
(2014) 03 MAD CK 0149

In the Madras High Court

Case No : O.S.A. No. 354 of 2013 and M.P. No. 1 of 2013

Sundaram Finance Limited

APPELLANT

Vs

Mr. M.K. Khunhabdulla

RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:

Arbitration Act, 1940 — Section 18

Arbitration and Conciliation Act, 1996 — Section 8 9 9(ii)(b)

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5, Order 38 Rule 5

Citation : (2014) 3 CTC 159 : (2014) 2 LW 479 : (2014) 5 MLJ 351

Hon'ble Judges : M. Venugopal, J; M. Jaichandren, J

Bench : Division Bench

Advocate : T. Srinivasaraghavan, for the Appellant;

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Appellant/Applicant has focussed the instant Original Side Appeal as against the order, dated 09.04.2013, in Application No. 268 of 2013, passed by the Learned Single Judge, in dismissing the said Application. The Learned Single Judge, while passing the common order in A. Nos. 111, 268 and 360 of 2013, on 09.04.2013, in paragraph 15, has observed that "The averments made by the applicant in mechanical manner does not make out any case for furnishing of security, when the loan is already secured, and it shall be open to the applicant to enforce the security after the award attains finality" and finding no merit and ultimately, dismissed the Applications.

2. The Learned Counsel for the Appellant/Applicant contends that the order of the Learned Single Judge in dismissing the A. No. 268 of 2013 dated 09.04.2013 requires reconsideration because of the reason that the said order overlooks the established legal principles touching upon the creation and enforcement of Hypothecation of Goods.

3. The Learned Counsel for the Appellant/Applicant submits that the Appellant/Applicant has categorically averred in Application No. 268 2013 that the

Respondent was arranging to sell of his immovable properties.

4. The Learned Counsel for the Appellant/Applicant projects an argument that an Application u/s 9 of the Arbitration and Conciliation Act, 1996 is not controlled by the provisions of Order XXXVIII Rule 5 of the Civil Procedure Code.

4. In effect, the contention of the Learned Counsel for the Appellant/Applicant is that the Arbitration and Conciliation Act, 1996 specifically provides powers to a Court of Law u/s 9 of the Act to pass an order of interim measure and in fact, the language of the ingredients of Section 9 of the 1996 Act is totally different from Section 18 of the Arbitration Act, 1940 or the ingredients of Order XXXVIII Rule 5 of the Civil Procedure Code.

6. Expatiating his submissions, the Learned Counsel for the Appellant/Applicant contends that Section 9 of the 1996 Act is so worded that a Court of Law has powers to grant interim measures of protection.

7. The stand taken on behalf of the Appellant/Applicant is that in an Application, u/s 9 of the Arbitration and Conciliation Act, 1996, there is no need for filing of an affidavit containing the particulars regarding the conduct of borrower in taking action to defeat the claim of the creditor as mandatorily set out under Order XXXVIII Rule 5 C.P.C.

8. According to the Appellant/Applicant, an apprehension in all the cases can only be that the other side is taking steps to delay or defeat or obstruct execution of the decree. As such, it cannot be said that the averments in the affidavit in Application No. 268 of 2013 are made in a routine and mechanical fashion.

9. The Learned Counsel for the Appellant/Applicant contends that the Arbitration and Conciliation Act, 1996 is not intended to provide for passing of an interim orders on the lines of Order XXXVIII Rule 5 C.P.C. or Section 18 of the Arbitration Act, 1940. Per contra, it is the plea of the Appellant/Applicant that the 1996 Act specifically provides power to Court u/s 9 of the Act in passing an interim order.

10. The Learned Counsel for the Appellant/Applicant while winding up his argument submits that the Learned Single Judge has committed an error in making an observation in the impugned order in Application No. 268 of 2013 dated 09.04.2013 that "there is no material on record to show any overt act on the part of Respondent showing steps have been taken to dispose of the properties".

11. At the outset, this Court points out that it is the case of the Appellant/Applicant that the Respondent approached it during March, 2012 with a request to extend loan facility for purchase of a MARUTI RITZ bearing Chassis No. MA3FDEBIS00368689 and fitted with Engine No. D13A1785079.

12. It is not in dispute that a Loan Agreement dated 03.03.2012 bearing Loan Contract No. GZ-158693 with the Appellant/Applicant is in respect of the aforesaid vehicle. In terms of the Agreement, the total loan amount of Rs.

5,82,120/- was repayable in 45 instalments, beginning from 03.03.2012 and ending on 10.01.2016. The Respondent had hypothecated and created charge over the vehicle in question and also that, the fact of hypothecation was recorded in the Registration Certificate of the said vehicle bearing Registration No. KL-58-G-8239. Indeed, one Khalid stood as Guarantor guaranteeing the due fulfilment of the obligations of the Respondent under the Loan Agreement. However, he was not impleaded as a party to the Application No. 268 of 2013 because of the reason that no relief was sought for against him by the Appellant/Applicant.

