

(2013) 04 MAD CK 0341

In the Madras High Court

Case No : A. No's. 5201, 5202 and 5203 of 2012 and 1296, 1297 and 1298 of 2013

Hinduja Leyland Finance Limited

APPELLANT

Vs

Jaffer Khan
Jaffer Khan Vs Hinduja Leyland Finance Limited

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12(6), 12(6)(h), 21, 36, 82
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 5
Contract Act, 1872 — Section 172, 173, 174, 175, 176
Partnership Act, 1932 — Section 69(3)

Citation : (2013) 3 CTC 76 : (2013) 2 LW 401

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Judgement

Vinod K. Sharma, J.—This order shall dispose of A. Nos. 5201, 5202 & 5203 of 2012 and 1296, 1297 & 1298 of 2013, as the common question of fact and law are involved in all these applications.

A. Nos. 5201 to 5203 of 2012:

These applications under Order XIV Rule 8 of O.S. Rules read with sec. 9(ii)(b) & (e) of Arbitration and Conciliation Act, 1996 have been filed by M/s. Hinduja Leyland Finance Ltd. for appointment of an Advocate Commissioner to seize and deliver the vehicles namely, "Multi Axle Goods Vehicle Truck" with police aide by breaking open the premises, wherever it is found and hand it over to the applicant.

A. Nos. 1296 to 1298 of 2013:

These applications under Order 14 Rule 8 of O.S. Rules read with section 9(ii)(e) of Arbitration and Conciliation Act, 1996 have been filed by the respondent/borrower for grant of leave to raise the interim orders, dated 10.12.2012 passed by this Court in A. Nos. 5201, 5202 and 5203 of 2012.

The question to be determined in these cases is "whether the provision of section 9 of the Arbitration and Conciliation Act, can be invoked to use the High Court as a Recovery Agent by Finance Companies/Banks to seize the vehicle ex-parte, without giving an opportunity of hearing to the respondent/ borrower, by seeking appointment of Advocate Commissioner, to seize the vehicle even without serving notice of petition along with the documents, so as to enable the borrower to know the reason for passing this extreme order of seizure."

2. Section 9 of the Arbitration and Conciliation Act, 1996 reads as under:

9. Interim measures etc. by Court.-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

3. Reading of the Section 9 of the Arbitration and Conciliation Act, 1996, shows that power u/s 9 can be exercised before, during arbitral proceedings or at any time after passing arbitral award, but before it is enforced in accordance with section 36 of the Arbitration and Conciliation Act, 1996, the jurisdiction can be exercised for preservation, interim custody or sale of any goods which are subject matter of arbitration.

4. The decision of this Court that jurisdiction u/s 9 cannot be exercised before commencement of arbitral proceedings was set aside by the Hon"ble Supreme Court in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., wherein the Hon"ble Supreme Court was pleased to lay down as under:

17. In our opinion this view correctly represents the position in law, namely, that even before the commencement of arbitral proceedings the Court can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.

18. Our attention was also drawn to the case of (Die Channel Tunnel Group Ltd. and France Manche S.A. v. Balfour Betty Construction Ltd. and Ors. [1992] 2 LLW) dealing with question of the jurisdiction of the England Court to grant an

interim injunction in a case where the parties have agreed that the disputes shall be settled by arbitration. The Court of Appeal referred to Section 12(6) of the Arbitration Act, 1950 which provided as follows:

The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of - (h) interim injunctions or the appointment of a receiver; as it has for the purpose of and in relation to an action or matter in the High Court....

Construing this Staughton LJ observed as under:

In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course. Whatever the meaning of "reference" to Section 12(6)(h) (and it is not always easy to determine the precise meaning of the word in arbitration statutes) I would hold that the power of the Court in such a case would be exercised for the purpose of and in relation to a reference.

We are in respect agreement with the aforesaid observations which are in conformity with the view which we have taken in construing Section 9 of the 1996 Act.

19. It was submitted by Mr. Subramaniam that even if the Court can exercise jurisdiction u/s 9 before the arbitral proceedings have commenced the party seeking to invoke Section 9 must express a manifest intention to arbitrate. The learned counsel submitted that this intention can take the following forms:

(a) In an application u/s 9, the party would have to state that it unequivocally relies on the arbitration agreement and makes an averment that it would invoke the arbitration Clause;

(b) At the time when the Court passes an interim order u/s 9, an express undertaking is given by the party before the Court that it would invoke the arbitration clause forthwith and within a fixed period; and

(c) a notice invoking arbitration clause should have been issued to the opposite party. It was contended that mere filing of an application u/s 9 was not sufficient to establish manifest intention to this extent.

