Application No.9466 of 2019

N. SATHISH KUMAR, J.

This application has been filed by the applicant/finance company under Section 9 of the Arbitration and Conciliation Act, 1996, to appoint an Advocate Commissioner with direction to seize the schedule mentioned vehicle which is lying under the custody of the Respondents or their men, agents, servants or anyone claiming under them from the premises of the Respondent at Old No.88, New No.167, 2nd Floor, Arcot Road, Vadapalani, Chennai 600026 or at any other place where the scheduled asset is found with the police aid and by breaking open locks if necessary and to take the same into his custody and sell the same at fair price market price.

2. It is the case of the applicant that the respondent availed of a vehicle loan from the Applicant-company and executed a loan agreement No.MMB0605130001 dated 13.05.2016, for a sum of Rs.3,50,000/- with intereest totalling Rs.4,96,139/- to be paid in 48 monthly installments and the

first installment commenced from 20.06.2016 and the re-payments were to run till 20.05.2020. It is stated that as of 01.08.2019, a sum of Rs.3,53,381/- is outstanding. In terms of the loan agreement executed by the respondent, the applicant/Finance company is entitled to re-possess the vehicle in the event of default committed by the respondent. It is also submitted that the continued use of the vehicle by the respondent would depreciate its value.

3. As per the agreement any dispute arising between the parties in respect of the loan transaction same shall be referred to sole arbitrator appointed by the company as per clause 22 of the agreement. It is the contention of the applicant that the respondents have committed default in payment of instalments as mentioned above. Therefore, the applicant issued legal notice. Meanwhile, this application has been filed seeking interim order for seizing the vehicle which is the subject matter of the arbitration proceedings.

4. The Honourable Supreme Court in ***Firm Ashok Traders and Another etc., v. Gurumukh Das Saluja and others [(2004) 3 SCC 155]*** has held as follows:

> *"**13.** The A&C Act, 1996 is a long leap in the direction of alternate dispute resolution systems. It is based on UNCITRAL Model. The decided cases under the preceding Act of 1940 have to be applied with caution for determining the issues arising for decision under the new Act. An application under Section 9 under the scheme of the A&C Act is not a suit. Undoubtedly, such application results in initiation of civil proceedings but can it be said that a party filing an application under Section 9 of the Act is enforcing a right arising from a contract? "Party" is defined in clause (h) of sub-section (1) of Section 2 of the A&C Act to mean "a party to an arbitration agreement". So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of court under Section 9 can be: (i) before, or (ii) during arbitral proceedings, or (iii) at any time after the making of the arbitral award but before it is enforced in accordance with Section 36. With the pronouncement of this Court in Sundaram Finance Ltd. v. NEPC India Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] the doubts stand cleared and set at rest and it is not necessary that arbitral*

proceedings must be pending or at least a notice invoking arbitration clause must have been issued before an application under Section 9 is filed. A little later we will revert again to this topic. For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the court under Section 9 must possess is of being a "party" to an arbitration agreement. A person not party to an arbitration agreement cannot enter the court for protection under Section 9. This has relevance only to his locus standi as an applicant. This has nothing to do with the relief which is sought for from the court or the right which is sought to be canvassed in support of the relief. The reliefs which the court may allow to a party under clauses (i) and (ii) of Section 9 flow from the power vesting in the court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The court is conferred with the same power for making the specified orders as it has for the purpose of and in relation to any proceedings before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. Under the scheme of the A&C Act, the arbitration clause is separable from other clauses of the partnership deed. The arbitration clause constitutes an agreement by itself. In short, filing of an application by a party by virtue of its being a party to an *arbitration agreement is for securing a relief which the court has power to grant before, during or after arbitral proceedings by virtue of Section 9 of the A&C Act. The relief sought for in an application under Section 9 of the A&C Act is neither in a suit nor a right arising from a contract. The right arising from the partnership deed or conferred by the Partnership Act is being enforced in the Arbitral Tribunal; the court under Section 9 is only formulating interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Section 69 of the Partnership Act has no bearing on the right of a party to an arbitration clause to file an application under Section 9 of the A&C Act.*

14. ... ...

15. ... ...

16. ... ...