13. It comes to be known that the Appellant/Applicant issued a notice through its Advocate to the Respondent and the Guarantor dated 13.10.2012, calling upon them to settle the contract by payment of the due amount. In fact, the notice sent to the Respondent was neither returned nor acknowledged. The Respondent/Borrower, under the Loan Agreement, referred to supra, committed default from the early stages and in terms of Article 14(2) of the Loan Agreement, the Appellant/Applicant is empowered to take custody of the hypothecated vehicle in the event of any default being committed by the Respondent and it is the plea of the Appellant/Applicant that it was not able to take custody of the vehicle as the same was secreted by the Respondent.

14. At this stage, this Court makes a useful reference to the details of the contract and the amount due, as averred by the Appellant/Applicant, in para 9 of Application No. 268 of 2013, which runs as under:

- (i) Name of the Lender : Applicant i.e., Sundaram Finance Ltd.
- (ii) Name of the Borrower: Mr. M.K. KUnhabdulla Respondent
- (iii) Name of the Guarantor : Mr. Khalid - Guarantor
- (iv) Number and Date of Agreement : GZ-158693 dated 03/03/2012
- (v) Total Loan amount : Rs. 5,82,120/-
- (vi) Number of Installment : Rs. 47 Monthly installments.
- (vii) First installment : 03/03/2012
- (viii) Last installment : 10/01/2016
- (ix) Rate of Interest : 14.95% p.a.
- (x) Default from : 4th installment due on 10/06/2012
- (xi) Amount claimed : Rs. 4,80,019.32 as on 28/12/2012.

15. The Learned Counsel for the Appellant/Applicant submits that the Respondent, who is liable to pay the amount due legally in terms of the aforesaid Agreement, has failed and neglected to pay the amount, in spite of repeated demands.

16. At this juncture, this Court relevantly points out that the properties set out in

the schedule to the judge's summons, according to the knowledge of the Appellant/Applicant, are the only properties of the Respondent and that the Respondent had hatched a plan of sale of the immovable properties, in order to defeat and delay the realisation by the Appellant/Applicant of the fruits of the award that may ultimately be passed in the arbitration proceedings. Also, it was averred that if the Respondent succeeded in selling away the immovable properties, then the Appellant/Applicant would suffer an irreparable injury, in that, the award that may be passed ultimately in the arbitration proceedings, would not be enforced for want of property.

17. It is to be borne in mind that in Application No. 268 of 2013 [filed under Order XIV Rule 8 of O.S. Rules read with Section 9(ii)(b) and (e) of the Arbitration and Conciliation Act, 1996], the Appellant/Applicant has sought for passing of an order by this Court in directing the Respondent herein to furnish security to the tune of Rs. 4,80,019.32 within such time, as this Court may stipulate and in default of the Respondent doing so, to order an attachment of the properties more particularly mentioned in the schedule of judge's summons through the District Court, Kannur and pass a conditional order of attachment.

18. The Learned Counsel for the Appellant/Applicant places heavy reliance on the decision of this Court in Ganesh Benzoplast Ltd., Mumbai, Ramkant S. Pilani and Shankarmal G. Pilani Vs. Sundaram Finance Ltd., Chennai and Oil and Natural Gas Corporation Ltd., Mumba, , wherein it is observed that Section 9 of the Arbitration and Conciliation Act, 1996 does not specifically require averment in any particular form as contemplated under Order XXXVIII, Rule 5 C.P.C. Further, it is held that the Provisions of CPC applicable in respect of proceeding application for attachment if before judgment need not confirm to requirements of Order 38 Rule 5 are not strictly applicable to the proceedings u/s 9 of the Arbitration and Conciliation Act, 1996, as there is no restriction imposed u/s 9 of the Arbitration and Conciliation Act for exercising jurisdiction by this Court.

19. At this stage, in the decision of the Hon''ble Supreme Court in Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, , wherein it is, inter alia, observed as follows:

.... No doubt, a view that exercise of power u/s 9 of the Act is not controlled by the Specific Relief Act has been taken by the Madhya Pradesh High Court. The power u/s 9 of the Act is not controlled by Order XVIII Rule 5 of the CPC is a view taken by the High Court of Bombay. But, how far these decisions are correct, requires to be considered in an appropriate case. Suffice it to say that on the basis of the submissions made in this case, we are not inclined to answer that question finally. But, we may indicate that we are prima facie inclined to the view that exercise of power u/s 9 of the Act must be based on well recognized principles governing the grant of interim injunctions and other orders of interim protection or the appointment of a receiver.