20. When a party applies u/s 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application u/s 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 if, at the time when the application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the

words "before or during arbitral proceedings" occurring in Section 9 it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may choose to apply u/s 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction u/s 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing with an application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act.

21. There is another aspect which calls for our attention. Section 82 of the 1996 Act gives the High Court power to make rules consistent with the Act. We were informed that all the High Courts have not so far made rules. Whereas the Section 84 gives the Central Government power to make rules to carry out the provisions of the Act, the High Court should also, wherever necessary, make rules. It would be helpful if such rules deal with the procedure to be followed by the Courts while exercising jurisdiction u/s 9 of the Act. The rules may provide for the manner in which the application should be filed, the documents which should accompany the same and the manner in which such applications will be dealt with by the Courts. The High Courts are, therefore, requested to frame appropriate rules as expeditiously as possible so as to facilitate quick and satisfactory disposal of arbitration cases.

The Hon''ble Supreme Court held that while passing an order, Court should ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction u/s 9 of the Act, can pass conditional order to put the applicant to such terms. The intention of Hon''ble Supreme Court therefore was that this jurisdiction should be used sparingly that too with conditions.

5. The Hon''ble Delhi High Court in National Building Construction Corpn. Ltd. (NBCC) Vs. IRCON International Ltd., was pleased to lay down as under:

16. Besides, Section 9 of the Act is discretionary. This discretion cannot be exercised as a matter of course. The petitioner as also the respondent are both public sector undertakings. It is not even shown, though averred in the petition, how a fraud in connection with the bank guarantees in question, of which the bank was or is aware, has been played and how the encashment of bank

guarantees would result in irretrievable loss or injustice to the petitioner in case the bank guarantees are allowed to be encashed on the terms stipulated in them. No case of fraud, let alone of "egregious nature", has been made out. Learned counsel for the petitioner has also failed to satisfy me that there would be no possibility whatsoever of the recovery of the amount from the respondent/beneficiary by way of restitution.

6. The Hon"ble Division Bench of Andhra Pradesh High Court in Sai Priya Construction Company Vs. K. Anantha Kumari Satya Raju and Another, was pleased to lay down that any application filed u/s 9 of Arbitration and Conciliation Act, 1996, no orders of permanent in nature can be passed and for this purpose, had placed reliance on the judgment of the Hon"ble Supreme Court in the case of Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., and further held as under:

21. That a part, the Court below had made a reference of the decision rendered by the apex Court in Firm Ashok Traders v. Gurumukh Das Saluja. In the said decision, Their Lordships of the apex Court, while dealing with the scope of Section 9 of the Act, held that the expression "interim relief" that is sought for by a party, or granted by the Court, shall fall within the meaning of the expression "an interim measure of protection." Their Lordships clarified that there is clear distinction between "permanent protection" and "interim protection."

22. Their Lordships of the apex Court further observed:

...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 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.

23. It was further observed by Their Lordships, with caution:

If arbitral proceedings are not commenced within a reasonable time of an order u/s 9, the relationship between the order u/s 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.

24. From the above, it is abundantly clear that the relief, which was granted, as an interim protection, shall remain as an interim measure only but shall not be allowed to continue to an unreasonable extent and as such, the arbitral proceedings shall commence within a reasonable period from the date of the order passed u/s 9 of the Act. it is further obvious that if the said arbitral proceedings, as contemplated under the agreement, did not commence within a reasonable period from the date of the interim order passed u/s 9 of the Act, the

relationship between the order passed u/s 9 of the Act and the actual arbitral proceedings would cease and the order can no longer be treated as the one passed "before" the arbitral proceedings. What is the reasonable period for the commencement of arbitral proceedings from the date of passing of interim order u/s 9 of the Act would depend upon the facts and circumstances of each case.

25. In other words, the orders passed u/s 9 of the Act being temporary in nature would remain as temporary and wither away by lapse of time, if it is unreasonable.

26. In this regard. Their Lordships of the apex Court further observed as under:

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.

27. Their Lordships of the apex Court further observed:

The Court may also while passing an order u/s 9 put the party on terms and may recall the order if the party commits breach of the terms.

