

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 09TH DAY OF MARCH 2020

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

A. No.8262 of 2018

In the matter of Arbitration &
Conciliation Act, 1996

and

In the matter of the Agreement dated
01/04/2017 by and between

FINGS TECHNOLOGY P LTY
Mahalakshmi Building, Village Road,
Nungambakkam, Chennai – 600 034

..Applicant

-Vs-

ALLWIN ENTERPRISES,
Rep.by its Prop.Mr.M.Amsathfaizul,
No.9915/7, New Golden Nagar,
Pudukottai-622 001

..Respondent

Application praying that this Hon'ble Court be pleased to direct
the respondent to furnish security for a sum of Rs.7,39,400/- pending
arbitraiton.

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

This application has been filed by the applicant under Section 9 of
the Arbitration and Conciliation Act, 1996, to direct the respondent to
furnish security for a sum of Rs.7,39,400/-.

2. It is the case of the applicant that there is a Dealership Agreement between the applicant and respondent, with regard to Distributor Agreement dated 01.04.2017. The agreement shall be valid for a period commencing from 01.04.2017 to 31.03.2018. The applicant has delivered the demo phones to the respondent and also raised invoices in time. There were in all 60 phones delivered to the respondent vide five invoices dated 27.02.2017, 07.03.2017, 24.08.2018, 16.11.2017 and 20.01.2018 respectively. As the respondent has not paid dues properly, the applicant has called upon the respondent to return the demo phones vide mail dated 27.07.2018. Thereafter, the respondent did not respond and remained reticent, which prompted the petitioner to come forward with the present petition.

3. With regard to Distributor Agreement, learned counsel appearing for the applicant submitted that though the agreement is of the year 2017, one of the Clauses, i.e. Clause No.8.8 deals with reference of disputes to the arbitrator and therefore, the parties shall be governed by Arbitration and it is to be noted that relief now sought for in the application by invoking Section 9 of the Arbitration and Conciliation Act. Section 9 of the Act deals with interim measures, that a party before or during Arbitral

it is enforced in accordance with section 36.

4. It is to be noted as per applicant the dispute arose in the year 2018 and this application has been filed for interim measures. Arbitration proceeding is not initiated and just filing the application for interim measures and without resorting to the clause which provides for a reference one cannot insist for interim protection. The Applicant is keeping silent from the year 2018 without even referring the matter for arbitration without initiating any Arbitral Proceedings. This court is of the view that interim protection as a matter of fact cannot be granted.

5. 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

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

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."

6. 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.

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 been explained. The very clause in the contract makes it clear that the Arbitrators to be appointed the moment default is committed by the company itself. In such being the position there was no need whatsoever to wait endlessly. Though it is stated that the default has committed from December 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, Arbitration has to be commences within 90 days. In this case, the Arbitral Proceedings has not commenced within 90 days. It is also to be noted 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. Having regard to the above judgment and also considering

nature of the dispute between the parties and the applicant has not initiated

any Arbitral Proceedings, this Court is of the view interim order cannot be granted.

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

Sd/N.S.K.J.
09.03.2020

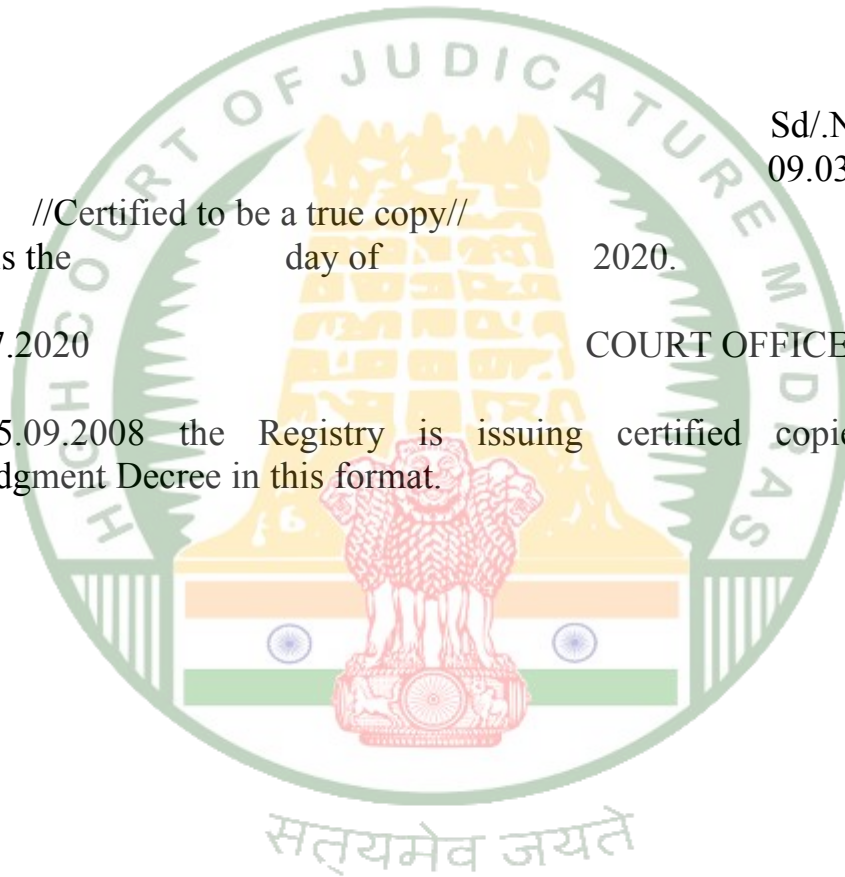
//Certified to be a true copy//

Dated this the day of 2020.

SU/10.07.2020

COURT OFFICER(O.S.)

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



WEB COPY