20. Also, in the decision of the Hon''ble Supreme Court in Adhunik Steels Ltd. Vs.

Orissa Manganese and Minerals Pvt. Ltd., , wherein it is, among other things, observed as follows:

10. ... 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 measure u/s 9 of the Act.

21. At the outset, this Court pertinently points out that to invoke the ingredients of Section 9 of the Arbitration and Conciliation Act, 1996, there ought to be a dispute which had arisen with respect to the subject matter of the agreement and referable to an arbitration. There must be a manifest intention on the part of applicant to take recourse to the arbitral proceedings at the time of filing of an application u/s 9 of the Act. It cannot be brushed aside that in the instant case as per Article 22 of the Loan Agreement, the Appellant/Applicant is empowered to initiate arbitral proceedings by having a sole arbitrator upon its Managing Director and further, it is specifically averred by the Appellant/Applicant in the Application that it undertakes to initiate arbitration proceedings within a reasonable time. In reality, the issuance of a notice in a particular case would suffice to establish a manifest intention to have the dispute referred to an Arbitration. An Application u/s 9 can be entertained before a Court of Law only if in a given case, the subject matter of arbitration comes within its ambit of original civil jurisdiction both in terms of pecuniary and territorial ones.

22. It is to be noted that even if a party projects an Application u/s 9 coupled with Order XXXVIII Rule 5 C.P.C. for necessary directions in requiring the opposite party to furnish security for the due amount in question and for a simultaneous order of conditional attachment of property, we opine that the ingredients of Section 9 enjoins a Court of Law to pass an order of interim measure without seeking the aid of the ingredients of Order XXXVIII Rule 5 C.P.C. The exercise of general power to award interim relief including the specific injunction relief under Order 39 C.P.C. and the Specific Relief Act are certainly applicable to the exercise of power u/s 9 of the Act, 1996.

23. Further, u/s 9 of the Arbitration and Conciliation Act, 1996, the Court entertaining an Application shall have the same power for passing orders as it has for the purpose of, and in relation to, any proceedings before it.

24. At this stage, this Court worth recalls the recollects decision in National Highways Authority of India Vs. UEM-Essar (JV) , whereby and whereunder, in paragraph Nos. 6 to 9, it is observed and held thus:

6. Considering that an interim application is for an interim application is for an urgent relief which is asked for as necessary to preserve the final relief is prayed in particular/specific type of cases, I may note that the notice under Clause 63.1 which has been issued in this case for cancellation of the contract is way back on 11.12.2006. The suit before the Civil Judge in Karnataka was filed in March, 2008 and which suit was on the application of the respondent herein u/s 8 of the Arbitration and Conciliation Act, 1996 was referred to arbitration because the contract in question had an arbitration clause. Consequently, this application which has been decided by the impugned order was filed before the Arbitrators on 29.5.2009. Obviously, therefore, considerable time has elapsed since the cancellation of the contract, issuing of the cancellation notice, filing of the suit in Karnataka and any issue of interim relief, therefore, would not arise more so because the final arguments are going on before the Arbitral Tribunal and the Tribunal has expressed its annoyance that the parties are concentrating more on filing of interim applications and not on the final arguments.

7. ... In a case where there are monetary claims of the appellant, the effect of taking over the machinery in terms of the agreed contractual clause in such a case is in fact a relief not only of attachment before judgment but the same would amount to execution of a future decree for money claims which the present appellant may have (of course it is not that it is bound to succeed in getting a money decree/award) and for which it seeks to appropriate the value of the machinery towards such claims in terms of the last para of clause 63.1 reproduced above. I may again note that the appellant claims to have not only the right to use the machinery but it claims under clause 63.1 the right to sell plant and machinery towards satisfaction of sums which it claims would be held to be due to it in other arbitration proceedings. Obviously, if therefore, the plant and machinery is sold, the present appellant would have to account for the monies which are received by it with respect to the sale of the plant and machinery since the machinery does not belong to the appellant and in fact which belongs to the respondent. Even if, there were in a case final monetary claims, any interim appropriation would effectively amount to execution of the final money claims through an interim measure amounting to interim execution of an expected money decree/award and which is not known to law. Further and more so, because the validity of a claim itself under the subject contractual clause in question is very much in issue and has yet to be pronounced and adjudicated upon by the arbitrators. Therefore, prima facie, I find at this stage, in view of the facts of the present case and the law as applicable that appellant is not entitled to appropriate the machinery, prayed for at the present stage. At the cost of repetition, it may be said that this would in fact amount to appropriation towards final money claims by an interim order when there are vexed issues and strenuous contest before the arbitrators.