7. The Hon"ble Delhi High Court in the case of Uppal Eng. Co. (P) Ltd. Vs. Cimmco Birla Ltd., was pleased to lay down as under:

13. It is well led that an order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution as it may be likely to ruin the reputation of the parties against whom the power is exercised. The Court must act with utmost circumspection before issuing an order of attachment and unless it is clearly established that the defendant, with intent to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of whole or any part of his property. An attachment before judgment is not a process to be adopted as a matter of course because the suit is yet to be tried and the defense of the defendant is yet to be tested. At that juncture the relief which is extraordinary, could be granted only if the conditions for its grant stands satisfied.

8. The Hon"ble Supreme Court in Arvind Constructions Co. Pvt. Ltd. Vs. Kalinga Mining Corporation and Others, was pleased to lay down as under:

12. The effect of the agreement dated 14.3.1991 and the Power of Attorney dated 25.3.1991 admittedly executed between the parties and the rights and obligations flowing therefrom are really matters for decision by the Arbitral Tribunal. We do not think that it is for us, at this interlocutory stage, to consider or decide the validity of the argument raised on behalf of the appellant-company that the agreement between the parties was co-terminus with the mining leases and the respondent firm could not terminate the agreement so long as the mining leases in its favour continued to be in force. Nor do we think it proper to decide the sustainability of the argument on behalf of the respondent firm that it

was mainly an agency agreement for a fixed term and on the expiry of the term, no right survives in the appellant-company unless of course the respondent firm agreed to an extension of the period. We leave that question open for decision by the Arbitral Tribunal.

13. Prima facie, it is seen that the mining lessee had entered into an agreement with the appellant-company for the purpose of raising the iron ore from the area covered by the mining lease. The term of the original agreement expired and this was followed by two extensions for three years each. Thereafter, the respondent firm had refused to extend the agreement and claims that it wants to do the mining itself. Prima facie, it is not possible to say that the High Court was wrong in thinking that it may be a case where an injunction could not be granted in view of the provisions of the Specific Relief Act. Here again, we do not think that we should pronounce on that question since that again will be a question for the arbitrator to pronounce upon. Suffice it to say that the position is not clear enough for us to assume for the purpose of this interlocutory proceeding that the appellant is entitled to specifically enforce the agreement dated 14.3.1991 read in the light of the Power of Attorney dated 25.3.1991. Of course, this aspect will be again subject to the contention raised by the appellant-company that the agreement created in his favour was co-terminus with the mining lease itself. But, as we have stated, these are the aspects to be considered by the Arbitral Tribunal. We refrain from pronouncing on them at this stage.

14. We think that adequate grounds are not made out by the appellant at this interlocutory stage for interfering with the order of the High Court. In that view alone, we consider it proper to decline to interfere with the order of the High Court and leave the parties to have their disputes resolved in terms of the arbitration agreement between the parties.

15. The argument that the power u/s 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power u/s 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69 (3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court u/s 9 of the Act. The power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the Court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the

general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration. 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.

9. Again, the Hon"ble Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.*, has 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 u/s 9 of the Act.

10. The Hon"ble Division Bench of this Court in *In In House Productions Pvt. Ltd. Vs. Meediya Plus and Ms. Sri Priya*, held that grant of injunction was a discretionary relief and while granting such injunction, the Court is required to satisfy itself that there is a prima facie case in favour of the party asking for injunction and irreparable injury or damage would be caused if injunction is not granted and balance of convenience lies in favour of the applicant.

11. This Court in *NEPC India Ltd., formerly NEPC Micon Ltd. Vs. Sundaram Finance Ltd.*, was pleased to lay down as under:

A reading of Sec. 9 of the Arbitration and Conciliation Act shows that no substantial relief could be granted under Sec. 9 of the Act and this section could be used only in cases where protection orders are to be passed pending arbitral proceedings. So long as there is no proceedings under the Act to resolve the case, Sec. 9 of the Act cannot be invoked. For getting an interim measure, there must be a substantial relief, atleast for appointment of an arbitrator or some other substantial relief contemplated under the Act. The relief sought for by the respondent is that he wanted to restore the custody of the machinery. That cannot be the relief that could be granted under Sec. 9 of the Act. It is also clear from the other averment in the original petition before the lower court that what the respondent wanted was to exercise his right of ownership under the Hire Purchase Agreement and not a relief that is contemplated under Sec. 9 of the Act.