17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] itself the Court has *said: (SCC p. 488, para 19) "It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings". Section 9 permits application being filed in the court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word "before" means, inter alia, "ahead of; in presence or sight of; under the consideration or cognizance of". The two events sought to be interconnected by use of the term "before" must have proximity of relationship by reference to occurrence; the later event proximately following the preceding event as a foreseeable or "within-sight" certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended* ***(as Sundaram Finance Ltd. [(1999) 2 SCC 479 : AIR 1999 SC 565] puts it)*** *and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL*

Rules is to provide "interim measures of protection". The order passed by the court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all-time or permanent protection.

18. *Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the "proximately contemplated" or "manifestly intended" arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made* *"before" i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms."*

5. The above judgment makes it clear that a party seeks relief under Section 9, has to demonstrate its manifest intention to arbitrate. Sub-Section (2) of Section 9 of Act, which came into force on and from 23.10.2015, makes it clear that any interim order passed prior to the commencement of the Arbitration Proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

6. Further Section 17 of the Act makes it very clear that the interim orders can be granted under Section 9(1) of the Act and can also be granted

by a Arbitral Tribunal. Only in case where there are circumstances which do not render the remedy provided under Section 17 efficacious, an application under Section 9(1) could be entertained. Therefore, the above judgment makes it clear that a party obtained interim orders under Section 9 of the Act, before the commencement of the Arbitral Proceedings cannot sit over without initiating arbitral proceedings as per law. After the amendment of the Act in 2015, Sub-Clause (2) of 9 of the Act makes it clear that whenever interim orders passed under Section 9(1) of the Act, the arbitral Proceedings shall be commenced within 90 days from the date of such order or within such further time as the Court may determine. Therefore, the time limit for initiating proceedings after interim orders become mandatory. Therefore, from the above amendment under Section 9 of the Act and the dictum of the Supreme Court, make it very clear that the party cannot sit over merely after obtaining the interim order under Section 9 of the Act. There must be an intention on the part of the party to refer the dispute to the Arbitration. Otherwise a person who seeks interim relief before the commencement of the

Arbitral Proceedings must establish the manifest intention to arbitrate.

7. Except general allegation in the application that the applicant is taking steps to initiate arbitration proceedings, what were the steps taken in this regard has not explained. The very clause in the contract makes it clear that the Arbitrators to be appointed the moment default is committed by the company itslef. In such being the position there was no need whatsoever to wait endlessly. Though it is stated that the defeault has committed from August 2018, even though the power of appointing of Arbitrator retained by the company, nothing has been done by the company to refer the matter to Arbitration. No doubt, there is no bar under Section 9 for granting interim injunction. It is also to be noted that even any interim order has passed before the Arbitral Proceedings, such order will operate only 90 days. In this case, the arbitral proceedings has not commenced within 90 days. It is also to be ntoed that the intention to arbitrate must be present on the part of the person who seeks interim relief. The intention to arbitrate must proceed an

application under Section 9 of the Act.

8. This Court also cannot lose sight of the nature of the petitions now a days filed particularly, in respect of the Hire Purchase Agreements. Many of the cases, the moment interim orders passed, the vehicles are being seized, no Arbitral Proceedings thereafter would be commenced. Such practice is common affair in many of the financing companies without resorting the dispute to the Arbitration as required under law. What is generally done in these cases, with the help of the Advocate Commissioner, is that the vehicle will be seized and sold away. Thereafter, there is no reference whatsoever normally made to the Arbitrator. Such practice in fact is against the very Arbitration and Conciliation Act. Therefore, when the applicant without demonstrating intention to arbitrate the matter he cannot come to the court for interim measures.

9. As already said, admittedly the power of appointing Arbitrators retained by the company. The interim orders also could be passed by the by the Arbitrator as per Section 17 of the Act. Hence, this Court is of the view

that without establishing the manifest intention to arbitrate, one cannot seek an interim order particularly for seizing the vehicles in hire purchase agreement. No doubt, such prayer is not prohibited, at the same time to get such orders it has to be established by the applicant that they have intention to arbitrate the matter. The delay in taking action even after alleged default by other side and delay in commencement of proceedings also can be taken into consideration to assess the intention of the parties to refer the matter for Arbitration. In a given case, though the default has committed long back Applicant is keeping silent and only interested in interim orders under Section 9 without demonstrating intention to arbitrate, therefore, this Court is of the view that the petitioner is not certainly entitled to interim relief as prayed for. There is no prima facie and balance of convenience in his favour. Further there would not be any hardship to the applicant. The applicant can very well seek such interim relief under Section 17 of the Act, before the Arbitrator.

10. In view of the above, the Application is dismissed. No costs.

04.03.2020

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