule 46A to 46C, CPC cannot apply to proceedings under Section 9 of the Act, as the underlying principle of Order 21 Rule 46A to 46C can be invoked only after passing the decree, as the words used are judgment debtor and not debtor or parties.

13. Secondly, the learned counsel for the 4th respondent submitted that the present application is in the nature of furnishing security and hence, the applicant should satisfy the requirements of Order 38 Rule 5 CPC. According to the learned counsel for the 4th respondent, to avail the benefit under Order 38 Rule 5 CPC, the applicant must show prima facie that its claim is bona fide and valid and also satisfy the Court that the respondents are about to remove or dispose of the whole or part of the property, with the intention of obstructing or delaying the execution of any award that may be passed against them. Learned counsel for the 4th respondent further submitted that the applicant has not shown any prima facie case for passing a prohibitory order and in this regard, he relied upon the decision of the Hon'ble Supreme Court in **Raman Rech. & Process Engg.Co. v. Solanki Traders [(2008) 2 SCC 302]**.

14. Here, pending arbitration proceedings the applicant filed this application under Section 9 of the Act, which deals with interim measures, etc. by Court. Section 9 of the Act is a substantive provision empowering 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 of the Act. The power under Section 9 is wide and interim order passed under Section 9 of the Act is a drastic order. While dealing with the application under Section 9 of the Act, the accepted principles that governed the grant of an interim injunction should be kept in mind and the normal rules that govern the Court in the grant of

interim orders are not sought to be jettisoned by the provision of Section 9. In this regard, it is worth to refer to the decision of the Hon'ble Supreme Court in **Adhunik Steels Ltd. vs. Orissa Manganese & Minerals Pvt. Ltd. (CDJ 2007 SC 781)** wherein it is held as under:

“10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the Court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of ‘just and convenient’ while speaking of passing any interim measure of protection. 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 measures under Section 9 of the Act.”

Therefore, the applicant has not only made out a clear case on merits of the claim, but also the applicant should establish that the denial of order would result in grave injustice to the applicant. The statutory discretion given to the Court under Section 9(1)(ii)(b) of the Act must be exercised judicially in accordance with the established legal principles and having regard only to the relevant considerations (vide: C.S.S.Corp. Private Limited vs. Space Matrix Design Consultants Private Limited [CDJ 2011 MHC 6542]).

15. In this case, the applicant has contended that the 4th respondent/Garnishee has to pay a sum of Rs.92,02,169/- to the first respondent and sought for a prohibitory order restraining the Garnishee from making payment to the first respondent to the extent of Rs.14,81,869/-. The applicant has filed the loan agreement, loan sanction letter and the letters of respondents 2 and 3 in which they have accepted their joint liability. The applicant has also filed the Audit confirmation letter issued by the 4th respondent to the 1st respondent wherein the 4th respondent has confirmed Rs.92,02,169/- as the balance due to the 1st respondent. On the other hand, the 4th respondent has disputed that it need not make any payment to the 1st respondent. According to the 4th respondent, the 1st respondent did not make supply and carry out portion of the

works assigned to it and towards the pending job, Rs.92,02,169/- was retained by the 4th respondent. The emails filed by the 4th respondent prima facie show that there was delay on the part of the 1st respondent in executing the committed work. It is not the case of the applicant that the respondents are acting in a manner to defeat the award. The applicant has not averred or provided any material to show that there is an apprehension or danger that the amount could not be recovered by it from the respondents 1 to 3, in case of an award being made in the arbitral proceedings. The applicant has filed a letter written by the 1st respondent dated 6.2.2015 stating that there was severe recession in the industry and asking the applicant to take steps against its customer for recovery of money. Except this, no material has been placed before this Court that the 1st respondent is not having financial stability and it is not a running concern. Further, the 4th respondent disputed the amount of Rs.92,02,169/- due to the 1st respondent. The applicant has failed to establish that balance of convenience lies in its favour and the denial of order would result in grave injustice to it.

16. In this view of the matter, I hold that the applicant has not made out a case for a prohibitory order against the 4th respondent/Garnishee. This application is therefore dismissed. No costs.

30.09.2019

S. MANIKUMAR, J.

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