12. It may be mentioned here that though finding of the Hon''ble Single Judge that Sec. 9 cannot be invoked as long as there are no proceedings under the Act to resolve the case, stands overruled, but the view that no substantial relief can be granted u/s 9 of the Act, still holds good.

13. The Hon''ble Division Bench of this Court in Chola mandalam DBS Finance Ltd. Vs. Sudheesh Kumar,) was pleased to lay down following guidelines for exercise of power u/s 9 of the Arbitration and Conciliation Act.

25. The guidelines are:

(a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, and if, prima facie, the balance of convenience is in favour of the applicant, then an ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the Court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

(b) After the advocate commissioner reports to the Court that the vehicle has been seized, it shall be in the custody of the applicant. This custody is on behalf of the Court, i.e., the applicant will be holding it in custodial egis.

(c) Of course, if even after notice, the borrower does not appear or if it appears to the Court that the borrower is deliberately evading notice, then it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard ex parte and orders passed in exercise of discretion of Court.

(d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the Court shall also ascertain whether

the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed putting the applicant on terms as laid down in Sundaram Finance's case (cited supra), because section 9 depends on a close nexus with the initiation of arbitral proceedings;

(e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears. After that, the Court shall hear the parties and pass orders.

(f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower. One other advantage in hearing the respondent before the closing of application is the clue that we get from Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.,], cited supra, where the Supreme Court encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution. Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines.

14. The settled law referred to above, is that power u/s 9 of the Arbitration and Conciliation Act, 1996 can be exercised by a party to arbitration agreement, before arbitration, during arbitration or even after passing of an award. Such interim measures are governed by the settled principle of law for grant of interim injunction, appointment of Receiver or attachment of the property etc.

15. The object of Sec. 9 of the Arbitration and Conciliation Act is only an interim measure pending commencement of proceedings or in the course of proceedings and the relief becomes executable only after the award. It is intended to protect the subject matter of the proceedings and to secure the interest of the party claiming such relief. It is not to give substantial relief, because such relief can be allowed only as a decree or final relief.

16. From the above, it is clear that provisions of section 9 of the Arbitration and Conciliation Act can be invoked for:-

(i) detention, preservation or inspection of property which is subject matter of dispute in arbitration. It also authorises Court to pass an order for preservation and interim custody. This interim custody therefore has to be a judicial custody. Therefore, Receiver can be appointed to retain the custody of the vehicle pending arbitration proceedings.

and

(ii) At the time of passing order under Sec. 9, an express undertaking is required to be given by the party before the Court that it would invoke arbitration clause forthwith within a fixed period.

(iii) Notice invoking arbitration clause should have been issued to the opposite

party, as mere filing of section 9 application is not sufficient to establish manifest intention to this extent.

(iv) The Court before ordering interim direction, has to be satisfied that their exist arbitration agreement and the applicant intends to take dispute to arbitration. It is thereafter, the Court can pass orders u/s 9 of the Act by giving such interim protection as facts and circumstances so warrants meaning thereby that the applicant has to seek interim relief leaving it to the Court to pass appropriate orders on application for interim measures.

(v) That the respective High Court should make rules consistent with the Arbitration and Conciliation Act to deal with the procedure to be followed by the Courts while exercising jurisdiction u/s 9 of the Act.

(vi) That order of attachment or appointment of Receiver before judgment is a drastic remedy and power has to be exercised with utmost care and caution, as it is likely suffer reputation of the party against whom power is exercised.

(vii) That the grant of interim prohibitory injunction or interim mandatory injunction are governed by well known rules and therefore, section 9 cannot be read de hors the accepted principles that governed grant of interim measures.

17. The party therefore is required to approach this Court by filing appropriate application for grant of relief like interim custody of the vehicle or sale of any goods and, it is left to the discretion of the Court, in a given circumstances as to whether the Court should order the respondent to surrender the vehicle, appoint a Receiver, who may even be an Officer of the Company, to recover the vehicle with the help of the police or even direct the respondent to furnish security for the amount in dispute or surrender the vehicle.

18. The practice of the Finance Companies/Banks to seek appointment of an Advocate Commissioner to seize the vehicle cannot be said to be remedy envisaged under the Act. Though in the given circumstances, it is left to the discretion of the Court to appoint an Advocate Commissioner to seize the vehicle with the police help, as the custody of the vehicle is to be "legal custody". The procedure adopted in seeking appointment of Advocate Commissioner without issuing any notice to the respondent, to seize the vehicle amounts to misusing the jurisdiction of this High Court to act as Recovery Agent, on behalf of the Finance Companies/Banks.