8. To the observations already made above I would seek to add herein the aspect that a reference to the appeal filed before this court as also the application for interim relief which was filed before the Tribunal shows that there are no

required and necessary averments therein which are called for in an application under Order 38 Rule 5 of the CPC viz., of the respondent/claimant is seeking to dispose of its properties to defraud its creditors or is running away from the jurisdiction of the arbitration Tribunal. Therefore, even if, the subject application of the appellant be treated as under Order 38 Rule 5 CPC for attachment of the machinery admittedly belonging to the respondent, the same is/was liable to fail as even the necessary averments for claiming the drastic relief of attachment before judgment are not found in the application which has been dismissed by the Arbitral Tribunal.

9. Therefore, at the time of dismissal of the appeals, I may reiterate what the Tribunal has observed that the parties are well advised to concentrate on final arguments and not on the filing of interim applications at the time of final arguments and not on the filing of interim applications at the time of final arguments. With these observations, these appeals are dismissed with costs quantified at Rs. 50,000/- in each of the appeals, to be deposited with the Delhi High Court Legal Services Authority since the respondent has not appeared. The costs be deposited within two weeks from today and failing which it will carry further interest of 18% per annum. The appeals are accordingly disposed of.

24. As far as the present case is concerned, the plea of the Appellant/Applicant is that the Respondent be directed to furnish security for a sum of Rs. 4,80,019.32 and in default to attach the properties mentioned in the schedule of judge's summons. Further, it is represented on behalf of the Appellant/Applicant that under Article 3.9 of the Loan Agreement, the Respondent had agreed to provide additional security to secure the amount due and payable under the Loan Agreement which he failed to honour. In the present case on hand, the loan of the Respondent is undoubtedly a secured one by means of the Loan Agreement dated 03.03.2012 entered into between the parties. Further, one Khalid stood as a Guarantor for the amount borrowed by the Respondent. One cannot ignore an important fact that seeking the relief from the opposite party in regard to furnishing of security to the tune of Rs. 4,80,019.32 by the Appellant/Applicant within such time to be stipulated by this Court and in default of the Respondent doing so, to order attachment of the properties, is not a process to be adopted either as a matter of routine or a matter of course. Ordinarily, the said process cannot be employed as a lever or premium for the Appellant/Applicant to coerce the Respondent to come to terms. As such, a Court of Law is to act with utmost caution and circumspection before passing an order of interim measure like this u/s 9 of the Act, 1996. At a nebulous stage, the relief of requiring the opposite party to furnish security for the amount in question, being an extraordinary one, cannot be granted merely on the basis of vague or general allegations that the Respondent is about to dispose of the properties or to remove it beyond the jurisdiction of the Court, when they are totally unsupported by particulars and this would not be a fulfilment of requisites of Section 9 of the Arbitration and Conciliation Act, 1996. Furthermore, the Appellant/Applicant in an affidavit to support his contentions, must state as to which portion they are true to

knowledge and the source of information should be disclosed and the grounds for belief should be stated. Also, an interim relief of requiring a party to furnish security and failure to do so, to result in attachment of properties are not to be passed/ordered because of the fact that no prejudice or hardship would be caused to the other side. Suffice it to point out that an order u/s 9 of the Arbitration and Conciliation Act, 1996 in regard to the prayer for requiring the opposite party to furnish security or in the arbitration the schedule mentioned properties can be passed only if circumstances exist of course to the subjective satisfaction of this Court, when the Appellant/Applicant has made out a case ex facie for obtaining such an order.

25. It transpires that in the matter of Arbitration of dispute between the Appellant/Applicant and the Respondent (in respect of Agreement No. GZ-158693 dated 03.03.2012), an award was passed during February, 2014 and therefore, it is reasonable and prudent for the Appellant/Applicant to take further course of action, as deems fit and proper, in the manner known to law and in accordance with law. Looking at from any point of view, the order passed by the Learned Single Judge dated 09.04.2013 in Application No. 268 of 2013, in dismissing the Application, by observing that "the averments made by the Applicant (Appellant) in mechanical manner does not make out any case for furnishing of security, when the loan is already secured etc.", cannot be found fault with, as opined by this Court. Viewed in that perspective, the Original Side Appeal fails. In the upshot of detailed qualitative and quantitative discussions and on taking note of the attendant facts and circumstances of the case in an encircling fashion, this Court comes to a resultant conclusion that the present Original Side Appeal sans merits and the same is dismissed, to prevent an aberration of Justice, without costs. Resultantly, the order, passed by the Learned Single Judge, dated 09.04.2013, in Application No. 268 of 2013, is affirmed by this Court for the reasons assigned in this Appeal. Consequently, connected Miscellaneous Petition is closed.