



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 08TH DAY OF JUNE 2022

THE HON'BLE MR. JUSTICE M.SUNDAR

ARB APPLN No. 93 of 2022

In the matter of Arbitration and  
Conciliation Act, 1996 Section 9  
and

In the matter of Arbitration  
Agreement dated 08.06.2015  
between Fujitec India Pvt.Ltd. And  
Kamala Mills Limited.

FUJITEC INDIA PRIVATE LIMITED

Plot No.52, 1st Cross Street,  
8th Avenue, Mahindra World City,  
Chengalpattu 603 004,  
Chengalpattu District,  
Herein represented by  
Mr.V.Muralidhar, Director-Finance.

..Applicant

-Vs-

KAMALA MILLS LIMITED,

Kamala House, Kamala City,  
Senapati Bapat Marg,  
Mumbai - 400 013.

Email Id: [Kamalamills@kamala.co.in](mailto:Kamalamills@kamala.co.in)

..Respondent

Arbitration Application praying that this Hon'ble Court be pleased to

<https://hcservices.ecourts.gov.in/hcservices/> pass an order directing the Respondent to furnish security by way of deposit

into the Court of/furnishing of bank guarantee for Rs.3,51,181/- being the



principal of Rs.2,34,129/- together with interest of Rs.1,17,052/- calculated till 31/03/2022 or some other form of security as may be deemed fit by this Hon'ble court, and in the event of the Respondent failing to furnish security as may be ordered by this Hon'ble Court, to direct attachment of the properties of the Respondent Company, more fully described along with the address where the properties are lying, in the Schedule in the Judge's Summons, so as to satisfy the sum due of Rs.3,51,181/-.

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

Captioned application has been presented in this Court under Section 9 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' hereinafter 'A and C Act' for the sake of brevity, with a prayer to direct the respondent to furnish security by way of deposit into Court or by way of bank guarantee to secure what according to the applicant is respondent's dues towards three lifts that have been supplied, and for service provided for the same qua a annual maintenance contract [AMC for brevity].

2. Factual matrix is, applicant company is engaged in manufacture, installation, commissioning and maintenance of lifts; that the applicant



company supplied three lifts ( two passenger lifts and one service lift) to the respondent under a contract dated 08.06.2015 (hereinafter 'primary contract' for the sake of convenience and brevity); that Clause 17 of the Appendix (IV) qua primary contract is the arbitration clause; that this Clause 17 is 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that according to the applicant, the respondent has not honoured i.e., paid monies, dues under invoices raised for supply, commissioning of three lifts and AMC provided for the same; that the applicant triggered the arbitration clause i.e., Arbitration Agreement by invoice dated 15.03.2022 which has been duly received by the respondent on 19.03.2022; that there has been no reply or compliance from/by the respondent and that the captioned application under Section 9 of A and C Act with the aforementioned prayer for furnishing security has been presented in this Court under such circumstances.

3. This Court carefully considered the arguments of Mr.S.Venkatesh Perumal, learned counsel on record for the applicant, perused the case file, analysed the submissions in the light of the case file and this Court comes to the conclusion that prayer in the captioned application cannot be acceded to.

The discussion and dispositive reasoning i.e., reasons are as follows :



(a) Prayer in the captioned application as can be culled out from the

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Judges Summons reads as follows :

*'This Hon'ble Court should not be pleased to pass an order directing the Respondent to furnish security by way of deposit into the Court of / furnishing of bank guarantee for Rs.3,51,181 being the principal of Rs.2,34,129 together with interest of Rs.1,17,052 calculated till 31-3-2022, or some other form of security as may be deemed fit by this Hon'ble Court, and in the event of the Respondent failing to furnish security as may be ordered by this Hon'ble Court, to direct attachment of the properties of the Respondent company, morefully described along with the address where the properties are lying in the schedule hereto, so as to satisfy sum due of Rs.3,51,181?'*

The above prayer is clearly in the nature of an attachment before judgment plea under Order XXXVIII Rule 5 of 'the Code of Civil Procedure, 1908' ('CPC' for the sake of brevity), law is well settled qua conditions precedent for a prayer under Order XXXVIII Rule 5 CPC to be answered in affirmative. The applicant should be able to demonstrate that the respondent is frittering away or is likely to secret the properties which are sought to be secured. There is no supporting material in this regard in the case file. Be that as it may, the affidavit is bereft of pleadings / averments in this regard. This by itself draws the curtains on the captioned matter. However, this Court proceeds to



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set out discussion / dispositive reasoning qua the other paragraphs of support affidavit also.

(b) As already alluded supra, captioned application is presented under Section 9 of the A and C Act and it has been presented before commencement of arbitral proceedings. In cases where a Section 9 application is presented before commencement of arbitral proceedings, it is imperative that the applicant demonstrates manifest intention to arbitrate. In the case on hand, as would be evident from the factual matrix, which is captured supra, for lifts supplied and AMC provided, invoices were raised by the applicant; allegedly there was a default in payment by the respondent, the applicant issued notice dated 15.03.2022 under Section 21 of A and C Act and the same has been duly received by the respondent on 19.03.2022. This means that 19.03.2022 is the date of commencement of arbitral proceedings within the meaning of Section 21 of A and C Act. Be that as it may, the invoices which remained unpaid relate to the year 2019, and going by the averments in paragraph No.5 of the support affidavit in the captioned application, the invoices are dated 24.01.2019 and 19.06.2019. The applicant has issued a legal notice making a demand



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07.03.2020, disputing the liability. Therefore, if 07.03.2020 is taken as the reckoning date, more than two years have elapsed from the date, on which the dispute had arisen. Therefore, the captioned application clearly fails to pass muster qua manifest intention to arbitration test.

(c) The captioned application also fails in terms of well settled principles governing under Order XXXVIII Rule 5 CPC as the captioned application has been presented casually two years later without supporting material and without even any averments to demonstrate that there is imminent threat of properties sought to be attached being frittered away or alienated by the respondent.

4. In the light of the aforementioned discussion and dispositive reasoning, the captioned application fails. However as there is a ADR [Alternative Dispute Resolution] mechanism that has been put in place, considering the fact that the applicant has already issued trigger notice and invoked the arbitration clause, it is open to the applicant to make the same prayer with requisite supporting material before the Arbitral Tribunal under Section 17 of A and C Act or under Section 9 of A and C Act before this Court if there



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5. Captioned application dismissed albeit preserving the rights of the applicant to the limited extent indicated supra. There shall be no order as to costs.

Sd/.M.S.J.  
08.06.2022

//Certified to be a true copy//

Dated at Madras this the                      day of                      2022.

SU/17.06.2022

COURT OFFICER(O.S.)

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