19. It may be noticed here that earlier, to enforce the terms of the agreement, private bank/finance companies used to appoint recovery Agents to seize the vehicle on default in payment of monthly instalments, without opportunity to the borrower to contest the right by placing their side of story.

20. This action of the bank was disapproved by the Hon"ble Supreme Court in Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others,], laying down as under:

16. Before we part with this matter, we wish to make it clear that we do not

appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.

28. In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force.

21. The Hon''ble Supreme Court in Citicorp. Maruti Finance Ltd. Vs. S. Vijayalaxmi, was pleased to lay down as under:

27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down.

22. After the law was laid down of the Hon''ble Supreme Court, Modus Operandi now adopted by the Financial Institution/the banks is to move an application u/s 9 of the Arbitration and Conciliation Act, to get an interim order for seizure of the vehicle with the help of the Police.

23. In all the cases, even notice is not served on the respondent, though amount in arbitration is secured by hypothecation of the vehicle, and is guaranteed by the guarantor.

24. The Hon''ble Madhya Pradesh High Court in Bank of India vs. State of Madhya Pradesh and others (1990 (2) BC 321) held that the Bank is secured creditor, in view of hypothecation. The Hon''ble Madhya Pradesh High Court has laid down as under:

6. In view of the contentions referred earlier, the learned counsel Shri Shard referred to a catena of decisions, which are as follows: The Bank of Bihar Vs. The State of Bihar and Others, . In this case, after referring to sections 172 to 190 of the Contract Act in paras 7 and 8, their Lordships held:

In our judgment the High Court is in error in considering that the rights of the pawnee who had parted with money in favour of the pawnor on the security of the goods can be defeated by the goods being lawfully seized by the Government and the money being made available to other creditors of the pawnor without the claim of the pawnee being fully satisfied. The pawnee has special property and a lien which is not of ordinary nature on the goods and so long on his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to

pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure.

the Government could not deprive the plaintiff of the amount which was secured by the pledge of the goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff in for such amount which the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt.

The plaintiffs right as a pawnee could not be extinguished by the seizure of the goods in its possession in as much as the pledge of the goods was not meant to replace the liability under the case credit agreement. It was intended to give the plaintiff a primary right to sell the goods in satisfaction of the liability of the pawnor, the Cane Commissioner who was an unsecured creditor could not have any higher rights than the pawnor and was entitled only to the surplus money after satisfaction of the plaintiffs dues.

(ii) The State Bank of Hyderabad, Secunderabad Branch Vs. Susheela and Others, , decision which supports the same proposition. Bank of India Vs. Binod Steel Ltd. and Another, . The petitioner Bank had advanced loan to respondent company on the hypothecation of its machinery which under the terms of the contract was allowed to remain with the company. The company later failed to pay wages of its workers and the payment of wages Inspector having moved the Additional Tahsildar for recovering the amount, the Additional Tahsildar took steps to attach the machinery and other moveables and to sell the same for recovery of the amounts due. The Bank objected to the act on taken by the Additional Tahsildar. In this Division Bench decision, placing reliance on the decision in The Bank of Bihar Vs. The State of Bihar and Others, it was held.

The bank stood in the position of secured creditor. "The possession of the company was for on behalf of the petitioner; that the legal possession and custody of the machinery must be held to be with the petitioner though physical possession was with the company; that the petitioner was in the position of secured creditor and that the Authorities has no right to attack and sell the machinery without satisfying petitioner's debit.

(iii) Still another decision referred in State Bank of Indore Vs. The Additional Tehsildar-Cum-Sales Tax Officer and Others, . There is the question for consideration was as to construction of section 33-C introduced in the M.P. General Sales tax Act, 1958 from March 1976 by the Amending Act No. 20 of 1976, namely, whether the charge for arrears of sales tax over the properties of the dealer brought into effect by this section would affect a mortgage or pledge created by the dealer before 15th March, 1976. On facts of that case, it was held that section 33-C does not affect the rights created in the petitioner's favour by mortgage or pledge before 15th March, 1976 and this rights cannot, be sold for

recovery of Sales tax dues of the dealer.

7. In view of the above discussion of facts and law, though the action taken by the N.I.D. u/s 22 of the M.P. M.V. Taxation act was illegal, yet because of the special lien and hypothecation, the Bank being a secured credit, it has first change and was entitled to sell the bus and appropriate the sale proceeds first towards its dues since hypothecation lien is dt. 16.12.73, whereas the amended section 22 came into force w.e.f. i.e., subsequent transaction. The Civil Court had already decreed, on 23.7.81, the Bank's claim for Rs. 14,870.35 and interest pendente lite and future from the date at the rate of 14% per annum. The bus has already been sold and the sale has been confirmed. The decretal dues of the Bank are said to be to the tune of Rs. 20,533.03 which is entitled to be reimbursed.

25. This Court in R. Justin Arulappa Vs. R. Xavier Arulappa and Gerayana Rani, was pleased to lay down that Advocate Commissioner cannot be appointed mechanically without going into the questions of dispute. For the purpose of taking custody, the proceedings should be normally governed by the principle of appointment of receiver and such appointment cannot be ordered mere apprehension without there being any other material on record justifying the action of seizing the vehicle from the custody of the owner, specially when the adjudication of dispute before the Arbitrator is yet to be commenced or is just commenced where the defence of the other party is yet to be looked into, to form prima facie view about the merit of contention.

26. In these background of the settled matter, it is necessary to note the facts of these applications.

27. It is pleaded case of the applicant that in the month of December, 2010, the respondent No. 1 approached the applicant company for loan for purchase of Multi Axle Goods Vehicle Truck bearing Engine No. 40J62355380 Chassis No. 426025JVZ740088 and Registration No. TN02-S-9933, for its commercial use. The loan was guaranteed by the second respondent. The loan agreement was entered into on 31.7.2011. Out of Rs. 6,00,000/- (Rupees six lakhs only) which was cost of the vehicle, the applicant advanced loan of Rs. 5,00,000/- (Rupees five lakhs only) which was repayable with interest in 35 equated monthly instalments commencing from 7.9.2011 and ending with 7.6.2014.

28. The vehicle was hypothecated in favour of the applicant to secure the loan amount besides guarantee by the respondent No. 2. It was one of the conditions in the agreement entered into between the parties that the amount was to be repaid as per repayment schedule subject to right of the applicant to recall the loan. The default in repayment of monthly instalments was to carry additional finance charges @ 36% for belated payment.

29. The case of the applicant is that the respondent No. 1 defaulted in making payment of instalments on due dates. It is also pleaded that as on 27.11.2012, a sum of Rs. 1,10,125/- (Rupees one lakh ten thousand one hundred and twenty

five only) towards monthly instalments was due apart from other charges.

30. A legal notice, dated 30.4.2012 was issued calling upon the respondent No. 1 to clear the outstanding dues, as agreement was terminated by the applicant, and arbitration proceedings under clause 23 of the agreement were initiated as steps are being taken to appoint Arbitrator. The liability of the respondent No. 1 & 2 under the agreement is joint and several, which gives liberty to the applicant either to proceed against the respondent No. 1 or 2. It is submitted that the respondent No. 1 failed to disclose the whereabouts of the vehicle to the representative of the applicant.

31. It is pleaded case of the applicant that it is not open to the applicant to act on their own to take possession of the vehicle and that attempt of the applicant to inspect and take possession of the vehicle failed, therefore, the applicant is under apprehension that the property is in danger of being wasted, damaged and alienated by the respondents.

32. The property is likely to suffer because of wear and tear resulting in value of the vehicle being depreciated.

33. Therefore, the case of the applicant is that until the claim of the applicant is adjudicated by the arbitral tribunal, it is necessary for the applicant to safeguard its claim. The amount due as on 27.11.2012 is Rs. 1,10,125/- (Rupees one lakh ten thousand one hundred and twenty five only).

34. On the pleadings referred to above, the application has been filed to appoint Advocate Commissioner, to seize and deliver schedule mentioned vehicle to the applicant and to sell the vehicle pending arbitration proceedings.

35. When the case came up for hearing on 10.12.2012, an ex-parte interim order was passed by this Court, appointing Mrs. C. Selvi, Advocate, as Advocate Commissioner to seize the vehicle and hand it over to the custody of the applicant.

36. The fee of the Advocate Commissioner was fixed at Rs. 10,000/- (Rupees ten thousand only) as initial remuneration, with direction to the applicant to invoke arbitration clause, within four weeks from the date of passing of the order.

37. The respondent No. 1 has filed application No. 1297 of 2013 for vacating the interim order, dated 10.12.2012 passed in A. No. 5201 of 2012.

38. In the affidavit filed in support of the application, the stand taken by the respondent No. 1, is that a sum of Rs. 4,95,000/- (Rupees four lakhs and ninety five thousand only) was advanced as loan by the respondent No. 1 and was to be repaid in monthly instalment @ Rs. 21,457/- (Rupees twenty one thousand four hundred and fifty seven only) per month, commencing from September 2011. The loan was to be cleared in 35 monthly instalments.

39. That the respondent also took refinance for purchase of two other vehicles bearing registration Nos. TN02-S-9933 and TN02-T-0982. In addition, the

applicant has also availed Rs. 10,00,000/- (Rupees ten lakhs only) for two other vehicles bearing registration Nos. TN 04 Q 5795 and TN 04 Q 5697 the loan was repayable in 36 equated monthly instalments @ Rs. 21,243/- (Rupees twenty one thousand two hundred and forty three only). Thus, the respondent No. 1 has availed loan from the applicant, for 5 vehicles.

40. It is submitted that vehicle No. TN04 Q 5695 was stolen at Navi Mumbai, for which complaint was filed at Kalomboli Police station, and case was registered vide F.I.R. No. 491/2010, dated 9.11.2010. The vehicle was insured with Bharti AXA General Insurance Company, Mount Road, Chennai for a sum of Rs. 6,00,000/- (Rupees six lakhs only).

41. Before registering F.I.R., the Police confirmed with the applicant as to whether the vehicle was seized by it. This shows that the applicant was fully aware of the fact, that the vehicle had been stolen, and it was for this reason that EMI was not paid, as the claim was filed with the Insurance Company which was to be paid to the applicant. The respondent/borrower had also sent legal notice.

42. It is also pleaded case of the respondent/borrower that the applicant deliberately credited the instalments payable to the vehicle bearing registration No. TN04 Q 5697, to the credit of the stolen vehicle bearing registration No. TN 04 Q 5695 without the knowledge and consent of the applicant.

43. On 26.10.2012, the applicant without prior notice seized the vehicle bearing registration No. TN 04 Q 5697 though instalments due against this vehicle was paid till date. That no notice along with copy of application was issued to the respondent/borrower while seizing the vehicle.

44. On coming to know that the vehicle had been seized, the respondent/borrower lodged a complaint with V-4 Rajamangalam Police station against Mr. Elankumaran for theft of the vehicle, who filed anticipatory bail application, and the matter was referred to Mediation, wherein it was informed that there is no default in payment of instalments with regard to seized vehicle.

45. The fact that notice is usually not served on the borrower is clear from the judgment of this court in R. Joseph Miranda vs. 1. Dhandapani Finance Pvt. Ltd. and another (O.S.A. No. 246 of 2010 decided on 1.10.2010).

46. It is also pleaded that while dispute was going on, the applicant/Finance Company seized other three vehicles on 11.1.2013. When the respondent/borrower went to lodge a police complaint, he was informed, that the vehicle has been seized through Advocate Commissioner, in pursuance to the order passed by this Court.

47. Even with respect to these vehicles, no notice was issued. EMIs paid for these three vehicles were also credited to stolen vehicle without the knowledge of the applicant.

48. The insurance company has rejected the claim, against which the applicant moved Consumer forum, claiming a sum of Rs. 6,00,000/- (Rupees six lakhs only).

49. The applicant/Finance Company was informed about the claim made against the Insurance Company.

50. It is also case of the respondent No. 1/borrower that the business of the respondent was completely ruined as the vehicle was seized without following procedure laid down by the Hon''ble Supreme Court and this Court. On account of illegal action, the respondent No. 1/borrower is losing Rs. 3000/- (Rupees three thousand only) per day on each vehicle. 2 It is pleaded case of the applicant that in the month of December, 2010, the respondent No. 1 approached the applicant company for loan for purchase of Multi Axle Goods Vehicle Truck bearing Engine No. 40J62355380 Chassis No. 426025JVZ740088 and Registration No. TN02-S-9933, for its commercial use. The loan was guaranteed by the second respondent. The loan agreement was entered into on 31.7.2011. Out of Rs. 6,00,000/- (Rupees six lakhs only) which was cost of the vehicle, the applicant advanced loan of Rs. 5,00,000/- (Rupees five lakhs only) which was repayable with interest in 35 equated monthly instalments commencing from 7.9.2011 and ending with 7.6.2014.

51. The reading file shows that in this case, no Court notice was served on the respondents nor the Advocate Commissioner while seizing the vehicle served order of petition, but only order appointing the Advocate Commissioner to seize the vehicle and the vehicle was seized. This procedure prima facie was contrary to law laid down by the Division Bench of Court in R. Joseph Miranda vs. 1. Dhandapani Finance Pvt. Ltd. and another (O.S.A. No. 246 of 2010 decided on 1.10.2010).

52. The very fact that the Hon''ble Supreme Court did not approve the act of Finance Companies/Bank from appointing recovery agents to seize vehicle to enforce the terms of the agreement clearly shows that the intention of the Hon''ble Supreme Court was that borrower should be heard before passing an order of seizing the vehicle. The procedure which was stopped by the Hon''ble Supreme Court, cannot be permitted by invoking section 9 of the Act to seize the vehicle, without even serving notice to the borrower.

53. The cases have come to the notice of this Court, where on the basis of false pleadings, the vehicle has been seized and on account of helplessness of the borrower to come to this Court to defend himself, the vehicle has been sold without even going for arbitration proceedings.

54. The process of law envisages the opportunity of opposite party to represent the case before any drastic order is passed. The seizure of vehicle which is hypothecated or is under the Higher Purchase agreement, is not such a relief qua which the respondent cannot wait for notice.

55. The Court is also required to see as to what relief is to be granted. It cannot be decided by the party that Advocate Commissioner should be appointed to seize the vehicle, as it involves imposing of liability on the borrower, as expenses of Advocate Commissioner and other expenses are debited to the account of the borrower.

56. In the given circumstances, if warranted, it is also open to the Court to appoint officer of the Finance Company as Receiver, who can get custody of vehicle with the help of Police. In that event, the conduct of the Receiver will be subject to judicial scrutiny of this Court. No additional burden will be put on the borrower, who is otherwise in difficulty.

57. Relief u/s 9 of the Act should not only be in accordance with law, but should also be equitable to safeguard the interest of both parties, as it is only a interim measures till the passing of final order.

58. Seizure of vehicle and permitting the applicant to dispose of the vehicle would lead to the conclusion that it is final order which is not permissible, u/s 9 of the Arbitration and Conciliation Act.

59. In view of the position of law explained hereinabove, now it is to be seen whether this application for appointment of Advocate Commissioner was maintainable or not, on pleaded facts and defence of the respondent.

60. It may be noticed here that in the affidavit filed, the applicant did not disclose, that one of the vehicles financed by the applicant was stolen, qua which proceedings were pending before the Consumer Court and this fact was within the knowledge of the applicant.

61. It was not brought to the notice of this Court while getting interim order that out of alleged amount of Rs. 6,95,000/- (Rupees six lakhs ninety five thousand only) only a sum of Rs. 1,10,125/- (Rupees one lakh ten thousand one hundred and twenty five only) was outstanding, meaning thereby that substantial amount had been paid. Therefore, it was not a case where the applicant could seek appointment of Advocate Commissioner to seize the vehicle, that too without giving an opportunity to the respondent to present their defence. The facts disclosed in the affidavit filed in support of the application filed for vacating the ex-parte interim order, clearly shows that the applicant/ Finance Company had come to Court with unclean hands, therefore was not entitled to any discretionary relief u/s 9 of the Arbitration and Conciliation Act. The applicant has also failed to disclose about the status of the arbitral proceedings before the Arbitrator.

62. Consequently, the A. Nos. 5201, 5202 & 5203 of 2012 are dismissed with costs which are assessed at Rs. 20,000/- (Rupees twenty thousand only) in each case. Whereas A. Nos. 1296, 1297 & 1298 of 2013 are allowed and M/s. Hinduja Leyland Finance Ltd. is directed to hand back the possession of the vehicle to the respondent No. 1, without any further delay. In order to do equity the borrower

is restrained from disposing of the vehicle pending arbitration proceedings. This judgment be placed before the Hon''ble Chief Justice for referring the matter to the Rules Committee for framing of rules as suggested by the Hon''ble Supreme Court in M/s. Sundaram Finance Ltd. vs. M/s. NEPC India Ltd. (supra).